THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2009 SKCA 43 Date: 20090330

Between: Docket: 1595

Merck Frosst Canada Ltd., Merck & Co., Inc.

Appellants (Defendants)

- and -

Gerald Wuttunee, John Doe I, John Doe II, John Doe III, John Doe IV, John Doe V, Jane Doe I, Jane Doe II, Jane Doe III, Jane Doe IV, Jane Doe V, Dr. John Doe I, Dr. Jane Doe I, and other John Does & Jane Does to be added

Respondents (Plaintiffs)

- and -

Her Majesty the Queen, as represented by The Minister of Health, And The Attorney General of Canada

Defendants

- and -

Robert Tiboni, Benny Mignacca and Elaine Mignacca

Interveners

Coram:

Jackson, Smith and Hunter JJ.A.

Counsel:

Maurice Laprairie, Q.C. and Neil Finkelstein for the Appellants
E.F. Anthony Merchant, Q.C. and Casey Churko for the Respondents
Harvey Strosberg, Q.C. and Bonnie Tough for the Interveners

Appeal:

From:	2008 SKQB 229
Heard:	November 4, 2008
Disposition:	Allowed
Written Reasons:	March 30, 2009
By:	The Honourable Madam Justice Smith
In Concurrence:	The Honourable Madam Justice Jackson
	The Honourable Madam Justice Hunter

Smith J.A.

I. Introduction

[1] This is an appeal from the certification of a multijurisdictional class action brought on behalf of certain Canadian consumers of Vioxx, a pain-relief drug manufactured and distributed in Canada by the appellants, with the approval of Health Canada, for approximately five years before it was voluntarily withdrawn from the market in October, 2004. The drug was withdrawn from the market in response to test results that suggested that consumption of Vioxx posed an increased risk of heart attacks and strokes.

[2] The action as originally conceived asserted a number of causes of action against the appellants, Merck Frosst Canada Ltd. and Merck & Co., Inc. (collectively, "Merck") and against Health Canada. The respondents sought certification as a class proceeding pursuant to *The Class Actions Act*, S.S. 2001, c. C-12.01, on behalf of persons resident in Saskatchewan and elsewhere in Canada who had either purchased or ingested Vioxx.

[3] Klebuc J., as he then was, was designated by the Chief Justice of the Court of Queen's Bench pursuant to s. 4(2)(a) of the *Act* to hear the certification application.

[4] At the first hearing before Klebuc J., in reasons dated January 18, 2007 (2007 SKQB 29), the action was dismissed as against Health Canada and several causes of action advanced against Merck were struck, leaving claims

against Merck brought pursuant to ss. 4(i) and 48 of *The Consumer Protection Act*, S.S. 1996, c. C-30.1 ("CPA"), ss. 36 and 52 of the *Competition Act*, R.S.C. 1985, c. C-34 and the torts of negligence, battery and deceit.

[5] Klebuc J. was of the view that his decision regarding available causes of action had materially narrowed the nature of identifiable classes, and adjourned the matter for further argument in relation to whether the requirements of s. 6 (1)(b)-(e) of *The Class Actions Act* had been met. In doing so, he proposed several "*prima facie*" classes and common issues for further review at the subsequent hearing. He also gave leave to the respondents to add the names of a number of specific plaintiffs to replace the "John Does" and "Jane Does" originally named in the style of cause.

[6] Subsequent to this decision, but before the hearing of the matter resumed, Klebuc J. was elevated to the Saskatchewan Court of Appeal and named Chief Justice of Saskatchewan. However, because of his extensive involvement in the matter, he continued to act *ex officio* as the designated judge in relation to this action to render two further judgments, culminating in the order that is the subject of this appeal. In the interest of efficiency I will henceforth refer to him, in relation to these decisions, by his present title, as Klebuc C.J.

[7] By a second judgment, dated February 15, 2008 (2008 SKQB 78), Klebuc C.J. certified the proceeding as a class action for all residents of Saskatchewan who met a somewhat complex class definition comprising a number of subclasses, to which I will return below, and also for all persons

meeting the same definition who resided elsewhere in Canada and chose to opt in to the action.

[8] Prior to the judgment of February 2008, the Saskatchewan legislature had passed legislation amending *The Class Actions Act* to provide for proceeding as a multijurisdictional class action, i.e. one that included in the class definition residents of Canada who were not resident in Saskatchewan on an "opt out" basis. *The Class Actions Amendment Act, 2007*, S.S. 2007, c. 21. However, this amendment was not proclaimed until April 1, 2008, and could not be taken into account in the original proceeding. Accordingly, in April, 2008, the respondents applied to amend the certification order to have the action certified as a multijurisdictional class action based on the previously prescribed class and subclasses, to apply to non-residents on an "opt out" basis pursuant to the newly amended *Act*. This application was granted by order dated May 29, 2008 (reasons for judgment dated June 3, 2008, 2008 SKQB 229).

[9] In his reasons for judgment in relation to the application for certification as a multijurisdictional class action, Klebuc C.J. noted that by this time thirty actions had been commenced in Canada against Merck based on losses consumers allegedly had suffered as a consequence of having ingested or having purchased Vioxx, but that only two, at that date, had been certified: the within action and a similar action in Quebec, brought only on behalf of residents of Quebec (*Sigouin c. Merck & Co. inc.*, 2006 QCCS 5325). Certification applications were pending in a number of other jurisdictions. Accordingly, pursuant to the newly amended Saskatchewan act, notice of the

application for a multijurisdictional certification was given to counsel in other jurisdictions known to represent plaintiffs in other potential class actions of a similar nature. Counsel for plaintiffs in the *Sigouin* action, and the Tiboni Law Group, a consortium of law firms from across Canada representing the plaintiffs who were also seeking multijurisdictional certification in Ontario, appeared to oppose the application. The certification application of the Tiboni Law Group was scheduled to be heard in Ontario in mid-June, 2008.

[10] In his reasons for judgment, Klebuc C.J. declined the respondents' application to include residents of Quebec in the multijurisdictional class, as a matter of judicial comity, in light of the fact that a similar action had already been certified in Quebec, relating only to residents of Quebec.

[11] The Tiboni Law Group argued that it was best able to look after the interests of all remaining potential class members by way of the Tiboni action. In an earlier proceeding in Ontario, in which the respondents' counsel, the Merchant Law Group, had also participated, (representing, *inter alia*, Saskatchewan plaintiff Wuttunee in a proposed class action very similar to the within action), the Tiboni Group had been granted carriage of a proposed multijurisdictional class action to be certified in Ontario, while the Wuttunee action had been stayed. (See: ***Setterington v. Merck Frosst Canada Ltd.***, [2006] O.J. No. 376, a decision of Winkler J.[*], as he then was.) It was partially

[*] Now Chief Justice of Ontario, formerly a judge of the Ontario Superior Court of Justice. In his previous capacity, the Chief Justice authored many decisions in relation to class proceedings, a number of which are referred to in this judgment. As a matter of convenience, I will use the title he held when he wrote each of those decisions.

in light of the decision of Winkler J. in this matter that the Tiboni Group asked that the within action be stayed pending a decision by the Ontario Courts as to whether the Tiboni action should be certified.

[12] This argument was rejected by Klebuc C.J., who noted that the within action was brought on somewhat broader grounds than the Tiboni action, that the legislative regime in Ontario, in contrast to that in Saskatchewan, allowed for costs to be awarded against an unsuccessful plaintiff, and that the within action had already been certified, while the Ontario certification application had not yet been heard. He was of the view that the matter would likely be ready to go to trial in Saskatchewan sooner than in Ontario.

[13] In the result, the within action was certified as a multijurisdictional class action to include, on an opt-out basis, all residents of Canada except those residing in Quebec who met the class definition.

[14] The Tiboni action certification application came before Cullity J. only two months later, in June 2008. Merck applied for a stay of the Ontario action in light of the multijurisdictional certification order that had issued in Saskatchewan. Cullity J. declined to stay the certification application, relying on the earlier order of Winkler J., giving carriage of the multijurisdictional application in Ontario to the Tiboni Group. He certified the action as a multijurisdictional class proceeding brought on behalf of all residents of Canada, except for residents of Quebec and Saskatchewan where similar actions had already been certified, who met the class description, on an

opt-out basis. (See: *Tiboni v. Merck Frosst Canada Ltd.* (2008), 295 D.L.R. (4th) 32, (Ont. Sup. Ct.).

[15] Subsequently, shortly after the appeal in the within matter had been heard by this Court, Bellamy J. granted Merck leave to appeal the refusal of Cullity J. to grant a stay of proceedings pending the final disposition of the overlapping multijurisdictional opt-out class action certified in Saskatchewan, but declined leave to appeal the decision to certify the Tiboni action as a class proceeding. (See: *Mignacca v. Merck Frosst Canada Ltd.*, [2008] O.J. No. 4731 (Ont. Sup. Ct.). On February 13, 2009, the Divisional Court of the Ontario Superior Court dismissed the appeal from the order of Cullity J. refusing to stay the Ontario action pending the outcome of the Saskatchewan action (*Mignacca v. Merck Frosst Canada Ltd.*, [2009] O.J. No. 821, reasons by Wilson J.). We were advised that Merck intended to appeal that decision to the Ontario Court of Appeal.

[16] In the result, at the time of this writing, residents of all Canadian provinces except Quebec and Saskatchewan are presumptively members of two class actions against Merck, claiming relief in relation to the consumption of Vioxx. The potential for chaos and confusion is obvious.

[17] The final certification order in the within matter defined the class on behalf of whom the action was brought as follows:

> The class shall be defined as comprising:
>
> Every person who purchased or ingested "Vioxx" (generic name: rofecoxib),which was manufactured, distributed and marketed in Canada by Merck Frosst Canada Ltd. and Merck & Co., Inc., and (1) who falls within all or any of the subclasses set

forth in Section A, if he or she is a resident of Saskatchewan, or (2) falls within any of the subclasses set forth in Section B, if he or she is a resident of Canada but not a resident of Saskatchewan or Quebec.

