C.A. No 1148

IN THE COURT OF APPEAL FOR SASKATCHEWAN

BETWEEN:

LARRY HOFFMAN, L.B. HOFFMAN FARMS INC.
and DALE BEAUDOIN

PROSPECTIVE APPELLANTS
(PLAINTIFFS)

AND:

MONSANTO CANADA INC.
and BAYER CROPSCIENCE INC.

PROSPECTIVE RESPONDENTS
(DEFENDANTS)

BROUGHT UNDER *THE CLASS ACTIONS ACT*

MEMORANDUM OF LAW
ON BEHALF OF THE PROSPECTIVE APPELLANTS

STEVENSON HOOD THORNTON BEAUBIER LLP
Barristers & Solicitors
#500, 321A – 21st Street East
Saskatoon, Saskatchewan
S7K 0C1

TABLE OF CONTENTS

MEMORANDUM OF LAW
ON BEHALF OF THE PROSPECTIVE APPELLANTS

1. This memorandum is submitted on behalf of the organic farmers of Saskatchewan (represented by Larry Hoffman, L.B. Hoffman Farms Inc. and Dale Beaudoin) who seek leave to appeal a decision of the court below that refused to grant them class action status under *The Class Actions Act*, S.S. 2001. Section 39(3)(a) of *The Class Actions Act* provides that with "leave of a justice of the Court of Appeal" they may appeal an order refusing to certify their action as a class action.

I. GROUNDS FOR LEAVE TO APPEAL

2. Leave to appeal is warranted because:

(a) the issues are of importance to the parties and the practice:

(i) Absent class certification, the organic farmers of Saskatchewan will likely be denied their "day in court" regarding a legitimate legal complaint of public importance; and

(ii) This Court will have an opportunity to provide guidance to the lower court, and to practitioners in the province, regarding the criteria to be satisfied in order to certify an action as a class action in Saskatchewan;

(b) the appeal has merit. The Learned Chambers Judge made numerous errors in determining that the Prospective Appellants had not met the prerequisites for class certification under *The Class Actions Act*, and in particular used an overly stringent test.

II. SUBMISSIONS

A. The Test to be Applied For Leave

3. The guiding considerations for the Court of Appeal in determining whether to grant leave to appeal are set out in *Schroeder v. Korf* (1996), 144 Sask. R. 229 (C.A.), where Layne J.A. stated the following at para. 7:

> Both parties agree on the criteria for the granting of leave to appeal an interlocutory order. These have been oft-stated by this Court and can be succinctly stated as follows:
>
> 1. Are the issues of importance to the parties and the practice?
> 2. Does the appeal have merit?
> 3. Is there practical utility of the appeal?
> 4. What is the effect of any delay on the proceedings as a result of the appeal?

4. Only the first two criteria are pertinent to this leave application.

B. The Issues are Important to the Parties

5. The organic grain farmers of Saskatchewan have brought an action against two large multinational corporations (Monsanto Canada Inc. ("Monsanto") and Bayer Cropscience Inc. ("Bayer")) seeking redress for the contamination of their organic fields by genetically-modified ("GM") canola and the destruction of a market. Owing to the complexities involved in advancing such an action – involving as it does a complaint of systemic contamination of the environment by engineered DNA – legal costs would likely far exceed what any individual organic grain farmer could hope to recover.

6. *The Class Actions Act* is remedial legislation designed to lend a hand to individuals in the organic farmers' predicament. Ward K. Branch, in *Class Actions in Canada* (Aurora, Ontario: Canada Law Book, 2005), in his chapter "Impetus For Class Action Legislation" (p. 2-1) explains as follows:

> In our highly complex society, the dissemination of the services is often carried out by large corporations and governments, whose activities and

> decisions affect many people simultaneously. The ability of each individual to monitor and assess the activities of these institutions is limited. As such, the litigation model that allows only individual determination of rights is impractical and fails to reflect economic reality.
>
> ...
>
> The high cost of litigation can serve as a substantial barrier to redress. The cost may make it difficult for individuals to maintain actions against large institutional defendants, particularly where a successful claim will not result in substantial recovery. The legal fees and costs of pursuing the claim may exceed the value of the claim itself. This is particularly so in Canada with our limits on non-pecuniary and conservative punitive damage awards.

7. It is not just the ability to pool resources to advance litigation that makes an otherwise unfeasible action feasible in these circumstances. The insulation that *The Class Actions Act* provides to litigants from being ordered to pay the other side's legal costs should not be trivialized. Large corporations have the capacity to spend large amounts on legal fees, disbursements and experts. Being ordered to pay what legal costs Monsanto and Bayer can afford would financially ruin most organic farmers. A case in point is the costs decision after trial in *Monsanto Canada Inc. v. Schmeiser,* 2002 FCT 439, a case in which a Saskatchewan farmer was sued for patent infringement by Monsanto regarding its GM canola. While the amount recovered by Monsanto at trial was merely $19,832, the court was prepared to order that Monsanto was entitled to up to $153,000 in costs including such things as the "reasonable travel, accommodation and related expenses for up to two counsel [from Toronto] for attendance and participation in Saskatoon at examinations for discovery, mediation and pre-trial conferences, and for trial."

8. Fortunately, except in the limited and exceptional circumstances listed in s. 40(2) (essentially where there has been litigation misconduct), s. 40(1) of *The Class Actions Act* provides that "neither the Court of Queen's Bench nor the Court of Appeal may award costs to any party to an application for certification ... to any party to a class action or to any party to an appeal arising from a class action at any stage of the application, action or appeal."

9. Without the protection of such a provision, it is highly unlikely that any individual organic farmer would step forward and put his or her farm at risk in order to advance this claim.

C. *The Issues are Important to the Practice*

10. *The Class Actions Act* is relatively recent legislation. A decision of this court will provide guidance to the lower court and to practitioners in the province on the various conditions to be satisfied before class certification is granted. It is a central contention of the proposed Appellants that the Learned Chambers Judge set the benchmark too high regarding the conditions to be met. If this benchmark is allowed to stand, class certification may be denied in the future to otherwise class action worthy claims in the Province of Saskatchewan.

> *See:* Randy C. Sutton, "A Rigorous Approach to Certification - the Saskatchewan Experience", *The Lawyers Weekly*, July 8, 2005, Vol. 25, No. 10

11. It is noteworthy that this court has previously granted leave to Monsanto and Bayer in this action to appeal a decision of the Learned Chambers Judge on whether Statement of Defences should be filed before or after the certification hearing.

> *Hoffman v. Monsanto Canada Inc.*, 2002 SKCA 86

12. The timing of defences in the context of a class action raises issues of far less significance than the certification issue itself.

13. A review of the cases indicates that this court has yet to pronounce on the certification test to be used in Saskatchewan.

14. In *Spencer v. Regina (City)*, 2003 SKQB 109, the court refused to certify a class action. The proposed representative plaintiffs in that action did not appear to seek to appeal the determination.

15. In *Daniels v. Canada (Attorney General)*, 2003 SKQB 58, the representative plaintiffs' motion for certification was refused. The plaintiffs initially sought an extension of time to file their leave to appeal application and were successful (2003 SKCA 225), but their

application for leave was refused (unreported). They sought leave to appeal that decision to the Supreme Court of Canada. That application was dismissed by the Supreme Court of Canada ([2003] S.C.C.A. No. 223).

16. In *Toms Grain & Cattle Co. v. Arcola Livestock Sales Ltd.*, the plaintiffs were ultimately successful in having their action certified as a class action (2004 SKQB 338). The defendants sought leave to appeal that determination and were granted leave by this Court (2005 SKCA 11). Cameron J.A. held at para. 22:

> Notwithstanding the fact the certification order was made in the exercise of discretionary power, I am satisfied the proposed appeal is of sufficient merit and importance to warrant the granting of leave to appeal. In my judgment, the making of the order against Prairie Livestock gives rise to arguable issues of substance which are of considerable importance to the parties and of some potential importance to the application, generally, of section 6 of The Class Actions Act, a comparatively new statute.

Lastly, while the consideration of s. 6 of *The Class Actions Act* makes this case potentially an important practice precedent, the lower court's determinations on whether the pleadings in this case disclose causes of action are potentially of greater significance. The prospect of this case as an international precedent has attracted academic comment. Professor Rodgers states in "Liability for the Release of GMOs into the Environment: Exploring the Boundaries of Nuisance" (2003) 62 Cambridge L.J. at 371-402:

> The decision in *Hoffman Farms* will be eagerly awaited, and may have major implications for plans to license GM crops for commercial exploitation in the UK.

Professor Glenn states in "Footloose: Civil Responsibility for GMO Gene Wandering in Canada" 43 Washburn L.J. 547 at 549-550:

> A second Canadian GMO case is presently before the courts. This is the case of *Hoffman and Beaudoin v. Monsanto Canada.* It attempts to put the responsibility for gene wandering squarely on the shoulders of the biotechnology companies which develop and sell the GM seeds and has been described as a potential "tidal wave" compared to the "legal ripple" of *Schmeiser.*

D. The Appeal Has Merit

(1) The Learned Chambers Judge started off on the wrong foot

17. In order to certify an action as a class action, a representative plaintiff must meet the five-pronged test under s. 6 of *The Class Actions Act*. The five prerequisites are as follows:

(a) The pleadings disclose a cause of action;

(b) There is an identifiable class;

(c) The claims of the class members raise common issues, whether or not the common issue predominate over other issues affecting individual members;

(d) A class action would be a preferable procedure for the resolution of the common issues; and

(e) There is a suitable representative plaintiff who would fairly and adequately represent the interests of the class, has produced a workable litigation plan, and has no conflict of interest with other class members on the common issues.

18. Section 7(2) of *The Class Actions Act* provides that "[a]n order certifying an action as a class action is not a determination of the merits of the action." Class certification is not supposed to be a merits test. Notwithstanding that class certification does not hinge on the merits, the Learned Chambers Judge allowed her (erroneous) view of the merits of the underlying complaint to influence each stage of her analysis beginning with her recitation of the facts.

19. At para. 11 of her recitation of the facts, after recognizing the propensity of GM canola to end up in farmland where it was not intended to be grown, she states as follows:

> The resulting presence of GM canola or canola seed on cultivated land where it is not intentionally cultivated is referred to by the plaintiffs as "contamination of the environment". A more neutral term, "adventitious presence" (sometimes referred to in the following discussion as "AP") is proposed by the defendants. This term is explained in the brief filed on this application by BCS as follows:

> In the context of the production and trade of grain and seed, the term "adventitious presence" (often simply abbreviated as "AP") refers to the unintentional, unavoidable, and incidental commingling of trace amounts of seed, grain, or foreign material (biological or other) or impurities in a quantity of seed or grain. AP can occur through any one of a number of unavoidable means, including mechanical mixing during the harvesting, processing, handling and storage of seed and grain, as a result of inclusion of foreign seed in or around the planted area, as a result of volunteers from previous year's crop or low seed admixtures, or as a result of cross-pollination with plants near or in the planted area.... (BCS brief of law at tab 1, para. 12)

20. With greatest respect to the Learned Chambers Judge, "adventitious presence" *as defined by Bayer Cropscience* is not a neutral term. Rather, it is lingo invented by the biotech industry to trivialize contamination complaints. The organic farmers do not consider the loss of an entire market, or the invasion of their organic fields by genetically modified organisms ("GMOs") to be unintentional, unavoidable, or incidental. Adopting the biotech industry's definition for "adventitious presence" as negligible and unavoidable commingling is to prejudge the outcome of an action where it is alleged that there has been negligent and systemic contamination of the environment by GMOs.

21. Another "merits" error pervading the Learned Chambers Judge's analysis is the inference she draws from the Plaintiffs mentioning the decision documents of Agriculture and Agri-Food Canada in the Claim. She states at para. 12 that "[a]s these documents are specifically identified in the pleadings, they are incorporated by reference into the statement of claim." These documents, however, are mentioned as part of the narrative in a Statement of Claim, which claims that the genetic modifications are a pollutant and a nuisance. Indeed, the first item of relief sought in the Statement of Claim is a "declaration that the genetic modifications inserted into canola by the Defendant are 'pollutants' within the meaning of the EMPA". Furthermore the Plaintiffs sought to have certified as a common issue of fact:

> Are the Defendants' GM canola lines environmentally unsafe notwithstanding any such approvals?

22. While the Learned Chambers Judge was correct that the Plaintiffs' position was, for the bulk of their claims, that they did not have to prove that the genetic modifications

belonging to the Defendants were inherently harmful. It is incorrect to say that the Plaintiffs' position was that these modifications were therefore environmentally benign.

23. At para. 22 of her decision, the Learned Chambers Judge concludes. "It is important for the discussion which follows to note that, in general, the plaintiffs do not allege in their pleadings that GM canola is per se harmful or dangerous to crops grown by the defendants."

24. It is noteworthy that the Learned Chambers Judge appears to have arrived at the opposite conclusion in an earlier decision on a motion by the Defendants to strike the Affidavit of Dr. Mae Wan Ho, which the Plaintiffs had filed in support of certification. The Affidavit dealt extensively with the dangers of GMOs to the environment and human health. The Defendants sought to have the Affidavit struck because they claimed that the Plaintiffs had not put these matters in issue in their pleadings. At least on this date, the Learned Chambers Judge disagreed:

> ¶ 68 As I have indicated above, the plaintiffs claimed as relief a declaration that the defendants' products were "pollutants" within the meaning of the EMPA, and this is also identified by the plaintiffs as a "common issue" on the application for certification.
>
> ¶ 69 *Prima facie*, these pleadings put in issue the question of whether genetically modified canola is environmentally unsafe....
>
> ¶ 71 ...[t]he defendant Aventis premises most of its objections on the claim that the general environmental safety of GMOs is not an issue raised on the pleadings. I have determined that this is not a valid objection.
>
> *Hoffman v. Monsanto Canada Inc.*, 2003 SKQB 174, (the "April 10, 2003 Fiat").

25. It is further noteworthy that the Learned Chambers Judge acknowledged that the Plaintiffs were seeking to file Dr. Mae Wan Ho's Affidavit in part to counter the Defendant's anticipated argument at the certification hearing that because their products received regulatory approval, they were completely safe and any prohibitions against them were unreasonable.

> Para. 77 of the April 10, 2003 Fiat.

26. There was no suggestion at that time that because the Decision Documents were mentioned in the Claim, that the Plaintiffs were bound by their findings and could not contradict them with other evidence.

27. Ultimately, the Learned Chambers Judge ordered the Affidavit to be struck. She did so, however, not because the Affidavit was irrelevant to the pleadings or otherwise inadmissible but because the issue as to whether GMOs are environmentally dangerous was a matter better determined at trial than the certification hearing. She concluded at paras. 78 and 83 of her April 10, 2003 Fiat:

> ¶ 78 While I agree that the first of these points raised by the plaintiffs is germane to the certification application, I am very doubtful that the goal identified is well served by this affidavit, in the context of this case. The affidavit goes far beyond identifying issues and describing evidence. It addresses the merits of one side of an extremely complex and heated scientific controversy-the general environmental safety of GMOs-an issue that should not, will not and could not possibly be determined on the certification application. To allow this affidavit to stand would invite the defendants to file affidavits of expert opinion on the other side of this issue and risks seriously complicating and confusing the issues which are properly to be determined on the certification motion. In short, evidence as to whether or not GMOs are inherently environmentally dangerous, while relevant to the merits of the plaintiffs' claim, is not directly relevant to any of the issues to be determined on the certification application. The certification hearing should not be taken up with lengthy and unhelpful arguments on the merits of this scientific dispute.
>
> ...
>
> ¶ 83 That being so, I order that the affidavit of Dr. Mae Wan Ho filed in support of the certification application be struck and give leave for it to be replaced with an affidavit in the form I have described. I make this order to insure that the certification process does not become embroiled in the merits of a scientific dispute that cannot properly be determined on affidavit evidence, and does not, in any case, raise issues to be determined on the certification motion, but at trial.

28. Unfortunately, the Learned Chambers Judge then proceeded to devote almost half her recitation of the facts in her certification decision to quoting (with evident approval) from the Canadian regulatory decision documents on the environmental safety of the Defendants' GMOs. Dr. Mae Wan Ho's Affidavit specifically addressed the inadequacy of the Canadian regulatory regime to properly evaluate GMOs for safety. In effect the Learned Chambers

Judge barred the Plaintiffs from filing an affidavit challenging the safety of GMOs because such "an extremely complex and heated scientific controversy" could only be determined at trial. Then she subsequently determined the scientific controversy in the Defendants' favour because the Plaintiffs did not challenge the safety of GMOs.