Section A. In this section, **Resident** or **Residents** means a person or persons who resided in Saskatchewan for a cumulative period of at least one month between October 25, 1999 and the [date of the certification order];

1. All Residents who by unfair marketing practices used by Merck, were **induced** to purchase Vioxx from a Canadian pharmacy rather than a cheaper NSAID and thereby suffered a financial loss: (the **"Resident Induced Subclass"**);

2. All Residents who purchased Vioxx from a Canadian pharmacy; and assert that Vioxx was:

(i) not of acceptable quality;

(ii) defective; or

(iii) not fit for the purpose of managing pain associated with:

(1) osteoarthritis;

(2) acute pain;

(3) primary dysmennoreah; or

(4) rheumatoid arthritis;

and who therefore may be entitled to damages equal to the purchase price paid for the Vioxx: (the **"Resident Purchaser Subclass"**)

3. All Residents who ingested Vioxx purchased from a Canadian pharmacy and claim that it caused or exacerbated a cardiovascular condition and thereby inflicted personal injury on them: (the **"Resident Injured Cardiovascular Subclass"**);

4. All Residents who purchased Vioxx from a Canadian pharmacy and claim that it caused or exacerbated a gastrointestinal condition and thereby inflicted personal injury on them: (the **"Resident Injured Gastrointestinal Subclass"**);

Section B. In this section, **Non-Resident** or **Non-Residents** means a person or persons who resided in a part of Canada other than in the Province of Saskatchewan and Quebec between October 25, 1999 and the date of this certification order;

1. All Non-residents who by unfair marketing practices used by Merck, were induced to purchase Vioxx from a Canadian pharmacy rather than a cheaper NSAID and thereby suffered a financial loss: (the **"Non-Resident Induced Subclass"**);

2. All Non-Residents who purchased Vioxx from a Canadian pharmacy and assert that Vioxx was:

(i) not of acceptable quality;

(ii) defective; or

(iii) not fit for the purpose of managing pain associated with:

A osteoarthritis;

B acute pain;

C primary dysmennoreah; or

D rheumatoid arthritis;

and who therefore may be entitled to damages equal to the purchase price paid for the Vioxx: (the "**Non-Resident Purchaser Subclass**")

3. All Non-residents who ingested Vioxx purchased from a Canadian pharmacy and claim that it caused or exacerbated a cardiovascular condition and thereby inflicted personal injury on them: (the "**Non- Resident Injured Cardiovascular Subclass**");

4. All Non-residents who purchased Vioxx from a Canadian pharmacy and claim that it caused or exacerbated a gastrointestinal condition and thereby inflicted personal injury on them: (the "**Non-Resident Injured** Gastrointestinal **Subclass**");

(a) (the Resident Induced Subclass, Non-Resident Induced Subclass, Resident Purchaser Subclass, Non-Resident Purchaser Subclass, Resident Injured Cardiovascular Subclass, Non-Resident Injured Cardiovascular Subclass, Resident Injured Gastrointestinal Subclass, and the Non-Resident Injured Gastrointestinal Subclass are hereinafter collectively referred to as the "**Subclasses**").

[18] The order identified the nature of the claims to be advanced and the relief sought by the class as follows:

(c) The nature of the claims to be advanced by the Class are the torts of negligence and battery for those who ingested Vioxx purchased from a Canadian pharmacy. The Class also advances claims for those who purchased Vioxx from a Canadian pharmacy based on: (1) the tort of deceit; (2) the sections pertaining to Unfair Practices and the statutory warranty of Acceptable Quality under *The Consumer Protection Act*…(the "CPA"); and (3) ss. 36 and 52 of the *Competition Act*….

(d) The relief sought by the Class through the Claims are (1) compensatory damages based on the torts of negligence and battery for personal injuries in the nature of cardiovascular or gastrointestinal conditions caused by the ingestion of Vioxx; (2) monetary remedies for financial loss based on (i) the difference between the price of Vioxx and the price of a cheaper NSAID or (ii) the return of the

> purchase price for Vioxx based on claims advanced under the tort of deceit, the CPA and/or *Competition Act*; and (3) punitive damages.

[19] The following common issues were certified:

> #1:Whether Vioxx can cause or exacerbate cardiovascular or gastrointestinal conditions.
>
> #2: If so, whether Merck knew or should have known that Vioxx can cause or exacerbate cardiovascular or gastrointestinal conditions.
>
> #3:Whether Vioxx is defective or unfit for the purpose for which it was intended as designed, developed, fabricated, manufactured, sold, imported, distributed, marketed, or otherwise placed into the stream of commerce in Canada by Merck.
>
> #4:Whether Vioxx should have been sold on the market or sold with more appropriate warnings and withdrawn sooner than it was.
>
> #5:Whether Merck provided adequate warnings with respect to Vioxx's potential side effects and misrepresented Vioxx's safety and efficacy.
>
> #6:Whether Merck's conduct relating to the design, testing, manufacturing, marketing, and withdrawal of Vioxx deserves to be rebuked with punitive damages.
>
> [Certification Order, 29 May, 2008, AB 4866a-4870a]

[20] The appeal is brought from this order on the grounds, generally, that the learned certification judge erred in concluding that an identifiable class exists within the meaning of s. 6(1)(b) of *The Class Actions Act*, in concluding that common issues exist within the meaning of s. 6(1)(c), in expanding the class to a multijurisdictional opt-out class action, and in concluding that a class action would be the preferable procedure within the meaning of s. 6(1)(d). The Tiboni Law Group was given leave to intervene on the question of the propriety of the multijurisdictional certification.

[21] Only days before this appeal was scheduled to be heard, the appellants brought an application seeking leave to argue that the amendments to the Saskatchewan *Class Actions Act* permitting multijurisdictional certification

were *ultra vires* the province. In light of the short notice provided for this application, this Court determined to proceed immediately with the argument in relation to all the issues raised by the appeal except for the propriety of the multijurisdictional certification, adjourning that portion of the hearing to a later date. In the interim, the Court was to hear argument on the question of whether leave ought to be granted at this stage to advance the argument of the constitutional validity of the amendments to the *Act* on this appeal.

[22] In the result, the Court concluded that it would not permit the appellants to raise the question of the constitutionality of the amendments to *The Class Actions Act* on the appeal in light of the fact that the issue had not been raised before Klebuc C.J., no evidence had been called on the issue, and it was raised in this Court very late in the day despite undertakings by all the parties to assist in expediting this appeal. (See: *Wuttunee v. Merck Frosst Canada Ltd*, 2008 SKCA 125.) Argument was subsequently heard on the question of the propriety of the multijurisdictional certification.

II. Factual Background and Factual Issues

[23] Vioxx is the trade name for the drug rofecoxib. It belongs to a class of pain relievers known as non-steroidal anti-inflammatory drugs, commonly called “NSAIDs”. This class includes prescription drugs such as naproxen, ibuprofen, diclofenac and over-the-counter medications such as Advil, Motrin and Aspirin (collectively, the traditional “NSAIDs”). These drugs have been traditionally used to treat pain from arthritis and other chronic inflammatory conditions. They work by inhibiting cyclooxygenase (COX), an enzyme that promotes pain and inflammation. Chronic use of traditional NSAIDs has been

shown to increase the risk of gastrointestinal problems including perforations, ulcers and stomach bleeds, (sometimes referred to as “PUBs”) resulting in thousands of deaths and tens of thousands of hospitalizations every year.

[24] In the 1990’s, scientists discovered that COX exists in at least two forms, known as COX-1 and COX-2. COX-2 is believed to be associated with pain and inflammation, while COX-1 is thought to be responsible for protecting the stomach lining. Traditional NSAIDs block both, indiscriminately. On the theory that a drug designed to inhibit COX-2 while proportionately sparing COX-1 would significantly reduce the risk of serious gastrointestinal perforations, ulcers and bleeds associated with traditional NSAIDs while providing the same relief from pain and inflammation, Merck and other drug companies developed selective COX-2 inhibitors, (those inhibiting COX-2 proportionately more than COX-1), producing Vioxx, in the case of Merck, as well as a drug known as celecoxib, marketed as Celebrex by Pfizer.

[25] In October 1999 Health Canada approved Vioxx for sale in Canada for the treatment of osteoarthritis, primary dysmenorrhea (menstrual pain), and acute pain. It was approved for the treatment of rheumatoid arthritis in April 2003. At all times, the approval was conditional on warnings to be attached to the information disseminated to health professionals and to ultimate consumers in relation to identified risks associated with the drug. These warnings changed from time to time as testing of the drug proceeded and new results became available.

[26] Vioxx was subjected to intensive testing both before and after its release. Three of these studies are of particular significance to these proceedings as they relate to the cardiovascular safety of Vioxx.

[27] In 1997 a Dr. Fitzgerald observed that Vioxx reduced a urinary metabolite of prostacyclin, a chemical that can help inhibit blood clotting, but had no effect on thromboxane, a chemical that promotes clotting. Dr. Fitzgerald therefore hypothesized that if these findings meant that Vioxx inhibited prostacyclin production in the blood vessels (and not only in urine) it might increase the risk of thrombotic cardiovascular events (*i.e.*, those caused by blood clots) such as strokes and myocardial infarctions (*i.e.*, heart attacks, sometimes referred to as "MIs").

[28] It is part of the respondents' theory that Merck failed to respond adequately to this hypothesis and, in fact, that in light of this study Vioxx ought never to have been marketed. Merck's position is that it had reason to believe that the Fitzgerald hypothesis was incorrect but that it nonetheless fully disclosed the hypothesis to the regulators and the public and continued to do appropriate follow-up testing.

[29] In March 2000 Merck received the preliminary results of VIGOR, a large clinical trial designed to test whether rheumatoid arthritis patients taking double the maximum recommended chronic dose of Vioxx still had significantly fewer serious gastrointestinal adverse events than patients taking standard therapeutic doses of naproxen. The data showed that in these circumstances Vioxx users had only half as many serious perforations, ulcers

and stomach bleeds as the naproxen users, but also that the naproxen users had approximately half as many thrombotic cardiovascular events and one-fifth the number of myocardial infarctions, as Vioxx users.

[30] Although these results were disclosed to both American and Canadian regulators and to the medical community, the respondents argue that there was an unreasonable delay in the dissemination of this information. Merck scientists theorized that the difference in thrombotic cardiovascular events shown by the test was most likely due to a cardio-protective effect of naproxen, combined with chance resulting from the small sample used for the test. Some of the respondents' expert witnesses opine that this theory was unreasonable and that Merck unreasonably emphasized this suggestion in the information it released to the regulators, the medical community and consumers.

[31] In September 2004 Merck received interim data from a trial called APPROVe, a placebo-controlled trial designed to assess Vioxx for the prevention of certain cancers. Merck had decided to analyze the data received also in relation to thrombotic cardiovascular events. The data indicated that the rate of thrombotic cardiovascular events for those taking Vioxx significantly exceeded the rate for those taking the placebo.

[32] In light of this result, Merck voluntarily withdrew Vioxx from the market on September 30, 2004.