(2) The Learned Chambers Judge erred in determining that the pleadings did not disclose a cause of action in negligence, nuisance, trespass and under the EMPA

29. The Learned Chambers Judge correctly identified the principles to be applied when considering whether pleadings disclose a cause of action in the context of a certification motion. At para. 29 of her decision, she adopted the following test from *Abdool v. Anaheim Management Ltd.* (1995), 121 D.L.R. (4th) 496 at 511 (Ont. Ct. (Gen. Div.)):

> The principles to be applied when considering whether pleadings support a legal cause of action are as follows:
>
> (a) All allegations of fact, unless patently ridiculous or incapable of proof, must be accepted as proved;
>
> (b) The defendant, in order to succeed, must show that it is plain and obvious beyond doubt that the plaintiffs could not succeed;
>
> (c) The novelty of the cause of action will not militate against the plaintiffs; and
>
> (d) The statement of claim must be read as generously as possible, with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies.

30. The Learned Chambers Judge went further to say:

> ¶ 32 A more generous approach, however, on a certification application, for which affidavit evidence is filed in relation to the other criteria listed in s. 6, would be for the Court to examine whether , on the basis of other evidence before it, it is apparent that the plaintiffs do, in fact, intend to allege facts, additional to those articulated in the statement of claim, that would be sufficient to fill any lacuna in the pleadings, and to consider whether an amendment to the pleadings, to plead such additional facts, should be considered. I am of the view that whether a further amendment of the pleadings should be suggested or permitted in the context of considering whether the first criterion for certification has been met is a matter of discretion for the Court, the exercise of which would depend primarily on whether it would be unfair to the respondents to catch them by surprise to

> consider such a possible amendment on this application. I will return to this point in the context of the discussion which follows.

31. The Learned Chambers Judge did not, however, appear to apply this approach when it came to the Plaintiffs' pleadings. It appears that the Learned Chambers Judge looked more to "evidence" to determine whether the pleadings disclosed a cause of action rather than what was stated in the Statement of Claim.

32. Furthermore, the Learned Chambers Judge appears to have treated amended pleadings as having a lesser status than original pleadings. Once a claim is amended, it is deemed to have been amended as if the pleadings were part of the original document. Amended pleadings ought to be treated no differently than original pleadings when determining whether the pleadings disclose a cause of action. Amended pleadings that the Learned Chambers Judge chose to ignore, and/or failed to give sufficient weight to, include the following:

> 16.(a) The Technology User Agreement at all material times provided that the granting of a license to use the Roundup Ready gene did not grant ownership of the gene to the grower. Growers entering into the Technology User Agreement, furthermore, were not permitted to save canola for replanting with the Roundup Ready gene. *The commercial production of Roundup Ready canola in Western Canada was, therefore, licensed by Monsanto Canada with ownership of the Roundup Ready gene at all times remaining with Monsanto Canada.* (emphasis added)
>
> 27(a) The Plaintiffs state that organic farmers in Saskatchewan, even if not growing, or attempting to grow, organic canola, have and will sustain contamination of their organic fields by reason of the prevalence of Roundup Ready canola or Liberty Link canola "volunteers" growing on their land. By reason of the prevalence of canola as volunteers in other crops, and the proliferation of transgenic (GMO) crops of the Defendants, organic farmers in Saskatchewan have and will sustain contamination of their fields from the transgenic crops sold by the Defendants.
>
> 27(b) Monsanto Canada has at all material times maintained a corporate policy of responding to farmers' complaints of contamination of Roundup Ready canola by arranging for the removal of unwanted Roundup Ready volunteers, including the removal of Roundup Ready canola volunteers found on certified organic land. The Plaintiffs state that Monsanto has therefore admitted responsibility and liability for stray Roundup Ready

plants including any cleanup costs associated with Roundup Ready volunteers found on certified organic fields.

36(a) ... The Plaintiffs state that the Defendants knew that the removal of an IPP and/or failure to introduce an adequate one, would result in the eventual loss of the European Economic Union market for Canadian canola. As a consequence, the Plaintiffs state that the European Union market for their organically grown Canadian canola was destroyed. The Plaintiffs state that the Defendants, when undertaking the task of developing export rules to ensure continued access to foreign markets, owed a duty not to do so negligently and, in particular, owed the Plaintiffs a duty to maintain an adequate IPP to preserve the European canola export market where most of the organic canola produced in Canada was sold. As a consequence, the Plaintiffs state that the Defendants are liable for the Plaintiffs' losses as particularized herein.

33. These amended pleadings support the Plaintiffs' claims for:

(a) contamination of their plants and fields by GMOs belonging to the Defendants;

(b) clean-up costs associated with identifying and removing stray GM canola plants;

(c) an inability to use canola in their organic crop rotations due to contamination concerns; and

(d) the destruction of the European market for their organic canola.

34. The pleading that Monsanto at all times owned the gene in issue should not be over-looked. A higher level of responsibility attaches to property that one owns. It is almost comical to compare the position that Monsanto took before the Federal Court, Federal Court of Appeal and Supreme Court of Canada in *Monsanto Canada Inc. v. Schmeiser*, 2001 FCT 256, 2002 FCA 309, and 2004 SCC 34, as compared to the submissions that Monsanto Canada made in the present case.

35. In *Monsanto Canada Inc. v. Schmeiser* (*supra*), Monsanto brought a patent infringement action against a Saskatchewan farmer who it alleged was growing canola that contained its genetic modification without a licence. The "unconfined release" of the genetic

modification reflected in the Canadian decision documents did not result in a waiver of Monsanto's patent rights. Furthermore, Monsanto submitted that the use of the genetic modification was tightly controlled by it such that it never gave up its ownership rights over the genetic modification. The Federal Court ruled at paras 93-97:

> ... Further, the circumstances here are not akin to those cases that the defendants urge are part of the larger law of admixture, where property of A introduced by A without B's intervention to similar property of B from which it is indistinguishable, becomes the property of B. Monsanto does have ownership in its patented gene and cell and pursuant to the Act it has the exclusive use of its invention. That is an important factor which distinguishes this case from the others on which the defendants rely.
>
> ¶ 94 Here the defendants urge that having introduced its invention for unconfined release into the environment without control over its dispersion, the plaintiffs, as inventor and licensee have lost any claim to enforcement of their rights to exclusive use. It is said for the defendants that Monsanto obtained regulatory approval for the "unconfined release" into the environment of the patented gene pursuant to the Seeds Regulations, C.R.C. c. 1400. Whether that is so is not significant in my view.
>
> ¶ 95 On the basis of the evidence of pictures adduced by Mr. Schmeiser, of stray plants and of plants in fields, in Bruno and its environs, it is urged that unconfined release and lack of control of Monsanto over the replication of the plants containing their patented gene clearly demonstrates extensive uncontrolled release of the plaintiffs' invention. Indeed it is urged this is so extensive that the spread of the invention cannot be controlled and Monsanto cannot claim the exclusive right to possess and use the invention. It is further urged that it was the plaintiffs' obligation to control its technology to ensure it did not spread and that Monsanto has not attempted to do so.
>
> ¶ 96 That assessment places much weight on photographs of stray plants in Bruno, said to have survived spraying with Roundup, in addition to photographs of canola in fields which is said to be of canola, some with the potential gene incorporated. With respect, the conclusion the defendants urge would ignore the evidence of the licensing arrangements developed by Monsanto in a thorough and determined manner to limit the spread of the gene. Those arrangements require agreement of growers not to sell the product derived from seed provided under a TUA except to authorized dealers, not to give it away and not to keep it for their own use even for reseeding. It ignores evidence of the plaintiffs' efforts to monitor the authorized growers, and any who might be considered to be growing the product without authorization. It ignores the determined efforts to sample and test the crops of the defendants who were believed to be growing

> Roundup Ready canola without authorization. It ignores also the evidence of Monsanto's efforts to remove plants from fields of other farmers who complained of undesired spread of Roundup Ready canola to their fields.
>
> ¶ 97 Indeed the weight of evidence in this case supports the conclusion that the plaintiffs undertook a variety of measures designed to control the unwanted spread of canola containing their patented gene and cell.

36. In the present case, by contrast, Monsanto has taken the position that the dissemination of its genetic modification is so widespread and so out-of-control that they should not be held responsible for it. At para. 135 of its Memorandum opposing certification, Monsanto argued:

> [t]here is no way to put the genie back into the bottle. GM canola is now part of the environment. Our federal government authorized and approved that.

37. Keeping these considerations in mind the cause of action issue can be examined in more detail. Schedule "A" to this Memorandum specifically examines the errors made by the Learned Chambers Judge regarding causes of action.

(3) The Learned Chambers Judge erred in determining that there was not an identifiable class

38. Subsection 6(b) of *The Class Actions Act* requires the plaintiff to satisfy the Court that there is an "identifiable class". Ward Branch in *Class Actions in Canada* (*supra*) summarizes the test that must be met to satisfy this section of *The Class Actions Act* (at 4-7 to 4-10):

> It is the representative plaintiff's burden to establish the existence and scope of any class with certainty. The purpose of the class definition is threefold: (a) it identifies those persons who have a potential claim for relief against the defendant; (b) it defines the parameters of the lawsuit so as to identify those persons who are bound by its result; (c) it describes who is entitled to notice. The courts will consider whether the definition of the purported class provides a basis by which members of the class can reasonably be identified in an objective manner. The definition must allow the court to assess whether or not a particular person falls within the class.
>
> The fact that the exact number of class members or the identity of each member is unknown is not a bar to certification.

> Definitions should avoid criteria that are subjective or that depend on the merits. Such definitions frustrate efforts to identify class members and contravene the policy against considering the merits of a claim in deciding whether to certify. For example, a class should not be defined on the basis of "those persons who have suffered damages". There must be some connection between the proposed common issues and the class definition. The class definition should be neither unduly narrow or unduly broad. The requirement is not an onerous one. The representative need not show that *everyone* in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not *unnecessarily* broad – that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that at the definition of the class be amended.

39. The Learned Chambers Judge had no difficulty determining that the Plaintiffs' proposed class definition met the "criteria that permits objective identification of potential class members" (para. 200). However, she was not prepared to find that the Plaintiffs had met a "rational connection" test. This test, derived primarily from Ontario authorities, requires that while each member of the class does not have to share an identical claim, they each must possess a "colourable claim". A definition will be considered to be over-inclusive if it includes individuals who do not have such a claim.

40. For starters, this test goes beyond what the Supreme Court of Canada stated, in *Hollick v. Toronto (City)*, 2001 SCC 68:

> The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad-that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended. ...

41. Secondly, the Learned Chambers Judge did not have the benefit of the recent Ontario Court of Appeal decision in *M.C.C. v. Canada (Attorney General)*, [2004] O.J. No. 4924, leave to appeal refused in [2005] S.C.C.A. No. 50. In *M.C.C.*, the Ontario Court of

Appeal confirmed that "rational connection" meant no more than that the members of the class must have a shared interest in the resolution of the common issues.

42. In *M.C.C.* the plaintiffs sought to certify a class action consisting of former students of an aboriginal residential school. The proposed class consisted of students who attended the school between 1922 and 1969. The claim was based on causes of action alleging vicarious liability, breach of fiduciary duty and negligence. The claim alleged that the school created an atmosphere of fear and intimidation and that the aim of the school was to promote the assimilation of aboriginal children. The initial application before the Ontario Superior Court was unsuccessful. As described by the Ontario Court of Appeal:

> ¶ 16 The motion judge then examined whether there was an identifiable class and whether there were any common issues. He found neither, because in essence he could see no cause of action common to all the students who attended the school between 1922 and 1969. He found that the circumstances and experiences of the students were far too diverse to support the notion that the respondents owed identical duties to each student, nor could it be said that, to the extent these duties were breached against one, they were breached against all.

43. An appeal to the Ontario Divisional Court was unsuccessful. On further appeal to the Ontario Court of Appeal, the Ontario Court of Appeal reversed the motion judge's decision. The Ontario Court of Appeal held as follows:

> ¶ 45 *Hollick*, supra, at para. 17, describes what is necessary to meet this requirement. The appellants are required to show that the three proposed classes are defined by objective criteria which can be used to determine whether a person is a member without reference to the merits of the action. In other words, each class must be bounded and not of unlimited membership. As well, there must be some rational relationship between the classes and the common issues. The appellants have an obligation, although not an onerous one, to show that the classes are not unnecessarily broad and could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issues.
>
> ¶ 46 As I have said, Haines J. found that the appellants failed to establish any identifiable class. In my view, he applied the wrong test in doing so by requiring that all students fully share a cause of action. This is inconsistent with *Hollick*, supra, which makes clear that the shared interest need only extend to the resolution of the common issues. The application of a wrong test is an error in principle and the decision which results can attract no

> deference. For its part, the majority of the Divisional Court did not address the identifiable class issue. However Cullity J. found that the requirement in s. 5(1)(b) had been satisfied by the appellants.
>
> ¶ 47 In my view, he was correct in doing so. The appellants satisfy all the dimensions of this requirement. Membership in the student class is defined by the objective requirement that a member have attended the school between 1922 and 1969. Membership in the families class requires that a person meet the objective criterion of being a spouse, common law spouse or child of someone who was a student. Likewise the siblings class is defined as the parents and siblings of those students. None of the three proposed classes is open-ended. Rather all are circumscribed by their defining criteria. All three classes are rationally linked to the common issues found by Cullity J. in that it is the class members to whom the duties of reasonable care, fiduciary obligation and aboriginal rights are said to be owed and they are the ones who are said to have experienced the breach of those duties. Finally, because all class members claim breach of these duties and that they all suffered at least some harm as a result, these classes are not unnecessarily broad. All class members share the same interest in the resolution of whether they were owed these duties and whether these duties were breached. Any narrower class definition would necessarily leave out some who share that interest. Thus I conclude that the identifiable class requirement is met.

44. The Ontario Court of Appeal used a lower standard than the Learned Chambers Judge. The class that was certified in *M.C.C.*, consisting of students in a school between 1922 and 1969 alleging abuse, is far more diffuse and varried than the class the organic farmers of Saskatchewan wish to certify.

45. The Learned Chambers Judge broke the claims of the Plaintiffs into two separate classes of complaints in order to ascertain whether there was "an identifiable class":

(a) the allegation that due to contamination concerns it is impossible or impractical for organic farmers to produce and market organic canola, resulting in the loss of a profitable crop and valuable tool in crop rotation for Saskatchewan organic grain farmers; and

(b) cleanup costs associated with GM canola volunteers on organic farmland.

(i) Loss of canola as an organic crop and market

46. In paragraphs 229 to 231 of the Learned Chamber Judge's decision, she summarized what she perceived to be the evidence filed in regard to this matter. At para. 229 she summarized the evidence of the Representative Plaintiffs. In the case of Dale Beaudoin, he experienced contamination of his organic canola in 1999 and, as a consequence, did not attempt growing it again. Larry Hoffman's evidence was that he would have grown canola in 1997 but did not do so because of GMO contamination concerns. In para. 230 the Learned Chambers Judge summarized the evidence of Douglas Sawatsky, that in 2000 he had positive results for GMO contamination in his organic brown mustard. The Learned Chambers Judge, at para. 231 then states: "[t]hat is the full extent of the evidence of this loss in relation to individual organic grain farmers."

47. The Learned Chambers Judge neglected to consider that the Plaintiffs commissioned Wallace Hamm, a forensic agrologist, to conduct a survey and provide an opinion on the gross losses sustained by organic grain farmers due to the loss of canola as an organic crop. Every organic certifier operating in Saskatchewan was asked to complete a survey using the certification records of each of their farmers regarding organic acres seeded to canola. Mr. Hamm, on reviewing data collected from the organic certifiers, pegged gross historic losses (between 1996 to 2001) at $1,359,683, future losses from 2002 to 2006 at $5,125,250, and future losses from 2007 to 2011 at $7,735,000. The total past and future gross losses were therefore calculated to be $14,219,933.

48. Not mentioned in the Learned Chamber Judge's decision, the Plaintiffs also commissioned Dr. Peter Stonehouse, who has a doctorate in agricultural economics, production economics, and farm management and marketing from the University of Manitoba and was a tenured professor with the Department of Agricultural Economics and Business with the University of Guelph, to comment about Mr. Hamm's report. Dr. Stonehouse opined that the agrologist's estimate of gross losses, assuming the data relied on to be accurate, to be a reasonable, realistic and plausible estimate of past and future gross losses of organic grain farmers.