[33] While the basic facts outlined above are not disputed, the expert opinion evidence filed on the certification application and the factums filed on this appeal reflect significant differences between the parties in relation to other contextual facts, including the conduct of Merck, and in relation to the implications of such facts and such conduct. Indeed, as the respondents' factum makes clear, it is their position that Merck knew or ought to have known of a significant cardiovascular risk associated with Vioxx even before the drug was marketed, and that it engaged in a myriad of deceptive actions to conceal that risk, including intentionally manipulating test results by the design of the tests, misleadingly describing test results and reporting inaccurate data. These allegations are denied by Merck.

[34] The facts in relation to the relative gastrointestinal safety of Merck are considerably less clear, as are the pleadings in this respect in the statement of claim. The respondents' factum (as opposed, I must say, to its pleadings) makes these allegations:

(1) that in gaining regulatory approval for marketing Vioxx Merck overemphasized the GI risk associated with traditional NSAIDs and, in particular, failed to acknowledge that between 1996 and 1998, before Vioxx was sold, hospitalization for serious PUBs had fallen significantly;

(2) that Merck failed to establish that its safety profile in relation to PUBs was better than all (as opposed to only some) traditional NSAIDs;

(3) that marketing of Vioxx as reducing the risk of PUBs ignored the fact that, because Vioxx is not a substitute for a low dosage of aspirin frequently taken for cardiovascular prophylaxis, and many users of

Vioxx were therefore also taking aspirin, such users would receive no benefit of a decrease in the risk of PUBs;

(4) that Vioxx did not, in any case, ***eliminate*** the risk of PUBs, and did cause some PUBs;

(5) that Merck deceptively manipulated the design of tests to misleadingly exaggerate its GI safety profile; and

(6) that Merck misleadingly marketed Vioxx as "safe for the stomach".

[35] None of these allegations is expressly set out in the statement of claim, although some might be thought to fall within an interpretation of less explicit allegations, such as a failure by Merck, generally, to subject Vioxx to proper tests for "risks", generally, to users prior to putting it on the market. The appellants do not admit most of these allegations and, for their part, emphasize the written warnings of the risk of PUBs that always accompanied the marketing of Vioxx.

[36] Finally, affidavits were filed by all of the plaintiffs added to the action pursuant to the January 18, 2007 judgment, alleging that they had taken Vioxx and had suffered various injuries and losses, as follows:

1. Don Bini deposed that he was prescribed and took Vioxx from November, 2000 until it was withdrawn from the market in September 2004 for his arthritis. He suffered two heart attacks in 2002.
2. Barbara Cerato took Vioxx from October 2001 until it was withdrawn from the market in September 2004. She deposed that she had chest pains and tightness in her chest while using Vioxx.

3. Margaret Clark was prescribed Vioxx in 2003 and took it until September 2004. She deposed that while taking Vioxx she had shortness of breath.
4. Brad Choquette was prescribed Vioxx for arthritis in 1999 and took it until September 2004. He deposed that while on Vioxx he suffered from high blood pressure and chest pains.
5. Ronald Derusha began taking Vioxx in on May 15, 2001. He deposed that he suffered a stroke on June 14, 2001, a second stroke 30 days later and a third stroke 30 days after that.
6. Lascelles Doyle deposed that she was prescribed Vioxx in 2002 and that "likely damages do not exceed $2,000." She did not allege any injury.
7. Vivian Singleton took Vioxx from 2001 until September 2004. She deposed that while on Vioxx she suffered chest pains, a racing heart, sensation of pins and needles in her hands, and was often dizzy and off balance.
8. Lois Simpson was prescribed Vioxx in 2003. She deposed that being on Vioxx caused her stomach pain and that her general damages would not exceed $2000.
9. Robert Robichaud took Vioxx from March 2001 until September 2004. He deposed that while on Vioxx he experienced stomach pain.
10. Lauretta Bell took Vioxx from January to July 2001. She deposed that since taking Vioxx she has been diagnosed with heart trouble, high blood pressure and blood clots.

11. Myra Hart took Vioxx from November 23, 2000 until September 2004. She deposed that while on Vioxx she suffered chest pains, sensation of pins and needles in her hands and was often dizzy and off-balance.
12. Lynn Udell took Vioxx from March 2003 to January 2004. She deposed that she suffered a stomach bleed in January 2005(while taking Naproxen) and believes that her symptoms were due to having taken Vioxx.

[37] Two of these individuals, Brad Choquette and Ronald Derusha were appointed as representative plaintiffs. The others would be members of the class as defined by the certification order.

[38] The medical records of all of these deponents were reviewed by expert medical witnesses for the appellants. These experts deposed that, in many cases, the records revealed medical histories indicating risk factors in relation to the symptoms complained of that were unrelated to the ingestion of Vioxx, that in some cases the symptoms complained of preceded the deponent's having ingested Vioxx and that, in some cases, the deponents were taking other prescribed medication carrying its own relevant risk factors.

[39] Although Vioxx was recalled from the market because of its perceived tendency to increase the risk of thrombotic cardiovascular events, it is apparent from this synopsis, and from the subclass descriptions and common issues approved in the certification order, that the respondents intend, in this action, to allege that Vioxx caused or contributed to a wide variety of cardiovascular or gastrointestinal conditions or events suffered by members

of two of the subclasses approved, by no means limited or related to thrombotic cardiovascular events. The factual and theoretical bases for these additional claims, however, are unclear.

[40] The statement of claim in this matter refers specifically to the facts relating to an increased risk of thrombotic heart attacks and strokes, but it tends to do so in vague terms, describing the risk of "adverse cardiovascular events" or "serious adverse cardiovascular events", generally, without limiting this description to thrombotic events. No risks other than those relating to cardiovascular events are explicitly alleged in the pleading at all, although many of the paragraphs of the statement of claim refer in general terms to "risks" created by Vioxx, refer to Vioxx as "dangerous" or "unsafe" without specifying the reason, or refer to its "overall safety profile".

[41] A brief review of the amended statement of claim is useful to illustrate the vagueness of the respondents' allegations in relation to the risks said to be associated with Vioxx. It is helpful to note that, while the amended statement of claim is 157 paragraphs long, much of it relates to proposed causes of action that were struck by Klebuc C.J., including a claim of breach of fiduciary obligation on the part of Merck, and a claim of negligence in relation to the manner in which Vioxx was withdrawn. Paragraphs 93-154 of the statement of claim all relate to the claim against the Government of Canada that was struck, although these paragraphs also include some factual allegations as to the nature of the risks imposed by Vioxx that could be relevant to a claim against Merck. Paragraph 155 purports to claim a constitutional tort, another cause of action that was struck.

[42] These paragraphs in the pleading are relevant:

- [32] alleges that the VIGOR trial "found **an increased risk of serious cardiovascular events, *including* heart attacks, and strokes** in patients taking Vioxx", and concedes that Merck submitted this study to the FDA and Health Canada in June 2000.
- [35] alleges that "other studies suggested **an increased risk of cardiovascular events**."
- [36] mentions that Merck voluntarily withdrew Vioxx from the market following the results of the APPROVe trial "because of **an increased risk of serious cardiac events, including heart attack and strokes**."
- [37] alleges that the defendants "ignored earlier findings and warnings about the **risks and negative side effects** of Vioxx", without identifying the risks or side effects at issue.
- [38] says the plaintiffs have suffered "injury and damage" due to having purchased or taken Vioxx, in general terms, with no specification of the nature of the injury or the damage.
- [43] refers to Vioxx as "**a dangerous drug**".
- [45] says the plaintiffs could not reasonably have discovered "**the dangerous nature of Vioxx**."
- [51] says that "as early as 1999, Merck was aware of the potential risk that patients who ingested Vioxx would suffer **an increased rate of adverse cardiovascular experiences** than patients who did not use Vioxx."
- [53] alleges that Merck negligently interpreted data received from the VIGOR trial, failing to appreciate the significance of "**serious adverse**

drug reactions and serious unexpected adverse drug reactions" disclosed by the VIGOR data.

- [54] says that Vioxx should not have been introduced into the Canadian market in 1999, or should have been withdrawn in 2000.
- [57] alleges that Merck failed to inspect and test Vioxx in a manner that would disclose "**the risks of using Vioxx** about which it ought to have known" and that Merck designed clinical trials in a manner that would fail to disclose "**the serious adverse effects** expected to result in the class of patients most likely to consume Vioxx and in a manner that overemphasized the benefits expected and underemphasized the risks expected to result in the intended users of Vioxx."
- [58] alleges that the labeling of Vioxx failed to disclose "the presence of **risks** of which [Merck] knew or ought to have known."
- [66] alleges that Merck engaged in unfair trade practices by making false or misleading representations "as to **the characteristics of Vioxx**."
- [69] alleges that warranties and representations by Merck that Vioxx was safe, effective, and fit and proper for its intended use "proved to be false because the product was **not safe and was unfit** for the uses for which it was intended."
- [73] alleges that Merck caused the plaintiffs to be deceived or misled "as to the true nature of **the risks** associated with using Vioxx."
- [74] alleges that Merck "intended to mislead the market in general as to the nature of Vioxx" in that it: (a) "championed the beneficial effects of Vioxx on the gastrointestinal tract but without disclosing **the**

deleterious effects on the cardiovascular and renovascular system and without disclosing that Vioxx was not any more effective in treating pain than the selective and non-selective NSAIDs produced by its competitors, which resulted in Vioxx possessing a **lower overall safety profile** in relation to all other forms of therapy that were reasonably available to consumers"; and (b) charged a price for Vioxx 300% higher than alternative forms of therapy, effectively suggesting superiority over equally suitable but less expensive alternative forms of pharmaceutical therapy.

- [91] alleges that Merck "willfully, deliberately, flagrantly, and wantonly took steps to withhold and manipulate information that it knew about **the adverse effects** of taking Vioxx."
- [109, part of the original claim against Health Canada that was struck] alleges that pre-clinical and clinical trials had "indicated that Vioxx was **not more effective and was less safe** than its non-selective NSAID comparators."
- [130] says that on April 19, 2002, "the Government issued an important safety advisory directed at patients taking Vioxx informing them that Vioxx possessed **a risk of causing gastrointestinal toxicity and a risk of causing adverse cardiovascular adverse events**" and that this warning ought to have been given immediately following the receipt of the VIGOR results were known.
- [131] says that Merck delayed advising users of the results of VIGOR.
- [136] refers to "**the expected qualities, characteristics, and dangerous propensities of Vioxx on the heart, cardiovascular system and gastrointestinal tract,**" alleging that Health Canada ought

to have predicted these in light of articles published in journals prior to the introduction of Vioxx into the market.

- [145] alleges that Health Canada ought to have known "that Vioxx was **a dangerous product**, and that as a result of taking it were (sic) exposed to an increased risk of serious cardiovascular events and other reasonably anticipated adverse effects."
- [149] alleges that plaintiffs "became ill from various effects due to the Vioxx."

[Bolding added in relation to all paragraphs from which quotations are taken.]

[43] At no point in the statement of claim is it expressly alleged that Vioxx increased the risk of adverse cardiovascular conditions or events other than heart attacks or strokes, or that it increased the risk of gastrointestinal conditions or events at all, although paragraph 130 mentions that the government *warned* of the risk of "gastrointestinal toxicity" and paragraph 136 mentions articles warning of potential risk to the gastrointestinal tract of which it is said the regulatory agency ought to have taken note.

[44] On an overall reading of the pleadings, even when supplemented by the evidence and arguments filed in this matter, in my view it is impossible to know what, exactly, is alleged in this action in relation to the potential risks of Vioxx use other than (1) that Merck failed to warn about and/or otherwise deliberately obscured the possibility that use of Vioxx could significantly increase the risk of thrombotic cardiovascular events; and (2) in marketing Vioxx Merck overstated the *reduction* of risk in relation to gastrointestinal PUBs associated with Vioxx in comparison with other NSAIDs.

[45] It is unclear whether claims are advanced on behalf of the “purchaser” subclasses that Vioxx suffered from defects unrelated to the risks of personal injury claimed by the “injured” subclasses. The appellants, for example, read the claim of unfitness of purpose as a claim that Vioxx was ineffective in relieving pain, although this defect is never expressly alleged, and is, as far as I have been able to determine, unsupported by any evidence or argument filed.

[46] Where the potential class members allege side effects of Vioxx apart from thrombotic cardiovascular injury, no theory of liability is articulated in relation to such claims. This is significant because of the peculiar nature of pharmaceutical drugs, all of which carry potential risks of side effects, which must be weighed, in individual cases, against the potential benefits of the drug. This is why these products are sold only by prescription from a licensed medical doctor. Accordingly, the mere fact the potential risk of a side effect was realized in relation to a particular patient would not, without more, support a claim of liability. Yet, in this action, there are no express allegations of, for example, failure to warn, or failure to test, in relation to these claims. In effect, there is no analysis of what the respondents would have to prove in order to establish liability.

III. Issues Raised on the Appeal

[47] Although several grounds for the appeal are raised, most of the appellants’ arguments focus on the range and diversity of the claims sought to be advanced in the action as certified, and the associated problems of class definition, identification of common issues, and the determination that a class

action is the preferable procedure for resolution of the common issues. This general concern is raised in the following paragraphs from the appellants' factum:

> [3] Most lawsuits concerning Vioxx have alleged that Merck failed to warn that Vioxx caused "thrombotic" (i.e., clotting) cardiovascular events (such as heart attacks and strokes), and involve claims that the plaintiff suffered such a cardiovascular event as a result of taking Vioxx. This case includes claims of that sort, but it does not stop there. As noted above, the cardiovascular subclass includes all manner of "cardiovascular conditions" having different etiologies and different outcomes from thrombotic events. And, consequently, the discovery of any purported associations between these non-thrombotic events and a drug like Vioxx will have had its own unique history. For example, physicians have long known of the association of elevations in blood pressure with all pain-relievers in the class of non-steroidal anti-inflammatory drugs (NSAIDs), including Vioxx, and their labels have long included that risk information. The class also includes a subclass of individuals who assert that they suffered gastrointestinal injury as a result of taking Vioxx; a subclass of individuals who assert that they would have purchased a cheaper drug (i.e., they paid too much for their drug) if not for unfair marketing practices by Appellants Merck Frosst Canada Ltd. and Merck & Co., Inc. (collectively, "Merck"); and a subclass of individuals who assert Vioxx was defective or otherwise not a suitable pain-relief medication for osteoarthritis, rheumatoid arthritis, acute pain, or primary dysmenorrhea and therefore want a refund of their purchase price.
>
> [4] The many thousands of individuals presently encompassed within the class definition have fundamentally distinct claims. Yet the class action certified in this action lumps all of those claims together, concluding that they can all be adjudicated in a single proceeding through subclassing. [Footnotes Omitted]

[48] In legal terms, the appellants raise five issues:

(1) Did the learned chambers judge err in concluding that the claims of the class members raise common issues?

(2) Did the chambers judge err in finding that a class action represents the preferable procedure for resolving the class members' claims?

(3) Did the chambers judge err in concluding that certification was warranted in part because Merck's settlement of U.S. litigation indicated that Vioxx could cause cardiovascular injury?

(4) Did the chambers judge err in determining that the class as defined constitutes an identifiable class?

(5) Did the chambers judge err in concluding that the action ought to be certified as a multijurisdictional class action?

[49] On the last question, the appellants argue, in particular, that Klebuc C.J. erred in failing to consider the extent to which choice-of-law issues and the need to apply substantively different consumer protection statutes of other Canadian provinces affected the propriety of certifying a multijurisdictional class. The interveners, the Tiboni Group, raise their own arguments as to the propriety of certifying this action as a multijurisdictional class action, arguing that Klebuc C.J. erred in failing to give proper consideration to the decision of Winkler J. (giving preference to the Tiboni Group over the Merchant Law Firm) on the carriage motion in *Setterington* and, more sweepingly, that the Saskatchewan Court, in any case, lacks jurisdiction to bind non-resident Canadians to the results of this action who have not expressly submitted to the jurisdiction.

[50] In the event, I have found it necessary to address only the first, second and fourth of the issues raised by the appellants. I propose to address these in the order in which the criteria for certification are set out in s. 6 of the *Act*.

IV. Analysis

[51] In my view, the most intractable difficulty with this action lies in the diversity of the claims sought to be advanced on a common basis, and in the related question of whether such an action is manageable as a class action. I

propose to begin the discussion, however, with the narrower question of whether Klebuc C.J. erred in his conclusion that the class certified constitutes an identifiable class within the meaning of s. 6(1)(b) of *The Class Actions Act*.

A. Did the chambers judge err in determining that the class as defined constitutes an identifiable class?

[52] Section 6(1)(b) of *The Class Actions Act* requires that, in order to certify an action as a class action, the court must be satisfied, *inter alia*, that there is an identifiable class. While s. 2 of the *Act* defines "class" as "two or more persons with common issues respecting a cause of action or a potential cause of action", no further light is shed, by the statute, as to the criteria for an "identifiable class". As class actions litigation has evolved in Canada, this has become a surprisingly thorny question.

[53] In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, McLachlin C.J. described the requirement for an identifiable class in the following passage:

> [38] While there are differences between the tests, four conditions emerge as necessary to a class action [from a review of the class proceedings statutes that then existed in Ontario, British Columbia and Quebec]. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria.

[54] Thus, in this passage, the objectives of the class definition were seen to be: to identify the individuals entitled to notice; to identify those entitled to relief (if awarded); and to identify those bound by the judgment. The Chief Justice considered that these objectives dictated that (1) the definition use objective criteria, (2) the criteria bear a rational relationship to the common issues asserted by all class members, and (3) the criteria not depend on the outcome of the litigation. The second of these requirements is associated with a prohibition against overly inclusive class definitions—*i.e.*, those that include individuals who have suffered no loss or injury and could not have a cause of action against the defendant. The third requirement reflects a prohibition against "merits-based" class definitions.

[55] In *Hollick v. Toronto(City)*, 2001 SCC 68, the Chief Justice considered further the requirement that "the criteria [defining the class] should bear a rational relationship to the common issues asserted by all class members." In this case, the class in a claim involving environmental pollution had been defined as all persons who owned or occupied property inside a specific geographic area within a specified period of time. This was accepted by the Court as an objective definition that did not depend on the merits of the action. However, the class so defined would have included some 30,000 people, and the proposed defendants argued that it was unlikely, on the evidence, that all of these individuals had their enjoyment of their property interfered with. The class definition, it was said, was over-inclusive. The Court rejected this objection in the following passage:

> [20] The respondent is of course correct to state that implicit in the "identifiable class" requirement is the requirement that there be some rational relationship between the class and common issues. Little has been said about this requirement

> because, in the usual case, the relationship is clear from the facts. In a single-incident mass tort case (for example, an airplane crash), the scope of the appropriate class is not usually in dispute. The same is true in product liability actions (where the class is usually composed of those who purchased the product), or securities fraud actions (where the class is usually composed of those who owned the stock). In a case such as this, however, the appropriate scope of the class is not so obvious. It falls to the putative representative to show that the class is defined sufficiently narrowly.
>
> [21] The requirement is not an onerous one. The representative need not show that *everyone* in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not *unnecessarily* broad – that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended: see W. K. Branch, *Class Actions in Canada* (1998), at para. 4.205; *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389 (S.C.J.) (claim for compensation for wrongful dismissal; class definition overbroad because included those who could be proven to have been terminated for just cause); *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Gen. Div.) (claim against school for misrepresentations about marketability of students after graduation; class definition overinclusive because included students who had found work after graduation).

[56] In addition, reference to the need to define class membership "without reference to the merits of the action" was repeated in paragraph 17 of this judgment.

[57] In the instant case, Klebuc C.J. defined the class as consisting of all persons who purchased or ingested Vioxx and *also* fell within one of the described subclasses. Ignoring for the moment the distinct subclasses for non-residents of Saskatchewan, there would appear, on the face of things, to be four distinct subclasses certified, unified only by the requirement that members of all the subclasses *either* purchased or ingested Vioxx. These are: (1) those who were induced to purchase Vioxx rather than a cheaper NSAID

by unfair marketing practices used by Merck and thereby suffered a financial loss (the "induced" subclass); (2) those who purchased Vioxx and claim that Vioxx was not of acceptable quality, defective, or unfit for the purpose of managing pain, "and who therefore may be entitled to damages equal to the purchase price paid for the Vioxx" (the "purchaser" subclass); (3) those who ingested Vioxx and claim it caused or exacerbated a cardiovascular condition (the "injured cardiovascular" subclass); and (4) those who purchased Vioxx and claim it caused or exacerbated a gastrointestinal condition (the "injured gastrointestinal" subclass).

[58] The effect of defining class membership in terms of membership in one of the subclasses was to certify eight distinct, although overlapping, classes. A given individual might, for example, be a member both of the "resident injured cardiovascular" subclass and the "resident purchaser" subclass, although this would not necessarily be the case.