49. The Plaintiffs also commissioned an expert, Dr. Rene Van Acker, to provide an opinion on the ability to produce GMO-free canola in Western Canada. Quoting from Dr. Rene Van Acker's October 23, 2004 report at para. 4:

> My findings are fairly summarized as follows:
>
> (a) Because of canola seed's ability to remain dormant for four to five years, its ability to cross-pollinate, the common usage of it in crop rotations, the extensive use of GM canola, and GM contamination of seed lots, the likelihood of contamination of non-GM canola by GM canola in Western Canada is very high and perhaps **absolute**;
>
> (b) Non-GM canola has been contaminated to a significant degree in Western Canada;
>
> (c) In Western Canada it would be very difficult and costly to produce and guarantee canola that is completely free of the GM trans-gene contamination. (emphasis added)

50. The Plaintiffs also commissioned Dr. Brenda Frick. At her cross-examination on March 24, 2004, she commented as follows:

> 158 Q And would there be other intellectually honest reasons why an organic farmer would not grow canola other than the GMO problem?
>
> *A* I think at the moment the GMO problem is so overwhelming that organic farmers wouldn't consider it. If there were no genetically-modified canola and they could do this without risk, there might then be other reasons why they would choose or not choose to do this, yes.
>
> 159 Q Right. And this is all conjecture; fair?
>
> *A* Define conjecture for me?
>
> 160 Q An element of guessing?
>
> *A* Well, I must admit I have not talked to every single organic farmer. I certainly have talked to organic farmers who have told me that this is the reason -- they would like to, they have in the past, they are willing to if they could, but just do not feel that the risks to their operation are warranted.

51. However, instead of quoting from (and hardly mentioning) the evidence of Wally Hamm, Dr. Stonehouse, Dr. Van Acker and Dr. Frick, the Learned Chambers Judge elected

to quote at length from an affidavit that was filed by Bayer's expert witness, Dr. Phillips, using up five pages of her Judgment. Dr. Phillips offered an opinion that the number of organic grain farmers who would have grown canola was small in the years in question and the reasons for not growing it likely had to do with reasons other than concerns about GMO contamination. It is noteworthy that the Learned Chambers Judge did not also quote from the cross-examination of Dr. Phillips in which he admitted to contradicting what he had earlier said in a reputed journal in regard to the organic farmers' losses.

> Q One of your published articles was exhibited to Dr. Stonehouse's affidavit dated October 14th, 2003. In fact, it's called his reply affidavit and it's an article that's Exhibit A to that affidavit called viabilities and economics of transgenetic crops?
>
> *A* Correct.
>
> Q Was that published in a peer-reviewed paper?
>
> *A* Yes, peer-reviewed journal. Nature Biotech.
>
> Q And it was published at a time before you were retained by any party to this litigation?
>
> *A* Yes.
>
> Q And as a published and peer-reviewed article, you intended that it convey truthful and accurate information?
>
> *A* Yes.
>
> Q And others in the academic and scientific community were intended to be able to rely on what your words state?
>
> *A* Yes.
>
> Q And you would be expected to stand behind what you state in the article?
>
> *A* Yes.
>
> Q You state in this article at page 539, and I'm quoting: "The introduction of transgenetic herbicide tolerant canola in Western Canada destroyed the growing, albeit limited, market for organic canola."
>
> *A* That's what it says.
>
> Q And you also state further on down that: "This lost market amounts to between $100,000 Canadian and

> $200,000 Canadian annually, but the calculation probably underestimates the opportunity cost of a market that many thought had significant potential for growth over this period."

A Correct.

52. It is submitted that the Plaintiffs met the light onus on them in showing that there was an identifiable class in regard to this complaint. It was not incumbent on the Plaintiffs to prove the complaint, nor to file affidavit evidence from every organic farmer in Saskatchewan, or even a majority of them.

53. The organic farmers filed adequate evidence to show a class-wide complaint. Every organic grain farmer has lost the right to grow organic canola free of GMO contamination risks. Every organic grain farmer lost the ability to sell organic canola into Europe. While losses may range from a dollar to thousands of dollars in the case of any particular organic grain farmer, this is a matter of degree rather than existence of a common interest.

(ii) Cleanup costs associated with GM canola volunteers on organic farmland

54. At para. 239 of her decision, the Learned Chambers Judge endeavored to summarize the evidence before her from the four organic farmers who filed affidavits regarding volunteer GMO contamination. It is noteworthy that in regard to Mr. Loiselle's loss she states: "[i]t is unclear whether this will result in any loss to Mr. Loiselle." Mr. Loiselle was required by his organic certifier to mechanically remove the plants from a large field. Having to handpick canola plants from a large field would be considered to be a loss by most farmers. Furthermore, the Learned Chambers Judge said that the evidence was limited to only two of the private certifiers, the C.O.C.C. (Canadian Organic Certification Cooperative Inc.) and the O.C.I.A. (Organic Crop Improvement Association). However, the cleanup requirements came from complying with the N.O.P. (National Organic Program), the standard to which all organic growers must adhere if they wish to ship organic grain into the United States. Most organic certifiers in Saskatchewan have adopted standards that meet the requirements of the N.O.P.

55. The Plaintiffs also filed evidence from Dr. Rene Van Acker. The following is from his affidavit sworn January 8, 2004:

> 3. Canola is a common volunteer in all crops in Manitoba, Saskatchewan and Alberta, generally, according to extensive, randomly stratified weed surveys...
>
> 4. In 2003 70% of canola (*Brassica napus*) grown in western Canada was transgenic (either Liberty Link or Roundup Ready)...If even the majority of pedigreed non-transgenic canola seedlots produced under strict rules of isolation and handling can contain transgenes then it would be conservative to suggest that there is a high probability that any particular population of apparently non-transgenic volunteer canola plants in western Canada would contain volunteer canola plants carrying transgenes.

56. The Learned Chambers Judge, however, determined that this evidence was insufficient to demonstrate a class complaint:

> ¶ 242 In any case, in my respectful view, it is not possible to certify a class on the basis of a statistical likelihood that a small portion of that class may, in the future, experience certain losses. Certainly there is evidence before me that some organic fields have in fact been contaminated by GM canola, in each case blown over from a neighbouring field where GM canola was grown. However, the claim asserted in relation to volunteer GM canola on organic farmland is essentially an individual claim. There is no evidence that the problem is widespread among members of the proposed class. As to the risk of future contamination (if such could conceivably be considered a viable claim, for which there is some doubt), this would certainly vary according to farming practices, including the use of buffer zones to protect from contamination from neighbouring fields.

57. Absent a trial, the Learned Chambers Judge should not have rejected the volunteer evidence so lightly. The Plaintiffs were not required to prove their case at this point, only to meet a light onus in demonstrating that there is an identifiable class. The Learned Chambers Judge went further than she needed in weighing the evidence and making factual conclusions, which the Plaintiffs maintain were incorrect in any event.

(4) The Learned Chambers Judge erred in rejecting the bulk of the issues proposed by the Plaintiffs as common issues

58. The Learned Chambers Judge utilized an overly stringent test in determining what may constitute a common issue. She furthermore failed to take into consideration significant differences between the Saskatchewan *Class Actions Act* and the class actions legislation in other provinces from which her precedents were derived. Lastly, the Learned Chambers Judge primarily engaged in a merits analysis in considering each of the proposed common issues.

59. The Learned Chambers Judge concluded her analysis of the general considerations applicable issue of whether there is a common issue by citing with approval from two Ontario Lower Court decisions in *Gariepy v. Shell Oil Co.* (2002), 23 C.P.C. (5th) 360 (Ont. S.C.J.) and *Pearson v. Inco Ltd.* (2002), 33 C.P.C. (5th) 264 (Ont. S.C.J.). The quote from *Gariepy* is as follows:

> The fundamental problem with the plaintiffs' position on the common issues is that the determination of whether the defendants' products are defective does not, in my view, materially or significantly advance the overall determination of the ultimate liability issue. It does not do so because of the fact that there are a myriad of reasons why any given class member's plumbing system might fail. This fact is made clear by the plaintiffs' own experts. ... (at para. 61)

The quote from *Pearson* is as follows:

> In the end result, therefore, while the determination of whether the defendants' resins are inherently defective might answer a scientific question of interest, it does not assist greatly in answering the question that is of primary interest to this court, which is the question of liability. Given the presence of different manufacturers, different designs, different installations, intervening events including improper maintenance or improper repair, varying water conditions including varying or no chlorine levels, varying mineral contents, varying water temperatures and varying water pressures, answering the scientific question only starts you on the necessary journey to find the final answer to the liability question in any given case. (at para. 67)

60. It is questionable whether these decisions represent the position of the Ontario courts given the Ontario Court of Appeal's decision in *M.C.C.* (*supra*). In that case the Ontario Court of Appeal remarked on the common issue requirement as follows:

> ¶ 51 *Hollick* also explains the legal test by which the common issues requirement is to be assessed. After dealing with the identifiable class factor, the Supreme Court addressed this question at para. 18:
>
> > A more difficult question is whether "the claims ... of the class members raise common issues", as required by s. 5(1)(c) of the Class Proceedings Act, 1992. As I wrote in *Western Canadian Shopping Centres*, the underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". Thus an issue will be common "only where its resolution is necessary to the resolution of each class member's claim" (para. 39). Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial ... ingredient" of each of the class members' claims.
>
> ¶ 52 This requirement has been described by this court as a low bar. See *Carom, supra,* at para. 42. Indeed this description is consistent with the commonality finding in *Hollick* itself. The class action proposed there was on behalf of some thirty thousand people who lived in the vicinity of a landfill site that was alleged to cause harm through noise and physical pollution. The Supreme Court found that the issue of whether the site emitted pollutants into the air met the test of s. 5(1)(c) because each class member would have to show this or see his claim fail. The Court did not see this conclusion to be at all undermined by the fact that this common issue was but one aspect of the liability issue and a small one at that. It clearly accepted that after the trial of the common issue the many remaining aspects of liability and the question of damages would have to be decided individually. Yet it found the commonality requirement to be met.
>
> ¶ 53 In other words, an issue can constitute a substantial ingredient of the claims and satisfy s. 5(1)(c) even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. In such a case the task posed by s. 5(1)(c) is to test whether there are aspects of the case that meet the commonality requirement rather than to elucidate the various individual issues which may remain after the common trial. This is consistent with the positive approach to the CPA urged by the Supreme Court as the way to best realize the benefits of that legislation as foreseen by its drafters.

61. There does not appear to be a requirement that a common issue must significantly advance the action as a whole only that it be a substantial ingredient to each individual claim. That there may be many individual issues would remain after the common issues are

determined appears to be irrelevant at this stage of the inquiry. It should be noted that the same considerations arise at the preferability stage.

62. Furthermore, the Learned Chambers Judge did not appear to contemplate differences in class actions legislation between Saskatchewan and other jurisdictions aimed at eradicating a predominance test when considering whether to certify a class action in Saskatchewan.

63. In the United States, common issues must predominate over individual ones for an action to be certified as a class action. In spite of language to the contrary, some Canadian decisions have allowed predominance issues to creep into the analysis. Often, class action certification is declined because there will be too many individual issues that remain to be determined after the common issues are tried. "Too many individual issues" has therefore become a common refrain for Defendants opposing class certification. The Learned Chambers Judge appeared to have bought into this appoach. Yet, there are important distinctions between Saskatchewan's Act and other jurisdictions having class actions legislation that make it clear that, in Saskatchewan at least, predominance is to form no part of the analysis.

64. Section 5(1)(c) of *The Class Proceedings Act, 1992* of Ontario identifies whether "the claims or defences of the class members raise common issues" as one of the criterion to be satisfied for class certification. The Act continues in s. 6 to identify that certain matters are not a bar to certification:

> 6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:
>
> 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
> 2. The relief claimed relates to separate contracts involving different class members.
> 3. Different remedies are sought for different class members.
> 4. The number of class members or the identity of each class member is not known.

5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

65. In *Abdool v. Anaheim Management Ltd.*, [1995] O.J. No. 16 (Ont. C.A.), Moldaver J. states:

> 128 Section 6 of the Act directs that the court, in coming to its decision to certify or not, shall not refuse certification solely if any one of the five delineated grounds is found to exist. Implicit in this, however, is the recognition that a court is entitled to consider the grounds referred to in s. 6 and where two or more of them are found to exist, the cumulative effect of these may legitimately be factored into the s. 5(1)(d) equation.

66. Moving to the British Columbia *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 7 of the Act reflects the equivalent of s. 6 of the Ontario Act. However, instead of saying "solely on any of the following grounds", s.7 of the British Columbia says "merely because of one or more of the following". Arguably, this means that the cumulative effect of the grounds mentioned are not a bar to certification. However, s. 4(2)(a) of the British Columbia Act directs the court to consider "whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members".

67. The Saskatchewan Act, at s. 9, reflects the British Columbia approach "by reason only of one or more" rather than "on any of the following":

> 9 The court shall not refuse to certify an action as a class action by reason only of one or more of the following:
>
> (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
>
> (b) the relief claimed relates to separate contracts involving different class members;
>
> (c) different remedies are sought for different class members;
>
> (d) the number of class members or the identity of each class member is not ascertained or may not be ascertainable;
>
> (e) the class includes a subclass whose members have claims that raise common issues not shared by all the class members.

68. Furthermore, and more significantly, the Saskatchewan Act does not contain the same provision found in the British Columbia Act providing that the preferability test is to

include consideration of "whether questions of fact or law common to the members of the class predominate over questions affecting only individual members".

69. It is clear, therefore, that in order to realize the remedial aims of class action legislation, the drafters of the Saskatchewan legislation did not intend to include predominance in any stage of the analysis in whether to certify an action as a class action or not. It can thus be concluded that while common issues must form a substantial ingredient in any class member's claim, it is not necessary that the common issues advance the action as a whole, or that there may be a significant number of individual issues remaining after the common issues are determined. In this sense, the Learned Chambers Judge's approach was overly stringent and her conclusions were laden with predominance concerns.

70. It is also helpful to keep in mind s. 7(2) of the Saskatchewan Act, which provides that "[a]n order certifying an action as a class action is not a determination of the merits of the action."

71. Or, as was put by the Ontario Court of Appeal in *M.C.C.* (*supra*):

> ¶ 50 Hollick also makes clear that this does not entail any assessment of the merits at the certification stage. Indeed, on a certification motion the court is ill equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis in fact for the certification requirement in issue.

72. Schedule "B" to this Memorandum examines the proposed common issues in detail. As will be seen, the Learned Chambers Judge used a combination of a predominance test and a merits test in rejecting the bulk of the common issues proposed by the Plaintiffs.

(5) The Learned Chambers Judge erred in determining that a class action was not the preferable procedure

73. The preferability requirement is well summarized by the Ontario Court of Appeal in *M.C.C.* (*supra*):

> ¶ 73 As explained by the Supreme Court of Canada in Hollick, supra, at paras. 27-28, the preferability requirement has two concepts at its core. The

> first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members. The analysis must keep in mind the three principal advantages of class actions, namely judicial economy, access to justice, and behaviour modification and must consider the degree to which each would be achieved by certification.
>
> ¶ 74 Hollick also decided that the determination of whether a proposed class action is a fair, efficient and manageable method of advancing the claim requires an examination of the common issues in their context. The inquiry must take into account the importance of the common issues in relation to the claim as a whole.

74. A review of the Learned Chambers Judge's decision reveals that she took a narrow view of the preferability analysis. For example, the important "access to justice" component of the preferability analysis earned the following single sentence in her 180-page judgment: (para. 323)

> Certainly there would be some advantage in relation to judicial economy and access to justice to have the applicability of these statutes determined in a single procedure.

75. While it is evident that the Learned Chambers Judge's analysis was influenced by her earlier incorrect determinations under cause of action, identifiable class and common issues, a class action would still be the preferable procedure even for the limited common issues identified by her.

76. One of the first items of relief requested in the Plaintiffs' Statement of Claim are declarations that the Defendants' GMOs are "substances" within the meaning of the EMPA, 2002 and the introduction of GMOs a "development" within the meaning of *The Environmental Assessment Act*. In and of themselves, the organic farmers of Saskatchewan have a substantial interest in their determination as a favorable ruling will impact on the introduction of future GM crops such as wheat. Section 11 of *The Queen's Bench Act, 1998*, S.S. 1998, c. Q-1.1, provides:

> A judge may make binding declarations of right whether or not any consequential relief is or can be claimed, and no action or matter is open to objection on the ground that a mere declaratory judgment or order is sought.

77. While it may be correct to say that any individual can seek the same declaration, realistically no individual would have the financial resources to seek it, nor would any particular organic farmer be willing to incur liability for costs. Therefore, even for the limited common issues identified by the Learned Chambers Judge, class proceedings would be the preferable procedure.

78. The Learned Chambers Judge concluded:

> ¶ 324 However, there can be no doubt that the individual issues that would remain to be determined would involve substantial individual inquiry, for the individual claimants would first have to prove that they have suffered a loss as a result of the introduction of GM canola and would then have to establish the value of that loss. Particularly the first of these issues is not, in my view, amenable to a simple procedure, for it requires inquiry into all the circumstances under which the individual claimant has farmed over any of the years for which a claim is advanced.