[59] The respondents had originally proposed a much simpler and ultimately broader class definition: all persons resident in Saskatchewan (or elsewhere in Canada who "opted in" to the action) who had either purchased or ingested Vioxx. After a number of claims in the original action had been struck, Klebuc C.J. expressed the view, in his judgment of January 18, 2007, that this required a more narrowly refined class definition. He commented further on this approach in the judgment of February 15, 2008. The decision to define the class in this way, as one comprising a number of distinct subclasses, is not, *per se*, challenged on this appeal. However, as will be seen in the analysis that follows, it is one that has significant implications in relation to other issues

that are raised, and I will return to consider the rationale offered for this approach to the class definition in more detail later in these reasons.

[60] In my respectful view, this subdivision of claimants is complicated more than it is clarified by the description in the certification order of the claims asserted, respectively, by each subclass, which, for convenience, I repeat here:

> (a) The nature of the claims to be advanced by the Class are the torts of negligence and battery for those who ingested Vioxx purchased from a Canadian pharmacy. The Class also advances claims for those who purchased Vioxx from a Canadian pharmacy based on: (1) the tort of deceit; (2) the sections pertaining to Unfair practices and the statutory warranty of Acceptable Quality under ***The Consumer Protection Act***…and the ***Competition Act***.

[61] The combination of the subclass descriptions and this description of the respective claims asserted by the various subclasses implies that those who suffered a cardiovascular injury are not relying on breach of statutory warranty, for example, or the tort of deceit, to support their claim, although it is unclear, from the judgment itself or any of the material before us, why this should be so.

[62] In addition, if the fourth subclass, of those who suffered gastrointestinal injury, is properly described in the order, (as those who ***purchased***, as opposed to ***ingested***, Vioxx) this paragraph suggests that the basis of their claim is different in kind from those who suffered cardiovascular injury, more akin, one presumes, to the claims of the "induced" and "purchaser" subclasses, depending upon a finding of breach of statutory warranty, for example, or unfair marketing practice, as opposed to negligence. It is extremely difficult

to be certain whether this is so because neither the pleadings nor the certification judgment, as I have indicated, clearly articulates the facts upon which this claim is based, or the respondents' theory of liability in relation to these claims.

[63] Moreover, the rationale for limiting the "purchaser" subclass that alleges breaches of the statutory warranties to those who "may be entitled to damages equal to the purchase price paid for the Vioxx" is not articulated either in the judgment or the pleadings. Section 64 of *The Consumer Protection Act* provides that "users" of a consumer product who suffer personal injury as a result of breach of a statutory warranty have a claim for damages. Some if not most purchasers would, of course, also be users or, in the words of the certification order, "ingestors".

[64] Nonetheless, the distinction between purchasers and ingestors in the class description appears to be deliberate. The respondents have made it clear that they would distinguish the claims of purchasers from the claims of ingestors of Vioxx, and that they do not see the two groups as coextensive, although they obviously overlap. That is, while logic dictates that most consumers of Vioxx were prescribed, purchased *and* ingested it, the respondents have indicated that it is their intention to pursue claims on behalf of the presumably smaller group of those who purchased but did not ingest the drug and also the much smaller group of those who ingested it but did not purchase it. The former group is said to include those who purchased the drug on behalf of someone else, such as a dependent, as well as those who purchased the drug to ingest, but never did, perhaps because of the recall of

the drug from the market. The latter group would include those who took Vioxx purchased and paid for by someone else. Presumably, the intention is to advance claims of breach of statutory warranty or unfair marketing practices, giving rise for a claim of return of the purchase price only, on behalf of the former, and personal injury claims, only, on behalf of the latter. For the much larger group of persons who both purchased and ingested Vioxx, both kinds of claims could, in theory, be advanced, but, on the existing order, only on the limited bases it identifies.

[65] As an aside, it is interesting to note that the distinction between purchasers and ingestors of Vioxx is not always made in the related class actions commenced in other jurisdictions. In *Sigouin,* for example, while the class is described in terms of those who "purchased or consumed" Vioxx, the claim advanced in the class action appears to be restricted to injuries related to "the consumption" of Vioxx. In *Tiboni,* by contrast, the class description is restricted to those "who were prescribed and ingested Vioxx" and yet one of the claims asserted is for return of the purchase price.

[66] In any case, it appears that the division of the class into subclasses in this case may have artificially divided and limited the claims asserted by various members of the class. These concerns are not merely formal, for, in my respectful view, they result from a failure in both the pleadings and the judgment below to set out clearly the precise nature of the claims or theory of liability asserted in each case and relate to certain difficulties, discussed later in these reasons, in determining the scope and content of the issues identified in the certification order as common issues.

[67] Setting aside those concerns for the moment, the appellants' objection to the class description in the certification order is that the descriptions of the subclasses are merit based or subjective. In particular, objection is taken to the following descriptions:

(1) The resident and non-resident "induced" subclasses comprise individuals who "by unfair marketing practices used by Merck were induced to purchase Vioxx from a Canadian pharmacy rather than a cheaper NSAID and thereby suffered a financial loss." This, it is said, involves three separate determinations of the merits of the relevant claim: whether Merck's marketing practices were unfair; whether those marketing practices induced the purchaser to purchase Vioxx instead of a cheaper NSAID; and whether the purchaser suffered a financial loss as a result of Merck's conduct.

(2) The resident and non-resident purchaser subclasses comprise persons who assert that Vioxx was of unacceptable quality, defective, or not fit for its intended purpose and have a potential claim for a full refund of their purchase price. While the appellants concede that this definition does not implicate issues on the merits of the claim, they argue that it is tied to subjective criteria (whether an individual ***asserts*** that Vioxx is defective, of unacceptable quality, etc., regardless of his or her actual experience with the drug) and requires an individual assessment of the possible subclass member's potential recovery.

(3) All four of the "injured" subclasses define membership in terms of whether an individual ***claims*** that Vioxx caused his or her injury, regardless of that person's actual experience with Vioxx.

[68] The primary issue raised by these arguments is whether, and to what extent, it is permissible to define a class or a subclass in such a way that membership in the class is determined by the merits, or outcome, of the action, and, to the extent that this is not permitted, whether and to what extent the objection to such a description might be met either by a more inclusive class definition or one that is based upon *claims* as to the merits of the action that are asserted by its proposed members.

[69] In the instant case, Klebuc C.J. was persuaded that there is no longer a strict prohibition against merit based class definitions on the basis of the decision of the Supreme Court of Canada in ***Rumley v. British Columbia*** 2001 SCC 69.

[70] This case involved a claim by current and former students at a residential school for the deaf and blind operated by the province of British Columbia, claiming against the government for failing to protect them from sexual and physical abuse of the children that had taken place at the school throughout its history. The appellants disputed only that the respondents had met the requirement of establishing common issues and showing that a class proceeding was the preferable procedure, conceding that a class described as follows met the requirements for an identifiable class:

> Students at the Jericho Hill School between 1950 and 1992 who reside in British Columbia and claim to have suffered injury, loss or damage as a result of misconduct of a sexual nature occurring at the school.

[71] The Supreme Court also appears to have proceeded on the basis of an assumption that the fact that widespread abuse had occurred was not in dispute.

In any case, it is clear that the fact of individual abuse was not the subject of common issues sought to be certified. It would be established in individual proceedings.

[72] This decision, in my respectful view, is not itself authority for approving a merits based class definition. The class definition in ***Rumley*** was a claims based, as opposed to a merits based, definition. Furthermore, the decision in ***Rumley*** was released the same day as the decision in ***Hollick*** which, as indicated above, confirmed that the criteria for membership in an identifiable class should not depend on the outcome of the litigation.

[73] In addition to these Supreme Court authorities, there is considerable authority, from other jurisdictions, suggesting, in general terms, that a merits based class definition is impermissible, and, in particular, that class definitions in terms of persons who suffered damages as a result of the defendant's conduct are barred. See, for example, the decisions of the Divisional Court, (2001), 54 O.R. (3d) 520 and the Ontario Court of Appeal, (2003), 63 O.R. (3d) 22, in ***Chadha v. Bayer Inc.***, overturning the judgment certifying the action [(1999), 45 O.R. (3d) 29].

[74] Nonetheless, the precise basis for this prohibition is somewhat unclear, as is its scope. The two most frequently heard arguments are (1) that if the criteria for class membership depend upon the outcome of the litigation it would be impossible, at the outset of the litigation, to determine who is a member of the class, and (2) that definition of class membership in terms of the outcome of the litigation leads to a kind of "circularity" in determining

who is bound by the results of the litigation, particularly where the defendant is successful on the common issues.

[75] In the Court of Appeal, the majority in *Chadha* seemed to focus on the first of these objections, commenting as follows:

> [69] Leave to appeal to the Divisional Court was granted by Lane J. on the basis that the motion judge erred in his definition of the class. As part of its decision, the majority of the Divisional Court held that the class definition was in error because the definition is not objective, but turns on the outcome of the litigation or the merits of the claim. I agree with that conclusion. As Sharpe J. stated in another case, (*Robertson v. Thomson Corp.* (1999), 43 O.R. (3d) 161, 171 D.L.R. (4th) 171 (Gen. Div.) at p. 169 O.R.):
>
> > I agree with Winkler J. in [*Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.)] and with [H. Newberg and A. Conte, *Newberg on Class Actions*, 3rd ed. (West Group, 1992)] at p. 6-61, that the class should be defined in objective terms, and that circular definitions referencing the merits of the claim or subjective characteristics ought to be avoided. ***Such definitions make it difficult to identify who is a member of the class until the merits have been determined.*** Definitions based upon the merits of the claim also violate the statutory policy that the merits are not to be decided at the certification stage. [Emphasis Added]

[76] In *Windsor v. Canadian Pacific Railway Ltd.*, 2007 ABCA 294, the Alberta Court of Appeal expressed the objection to merit based class definitions in terms of circularity: “only those with valid claims are members of the class, and only members of the class have valid claims” (at para 23). This problem has most commonly been associated with the difficulty of determining who would be bound by the decision, should the defendant be successful on the litigation of the common issues.

[77] Cullity J. addressed all of these arguments in *Ragoonanan v. Imperial Tobacco Canada Ltd.* (2005), 78 O.R. (3d) 98 (Ont. Sup. Ct.), pointing out that the first objection seems to assume, wrongly, that it will be necessary to

identify each class member before the common issues can be considered, and that circularity is not necessarily involved, particularly where the reference in the class description to the merits relates to disputed individual issues rather than common issues. This is often the case where the class is defined as those who suffered loss or damage, or even those who suffered loss or damage caused by the product or actions of the defendant, where causation is an individual issue, rather than a common issue.

[78] As Cullity J. pointed out, complete identification of the individuals who make up a class is seldom determined at the outset of a case, prior to certification, and may, in fact, never be determined, if the defendant is successful. Where determination is necessary, either for the purpose of making a claim, if the plaintiffs are successful on the common issues, or to argue *res judicata,* if the defendant is successful, it would often be necessary, following determination of the common issues, for the successful party to establish that an individual met whatever criteria for class membership are identified in the class definition, whether or not these are considered to be merits based.

> [13] The restrictive effects of the supposed rules relating to inclusiveness are buttressed by [an] insistence that membership in the class must be determined without reference to the "merits of the action". Such a rule makes perfect sense – and is obviously necessary – where the reference to the "merits" results in circularity. A class, for example, could not be defined meaningfully in terms of persons to whom the defendant was liable, or owed a duty of care, if liability, or the existence of a duty of care owed to class members, was a common issue. However, where the reference to the merits relates to disputed individual issues – rather than common issues – circularity, in this sense, is not necessarily involved.
>
> [14] When it is sometimes said that merits-based individual issues create circularity, what appears to be meant is that persons who will be bound by a judgment on the common issues cannot (logically?) be identifiable by criteria that will determine whether they will have valid claims. As s. 27(3) of the *CPA* provides

> that a judgment on common issues binds class members, it is thought to follow that the class must be ascertainable before, or at least at the end of, the trial of the common issues. This will be relevant only where the common issues are decided in favour of the defendant but, so the argument proceeds, the defendant must then be able to identify the class members. Moreover, because only members will be able to make claims in reliance on common-issues judgments that are favourable to the class, it is thought that it must be possible to identify them before proceeding to proof of loss and the resolution of any other individual issues that will determine liability. Where merits-based criteria beg questions that are individual issues, the result of a decision on the common issues in favour of a defendant would be that the identity of members of the class might, and often would, never be determined.
>
> [15] Such objections are, I believe, formal rather than substantive and certainly not logically compelling. Whatever class criteria are employed, class members will very often not have been identified when an action is dismissed as a result of a decision on the common issues favourable to a defendant. Where the plaintiffs are successful on the common issues, the actual composition of the class will very often not be determined until the individual issues have been decided, as it will only then have been determined whether claimants satisfy whatever class criteria are employed. Even then as, pursuant to s. 25 of the *CPA*, claimants will usually be required to come forward within a stipulated period, there may be class members whose identity is never ascertained. In short, at the conclusion of a trial of common issues – and before any individual issues are addressed – it will often be possible to identify the members of a sizable class only in terms of the class criteria.
>
> [16] It follows that, a defendant wishing to rely on ***res judicata***, or issue estoppel, arising from a decision on the common issues in a class proceeding, may never have the benefit of a prior judicial, or other binding, decision on whether the plaintiff in the subsequent case was a member of the class. In consequence, the defendant might have to prove that the criteria for the plaintiff's membership in the class was satisfied. This, however, would be so whether the criteria were, or were not, considered to be merits-based. As I will indicate, I believe that the implications for subsequent proceedings may require that some limits be placed on the use of criteria that are likely to be seriously in dispute, but I do not believe this would justify a rejection of "merits-based" criteria as such. Most fundamentally, no meaningful distinction can, I think, be drawn between criteria that require proof of material facts that constitute the cause of action and other "objective" criteria. The ability of a claimant to satisfy any class criteria might be challenged by a defendant as a ground for denying liability to such person and any such criteria will be included in the material facts that comprise the cause, or causes, of action pleaded in the proceeding.

[79] This analysis seems to me to be compelling.

[80] Cullity J. did, however, accept that a class definition in terms of persons to whom the defendant was liable, or owed a duty of care, where liability or existence of a duty of care owed to class members was a common issue, would result in unacceptable circularity. He also considered that the requirements of fairness to the defendant or efficiency might lead to the conclusion that a class description based on criteria seriously in dispute was unacceptable. On the second point he said this:

> [29] ….Fairness to defendants, as well as finality and the requirement that a class proceeding should significantly advance the proceedings and be an efficient method of doing so, may be thought to require that the identification of persons who will be bound by a decision on the common issues will not depend on the resolution of issues that are likely to be at the forefront of – or seriously in dispute in – the proceedings in question. In some – but not, I think, all – cases, fairness may require that such persons should be identifiable for the purpose of subsequent proceedings without the need to litigate substantial issues that – but for the defendant's success on the common issues – would have been seriously disputed in the class action, and on which the respective positions of the parties would have been the reverse of those advanced in the subsequent proceedings.

[81] Why class criteria dependant on the outcome of a common issue would necessarily result in a logically inescapable circularity has not, so far as I have been able to determine, been fully articulated or analyzed. However, this point seems central to the distinction: where class criteria are based on the outcome of individual, as opposed to common, issues, it is only an individual's membership in a theoretically determinable class that is left to be determined. Thus, where the defendant is successful on the common issues, a further inquiry would be necessary to determine whether any particular individual was a member of the class that is bound by the earlier decision. This does not seem to involve a fatal circularity, although, as Cullity J. pointed out, it may introduce an unacceptable degree of complexity in the context of determining

whether the procedure proposed is fair and efficient. A person found not to be a member of the class in an individual inquiry, while therefore not technically bound by the determination in favour of the defendant on the common issues, would nonetheless be bound by the individual decision, itself necessary to the merits of his or her claim.

[82] Where the class is defined in terms that depend on the outcome of a common issue, however, a finding in favour of the defendant on that issue entails a finding that the class, *per se*, does not exist, *i.e.*, that *no one* can satisfy the criteria for class membership. This seems to entail the further proposition that *no one* is bound by the decision, and the defendant has achieved a pyrrhic victory. To take a simple example, if the class were defined as all those to whom a defendant owed a duty of care in a particular context, and whether the defendant owed such a duty of care were itself a common issue, a finding on this issue in favour of the defendant, to the effect that it did not owe such a duty of care, would mean that no such class exists. The apparent circularity would result should an individual seek to claim, in a subsequent action, that such a duty of care does exist. To be bound by the earlier decision, the individual would have to be a member of the class to whom the duty was owed. However, the result of the earlier decision is that no such class exists.

[83] I am not fully persuaded that the courts would find it impossible to cut through this Gordian knot, for it would seem to be as problematic for the hypothetical plaintiff as for the defendant, but it cannot be denied that it presents a logical puzzle. I am compelled to conclude that this is sufficient to

support the widespread current authority prohibiting class definitions that depend on the outcome of the litigation of a common issue. At the very least, such a definition would present a dilemma for a successful defendant seeking to resist re-litigation of that issue.

[84] More significantly, perhaps, the distinction between criteria that depend on the merits of individual issues and criteria that depend on the outcome of the litigation of common issues is relevant to the assertion that such a definition would necessitate an illicit inquiry into the merits of the claim on the certification application, for, while it is not necessary, at that stage, to be able to identify all members of a proposed class, it is necessary to provide factual evidence that the class exists. Providing such evidence in relation to the merits of an individual issue may not be problematic, but requiring evidence of the merits in relation to proposed common issues would plunge the certification court into the illicit inquiry. This objection, too, may prove more formal than substantive in light of the growing sentiment that it is enough to show that members of the class have a *potential* or *colourable* claim against the defendant in order to satisfy the requirements for an acceptable class definition. Nonetheless, I would conclude that at this stage in the evolution of legal principles surrounding the certification of class actions in Canada, class definitions that set criteria for membership dependant on the outcome of litigation of the common issues certified are prohibited.

[85] However, in my view, the arguments of Cullity J. that this prohibition does not necessarily extend to those cases where the class definition depends

upon the outcome of an individual issue (whether an individual suffered injury or loss, for example) are compelling.

[86] In the course of his discussion of this issue, Cullity J. pointed out the frequent tension between the requirement that the class definition not be merit based and "supposed rules" that a class must neither be over-inclusive nor under-inclusive:

> [21] The inevitable tension between rejecting a merits-based test and requiring that a class must not be over-inclusive is also illustrated by the finding of the Divisional Court in *Chadha* that the deletion of the reference to damage would result in an unacceptably over-inclusive definition.

[87] Just as he would have restricted the applicability of the merit based prohibition, Cullity J. also challenged the strictness of the supposed rules against over-inclusivity or under-inclusivity, in these passages:

> [11] It is argued that a proposed class that contains persons who will not have valid claims is unacceptably over-inclusive, while a class that "arbitrarily" excludes persons who have – or may have – valid claims is under-inclusive. I adhere to the view I have expressed in other cases that neither of the suggested restrictive rules is supported by the following passage from the reasons of the Chief Justice in *Hollick*, at paras. 20-21, that is commonly relied on as authority for each of them:
>
> > It falls to the putative representative to show the class is defined sufficiently narrowly.
> >
> > The requirement is not an onerous one. The representative need not show that <u>everyone</u> 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 <u>unnecessarily</u> 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 . . .
>
> [12] I understand that passage to accept a concept of over-inclusiveness confined to cases where more narrow class definitions would be possible without arbitrarily excluding persons who share the same interest in the resolution of the common issues. I do not understand it to imply that a plaintiff cannot choose – arbitrarily or

> otherwise – the persons whom he, or she, wishes to represent, or that the only class proceedings permissible are those where the class contains everyone with the same interest. Rather than supporting either of the suggested rules of class definition, it seems to me that the Chief Justice was recognizing that an "over-inclusive" class contemplated by the first of those rules is permitted if a more narrow definition would arbitrarily exclude persons whose claims the plaintiff wishes to enforce. A class may be over-inclusive if necessary but not necessarily over-inclusive.

[88] Despite his doubts, Cullity J. considered himself bound by earlier Ontario decisions to reject merit based criteria as part of a class definition. Accordingly, he went on to consider whether this restriction might be addressed by a class definition that replaced merit based criteria (e.g., persons who suffered damage or loss) with “claims based” criteria (e.g., persons who claimed to have suffered damage or loss). In the end, he rejected this approach as unacceptably subjective and ambiguous, commenting as follows:

> [44] References to "objective" and "subjective" standards are notoriously ambiguous. In Mulheron, *op. cit*., and the passage I have quoted from *Nixon v. Philip Morris (Australia) Ltd.*, *supra*, [(1999), 95 F.C.R. 453] references to subjective criteria appear, for example, to relate to all those that raise individual issues rather than to those only that relate to a state of mind, exercise of judgment or personal choice of a particular individual. Whether the wider, or narrower, notion of subjective criteria is adopted it should, I believe, be understood to apply to the reference to persons who "claim that the fire was caused by an ITCL brand cigarette igniting upholstered furniture or a mattress" in the amended notice of motion. A criterion that leaves a potential claimant free to decide at a convenient time whether he, or she, will be a class member and be bound by the judgment of the court, is, in my opinion, neither objective nor in accordance with the policy of the *CPA* or the purposes of class definition.