79. Stating that the Individual Plaintiffs' claims are not "amenable to a simple procedure" is surprising given the fact that the bulk of the claims would be within the monetary limits set out in either *The Small Claims Act* or the Simplified Procedure Rules. The Litigation Plan filed by the Plaintiffs was not mentioned by the Learned Chambers Judge. The following is from the Litigation Plan:

> **Split Between Liability and Individual Damages**
>
> The Litigation Plan calls for a determination of the common issues following which there will be a determination of individual claims. Splitting liability from damages will greatly reduce the amount of court time required to address the various common issues raised by the Plaintiffs. It is anticipated that the actual trial will take no more than a month. It will furthermore relieve the Court of the burden of concurrently hearing evidence on numerous potentially moot individual claims if it should ultimately decide against the class on the common liability issues.
>
> The focus on liability in the common issues will obviate the need to examine members of the class for discovery other than the representative plaintiffs (who already have underwent comprehensive cross-examinations).
>
> After the trial is concluded, and assuming a favorable outcome on the common issues, the resolution of the individual claims can then proceed. Once common issues have been determined in favor of a class, Section 29 of *The Class Actions Act* gives the Court a wide discretion to craft a procedure for the determination of the individual claims. While that procedure will be

> subject to the Court's discretion, after having heard submissions by the Plaintiffs and the Defendants, the Plaintiffs provisionally suggest the following procedure for the determination of the individual claims:
>
> 1. The Court will appoint an independent expert/arbitrator, acceptable to the Plaintiffs and the Defendants, to determine individual claims;
> 2. The members of the class will be given a deadline to submit their claims. The claims can be submitted by affidavit, with supporting documents, using forms developed by the independent expert/arbitrator in consultation with counsel for the Plaintiffs and Defendants. The forms will cover such matters as crop rotations, organic certification, contamination incidents, verification of clean-up costs and the like;
> 3. The Defendants will have the right to cross-examine anyone submitting a claim before the independent expert/arbitrator and to demand further production of relevant documents;
> 4. There will be a limited right of appeal from the decision of the independent expert/arbitrator.
>
> While the foregoing plan is provisional the intent is to employ an expeditious and inexpensive means to determine individual claims if the court should determine the common issues in favor of the class.

80. The Litigation Plan calls for a workable and sensible means by which to resolve the dispute.

81. Schedule "C" to this Memorandum examines access to justice, judicial economy and behavior modification as applied to this case in more detail.

(6) The Learned Chambers Judge erred in determining that the Representative Plaintiffs would not fairly and adequately represent the interests of the class

82. The Learned Chambers Judge was not satisfied that Mr. Beaudoin or Mr. Hoffman would fairly and adequately represent the interests of the class, mainly because the existence of a document that they signed entitled "Legal Costs Indemnity Agreement" and "Agreement to Act as Representative Plaintiff".

83. The Learned Chambers Judge did not comment on whether a workable litigation plan had been produced or whether the individuals would have an interest in conflict with other class members. Presumably, these did not present impediments to certification.

84. The impugned provision of the Agreement to Act as Representative Plaintiff provides that "I further appoint and authorize the SOD-OAPF Committee to retain and instruct counsel on my behalf on all matters pertaining to said class action." The Learned Chambers Judge held that the representative plaintiffs cannot delegate their duty to instruct counsel to a committee and they were therefore not appropriate representative plaintiffs.

85. The Litigation Plan describes the OAPF as follows:

> Furthermore, the Organic Agriculture Protection Fund ("OAPF") maintains a website at www.saskorganic.com in which regular updates are posted about the action, including press releases, copies of court documents, press reports and contribution information. The website is regularly updated.
>
> **The OAPF and funding**
>
> The OAPF is a special committee of the Saskatchewan Organic Directorate ("SOD") a not-for-profit organization. The OAPF was created to represent the organic farmers of Saskatchewan. Membership on the OAPF is not restricted to SOD members, to ensure that the interests of all organic farmers are fairly represented. The OAPF meets regularly for litigation updates and in order to instruct counsel.
>
> Members of the Committee have been invited speakers at numerous international conferences discussing the issues surrounding GMOs. To attend a conference, the OAPF requests that the travel costs of its Committee Member be covered as well as a donation be made to the Fund.
>
> The Representative Plaintiffs have agreed to allow the OAPF to instruct counsel. This allows the class some of the same advantages enjoyed by the Defendants who are able to utilize corporate committees to provide strategic direction to counsel and public relation departments to deal with the media. It also lends a measure of legitimacy to the decisions made on behalf of the class preferable to many class actions that are directed by class counsel with little to no formal input from the class.
>
> The OAPF has been successful in its fundraising efforts. Since its inception it has raised approximately $250,000 and has successfully funded the action since it was commenced on January of 2002.

86. There are obvious advantages to the involvement of the OAPF. It provides a means to gauge the interests of the class in matters that pertain to the common issues as opposed to

the individual claims of the Representative Plaintiffs. It operates a website. It provides fundraising services. It has established connections with the organic industry in regard to locating expert and lay witnesses. It created a network of contacts to obtain information about GMOs. To expect an individual organic farmer to also be a litigation expert, GMO expert, organic certification expert, industry leader, skilled fundraiser, media savvy, website operator, and an organic farmer suffering from GMO contamination is asking a great deal. A representative plaintiff does not have to be a superhero.

87. As stated by Mr. Justice Tallis in this case on the appeal (*supra*) regarding the requirement for defences:

> 16. When a plaintiff sues on behalf of the class he assumes a fiduciary obligation to members of the class, surrendering any right to compromise a group action for his individual gain or advantage. Even if a named plaintiff receives all of the benefits that he seeks in the claim, such success does not relieve him of the duty to continue the action for the benefit of others similarly situated.

88. The Agreement to Act as Representative Plaintiff explicitly recognizes the surrender of rights mentioned by Justice Tallis. The intent of the Agreement is obviously to provide an assurance that the action will be continued in the interests of the class and not settled or discontinued for individual gain or advantage. The Agreement was not intended to, and did not, relieve the Plaintiffs of their fiduciary obligations to the class. The Agreement was intended to enhance them.

89. This is why The Learned Chambers Judge misconstrued counsel's offer to "tear up" the Agreement if it presented a problem. Obviously, agreements cannot be torn up without the consent of the parties that signed them. What the offer meant was that the Representative Plaintiffs were fully prepared to accept the responsibilities imposed on them by the court to be representative plaintiffs. The Act provides:

> 7(1) The court may adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence to be introduced.

90. If the Agreement is the problem, and the Representative Plaintiffs are otherwise suitable, the appropriate solution is to allow the Plaintiffs an opportunity to amend the agreement to address the concern. For example, the agreement could be amended to provide that the OAPF is to operate strictly in a consultant capacity. Counsel's offer reflected the willingness of the parties to the Agreement to amend it in such a fashion if required.

91. The Learned Chambers Judge, however, concluded at para. 338 that even if the Agreement were amended, "there is no evidence ... that the individuals in question are either willing or able to assume the responsibility for this action on behalf of all members of a certified class." This conclusion was neither justified nor correct. The following is from the sworn evidence of Larry Hoffman:

> 10. Both myself and L.B. Hoffman Farms Inc. are willing to be appointed as representative plaintiffs to represent all organic grain farmers in Saskatchewan. I believe I can fairly represent the interests of organic grain farmers in Saskatchewan. Furthermore, L.B. Hoffman Farms Inc. reflects the common practice that many farmers, including organic farmers, conduct their farming operations through corporations. It is therefore fitting that an organic farming corporation should also be named a representative plaintiff.
>
> 11. I am a member of the Saskatchewan Organic Directorate. For the purpose of bringing this action on behalf of organic farmers, the Saskatchewan Organic Directorate established the Organic Agriculture Protection Fund ("OAPF"). I am on the Committee of the OAPF. Exhibit "A", Tab 17 to this my affidavit is a true copy of a Legal Costs Indemnity Agreement and Agreement to Act as Representative Plaintiff between me, L.B. Hoffman Farms Inc. and the OAPF.
>
> 12. I have previously held positions of trust and public office in which I have represented the interests of others. I was Mayor of the Village of Spalding from 1986 to 1991, and Alderman of the Village of Spalding from 1984 and 1986. Since 1993 I have served on the Certification Committee of the Organic Crop Improvement Association ("OCIA") Chapter 5 and have been the Chairman of the Committee since 1995. I have also served on numerous boards including the Spalding Union Hospital, the Quill Plains Lodge, and the Spalding Recreational Board. I am a former parish council member for Dovre Lutheran Church in Spalding and Immanuel Lutheran in Naicam.

92. The following is from Dale Beaudoin's Affidavit:

> 17. I will fairly and adequately represent the interests of the class and I am aware of the responsibilities to be undertaken. My responsibilities include producing all relevant documents and attending court when required. I also recognize that I am bringing this action on behalf of an entire class of farmers, and that it cannot be settled, compromised or discontinued without the Court's approval.

93. If Mr. Hoffman and Mr. Beaudoin were not prepared to accept a revised arrangement (as they said they would) then a substitute representative plaintiff would have to step forward. If they fail to live up to the obligations that they have offered to undertake in a revised arrangement, then the court possesses the ability to appoint a replacement representative plaintiff.

III. CONCLUSION

94. The Proposed Appellants submit that the proposed appeal is meritorious. Furthermore, it raises issues of significance to the parties and practice. The Proposed Appellants therefore respectfully request leave to appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Saskatoon, in the Province of Saskatchewan this 5th day of August, 2005.

STEVENSON HOOD THORNTON BEAUBIER LLP

Per: _____

Solicitors for the Prospective Appellants
LARRY HOFFMAN, L.B. HOFFMAN FARMS INC.
and DALE BEAUDOIN

S:\SABRA\WORK\TJZ\SOD-34904000\APPEALS\APPEAL OF CERTIFICATION DECISION\MEMORANDUM OF LAW (AUG-05).DOC

This document was delivered by: STEVENSON HOOD THORNTON BEAUBIER LLP, Barristers and Solicitors, 500-321A 21st Street East, Saskatoon, Saskatchewan S7K 0C1; Address for Service: Same as above; **Lawyer in Charge: Terry J. Zakreski** (File No. 34904000); Telephone: (306) 244-0132; Fax: (306) 653-1118.

IV. LIST OF AUTHORITIES

Schroeder v. Korf (1996), 144 Sask. R. 229 (C.A.) ***(para. 3)***

Branch, Ward K., *Class Actions in Canada* (Aurora, Ontario: Canada Law Book, 2005) ***(paras. 6, 38)***

Monsanto Canada Inc. v. Schmeiser, 2002 FCT 439 ***(para. 7)***

Sutton, "A Rigorous Approach to Certification – the Saskatchewan Experience", *The Lawyers Weekly*, July 8, 2005, Vol. 25, No. 10 ***(para. 10)***

Hoffman v. Monsanto Canada Inc., 2002 SKCA 86 ***(paras. 11, 87)***

Spencer v. Regina (City), 2003 SKQB 109 ***(para. 14)***

Daniels v. Canada (Attorney General), 2003 SKQB 58; 2003 SKCA 225; [2003] S.C.C.A. No. 223 ***(para. 15)***

Toms Grain & Cattle Co. v. Arcola Livestock Sales Ltd., 2004 SKQB 338; 2005 SKCA 11 ***(para. 16)***

Rodgers, "Liability for the Release of GMOs into the Environment: Exploring the Boundaries of Nuisance", (2003) 62 Cambridge L.J. ***(para. 16. & C-para. 15)***

Glenn, "Footloose: Civil Responsibility for GMO Gene Wandering in Canada", 43 Washburn L.J. 547 ***(para. 16)***

Hoffman v. Monsanto Canada Inc., 2003 SKQB 174 ***(para. 24)***

Abdool v. Anaheim Management Ltd. (1995), 121 D.L.R. (4th) 496 (Ont. Ct. (Gen. Div.)) ***(para. 30)***

Monsanto Canada Inc. v. Schmeiser, 2001 FCT 256; 2002 FCA 309; 2004 SCC 34 ***(paras. 34, 35)***

Hollick v. Toronto (City), 2001 SCC 68 ***(para. 40 & C-para. 1, 13)***

M.C.C. v. Canada (Attorney General), [2004] O.J. No. 4924, leave to appeal refused in [2005] S.C.C.A. No. 50 ***(paras. 41-44, 60, 71, 73)***

Gariepy v. Shell Oil Co. (2002), 23 C.P.C. (5th) 360 (Ont. S.C.J.) ***(para. 59)***

Pearson v. Inco Ltd. (2002), 33 C.P.C. (5th) 264 (Ont. S.C.J.) ***(para. 59)***

Abdool v. Anaheim Management Ltd., [1995] O.J. No. 16 (Ont. C.A.) ***(para. 65)***

Cooper v. Hobart, 2001 S.C.C. 79 ***(A-para. 4)***

Perre v. Apand Pty. Ltd., (1999), 164 A.L.R. 606 (H.C.A.) ***(A-paras. 11, 12)***

Union Oil Co. v. Oppen, 501 F. 2d 558 (1974) ***(A-paras. 11)***

Brown v. Port Edward (District), [1997] B.C.W.L.D. 133 ***(A-paras. 15-17)***

Sapone v. Clarington (Municipality) (2001), 14 C.L.R. (3d) 254 (Ont. S.C.J.) ***(A-para. 19)***

Re StarLink Corn Products Liability Litigation, Marvin Kramer v. Aventis CropScience USA Holding Inc. (2002), 212 F. Supp. 2d 828 (U.S. District Court, N.D. Illinois) ***(A-paras. 19-20)***

Kerr v. Revelstoke Bldg. Materials Ltd., [1976] W.W.D. 139 ***(A-paras. 30-31)***

Robert M. Solomon, R.W. Kostal and Mitchell McInnes, *Cases & Materials on the Law of Torts*, 5th ed. (Toronto: Carswell, 2000) ***(A-para. 32)***

Esso Petroleum Co. Ltd. v. Southport Corp., [1954] 2 Q.B. 182, 2 All E.R. 561 (C.A.); *Esso Petroleum Co. Ltd. v. Southport Corp.*, [1956] A.C. 218 ***(A-paras. 34-35)***

Bullen & Leake & Jacob's Precedents of Pleadings, 13th ed. (London: Sweet & Maxwell, 1990) ***(A-para. 35)***

Klar, *Tort Law*, 3rd ed. (Toronto: Carswell, 2003) ***(A-para. 36)***

Scurry–Rainbow Oil (Sask) Ltd. v. Taylor [2001] S.J. No. 4279 (Sask. C.A.) ***(A-para. 40)***

Imperial Oil v. Quebec (Minister of the Environment) 2003 SCC 58 ***(A-para. 46)***

McNaughton, Jodi, "GMO Contamination: Are GMOs Pollutants under *The Environmental Management and Protection Act*? (2003) 66 Sask. L.R.183-216 ***(A-para. 48)***

SCHEDULE "A" – CAUSE OF ACTION ERRORS

(a) ***The Learned Chambers Judge erred in determining that the pleadings did not disclose a cause of action in negligence***

1. At para. 44 of her decision, the Learned Chambers Judge recognized that the Defendants were subject to two duties that they were alleged to have breached, giving rise to liability to the Plaintiffs. The first is a duty to certified organic grain farmers to "ensure" that GM canola would not infiltrate and contaminate farmland where it was not intended to be grown, "or at least take steps to minimize such infiltration and contamination by warning growers purchasing their products of the potential for cross-pollination and advising them of farming practices designed to limit the spread of the gene". The second duty involved a duty to maintain the identity preservation program with which the crops were first introduced to preserve the European canola market. In regard to the former duty, the Learned Chambers Judge, at para. 46, was troubled by the use of the word "ensure" in the Claim. However, put in the context of the Claim, "...it is reasonable to interpret the sentence as expressing the more modest allegation that the defendants owed a duty to certified organic grain farmers to *take reasonable care to prevent their GM canola from infiltrating and contaminating farmland.*" (emphasis in original)

2. After reviewing the authorities, the Learned Chambers Judge summarized the test to be applied to the first duty of care alleged by the Plaintiffs as follows:

> ¶ 59 Thus, the *Anns* test as amplified in the passages from *Cooper* quoted above requires the Court to determine, first, whether the case falls within or is analogous to a category of cases in which a duty of care has previously been recognized. The plaintiffs concede that the answer to this question in the case before me is no.
>
> ¶ 60 The second question is then whether this is a situation in which a new duty of care should be recognized. The first leg of the *Anns* test is whether the pleadings allege reasonably foreseeable harm and relational proximity sufficient to establish a *prima facie* duty of care.

3. While the Learned Chambers Judge was prepared to find that foreseeability requirement was met in the pleadings (see paras. 63–66), she determined that the Plaintiffs had not met the "proximity" test. At para. 67 she determined:

> ¶ 67 ...They have not alleged physical harm to themselves or their property. They have alleged no special relationship between themselves and the defendants....

4. With greatest respect to the Learned Chambers Judge, the Plaintiffs *did* allege physical harm to their property. They alleged that, even if not intending to grow an organic canola crop, their fields are nevertheless being invaded by stray GM canola "volunteers". These GM canola volunteers sully the organic farmer's produce and must be removed. This is clearly reflected in the Statement of Claim which claims "cleanup costs" associated with identifying and removing GM canola volunteers from organic farm fields. As recognized in *Cooper v. Hobart*, 2001 S.C.C. 79 (cited in para. 57 of the Learned Chamber Judge's decision at page 33):

> What then are the categories in which proximity has been recognized? First, or course, is the situation where the defendant's act foreseeably causes physical harm to the plaintiff or the plaintiff's property.

5. The statement of the Learned Chambers Judge that no physical harm to the Plaintiffs' property had been alleged and, therefore, there was no proximity results from a clear misreading of the Plaintiffs' Statement of Claim. Furthermore, organic farmers are a subset of non-GMO farmers. There is sufficient proximity for there to be a duty of care as between the Defendants, who developed GM plants, and the Plaintiffs who are part of a class of non-GMO farmers to whom the Defendants reasonably contemplated would be the unwitting recipients of GM plants.

6. The Learned Chambers Judge went on to consider whether there were any policy considerations that would limit the imposition of the duty of care in the circumstances of the case. At para. 71 the Learned Chambers Judge once again referenced the Decision Documents of the Federal Government authorizing the unconfined release and held:

> The imposition by the courts of a duty of care not to release the substances into the environment would therefore appear to be in conflict with express government policy.

7. It is hardly judicial policy to at all times defer to government regulators. Everything from thalidomide to the exploding Pinto at one point received government regulatory approval.

8. The Learned Chambers Judge goes on to state at para. 72:

> In effect, the alleged damage is not of physical harm to the plaintiffs' crops, but arises from the alleged inability to meet the requirements of organic certifiers or of foreign markets for organic canola. There is no allegation that GM canola is unhealthy or causes detrimental physical problems to humans or plant life. The claim is therefore analogous to that of *M. Hasegawa & Co. v. Pepsi Bottling Group (Canada) Co.*, 2002 BCCA 324, (2002), 213 D.L.R. (4th) 663 (B.C.C.A.), in which the plaintiff claimed damages resulting from the introduction of mould into bottled water. The evidence failed to establish any health or safety concerns. The Court concluded the only consequence of the mould was aesthetic, with a resulting adverse effect of the marketability of the water. On these facts the Court held there was no duty of care.

9. The Learned Chambers Judge is forgetting that the *M. Hasegawa & Co.* decision occurred *after a trial*. As argued above, the Learned Chambers Judge had earlier ruled, on the contrary, that the pleadings had put in issue the safety of the GM canola crops and, furthermore, whether GMOs are unhealthy or cause detrimental physical problems to humans or plant life was a matter to be left for trial. At trial, the trial court may well accept the testimony of witnesses, such as that of Dr. Mae Won Ho, that GMOs pose significant health and environmental risks.

10. The Learned Chambers Judge then went on to determine whether the Plaintiffs' claim would be barred by the "pure economic loss" rule. It should be noted, however, that the pure economic loss doctrine would apply only to the Plaintiffs' loss stemming from their allegation that organic farmers are not growing canola due to legitimate concerns about contamination.

11. The Learned Chambers Judge sought to distinguish the Plaintiffs' claim from *Perre v. Apand Pty. Ltd.*, (1999), 164 A.L.R. 606 (H.C.A.) and *Union Oil Co. v. Oppen*, 501 F. 2d

558 (1974), where the pure economic loss rule did not bare the claims. She sought to do so because, unlike the defendant in *Perre* (supplying potato seed with bacterial wilt) or the defendant in *Union Oil* (leaking oil into the ocean), Monsanto and Bayer were "pursuing their legitimate economic interests in relation to the damage complained of" and therefore could not be subject to liability. As she states:

> ¶ 79 In this case [i.e. Union Oil], as in *Perre*, it is clear that the defendants could not be said to have been pursuing their legitimate economic interests in relation to the damages complained of, for they were not legitimately entitled to cause damage to life in the sea or damage to the environment.

12. Yet, the defendants in *Perre* and *Union Oil* were also pursuing *their* legitimate economic interests in selling potato seed in the case of *Perre* and transporting oil in the case of *Union Oil*. For the Learned Chambers Judge to say that Monsanto and Bayer were simply pursuing their legitimate economic interests and therefore have done no legal wrong is a predetermination by her of the outcome at trial.

13. The Learned Chambers Judge then proceeded to consider whether the Plaintiffs' claim regarding the dismantling of the identity preservation program by the Defendants disclosed a cause of action in negligence. This part of the Plaintiffs' claim is summarized in para. 82 of the Learned Chambers Judge's decision. The allegations from para. 36(a) of the Claim may be broken down as follows:

(a) Because the export of GM canola was not regulated in Canada, the Defendants undertook to develop their own export rules needed to assure continued access to foreign markets for Canadian canola;

(b) The Defendants developed these export rules with the Canadian Canola Council of Canada and introduced their products in 1995 and sold them in 1996 under an identity preservation program ("IPP") purportedly designed to ensure that no GM canola entered the canola export market, as the Japanese and European market had not approved the GM canola lines of the Defendants;

(c) The Defendants dropped the IPP in 1997, once approvals for the Japanese market were obtained. The Defendants knew that the removal of an IPP and/or failure to introduce an adequate one, would result in the eventual loss of the European Economic Union market for Canadian canola. As a consequence the European Union market for organically grown Canadian canola was destroyed.

14. To better appreciate the Plaintiffs' claim in this regard, it is helpful to quote from the cross-examination of one of the Defendants' experts on his affidavit, Dr. Peter Phillips, on April 22, 2004:

> Q And the markets that they were concerned about at the time was the Japanese market and the European market?
>
> A The two identified markets that were, that at that point were buying significant quantities, Japanese had been a consistent buyer, Europe was an episodic buyer, those were the two main markets that bought significant volumes that had not approved the variety. Other key markets such as Canada, the United States and Mexico and many of the Asian markets either were accepting Canadian regulatory decisions or had already approved the product for commercialization and consumption.
>
> Q Was there, like, in 1995, there's a difference between '95 and '96; was there not?
>
> *A* Yes. 1995 was, for the most part, really a seed multiplication year. Once the varieties were approved for commercial release, there simply wasn't enough seed to plant significant acreage in Canada. It's not clear to me why there wasn't, but that's not an unusual occurrence in a new product introduction, so there was a little bit of the oilseed I believe that was crushed for commercial uses, but the bulk of it was retained and reprocessed for seed in the following year.
>
> Q And then in 1996 it was commercially grown by farmers, but subject to the same IPPM?
>
> ...

Q Because one of the things that it allowed Monsanto and AgrEvo, as Bayer Cropscience was then known, was to bring their products to market early?

A Correct. In fact, we did offer a preliminary estimate on page 61 of the same report calculating the net present value of accelerated adoption of the two new canola varieties relative to what they would have been otherwise. Essentially what we did is we assumed that the adoption rates - that without the identity preserved production system that was in place, the adoption rates would have been lagged by two years relative to what they actually were with the system in place and just reprofiling the revenue stream back two years was estimated to have a net present value of approximately $100 million of revenue for the industry.

Q How much of that $100 million would have went to Monsanto and AgrEvo?

A It would be a function of their market shares which we did not calculate in that report.

Q Would that $100 million be shared between the two of them though?

A Yes, depending on how much -- the calculation was based on a dollar per acre formula which was, although they had both, both have a different pricing and marketing strategy, Monsanto using a technology use fee with a non-patented chemical and AgrEvo using a patented chemical and in some cases a hybrid seed and at that period using a non-hybrid seed. They priced them differently, competitive, relatively competitively and we took the $15 an acre as a proxy for the rent or the profit that, the cash flow profit that the two companies would be earning from their technology in those two platforms.

Q Well, in the case of Monsanto, that is it's technology user fee?

A That's correct.

Q $15 an acre?

A That's correct.

Q And you estimated that Bayer Cropscience would make about the same from the sale of its patented chemical Liberty?

A And seed.

Q And seed. Was the IPPM effective?

A By any records we were able to examine, yes. We found no evidence nor in fact any suggestion that there was any adventitious presence of GM canola in the Japanese supply chain during the period in which this special system was in place.

Q And farmer compliance was high?

A By all accounts it was high.

Q And no grainfetti ending up where it wasn't supposed to be?

A None that was reported to us in our investigation.

Q Grainfetti being the confetti with the serial numbers added to the --

A Unique identifiers, yes.

Q Unique to the farmer's crop that was put in their bins that were sealed?

A Yes.

Q Was the -- now, the reason for the IPPM was that the government lacked the mandate to regulate in the area; correct?

A The government did not exercise a mandate in that area, correct.

Q And so AgrEvo and Monsanto stepped in to, in effect, self-regulate?

A Correct, in conjunction with the industry. We did not examine this in great detail, but I think it's fair to say that from the -- we allude to it in our report, but from the evidence we were able to garner through surveys with various parts of the industry outside of the two technology owners, Monsanto and AgrEvo, then AgrEvo, the view was that if it had simply been a firm-based IPPM system, that it would have had a greater difficulty being successful, that the role of all the actors I talked about earlier was a critical part of satisfying the importers, Japan and Europe, but also satisfying the participants within the supply chain that this

was important and that it, that there were some benefits to both those inside and outside the supply chains that were evolving.

...

Q The IPPM was dropped in the 1997 crop year; correct, sir?

A That's my understanding, yes.

Q And it was dropped because why?

A There were a significant number of - our understanding is that there were a significant number of debates within the industry about the cost benefit of maintaining the system given that Japan, which was the single largest market at that point, had approved a variety for commercial importation.

Q What was the other market? Europe had not?

A That's correct.

Q So there was a cost-benefit analysis of maintaining the system with that market?

A I couldn't say that there was a cost-benefit analysis done in a formal sense, but based on the discussions, the decision was made not to maintain the supply chain.

Q Knowing that it would spell, or likely spell the loss of the European canola export market?

A I'm not privy to what their state of thinking was. That's one assumption one might make.

Q Well, it's indeed an assumption that you made, sir, in your article.

A I don't think we quite said that they knew they would lose the market. At that point in 1997 there was still every expectation, I think even within Europe, that they would be approving at some reasonably timely, on some reasonably timely basis the varieties that had been proposed for importation, so that the, there was an expectation it might have some disruption to the market for some period, but it certainly wasn't, I don't think anybody thought that there was going to be a ban imposed in 1998 for the next six years, even the Europeans didn't.

Q You state in your paper: "The Canadian export industry was faced with the choice of establishing a private regulatory mechanism to ensure GM-free shipments or to forego the market." You state that in your paper, page 55, 56?

A Correct.

Q And when they are talking about foregoing the market, they are talking about foregoing the European market?

A That's one of the markets that they would be at risk, yes. I think that was what we were interpreting that in that paragraph.

Q And you also state: "In this case, the industry decided that the potentially large permanent costs of an IPPM system to handle the risk in the EU market would not be compensated by either large sustained shipments or price increases. Hence, the industry declined to serve that market once the veritable stocks of GM-free canola were run down." You state that in your report?

A Yes, that's correct.

Q And that is correct?

A That's what we stated, yes, at that time.

Q It was correct at the time you stated it?

A Yeah. My understanding, yes.

15. The Learned Chambers Judge held, at paras. 84-88 of her decision that the claim did not disclose a cause of action as there was no pleading of any detrimental reliance on the part of the Plaintiffs in regard to the Defendants' "gratuitous" undertaking to preserve access to foreign markets. In her analysis the Learned Chambers Judge endeavored to distinguish *Brown v. Port Edward (District)*, [1997] B.C.W.L.D. 133.

16. In *Brown* the defendant had given an undertaking to an excavator to clean up oil that the excavator had spilled in front of the defendant's residence. The defendant neglected to clean up the oil. The plaintiff slipped on the oil whilst walking down the street and was injured. Madam Justice Smith held:

> ¶ 88 In the case before me, there is no allegation that the plaintiffs relied in any way on the implementation of the IPP or even that they knew of its existence. There is no allegation that their circumstances were worse, as a result of the implementation and subsequent abandonment of the IPP, than they would otherwise have been had the IPP not been introduced in the first place. It is my view that no duty of care arises from a gratuitous undertaking in the absence of some element of detrimental reliance, or other detriment. Accordingly, I conclude that para. 36(a) of the claim does not disclose a reasonable cause of action.

17. However, there was clearly no detrimental reliance in the *Brown* decision as the plaintiff was unaware of the promise that the homeowner had made to the excavator to clean up the oil. Furthermore, it cannot be said that the pleadings fail to allege that the Plaintiffs' circumstances were worse than they would otherwise have been if the IPP had not been introduced in the first place. Their situation was worsened as a result of the implementation of the IPP as GM crops were introduced when they would not otherwise have been! Furthermore, their situation was worsened by the repeal of the IPP as it caused the destruction of the European export canola market.

(b) The Learned Chambers Judge erred in determining that the Plaintiffs' Statement of Claim did not disclose a cause of action in nuisance

18. After canvassing the authorities, the Learned Chambers Judge appeared to be prepared to find that the pleadings of the Plaintiffs disclosed a cause of action in nuisance. Her conclusion is reached at paras. 108 – 110:

> ¶ 108 I do not discount these arguments or the difficulty the plaintiffs may have in meeting them. However, it is impossible for me to conclude that the defendants' success on these points is plain and obvious, which is the test that must be applied on the application to strike the pleading as disclosing no reasonable cause of action. The test for what constitutes nuisance is notoriously vague and changes over time. The plaintiffs' allegation is in effect that the crops and land of organic farmers is effectively contaminated by the presence of GM canola. The analogy to contamination of land by weeds is in my view too close to make it certain that the plaintiffs' argument on this point cannot succeed. It can be argued that just as weeds made it difficult or impossible to grow a conventional crop successfully, so too does contamination by GM canola make it impossible to grow organic crops. The significance of the distinctions argued by the defendants is one which must be assessed, in my view, by the trial judge on the whole of the evidence.

> ¶ 109 The same is true of the argument that the damage or interference alleged by the plaintiff is not sufficiently significant. This is an assessment to be made by the trial judge in the context of all the evidence at trial. It is impossible for me to say, at this point, that the plaintiffs have no chance of success on this point.
>
> ¶ 110 The plaintiffs' claim is novel, and there are difficult hurdles to overcome. However, I do find it plain and obvious that they cannot succeed in showing that the damage or interference they have alleged constitutes a legal nuisance.

19. The Learned Chambers Judge then struggled with whether the Defendants as manufacturers could be made to be responsible for a nuisance created by farmers using their product. At paras. 115–120 of her decision, she considered the cases of *Sapone v. Clarington (Municipality)* (2001), 14 C.L.R. (3d) 254 (Ont. S.C.J.) and *re StarLink Corn Products Liability Litigation, Marvin Kramer v. Aventis CropScience USA Holding Inc.* (2002), 212 F. Supp. 2d 828 (U.S. District Court, N.D. Illinois), both cases in which statements of claim were found to disclose causes of action, notwithstanding that the defendant in the case of the *Sapone* decision was a municipality issuing building permits, and in *StarLink* was a biotechnology company that allowed GM corn that had been approved only for animal feed to enter the human food supply chain. The defendant in *StarLink* had failed to comply with mandatory segregation requirements, resulting in GM corn commingling with conventional corn. The Court was prepared to hold that liability could potentially be imposed on the manufacturer, as liability in private nuisance can arise "not only when he carries on the activity but also when he participates to a substantial extent in carrying it on." (para.120)

20. The Learned Chambers Judge sought to distinguish the case at bar from the *StarLink* decision on the basis that the pleadings in the present case did not allege that GM canola is harmful *per se*, or rendered organic crops unfit for consumption, or was otherwise harmful. She states at para. 121:

> ¶ 121 The case at bar is distinguishable on both of the points crucial to the *StarLink* decision. It is not alleged that contamination of organic crops by GM canola is harmful per se or that it renders the organic crops unfit for consumption or otherwise harmful. Nor is it alleged that the defendants in this case failed in any way to conform to the requirements imposed on them. Indeed, it is conceded in the pleadings that they had received federal approval for the unconfined release of the GM canola varieties.