[89] Having determined in *Ragoonanan* that the plaintiff could not define a class that was not over-inclusive without resort to merit based limits, Cullity J. denied certification. This decision was upheld on appeal ((2008) 54 C.P.C. (6^{th}) 167).

[90] There is considerable disagreement in the case law as to whether a claims based class definition is objectionable, as Cullity J. concluded, on the grounds that it is subjective or ambiguous. In *Wheadon v. Bayer Inc.*, 2004 NLSCTD 72, 46 C.P.C. (5th) 155 (leave to appeal denied, 2005 NLCA 20) and *Walls v. Bayer Inc.*, 2005 MBQB 3, (leave to appeal denied 257 D.L.R. (4th) 435), the respective Courts approved class definitions of all persons (of a defined residence) who were prescribed and ingested the drug Baycol and "who claim personal injuries as a result." Barry J., in the Newfoundland Supreme Court, said this:

> [104] …The second indentifying factor, claim of personal injury, Bayer objects to as subjective. But although there will obviously be a subjective reason for making a claim, whether or not one makes a claim can be objectively determined. It is not necessary that every class member be named or known at the outset but only that a "claim to membership in the class be determinable by stated, objective criteria". The Plaintiffs meet this requirement here.
>
> [105] I find support for this conclusion in *Rumley v. British Columbia*, where the class in a sexual abuse case was defined by reference to students attending a school between certain years who resided in British Columbia and claimed to have suffered injury as a result of sexual misconduct at the school. The class definition was not in issue at the Supreme Court level but had been accepted by the British Columbia Court of Appeal.

[91] In *Walls v. Bayer Inc.*, MacInnes J. said this:

> [27] While it may be true that one's determination of personal injury may be subjective, the fact of a claim to personal injury is not. That is, it will be easy to determine objectively whether and which prospective plaintiff claims not only to have been prescribed and to have ingested Baycol purchased in Canada, but also to have suffered injury as a result.
>
> [28] The proposed class definition is silent as to the merits of the claims, but as the criteria should not depend on the outcome of the litigation, it is not necessary that prospective class members be able to successfully establish that they have suffered injury. The criterion is simply that they claim to have suffered injury.

[92] On the other hand, in *L.(T.) v. Alberta (Director of Child Welfare)*, 2006 ABQB 104, Slatter J. took a contrary view:

> [65] In my view, claims-based class definitions are based on a subjective consideration, and are *prima facie* problematic. As the Court held in *Western Canadian Shopping Centres*, it is important to know from the beginning who will be bound by the decision in the class action, win, lose or draw. It is not an acceptable situation for a class member to potentially argue in the future that they are not bound by the result of the class proceedings, or a settlement, because they never "claimed" anything, or that they never claimed anything at a relevant point in time.

[93] My reading of recent Ontario decisions is that the courts there have tended to resolve the tensions and difficulties identified by Cullity J. by accepting a more liberal approach to over-inclusive class definitions, as he suggested, but also, despite his views to the contrary, generally accepting the idea of "claims based" class definitions, while continuing to reject merit based class definitions, even when these are based on the outcome of individual, as opposed to common, issues.

[94] In *Frohlinger v. Nortel Networks Corp.* (2006), 40 C.P.C. (6^{th}) 62, (Ont. Sup. Ct.), Winkler J. was asked to approve a settlement on behalf of Canadian residents who had purchased Nortel stock during a specified period. The settlement had been arrived at in relation to proceedings in the United States, on behalf of a class described, in the American proceedings, as all persons who had purchased Nortel stock during the requisite period "and suffered damages thereby." Although he concluded that this difference would be of no consequence, under the settlement plan, Winkler J. went on to discuss the prohibition, in Canada, of merit based class definitions, and the related prohibition against over-inclusive classes.

[18] Although courts in Canada have rejected merits-based class definitions, the courts also recognize that over-inclusive class definitions must also be avoided. In *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2005), 78 O.R. (3d) 98 (Ont. S.C.J.), Cullity J. undertook an extensive review and analysis of the current Canadian case law with respect to class definitions. In his view there was an "inevitable tension between rejecting a merits-based test and requiring that a class must not be over-inclusive". However, in *Ragoonanan Estate*, after a probing review of the relevant case law, Cullity J. ultimately determined that the plaintiff could not define a class that was not over-inclusive without resort to merit-based limits and, accordingly, denied certification.

….

[21] The underlying reason for each of these prohibitions is readily apparent. Merits-based class definitions require a determination of each class member's claim as a pre-condition of ascertaining class membership. Carrying that concept to its logical conclusion, it would mean that at the conclusion of a class proceeding, only those individuals who were successful in their claims would be members of the class and, therefore, bound by the result. Theoretically, unsuccessful claimants would not be "class members" and would be free to commence further litigation because s. 27(3) of the *CPA*, which states in part:

> A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding ...

would not bind them or bar them from commencing further actions.

[22] The rationale for avoiding over-inclusiveness, on the other hand, is to ensure that litigation is confined to the parties joined by the claims and the common issues which arise.

[23] Merits-based definitions are self-evident. Over-inclusive class definitions on the other hand are more elusive. It cannot be the case, as is evident here from the fact that approximately 150,000 claims had been filed as of the date of the hearing, that a class is over-inclusive simply by reason of its numerical size. Similarly, a proper class definition does not include only those persons whose claims will be successful. Rather, as the Chief Justice states in *Hollick*, the essence of a proper class definition goes to the "rational connection between the class as defined and the asserted common issues". It is neither express nor implied in that statement that a class member's "colourable" claim must be one that will ultimately be successful. Indeed, it is the purpose of a class action to resolve claims through the utilization of a common issue phase and an individual issue determination, if necessary.

[24] Although the individual issues that exist obviously have an impact on the certification of a class proceeding, the class definition must be connected to the common issues raised by the cause or causes of action asserted. It is this element of commonality, which must be assessed on a case by case basis, that determines the viability of a particular class definition. Hence, where, as here, the allegations are that misstatements led to an artificially inflated share price during certain periods

> of time, it follows logically that anyone purchasing those shares in a relevant period has a potential claim giving rise to common issues shared with every other purchaser in the same period. As noted in ***Hollick***, the relationships between the classes and the common issues asserted in these actions are "clear from the facts". Therefore, in my view, it is not over-inclusive to frame the classes in the manner set out in ***Frohlinger*** and ***Gallard***i. The fact that any person so described may not ultimately be successful in advancing a claim for damages does not preclude their inclusion in the class. As stated by the Chief Justice in ***Western Canadian Shopping Centres Inc.*** at para. 38:
>
> > ...the class must be capable of clear definition .... The definition should state objective criteria by which members of the class can be identified. <u>While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation.</u> (emphasis added)
>
> [25] Over-inclusive class definitions can be avoided without resort to merits-based indentifiers by adherence to the concept that the core of a class proceeding is the element of commonality. It is implicit in that concept that the cause of action, the scope of the class and the common issues are inextricably inter-related. Indeed, the first three criteria for certification as a class proceeding under s. 5(1) of the ***CPA*** may be stated in a single sentence as follows: There must be a cause of action, shared by an identifiable class, from which common issues arise.

[95] All three points were again addressed by Winkler J. in ***Attis v. Canada (Minister of Health)*** (2007), 46 C.P.C. (6th) 129 (Ont. Sup. Ct.). That case involved an attempt to certify a claim against government regulators after settlement of other claims that had been advanced against Dow Corning Corporation and affiliated corporations in relation to defective breast implants manufactured by those corporations and approved for distribution in Canada by Health Canada. While Winkler J. dismissed the certification application because he found there was no cause of action against the government regulators, he went on to consider the other criteria for certification.

[96] The plaintiffs sought to certify a class identified, essentially, as all persons (of prescribed residence) who were implanted with breast implants

manufactured by the Dow Corporations between specified dates. The defendant objected that the class definition was unnecessarily broad and that there was no rational connection between a class member who did not suffer any injury or damages and the purported negligence by the defendant. Winkler J. rejected that argument in this passage, now giving a more liberal interpretation, in my view, to the requirement that the class definition be "rationally connected" to the claims asserted in the putative class action:

> [52] The basic claim of the plaintiffs is that the breast implants, or medical devices, at issue were unsafe for their intended use and, therefore, should not have been permitted to be sold or used in Canada. It logically follows that there is a rational connection among all individuals who were implanted with the devices and the claim made. ***The fact that some of the individual class members may not have suffered harm, or not yet suffered harm, does not alter the fact that they were exposed to an allegedly defective device. While any particular class member's claim may prove to be unsuccessful, one purpose of class action litigation is to achieve judicial economy by resolving all potential claims.*** As stated in ***Hollick v. Metropolitan Toronto (Municipality)***, [2001] 3 S.C.R. 158 (S.C.C.) at para 21:
>
> > 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 ...
>
> [53] In consideration of an allegation that a given product is unsafe for use, it is difficult to accept the proposition that all users would not have some interest in the outcome of the litigation. Conversely, it is equally difficult to accept a proposition that the defendant subject to the allegation would not want to ensure that all potential claims are resolved and all potential claimants bound by the result, including those claims that may fail. [emphasis added]

[97] He then went on to consider whether, in any case, the definition might be limited by restricting it to those who *claimed* to have suffered harm from the breast implants, saying this:

[54] Notwithstanding my view that the class description is not overly broad in the context of the claim made by the plaintiffs, as the Supreme Court noted in *Hollick*, it would be within the court's discretion to amend the class description in any event. One approach to limiting classes, which is becoming a common practice among plaintiffs to circumvent arguments regarding over-inclusive class descriptions, would effectively meet the argument advanced by Canada. That approach is to include a limiting phrase in the class description to the effect of "all those persons who claim" in respect of the alleged harm, or some variation thereof.

[55] A definition based on a "claims made" limitation was utilized in ***Rumley v. British Columbia***, [2001] 3 S.C.R. 184 (S.C.C.). By the time the *Rumley* case reached the Supreme Court, the parties to the litigation were not contesting the class definition and thus the Court did not comment expressly on the class description. However, the Court was required to consider the uncontested class definition as set out by the British Columbia Court of Appeal in the context of its determination of the live dispute relating to common issues. Given the number of times the Court had reference to the class definition during its discussion on common issues, it must be assumed that the definition, if not expressly approved, was, at a minimum, implicitly so.