21. As noted above, the Learned Chambers Judge reached the opposite conclusion in an earlier decision.

22. Furthermore, she failed to consider the activities of the Defendants showing a "participation to a substantial extent" in carrying on the nuisance beyond the point of sale of seed to farmers. The pleadings expressly identified the involvement of Monsanto with its licensed users of its product to the extent that Monsanto at all times retained ownership over its licensed gene. Bayer maintained an interest in being able to sell its patented chemical to those growing its GM crop engineered to be Liberty resistant. This demonstrates a high level of involvement by Monsanto, and significant involvement of Bayer, with the growing of GM crops by farmers who have purchased GM canola from the Defendants.

23. Paradoxically, the Learned Chambers Judge allowed that her cause of action analysis of *The Environmental Assessment Act* and the EMPA claims may change her determination on whether the pleadings support liability in private nuisance. In her words:

> ¶ 123 I must add that this conclusion does, of course, ignore two other causes of action alleged in the statement of claim: the alleged failure of the defendants to comply with the EMPA, and the alleged failure to obtain an environmental assessment under *The Environmental Assessment Act*, S.S. 1979-80, c. E-10.1 ("EAA"). These putative causes of action are address below. If either of these claims is well founded, it is conceivable that this could be seen to lend the necessary allegation of malfeasance required in the American cases to support liability in private nuisance. This would raise the further question, of course, as to whether the American cases were to be followed, but would be sufficient, in my view, to make an arguable case, precluding striking the claim at this stage. Of course, if either of these two statutory claims were found to be well founded, as will be seen, then the claim of nuisance would in any case be redundant, for the civil liability imposed by these statutes is both strict and sweeping in its scope. Nonetheless, my conclusion that no cause of action can lie in private nuisance on the basis of the facts alleged in the case before me must be qualified by the observation that the contrary conclusion could follow if the Court should conclude that either of the statutory claims is well founded.

24. The Learned Chambers Judge *did* find, however, that in at least two respects the pleadings did disclose causes of action under *The Environmental Assessment Act* and under the EMPA, 2002, but nevertheless did not go back and revisit her provisional determination

that "the contrary conclusion could follow if the Court should conclude that either of the statutory claims is well founded."

25. Her determination that liability in nuisance would be redundant if civil liability could be imposed under the statutes is manifestly not a reason for striking pleadings. There are defences available to the Defendants under both *The Environmental Assessment Act* and under the EMPA that may not be available in nuisance and *vice versa*. Furthermore, statutes can be repealed or amended at any time. It is therefore important as a legal precedent that if there could be liability in nuisance, that such liability stand as a precedent for other cases.

(c) The Learned Chambers Judge erred in determining that the Statement of Claim did not disclose a cause of action in trespass

26. The Learned Chambers Judge was not prepared to find that the pleadings disclosed a cause of action in trespass for want of a sufficient "directness". She states:

> ¶ 131 This argument, which is essentially an argument for some degree of liberalization of the law of trespass, does not, by its own terms, go nearly as far as the plaintiffs would wish to take it, for it is clear that much more than "natural and inevitable forces" must intervene between merely marketing GM canola and its arrival on the plaintiffs' land.

27. With respect to the Learned Chambers Judge, the Defendants did far more than "merely market GM canola":

(a) They "invented" a gene in their biotechnological laboratories;

(b) They incorporated the gene into the genome of a canola plant, creating something that had never existed in nature before;

(c) They tested their canola crops in numerous "field trials" in Saskatchewan;

(d) They multiplied their seed stocks and sold canola seed to farmers containing the genetic modification;

(e) They dropped all segregation measures and provided no contamination warnings;

(f) They promoted the use of their products as herbicide-tolerant canola;

(g) Monsanto, it at all times, only licensed the use of the gene while retaining ownership. Bayer sold a patented chemical to use on its GM canola.

28. The Defendants are clearly responsible for introducing a substance into the environment that did not exist before, that forever changed the Saskatchewan agricultural landscape.

29. Some cases and commentators have asserted that a trespass must be committed by the direct placement of the trespassing article on the plaintiff's land. They argue that it is not trespass for an article to simply "drift" or be carried to the plaintiff's lands by diffusion or natural means.

30. However, in *Kerr v. Revelstoke Bldg. Materials Ltd.*, [1976] W.W.D. 139, for example, the court was satisfied on the evidence that a cause of action founded in trespass was established. The court held (at para. 11):

> The evidence establishes that their premises were invaded from time to time by smoke, sawdust, fly ash and objectionable sounds. The physical invasion of their premises by sawdust and fly ash was so severe on occasion that it interfered with their use and enjoyment of their property. Actual samples of fly ash were collected and placed in vials by the plaintiff...and were entered in evidence as exhibits.

> "Every invasion of property, be it ever so minute is a trespass." *Entick v. Carrington* (1765) 19 St fr, 1030, 1066 *Salmond* (15th ed.) @ pg. 49 *Boyle v. Rogers* (1921) 2 WWR 704 affd. (1922) 1 WWR 206 (Man. C.A.)

> It is a trespass to place any chattel upon the Plaintiff's land or to cause any physical object or noxious substance to cross the boundary of the Plaintiffs' land...

> *Salmond on torts* (15th ed.) @ pg. 53

31. Significantly, there is no mention of any directness requirement in *Kerr*. Indeed C.E.D. (West), 3rd ed., Vol. 11B, Title 55 at para. 13, cites *Kerr* for the proposition that "[p]hysical invasion by a pollutant substance to the degree that a plaintiff's use and

enjoyment of his or her property is interfered with may entitle the plaintiff to recovery of damages for trespass."

32. In Solomon, Kostal and McInnes, *Cases & Materials on the Law of Torts*, 5th ed. (Toronto: Carswell, 2000) at 119, the authors state:

> Traditionally, the tort of trespass to land has been limited to the direct, intentional, intrusion of objects that are visible to the naked eye. However, in *Martin v. Reynolds Metal Co.*, 342 P. (2d) 790 (Oregon S.C. 1959), the defendant manufacturer was held liable in trespass because its operations caused invisible fluoride particles to settle on the plaintiff's land making it unfit for cattle.

33. The authors note that in *Martin*, the court was faced with the task of applying established legal principles to new situations and had no difficulty modifying traditional principles to fit a novel situation.

34. One case often cited for the proposition that there must be directness to establish a case in trespass is *Esso Petroleum Co. Ltd. v. Southport Corp.*, [1954] 2 Q.B. 182, 2 All E.R. 561 (C.A.). In that case, oil jettisoned by the defendant was carried by the waves to the plaintiff's shore. Lord Denning denied that this was a trespass, based on the lack of directness. This case, however, was appealed to the House of Lords. Many authors overlook the House of Lords decision (*Esso Petroleum Co. Ltd. v. Southport Corp.*, [1956] A.C. 218). The House of Lord's determination of the trespass issue is not clear. The summary of the case, at 219, indicates that, per Lord Radcliffe and Lord Tucker, trespass did not lie on the facts of the case. It must be noted, however, that the summary uses the word "semble" with respect to this part of the decision. Semble indicates either an *obiter dictum* in a court opinion or it introduces an uncertain thought or interpretation.

35. Some authors indeed cite the House of Lords decision in *Esso Petroleum* for the *opposite* conclusion:

> The act complained of must be a physical interference with the plaintiff's land, but there will be sufficient interference if matter is deliberately placed so that natural forces will carry it to the plaintiff's land, e.g. by the jettison of oil at sea.

See: *Bullen & Leake & Jacob's Precedents of Pleadings*, 13th ed. (London: Sweet & Maxwell, 1990) at 923.

36. Lewis Klar argues:

> The interferences in these cases [for example, *Esso*] were set in motion by the defendants, assisted only by natural and inevitable forces, and ought to have been treated as sufficiently direct to constitute a trespass. If the results were unexpected, or could not reasonably have been foreseen, this would defeat the claim, not, however, because the injury was not direct, but because it was neither intentional nor negligent.

In a footnote, Klar states:

> Where a person throws a stone into the sky over the plaintiff's land, and it comes down on the plaintiff's land, one would not deny that a trespass has been committed even though the force of gravity was an important factor in producing the result. Similarly, where one pours oil onto water, sprays a chemical into the air or points a rain spout in the direction of a neighbour's property, and waits for natural forces to produce an invasion of another's land, the results ought to be treated as sufficiently direct.
>
> - Klar, *Tort Law*, 3rd ed. (Toronto: Carswell, 2003) at 103.

37. It should also be kept in mind that the nature of trespassing articles owned by the Defendants is that they do not simply trespass on the fields of farmers and sit there. They take root, grow, propagate, and spread. The biological nature of the trespassing article deserves special consideration as recognized in the "stray bull" cases, which do not require that the owner of the bull directly put his bull onto his neighbour's property before there is liability.

38. If there is a requirement for directness, it should either be held not to apply in this special and novel case or deemed to be sufficiently met.

39. Indeed, liability in trespass should be a consequence of the commodification of genetic material in which the Defendants have engaged and from which the Defendants have profited. The Plaintiffs ought to be entitled to say to the Defendants, "Look, if this is your property, then please remove it from my land."

40. There is at least an arguable point for trial that the tort of trespass can be evolved to meet the needs of this novel situation. As Mr. Justice Tallis observed in *Scurry–Rainbow Oil (Sask) Ltd. v. Taylor* [2001] S.J. No. 4279 (Sask. C.A.):

> ¶ 97 The genius of the common law lies in its adaptiveness to changing times. Its basic principles were not meant to become rigid formulae, inflexible and resistant to new developments or changing concepts in the commercial world. Since common law rules are judge-made rules, the Court can make exceptions to such rules when changing conditions so mandate. Common law rules may be tweaked to do justice between the parties when a rigid and mechanistic application of a rule would run counter to the object and purpose of the rule.

41. The tort of trespass is capable of being "tweaked to do justice between the parties" in this case.

(d) ***The Learned Chambers Judge erred in determining that the Plaintiffs' Statement of Claim did not disclose a cause of action under* The Environmental Management and Protection Act *("EMPA")***

42. At para. 138 of the Learned Chambers Judge's decision, she states that in order to establish liability under s. 13 of the EMPA, the Plaintiffs must establish five things:

> [138] In order to establish a claim under this provision, the plaintiff must allege and prove:
>
> (1) that the GM canola varieties of the defendants are "pollutants" within the meaning of the Act;
>
> (2) that immediately before the first discharge of the "pollutant", the defendants were either the "owners" of the pollutants or "persons having control" of the pollutants;
>
> (3) that the "pollutant" has been "discharged";
>
> (4) that the discharge of the pollutant has been into the "environment;
>
> (5) that the discharge has caused loss or damage to the plaintiffs.

43. Paragraph 40 of the Plaintiffs' Statement of Claim reads as follows:

> Further, or in the alternative, the Plaintiffs state that the Defendants' genetic modifications are "pollutant", within the meaning of *The Environmental*

> *Management Protection Act* (Saskatchewan) ("EMPA"), that has caused loss or damage to certified organic grain farmers because of its discharge into the Saskatchewan environment. The Plaintiffs state that at the time of its first discharge, the genetic modification was owned by the Defendants or, in the alternative, the Defendants were persons having control of the pollutant. The Plaintiffs therefore state that the Defendants are liable to certified organic grain farmers represented in this action pursuant to Section 13(3) of the EMPA for the damage sustained by them as the result of the introduction into the Saskatchewan environment of GM canola.

44. Each of the constituent elements mentioned in para. 138 of the Learned Chambers Judge's decision are contained in para. 40 of the Plaintiffs' Statement of Claim. The pleadings therefore disclose a cause of action. It is submitted that the Learned Chambers Judge appeared to require the Plaintiffs to also prove their cause of action, something they are not required to do.

45. The Learned Chambers Judge first considered whether simply alleging the conclusion that the products were a "pollutant" within the meaning of the EMPA was sufficient without pleading facts to support the conclusion. The Learned Chambers Judge, at that point, noted that the Plaintiffs had filed evidence, namely evidence contained in the Dr. Mae Wan Ho affidavit, that would satisfy the requirements of the definition of a "pollutant" if the affidavit is assumed to be true. (see paras. 146-150) She would therefore not strike the pleading on this basis because they could be amended and such amendments would not catch the Defendants off-guard. On that score, it should be noted that defects in pleadings can be remedied by amendment or particulars. It is noteworthy that neither Defendant sought particulars of the Plaintiffs' allegation that their products were pollutants, notwithstanding having served extensive demands for particulars on practically every other allegation made by the Plaintiffs.

46. The Learned Chambers Judge was not prepared, however, to find that the Defendants had discharged a pollutant or were the persons having control or ownership at the time of discharge. It is readily apparent, however, that the Learned Chambers Judge engaged in an errant merits analysis rather than reviewing pleadings in arriving at this conclusion. She notes:

> ¶ 154 It is clear that "discharge" in this sense refers to a physical act that disperses the "pollutant" into the environment. It is important to remember that "environment" is also restrictively defined, as discussed above. It does, however, include the "atmosphere". Whether planting and growing open-pollinating GM canola satisfies the definition of discharge of the GM gene into the environment is at least arguable. However, simply marketing a product to be planted and grown by farmers cannot, in my respectful view, satisfy the definition of "discharge". Were it otherwise, merely marketing oil or toxic chemicals would be considered a "discharge" into the environment. Nor can dismantling, or abandoning, a program designed to keep GM canola separate from conventional canola for the purpose of the export market in itself constitute "discharging" something into the environment.
>
> ¶ 155 The further issue is whether either Monsanto or BCS can be said to have been an "owner of a pollutant" within the meaning of s. 2(r) ("the owner of a pollutant immediately before the first discharge of the pollutant and includes a successor, assignee, executor or administrator of the owner") or a "person having control of a pollutant" within the meaning of s. 2(t) ("the person having the charge, management or control of the pollutant immediately before the first discharge of the pollutant and includes a successor, assignee, executor or administrator of that person"). If the relevant "discharge is confined to dissemination of the modified gene by cross-pollination or dispersal of GM canola seed during cultivation and harvest, as I believe is the only possible interpretation of the Act, it is difficult to see how either of the defendants who sold the seed to farmers to cultivate, could be said to fit either of the relevant definitions.

47. The pleadings alleged that the Defendants were responsible for introducing something new into the environment and are therefore the ones responsible for discharging it. They should therefore be held responsible for cleaning it up. Indeed, holding the Defendants responsible for the pollution of the environment by GMOs gives effect to the "polluter-pay" principle which has become entrenched in Canadian environmental law and purposively underlies the EMPA. As stated by the Supreme Court of Canada recently in *Imperial Oil v. Quebec (Minister of the Environment)* 2003 SCC 58, at paras. 23-4:

> ¶ 23 Section 31.42 *EQA*, which was enacted in 1990 (S.Q. 1990, c. 26, s. 4), applies what is called the polluter-pay principle, which has now been incorporated into Quebec's environmental legislation. In fact, that principle has become firmly entrenched in environmental law in Canada. It is found in almost all federal and provincial [page642] environmental legislation, as may be seen: *Canadian Environmental Protection Act*, 1999, S.C. 1999, c. 33; *Arctic Waters Pollution Prevention Act*, R.S.C. 1985, c. A-12, ss. 6, 7; *Fisheries Act*, R.S.C. 1985, c. F-14, s. 42; *Waste Management Act*, R.S.B.C. 1996, c. 482, ss.

> 26.5(1), 27(1), 27.1, 28.2, 28.5; *Environment Management Act*, R.S.B.C. 1996, c. 118, s. 6(3); *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, ss. 2(i), 112, 113(1), 114(1), 116; *Environmental Management and Protection Act, 2002*, S.S. 2002, c. E-10.21, ss. 7, 9, 12, 14, 15, 46; *Contaminated Sites Remediation Act*, S.M. 1996, c. 40, ss. 1(1)(c)(i), 9(1), 15(1), 17(1), 21(a)); *Environmental Protection Act*, R.S.O. 1990, c. E.19, ss. 7, 8, 43, 93, 97, 99, 150, 190(1); *Pesticides Act*, R.S.O. 1990, c. P.11, ss. 29, 30; *Ontario Water Resources Act*, R.S.O. 1990, c. O.40, ss. 16.1, 32, 84, 91; *Crown Forest Sustainability Act*, 1994, S.O. 1994, c. 25, s. 56(1); *Environment Act*, S.N.S. 1994-95, c. 1, ss. 2(c), 69, 71, 78(2), 88, 89, 90; *Environmental Protection Act*, S.N.L. 2002, c. E-14.2, ss. 8(1), 9, 28, 29, Part XIII; *Environmental Protection Act*, R.S.P.E.I. 1988, c. E-9, ss. 7, 7.1, 21; *Environmental Protection Act*, R.S.N.W.T. 1988, c. E-7, ss. 4(2), 5.1, 6, 7, 16. (See R. Daigneault, "La portée de la nouvelle loi dite 'du pollueur-payeur'" (1991), 36 McGill L.J. 1027.) That principle is also recognized at the international level. One of the best examples of that recognition is found in the sixteenth principle of *Rio Declaration on Environment and Development*, UN Doc. A/Conf. 151/5/Rev. 1 (1992).
>
> ¶ 24 To encourage sustainable development, that principle assigns polluters the responsibility for remedying contamination for which they are responsible and imposes on them the direct and immediate costs of pollution. At the same time, polluters are asked to pay more attention to the need to protect ecosystems in the course of their economic activities.

48. The Learned Chambers Judge clearly lost sight of the fact that the Defendants are responsible for GMOs being in the environment in the first place when she zeroed in on the issue as to who is responsible for discharges occurring at the plant level from seed planted by farmers. According to her, the Defendants cannot be held responsible for "discharges" of pollen or seed from plants that the Defendants never planted. Such an analysis neglects the "first" act of the Defendants of incorporating their engineered "pollutant" into a proliferating and invasive biological agent and then releasing it into the environment.

49. Of note is the definition of "release" in section 107 of *The Seeds Act Regulations* which is defined as "any discharge or emission of seed into the environment or exposure of seed to the environment and includes the growing and field testing of plots." Therefore, the first discharge into the environment could be said to have occurred in the field plots, an act for which the Defendants are plainly responsible. Jodi McNaughton makes this argument in *GMO Contamination: Are GMOs Pollutants under* The Environmental Management and

Protection Act?, 66 Sask. L. Rev. 183 2003 and argues that there has been a continuous discharge ever since.

50. The Learned Chambers Judge was also not persuaded that the Defendants were the owners of the pollutant or the ones having control.

> ¶ 156 The plaintiffs rely heavily on their belief that both defendants own the patent to their genetic modification (although this is alleged in the statement of claim only as against the defendant Mosanto) and, in the case of Monsanto, on the fact that Monsanto has a contract with growers, "technology user agreements" which permit growers to grow Roundup Ready canola. Paragraph 16(a) of the statement of claim alleges:
>
> > 16.(a) The Technology User Agreement at all material times provided that the granting of a license to use the Roundup Ready gene did not grant ownership of the gene to the grower. Growers entering into the Technology User Agreement, furthermore, were not permitted to save canola for replanting with the Roundup Ready gene. The commercial production of Roundup Ready canola in Western Canada was, therefore, licensed by Monsanto Canada with ownership of the Roundup Ready gene at all times remaining with Monsanto Canada.
>
> ¶ 157 In my respectful view it is not reasonably arguable that ownership of a patent in the modified gene and enforcement of patent rights through "technology user agreements" are sufficient to constitute "ownership" or "control" of the "pollutant" (GM canola seed and resulting pollen) after the seed is sold to farmers and cultivated by them, as these words are used in the Act. The "control" asserted by the technology user agreement is not control of when and how GM canola is cultivate or harvested, but only control, or restriction, of the right to save and use seed from the GM crop.

51. The Learned Chambers Judge omits to mention that the TUA was not restricted to the right to save and reuse seed, but clearly provided that ownership of the gene would remain with Monsanto notwithstanding that farmers were planting seeds containing the gene. By its TUAs, Monsanto extended its patent rights to manufacture and use its patented gene to include *ownership*.

52. Furthermore, the pleadings state

> 27(b) Monsanto Canada has at all material times maintained a corporate policy of responding to farmers' complaints of contamination of Roundup Ready canola by arranging for the removal of unwanted Roundup Ready volunteers, including the removal of Roundup Ready canola volunteers found on certified organic land. The Plaintiffs state that Monsanto

> has therefore admitted responsibility and liability for stray Roundup Ready plants including any cleanup costs associated with Roundup Ready volunteers found on certified organic fields.

53. This part of the Plaintiffs claim was ignored by the Learned Chambers Judge. The pleading underscores the ownership and control exercised at all material times by Monsanto over its patented gene.

(e) ***The Learned Chambers Judge's treatment of the EMPA, 2002 and the EAA***

54. The Learned Chambers Judge correctly determined that the Plaintiffs' pleadings disclosed a cause of action under *The Environmental Management and Protection Act, 2002* ("EMPA, 2002") and under *The Environmental Assessment Act* ("EAA"). At paragraph 191 she held that it was not sufficient, however, for the Plaintiffs to plead as a conclusion that the testing, development of GMOs was a "development" within the meaning of the EAA. The defect, however, could be remedied by amendment since the Defendants would not be caught by surprise. As with "pollutant" the defect could also easily be remedied by particulars, neither of which Defendant had requested.

55. In and of itself, successfully obtaining a declaration that the testing and development of GMOs is a "development" within the meaning of the EAA will have major repercussions for the Plaintiffs. The Act imposes strict liability for losses and furthermore paves the way for an injunction should the Defendants attempt in the future to proceed with other GMOs without the required approval under the Act. All members of the class share this common interest as it is beyond doubt that GMOs are prohibited substances in certified organic grain production.

SCHEDULE "B" – COMMON ISSUES ERRORS ANALYSIS

(a) Proposed common issues of fact

(1) What is the nature, extent, scope of the prohibitions against GMOs in certified organic production in the United States under its National Organic Program (the "N.O.P."), in the European Union under its EEC No 2092/91 (the "European Organic Standard"), or in Japan under Japanese Agricultural Standard (the "J.A.S.") and when did such prohibitions come into effect?

1. The pleadings, particulars and materials filed in support of the certification application make it abundantly clear that the majority of organic grain produced in Saskatchewan is destined for foreign markets. Furthermore, regardless of what any individual certifier's standards may be, all organic grain destined for either Europe, the United States or Japan must comply with the organic import standards of those countries regardless of domestic certification. In this respect, the standards are common to every organic certifier.

2. The Learned Chambers Judge began by recognizing, at para. 269:

> There can be no doubt that the nature and extent of organic standards of export markets in relation to the adventitious presence of GM canola (if this is what is meant by "prohibitions against GMOs") are generally relevant to the plaintiffs' claims.

3. This ought to have been enough to constitute a common issue. The Learned Chambers Judge, however, went on to hold that because the standards may have varied over time, they would cease to be common. However, there was no evidence that the N.O.P., the European Organic Standard or the J.A.S. varying in regard to GMOs since their introduction.

4. The Learned Chambers Judge then held at para. 270:

> In addition, the literal organic standards relating to GMOs and the dates of adoption in relation to the N.O.P. and the European Union are a matter of public record and are in evidence on this application. These issues therefore would not, in my view, significantly advance the litigation.

5. The N.O.P., European Organic Standard and the J.A.S are matters of foreign law. Foreign law does not form part of the public record in Saskatchewan but must be proven in court with witnesses. For example, in the certification application, evidence of foreign standards included an affidavit of Edward Korwek, a Washington D.C. attorney hired by Bayer CropScience and Debbie Miller, the President of OCIA International Inc., based out of Lincoln, Nebraska.

6. As establishing foreign law requires witnesses it forms a significant ingredient in the organic farmers claim. How many times would the same foreign laws and regulations need to be proved if the organic farmers' complaint was required to be proved by individual claims?

> *(2) What was the nature, extent and scope of the general European ban on the importation of grain containing GMOs and when did it come into effect?*

7. This common issue, as with the previous, necessitates proof of foreign law. It is a substantial ingredient to the claim because the organic farmers allege that they were shut out of this market due to contamination concerns once the IPP was dropped. Furthermore, they allege that all organic grain destined for Europe is tested for the presence of GMOs and rejected if any trace amounts are found. The Learned Chambers Judge, however rejected the common issue not because it was not a common issue but because she apparently could decide it at this stage against the Plaintiffs:

> ¶ 274 It is not clear, in any case, exactly how this matter relates to the plaintiffs' claim. They plead that organic grain crops are processed and marketed separately from conventional grain crops, and that this segregation of organic products is an essential part of organic production and marketing. The plaintiffs seem to tie the issue of a general European ban to the claim that they were caused loss by the abandonment of the "identity preservation program", (the "IPP"), which had been put in place to segregate GM canola from conventional canola in the first two years following the introduction of GM canola in order to protect the export market for conventional canola.
>
> ¶ 275 I have already held that this aspect of the plaintiffs' claim fails to disclose a reasonable cause of action, for the plaintiffs do not and apparently cannot plead that they relied on the introduction of this program. In any case, however, the plaintiffs have not established a factual basis to suggest that the abandonment of the IPP is relevant to the losses they claim. While there is evidence that the failure to maintain this program may have been

> relevant to the loss of the EU market for conventional Canadian canola, generally, it is difficult to see how the failure to maintain segregation of GM crops from conventionally grown crops could have affected the organic growers in particular, as organic crops are segregated in any event to keep them separate, not only from GM canola, but from all conventionally grown canola.

8. This appears to clearly be a determination on the merits, and an incorrect one at that. It is speculation to assume that organic producers did not sustain the same destruction of a foreign market due to contamination concerns as conventional producers because organic production is segregated. For example, the United States closed its borders to all Canadian beef, organic and convention, once a BSE case was detected. It did so notwithstanding the fact that organic cattle are not fed animal parts and are therefore unlikely to contract the disease.

> *(3) Under the N.O.P., the European Organic Standard, or the J.A.S., if a certified organic grain farmer suffers infiltration of his or her organic fields by volunteer GM canola, is that organic farmer required to:*
>
> *a. remove any such plants from his or her land?*
>
> *b. clean such canola seeds from his or her grain?*
>
> *c. pay for additional inspections?*
>
> *d. file additional organic plans of production?*
>
> *e. monitor his or her fields in the future to ensure that such plants have been completely removed?*
>
> *f. not grow any future crops on the same field that can cross with canola or from which canola seed cannot be easily cleaned post-harvest?*
>
> *And what is the duration of any such requirements?*

9. The Learned Chambers Judge misinterpreted this proposed common issue. The common issue relates to the claim by the organic farmers for cleanup costs regarding having to remove GM canola plants from their fields, regardless of whether or not they are growing canola, in order to maintain certification. The instances of where contamination was experienced were instances through two private certifiers in Saskatchewan where the N.O.P. was applied requiring the farmer to uproot and remove the GM canola from their organic

produce and to restrict further crops on the same fields so as to avoid future GMO contamination.

10. Understanding what requirements are imposed on organic farmers seeking to sell organic grain into Europe, Japan and the United States regarding volunteer GM canola in other crops is a matter of foreign law and was the subject of controversy in the application. For example, the Defendants looked at the restriction on the "use" of GMOs in the N.O.P. as not precluding inadvertent commingling because the organic farmer did not "use" a GMO. The Plaintiff's witnesses, however, maintained that N.O.P. provisions banning organic grain from coming into contact with prohibited substances would apply. There clearly is a controversy in regard to this issue warranting class determination.

(4) What are the agrological challenges and benefits of growing canola organically, how suitable is it for organic production?

11. The Plaintiffs and the Defendants filed conflicting affidavits regarding the suitability and benefits of organic canola. The Defendants claim that canola was not suited for organic production, while the experts retained by the Plaintiffs claim that it was - ergo, a triable issue was raised. The background information on the suitability of canola to organic production would form a substantial ingredient in any organic farmer's complaint about the ability or inability to grow organic canola. Once again, the Learned Chambers Judge's dismissal of this common issue appeared to have more to do with her preference of the Defendant's side of the dispute that canola was ill-suited to organic production and therefore it was unnecessary to make this a common issue.

(5) What was the potential of the European Union market for organic canola from Saskatchewan certified to the European Organic Standard in the years in issue absent GMOs?

12. The Learned Chambers Judge determined:

> ¶ 280 It is my view that either question could have some limited relevance to the claim for lost sales, or lost opportunity to sell, to the European market, in the sense that general or statistical information of this sort would have some probative value in attempting to value any loss of this nature proved at trial. The information could not, however, in any way avoid a case by case

> consideration of the circumstances of individual farmers either in determining whether they have suffered such a loss, or the value of that loss in the particular circumstances. Accordingly, it is my view that this question is essentially one that would involve individual inquiry, and to the extent that it can be answered generally it would be of only limited significance in advancing the claims of the class members.

13. Whether any individual organic farmer may have grown canola in any particular year would depend on the price he or she could expect, which, of course, is related to supply and demand. Assessing the potential of the market for organic canola from Saskatchewan would relate to each organic farmer's claim notwithstanding that, when it came time to determine individual complaints, each individual farmer would have to prove his or her loss. Each individual would otherwise be faced with having to prove the same general market availability wasting judicial resources and risking inconsistent results. Indeed, the potential of the market was the topic of controversy as one of the Defendants' witnesses purporting to maintain that increased European production accounted for the bulk of the market loss.

(6) What premiums would such certified organic canola have commanded?

14. Once again, whether an organic farmer would choose to grow canola will hinge, to a large extent, on the price he could achieve. For example, if the price premium is double or triple what conventional canola sells for, it is more likely that any individual would be likely to grow it.

(7) As a result of the widespread dissemination of the Defendants' GM crops in Saskatchewan, is it reasonably possible for organic grain farms in Saskatchewan to (a) obtain canola seed free from infiltration by the defendants' GMOs and (b) produce organically grown canola free from infiltration by the defendants' GMOs??

15. This common issue goes to the organic farmers' complaint that there is no GMO-free seed source in Saskatchewan nor can organic canola be grown free from infiltration. It forms a common ingredient in their complaint. Instead of asking whether it was a common issue, the Learned Chambers Judge asked whether, in her view, it had merit:

> ¶ 282 This question is obviously actually two, quite distinct questions. There is no evidence at all before me as to the difficulty of obtaining canola seed free from infiltration by GMOs, except for evidence that some organic

> farmers in Saskatchewan do continue to grow canola and market it as organic. Presumably, organically grown canola seed could, at least in theory, (and, I have no reason not to believe, in practice) be obtained from anywhere in the world where GM canola is not grown, even if it proved to be difficult to produce in Saskatchewan.

16. This determination flies in the face of the expert evidence that the Plaintiffs had tendered, unchallenged by the Defendants. As previously mentioned, Dr. Rene Van Acker's October 23, 2004 report stated at para. 4:

> My findings are fairly summarized as follows:
>
> (a) Because of canola seed's ability to remain dormant for four to five years, its ability to cross-pollinate, the common usage of it in crop rotations, the extensive use of GM canola, and GM contamination of seed lots, the likelihood of contamination of non-GM canola by GM canola in Western Canada is very high and perhaps absolute;
>
> (b) Non-GM canola has been contaminated to a significant degree in Western Canada;
>
> (c) In Western Canada it would be very difficult and costly to produce and guarantee canola that is completely free of the GM trans-gene contamination.

17. It is noteworthy that Dr. Van Acker also attached, as part of his evidence, the seed lot study that showed that certified seed lots were contaminated by GMOs from both Defendants. The Learned Chambers Judge's statement that the solution to the entire problem is for organic farmers to buy canola seed from, for example, Australia, borders on the ridiculous. Furthermore, if there was evidence that some organic farmers may be continuing to grow canola, it is unknown whether these farmers experienced contamination in attempting to do so.

18. The significant point is the organic farmers in their Claim have brought a claim of systemic contamination of organic canola by the Defendants. It is clearly an appropriate common issue as to how extensive and widespread the contamination is.

> *(8) What is the prevalence of volunteer canola in Saskatchewan?*
>
> *(9) What is the statistical probability that such volunteer canola contains a transgene owned by one of the Defendants (and their relative percentages)?*

19. These common issues form a substantial ingredient to every organic farmer's claim as they pertain to the class-wide complaint about there having been systemic contamination of the environment by the Defendants' GMOs. The Learned Chambers Judge dealt with these by stating:

> Either a farmer has suffered this loss or he or she has not. The statistical probability of such a problem is simply irrelevant.

20. On the contrary, that a problem is commonplace and can readily occur does have relevance to the issue of whether it did occur in any particular case. A claim by a plaintiff that he was hit by a car is easier to prove if he alleged it occurred while crossing a street than putting on his pajamas, even though in either case the issue is whether it occurred. Where an event is more probable, the amount of evidence required to prove it on a balance of probabilities is less.

> *(10) How much GM canola did each Defendant sell in Saskatchewan in the years in question?*

21. The Learned Chambers Judge acknowledged that the common issue "might be relevant to the defendants' proportionate liability for damages, should the case reach that point." However, she would not certify it as a common issue, presumably based on her predetermination that the case would never reach that point. This is an insufficient basis for refusing to certify a common issue.

> *(11) What licensing arrangements did the Defendants enter into with producers and/or seed companies regarding the sale of their products in the years in question?*

22. The rejection of this as a common issue by the Learned Chambers Judge coincided with her rejection of there being a cause of action in trespass or in nuisance. She states, "it appears that this question is relevant to the plaintiffs' claim only if I am in error in so concluding." It is submitted that the Learned Chambers Judge was in error in concluding that there was no reasonable cause of action in nuisance or trespass and the common issue is therefore sound.

(12) *What corporate policies and procedures did the Defendants have in the years in question to address complaints of "adventitious presence"?*

(13) *What instructions, education, and warnings did the Defendants give to farmers purchasing their GM products in the years in question regarding use, containment, and pollen flow?*

23. Similarly, the Learned Chambers Judge would have found these to be a common issue had she found the pleadings disclosed a reasonable cause of action in negligence. As the Plaintiffs submit that there is a reasonable cause of action in negligence, these common issue ought to have been certified.

(14) *What was the nature, extent, scope, design and aim of the Identity Preservation Program ("IPP") and the Defendants' involvement in its introduction, maintenance and repeal?*

(15) *To what extent did the Defendants profit from the IPP or its repeal?*

(16) *Did the Defendants have any express, imputed or implied knowledge of how their GM canola would infiltrate conventional canola if released without an IPP?*

(17) *Did the Defendants have any express, imputed or implied knowledge of the potential damage that dismantling the IPP could have on the European export market for Canadian Canola?*

(18) *Did the Defendants have any express, imputed or implied knowledge of the reliance of organic canola producers on the European market?*

24. The Learned Chambers Judge's refusal to certify these as common issues is based on a determination of the merits rather than whether they are common issues. She found at para. 288:

> ¶ 288 As I have already commented, not only have the plaintiffs failed to provide any evidence that the abandonment of the IPP in any way affected the export market for organic canola, it is contrary to the logic of the claim as presented to suppose that it could have done so. The purpose of the program was to segregate GM canola from non-GM canola (by separately processing GM canola and inserting grain "confetti") to ensure, in the early years, that the export market for non-GM canola was preserved. Cessation of this segregation could not affect organically grown canola, because that continued and continues to be segregated, and marketed separately, from all non-organically grown canola whether or not it is GM canola.

25. Markets do not always react logically to contamination issues as the BSE crisis aptly demonstrates. The fact remains that the IPP kept the market open and its repeal caused its closing, even though the IPP may have been inadequate to have prevented contamination from eventually occuring. Contrary to what the Learned Chambers Judge says, there clearly was evidence of this having occurred from the mouth of Bayer's own witness:

> Q You state in your paper: "The Canadian export industry was faced with the choice of establishing a private regulatory mechanism to ensure GM-free shipments or to forego the market." You state that in your paper, page 55, 56?
>
> *A* Correct.
>
> Q And when they are talking about foregoing the market, they are talking about foregoing the European market?
>
> *A* That's one of the markets that they would be at risk, yes. I think that was what we were interpreting that in that paragraph.
>
> Q And you also state: "In this case, the industry decided that the potentially large permanent costs of an IPPM system to handle the risk in the EU market would not be compensated by either large sustained shipments or price increases. Hence, the industry declined to serve that market once the veritable stocks of GM-free canola were run down." You state that in your report?
>
> *A* Yes, that's correct.

26. Furthermore after the IPP was dismantled GM crop production grew exponentially. Once that happened, even the segregated production system of organic farmers could not protect organic grain from contamination.

27. Nevertheless, this is a matter that ought to be determined at trial and not at the certification hearing. The organic farmers have claimed that the introduction and premature repeal of the IPP destroyed an export market, the issues are clearly common ingredients to each of their complaints.

(19) *What regulatory approvals did the Defendants receive from the Federal Government of Canada or the Provincial Government of Saskatchewan pertaining to the testing, licensing and release of their GM crops?*

(20) *Are the Defendants' GM canola lines environmentally unsafe notwithstanding any such approvals?*

28. The first of these questions the Learned Chambers Judge would not certify as a common issue because it was "a matter of public knowledge". This is presumed to be true by the Learned Chambers Judge. Exactly what approvals the Defendants received from the Federal Government is relevant to the case. Furthermore, there was no evidence of any provincial approvals.

29. In regard to issue #20, the Learned Chambers Judge agreed that if there was a complaint by the Plaintiffs disclosing a cause of action under the EMPA, that the issue would be an acceptable common issue.

(b) ***Proposed common issues of law***

(1) *Did the Defendants owe a duty of care to certified organic grain farmers in Saskatchewan as a class not to harm their access to the European Union market and in that regard:*

a. *to ensure that their products were not released in a way that they would infiltrate conventional canola? and/or*

b. *to warn farmers purchasing their products about cross-pollination? and/or*

c. *to introduce their products with an IPP designed to protect the foreign markets that have not approved their GMOs for import? and/or*

d. *to preserve the IPP to protect the European Union market until import approvals were obtained?*

(2) *Did the Defendants breach such duties of care?*

(3) *If an organic farmer sustains a loss resulting from not growing organic canola because of unacceptable risks of GM infiltration (but before such infiltration has occurred), is such a loss barred by the "pure economic loss" doctrine?*

30. Rejection of these common issues appears to be primarily based on the merits. As determined by the Learned Chambers Judge:

> ¶ 296 The defendants also point out that the first of these questions, unlike the pleadings, seems to confine the negligence claim to the loss of the European market. There is no evidence before me as to which members of the class, or how many individuals, could or would have sold organic canola into the European market. There is some evidence that few did so, due to the high cost of transportation and the existence of a more favourable market in the United States. The defendants could only have owed a duty not to harm the European organic canola market to those who had an interest in participating in that market and an ability to do so. The evidence before me is that not all private certifiers had or have access to the EU market.

31. From a study commissioned by the Plaintiffs using data collected from organic certifiers and traders, the loss of this market was estimated to be worth in excess of $14 million. Furthermore it is irrelevant whether any private certifier has access to the market as access to the market is governed by the European Standard, not by domestic standards.

32. At any rate, these are purely merits considerations rather than identifying whether or not the issues are common. As discussed below, the Litigation Plan filed by the Plaintiffs called for the division between liability and damages. The common issues were framed in such a way as to address the duty of care issue from the point of view of the Defendants' activities without regard to individual issues and liability.

> *(9) Do the Defendants' sufficiently own and/or control their transgenes rendering them potentially liable should their transgenes interfere with an organic farmer's use and enjoyment of his or her land?*
>
> *(10) Is organic farming an overly sensitive land use so as to preclude any potential liability?*
>
> *(11) Are the Defendants entitled to rely upon The Agricultural Operations Act as a defence to a nuisance claim?*

33. In regard to question #9, the Learned Chambers Judge recognized that the nuisance question is capable of being addressed on a class-wide basis. She held:

> ¶ 302 However, the primary issue at this stage of the analysis is whether, assuming that the pleadings disclose a reasonable cause of action in nuisance, and that there is an identifiable class, liability for nuisance would, in any case, be a question for which there is a common answer across the class.

34. In regard to Question #10, she held:

> ¶ 303 Question No. 10 might be answered in a general way, applicable across the class, but the issue of over-sensitivity is primarily one that would be variable, as between farmers, depending on the level of tolerance of the presence of GMOs, or of volunteer GM canola plants, to which each farmer was subject, and over time, as standards of tolerance varied over time.

35. Nevertheless, the general question remains as to whether organic agriculture's ban of GMOs and co-mingling with GMOs constitutes an overly sensitive land use. Contrary to the determination of the Chambers Judge, this question is capable of being addressed on a class-wide basis.

36. The Learned Chambers Judge believed that it would be premature to certify question #11 as a common issue. No objection is taken to that.

> *(12) Do the Defendants have sufficient ownership or control of the transgenes that they have created and released into the environment to make them liable for the tort?*
>
> *(13) Is there a "directness" requirement for the tort and, if so, was infiltration sufficiently inevitable to satisfy the requirement?*
>
> *(14) Does the propensity of the released genetic material to propagate and proliferate obviate a "directness" requirement?*

37. The Learned Chambers Judge, having found that the pleadings did not disclose a reasonable cause of action, was not prepared to find these to be common issues, however she states at para. 305:

> The questions posed by the plaintiffs (all three of which are, in my respectful view, the same question, differently worded) would be relevant to whether there is a cause of action, if I am mistaken that it is "plain and obvious" that there is not.

38. She goes on to state, however, "[t]he evidence on this application suggests that very few organic farmers have experienced the 'contamination' of which the statement of claim complains." This is clearly a merits determination, inappropriate at this stage of the analysis.

> *(15) Are the Defendants' transgenes "pollutants" within the meaning of the EMPA and/or a "substance" within the meaning of the EMPA, 2002?*

> *(16) If so, did the Defendants own or control the transgenes when they were first discharged into the environment under the EMPA or were they persons responsible for the discharge under the EMPA, 2002?*
>
> *(17) Does the responsibility for any discharge under either Act extend to the progeny of plants containing the transgenes?*
>
> *(18) Are claims based on canola plants or seeds containing the Defendants' transgenes that have spread onto organic fields after October 1, 2002 to be governed by the EMPA, 2002, and ones occurring before by the EMPA?*

39. Had the Learned Chambers Judge concluded that there was a cause of action under the EMPA, as opposed to strictly the EMPA, 2002, she would have determined that these were appropriate common issues:

> ¶ 307 However, if it is assumed that there is a cause of action under both Acts, and that the plaintiffs have defined an appropriate class, then question Nos. 15 and 16 would in my view be appropriate common questions, for they would clearly be relevant to the determination of liability. Question Nos. 17 and 18, which attempt to address the scope of the two Acts would also be appropriate.

40. In conclusion the bulk of the common issues proposed by the Plaintiffs were deserving of being accepted as such. The Learned Chambers Judge's rejection of them appears to relate more to her predetermined view of their merit rather than whether they are suitable common issues under the Act.

SCHEDULE "C" – PREFERABLE PROCEDURE IN DETAIL

(a) Access to Justice

1. There is no "fund" set up to compensate organic farmers sustaining damage caused by GM canola pollution as there was in *Hollick v. Toronto (City)* (*supra*) to compensate those harmed by landfill pollution. There is little prospect that either of the Representative Plaintiffs or, for that matter, any member of the class possesses the personal resources to take on the likes of Monsanto or Bayer Cropscience. The organic farmers' only hope is to bring a class action where they can access pooled resources and realize economies of scale. There are simply too many broader issues involved in the potential liability of the Defendants to make it economically worthwhile for any individual farmer to tackle them, given the potential recovery involved. For example, Mr. Beaudoin's loss associated with the contamination of his canola crop was only a few thousand dollars.

2. The Plaintiffs, and the class that they represent, have no realistic means of bringing their claim or seeking compensation, except in the context of a class action. Through a class action they can seek a determination of the important common issues, including declarations of right, and by that obtain an important and binding legal precedent. Thereafter, an expeditious and cost-effective means can be employed to hear and determine individual claims, which the Defendants can be ordered to fund.

3. As emphatically stated by Larry Hoffman at his cross-examination on March 23, 2004:

> 288 Q Could you on your own fund the lawsuit as a Plaintiff?
>
> A No, I can't, and that's why we're doing the class action lawsuit, because I have like-minded interests and I think that other, the 900 or a thousand others would have similar interests that I do, so I cannot do it myself.

4. These arguments are not diminished even if the class action were to have the limited scope identified by the Learned Chambers Judge for the issues found by her to be common.

No single organic farmer would likely have the resources to bring such an action to a conclusion.

(b) ***Judicial Economy***

5. Perhaps the strongest arguments on preferability can be made in relation to judicial economy. We are only at the certification stage and already the parties have involved experts from various parts of Canada and, indeed, other countries. The following is a list of experts who have provided affidavits and where they reside:

Expert	**Residence**
Dr. Rene Van Acker	Winnipeg, MB
Gary Smith	Saskatoon, SK
Dr. Brenda Frick	Saskatoon, SK
J. Wallace Hamm	Saskatoon, SK
Debbie Miller	Lisieux, SK
Dr. Peter Stonehouse	Guelph, ON
Brian Kozisek	Lincoln, NB, USA
Dr. Mae Wan Ho	London, England
Phillip Thomas	Lacombe, AB
Dr. Conrad Lichtenstein	London, England
Susan Ross	Saskatoon, SK
Edward Korwek	Washington, DC
Gary Stringam	Edmonton, AB
Peter Phillips	Saskatoon, SK

6. The number of lay witnesses who have provided affidavits, and their residences are equally diffuse:

Witness	**Residence**
Larry Hoffman	Spalding, SK
Dale Beaudoin	Maymont, SK
Michael Marriage	Hungerford, England

Pat Neville	Govan, SK
Marc Loiselle	Vonda, SK
Douglas Sawatsky	Gull Lake, SK
Robert Willick	Blaine Lake, SK
Martin Pratchler	Govan, SK
Robert Ingratta	Ottawa, ON
Margaret Gadsby	Morrisville, NC, USA

7. The issue is, how many times must these witnesses, and many others, be required to travel to Saskatchewan and around Saskatchewan for the purpose of trying the same issues?

8. There are other reasons why the class action would be preferable, and these pertain to disclosure of documents. In the Affidavit of Robert Ingratta, sworn September 12, 2003, he refers to Monsanto's application to Agriculture and Agri-Food Canada consisting of 12 volumes of data, comprising over 3,500 pages. He further refers to Monsanto's application to Health Canada, consisting of 15 volumes of data reports, comprising over 4,200 pages. There is reference in the Affidavit to requests to AAFC as well as Health Canada for additional information, which was allegedly provided by Monsanto Canada. While not as specific as the officer from Monsanto, Margaret Gadsby, the officer for Bayer Cropscience, referred to extensive "scientific data" submitted to the regulatory agencies.

9. The Plaintiffs responded to these averments by serving a Notice to Produce Documents on the Defendants pursuant to Rule 213 of *The Queen's Bench Rules*. Monsanto responded by bringing a Notice of Motion dated November 26, 2003, seeking a confidentiality order. The draft order is elaborate with some 13 clauses and numerous subclauses.

10. Given that allegedly sensitive confidential information from the Defendants might be required to be disclosed as part of the action, it makes much more sense, and would be easier to enforce, in the context of a single action as opposed to a multitude of actions.

11. Furthermore, being in a class action gives the Plaintiffs the clout to request such documents. It is doubtful that Monsanto would be offering to produce such documents to

somebody bringing a $2,000 claim in the Small Claims Court of Saskatchewan. The photocopy costs alone would exceed any recovery achieved. An example of the clout and wherewithal that the class action gives to the Plaintiffs is the application that they brought to compel the Federal Government to disclose missing portions of a seed lot contamination study that Agriculture and Agri-Food Canada had commissioned. Before the return date of the motion, Agriculture and Agri-Food Canada acceded to the request by volunteering to disclose the full report. That report, relied on by Dr. Rene Van Acker, showed that certified seed growers, notwithstanding their strict requirements and extensive buffer zones, nevertheless sustained contamination from the Defendants' products. The document will prove crucial to the Plaintiffs' case. It is doubtful that a single organic farmer would have the clout or wherewithal to demand such a document from the Federal Government of Canada in the context of a small claim or to afford to launch a court application to compel its delivery.

12. The same considerations arise if the class action would have the limited scope identified by the Learned Chambers Judge.

(c) ***Behavior Modification***

13. As stated by Madam Justice McLachlin in *Hollick* (*supra*):

> [w]ithout class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for one plaintiff the expense bringing suit would far exceed the likely recovery.

14. This is precisely what the Defendants have done. They have caused a large harm by causing many small harms so that no single individual can afford to complain. The organic farmers' complaint is respecting systemic contamination of the environment.

15. The legal precedent that would be created by a successful lawsuit against the Defendants regarding their GM crops will create an important national and, indeed, international precedent. Professor Rodgers states about our case in his article "Liability for the Release of GMOs into the Environment: Exploring the Boundaries of Nuisance", *supra* at 377:

> The decision in *Hoffman Farms* will be eagerly awaited, and may have major implications for plans to license GM crops for commercial exploitation in the UK. Whatever the outcome, the Canadian litigation will throw into sharp relief the issues surrounding environmental liability for GMO contamination, and the potential use of tort law to modulate property rights and risk where the introduction of GM crops is involved.

16. The recent announcement by Monsanto Canada of the withdrawal of its plans to commercialize Roundup Ready wheat, and the withdrawal of its application to the Canadian regulatory authorities, is an example of how corporate behavior can be modified by the publicity and backlash associated with the introduction of GM crops and assisted by actions such as those taken by the Plaintiffs in seeking a class action.

17. Furthermore, a successful declaration that the testing and development of GMOs was a "development" within the meaning of the EAA would operate to modify behavior because the Defendants can be enjoined if they should attempt to introduce future GM crops without ministerial approval. This would compel the Defendants to submit their engineered genes to a public environmental scrutiny rather than the behind closed doors approach they have been allowed to use with the federal government's regulatory bodies.