[56] The use of "claims made" limiters has not been universally accepted. Some courts have characterized them as verging into an impermissible "merits-based" definition. I do not share this view. If membership in a class is defined as those who make claims in respect of a particular event or alleged wrong, no determination of the merits of any particular claim is necessary prior to making a determination as to whether the claimant is a member of the class. Similarly, if a person's claim fails, it does not eliminate the person from the class, rather it demarks the claimant as a class member whose claim has been determined through a binding process. It is not the purpose of class proceedings, or class definitions, to bind only successful claimants. All those who may bring claims in respect of a particular event or allegation should be bound if possible, subject of course to the legislated exception of those putative class members who exercise the right to opt out of the class proceeding.

[57] Another criticism of a "claims made" limiter on class description is that it does not provide the necessary certainty of identifying those who are bound by the class definition. In my view, this criticism is founded on too narrow an interpretation of both the class definition and the functions of a court supervising a class proceeding. Defining a class as those persons "who claim" includes those persons who may come forward in the future to make a claim. A defendant and, for that matter, the court, will be in a position to ascertain whether a particular person is included in the class and bound by the resolution of the common issues. In this respect, it is trite that class members need not be identified individually at the time the class is certified. Accordingly, utilizing a "claims made" in the appropriate case leaves the defendant in no different position vis à vis knowledge of the class membership than would be otherwise the case. As for the potential class members,

> the court can ensure that the notice adequately conveys the effect of the class definition and the fact that claims in the future may be barred as a result of the resolution of the proceeding.

[98] Finally, he made it clear that the prohibition against merits based class descriptions was alive and well, at least in Ontario:

> [58] I do not wish to have any of the foregoing construed as a departure from the prohibition against merits based class descriptions. Thus, to combine a merits based determiner with a "claims made" limitation would run afoul of the settled principles regarding class descriptions.
>
> [59] Here, I do not find it necessary to insert a "claims made" limiter in that the class description proposed by the plaintiffs is not overly broad. However, in my view, such an amendment would entirely meet the objection to the class description advanced by Canada.

[99] Thus, Winkler J. agreed with the conclusion of Cullity J. that the over-inclusivity bar prohibited only ***unnecessarily*** broad class definitions, and added that, in a product liability case, a rational connection between the class of all users of a product and a claim that the product was unsafe could be found in the *potential* claim of anyone who had been ***exposed*** to an unsafe product.

[100] In endorsing claims based criteria for class definition, Winkler J. did not address the objection that such criteria are subjective, but he did acknowledge, in these passages, the objection that such definitions are ambiguous in that they do not say ***when*** the “claim” must have been advanced, leaving it to a potential future claimant to assert that they never claimed anything, or that they did not make the claim at a relevant point in time. His response was that “defining a class as those persons ‘who claim’ includes those persons who may come forward in the future to make a claim,” and that the court could ensure that the notice to potential class members effectively conveys “the

effect of the class definition and the fact that claims in the future may be barred as a result of the resolution of the proceeding."

[101] The liberal reading of the rational connection test proposed by Winkler J. has been accepted in other Ontario certification decisions, including the decision of Cullity J. in *Tiboni* where he certified a class identified as all Canadian residents (with exceptions for Quebec and Saskatchewan) who were prescribed and ingested Vioxx. Cullity J. commented:

> [76] In *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (QL), 84 A.C.W.S. (3d) 230 (Gen. Div.), at para 10, the three purposes of a class definition were described as: (a) to identify the persons who have a potential claim for relief against the defendants; (b) to define the parameters of the law suit so as to identify those persons who are bound by its result; and (c) to describe who is entitled to notice pursuant to the Act.
>
> [77] Whether or not a class accepted in this case is limited to those who claim to have suffered harm, only those who make such a claim will have any possibility of obtaining relief for Merck's negligence, and all persons who ingested Vioxx will be "bound" in the sense that they will be unable to relitigate an unfavourable decision on the common issues and obtain damages for negligence. As far as notice is concerned, the use of a "claims limiter" would not affect the necessity to give notice of certification to all persons who ingested the drug. In consequence, the use of a "claims limiter" does not, in my opinion, narrow the class significantly. It is arguably a verbal device that achieves nothing except to meet an argument that appears to be based on a misreading of *Hollick*.
>
> [78] For essentially the same reasons as those provided by Winkler J. in *Attis*, I cannot accept the submission of Merck's counsel that the plaintiffs have the burden of establishing by evidence that all members of the class are likely to have causes of action against the defendants, if this means that all will probably have suffered harm. In any class action involving claims in tort for personal injury, or economic loss, it is possible that the claims of some class members will be unsuccessful. This is virtually ordained by the authorities that preclude merits-based class definitions. As the Chief Justice recognised in *Hollick*, a minimum evidential basis must be provided for the existence of class members' claims that raise common issues, but this falls far short of the proposition that the plaintiffs must establish on a balance of probabilities that all class members have claims that are likely to succeed, or that they have suffered harm. In *Hollick*, the court found that the necessary minimum evidentiary burden had been discharged when the plaintiff provided evidence that

> complaints of harm had been received from 950 of the approximately 30,000 members of the putative class.
>
> [79] In my judgment, the reasoning of Winkler J. in *Attis*, at para. 52, is equally applicable to the primary class definition proposed by the plaintiffs and it follows that the definition is satisfactory.

[102] While it is not necessary to decide, in this case, whether this liberal view of the rational connection test should be adopted in Saskatchewan, I would express some doubt as to whether uninjured members of a class could be said to have a "potential or colourable" claim to recover damages for personal injury, although they might, of course, have a claim for being exposed to a risk, if this claim is also advanced in the action. Further, given the fact that the appellants in that case did not contest the class definition, *Rumley* is weak authority, in my view, even for the proposition that the difficulty of defining a sufficiently contained class can be met by use of a claims based definition. Because the definition in that case did not, in any event, depend upon the outcome of the litigation of the common issues certified, it clearly does not support the view that in *all cases* such a definition would be sufficiently objective and certain.

[103] In my view, what emerges from this review is a requirement for careful scrutiny of the facts and circumstances of a particular case prior to deciding: (1) whether a particular class definition is too broad to satisfy the requirement that it be rationally connected to the causes of action and common issues identified in the case; (2) that a merits based definition will necessarily lead to circularity or otherwise be objectionable; and (3) whether a claims based

class definition sufficiently meets the requirements of objectivity and certainty, in light of the established purposes of class definition.

[104] Turning, then, to the case at hand, it is clear, in my view, that the induced subclasses, defined as those "who by unfair marketing practices used by Merck, were induced to purchase Vioxx from a Canadian pharmacy rather than a cheaper NSAID and thereby suffered a financial loss", set criteria for class membership that depend on the outcome of the litigation of common issues, in this case relating to Merck's conduct in marketing Vioxx, necessary for determination of whether it committed unfair marketing practices, as well as the outcome of the litigation of individual issues, whether the individual was "induced" by such conduct to purchase Vioxx rather than a cheaper drug and thereby suffered a financial loss. This definition is therefore objectionably circular even on the more liberal view of Cullity J., discussed above.

[105] This conclusion raises the question whether this problem might be solved by simply amending the definition to describe the class as those who *claim* to have been induced by unfair marketing practices of Merck to purchase Vioxx from a Canadian pharmacy rather than a cheaper NSAID and thereby to have suffered a financial loss.

[106] In my respectful view, this definition cannot meet the requirements of objectivity and certainty. Unlike a definition in terms of those who *claim* loss or injury, which claim would itself be related to an objective, verifiable fact or event, *any* purchaser of Vioxx is free to claim that Merck engaged in some

unspecified unfair marketing practice, or not, as and when he or she sees fit. There is *no* objective fact that, in itself, would either legitimate or defeat such a claim. The claim that Merck engaged in unfair marketing practices is the claim of a legal result. Although such a conclusion would be based on facts, the definition of this subclass does not indicate what those are or tie the definition to them. If the requirement that the class definition not be subjective means anything at all, this definition, in my view, cannot satisfy that criterion.

[107] Moreover, and more significantly, in light of the purposes of a class definition, this definition would be inherently uncertain and ambiguous. In addition to the fact that it does not specify when such a claim must have been asserted, it is rendered more uncertain by the fact that the "unfair marketing practices" referred to are unspecified, and by the fact that this is, in any case, a legal concept with which most purchasers would be unfamiliar, and would be based on allegations of fact that are not specified.

[108] One purpose of class definitions is to allow sufficient notice to be given to potential class members to permit them to make an informed choice as to whether to opt in or opt out of the class action. This is particularly important when the action is classified as an "opt-out" national class action, and that importance is again magnified when more than one related action is so certified, giving rise to the possibility that potential claimants may need or want to choose which action to be a part of. Any individual who failed to opt out of a nationally certified class would potentially find himself or herself bound by the results and, where more than one such action has been certified,

those results could potentially be conflicting. The ambiguity inherent in a claims based alternative to the definition of this subclass would, in my view, render an informed decision in this regard virtually impossible.

[109] If we turn to the purchaser subclass definition of all those who purchased Vioxx and "assert that Vioxx was: (i) not of acceptable quality; (ii) defective; or (iii) not fit for the purpose of managing pain associated with osteoarthritis, acute pain, primary dysmenoreah; or rheumatoid arthritis," some of the same problems recur. This definition is not merits based, but claims based, and therefore avoids the circularity problems of a merits based definition. The "claims" referred to, however, are, again, claims of legal conclusions, not readily understood by the average purchaser of Vioxx and, in any case, ambiguously described (for it is not said in what respect it is claimed that Vioxx was defective or unfit). In my view, this criterion is objectionably subjective and ambiguous and could not serve the functions required of a class definition for that reason. I cannot conceive of a notice provision that would clearly and effectively indicate to potential class members whether they did or did not fall within the class so described.

[110] The four subclasses of "injured" plaintiffs do not suffer from these defects to the same degree. They are defined in terms of persons who "claim" that Vioxx caused or exacerbated a cardiovascular condition or injury (in one case) or gastrointestinal condition or injury (in the other). While these definitions are arguably subjective, at least they are grounded in factually objective allegations (having suffered an injury or adverse condition) that are understandable to the average user or purchaser of Vioxx and would serve to

limit the extent to which anyone might plausibly claim to be or not to be a member of the class. If one accepts the suggestions of Winkler J., discussed above, that such a definition should be interpreted to include those persons who may come forward in the future to make such a claim, and that this point could be clarified in the notice given to potential class members, then such a definition would satisfy the rationale for the requirement of an identifiable class.

[111] As I have concluded that the description of the first two subclasses are objectionably merits based or subjective and ambiguous, the question which arises is whether this objection could be met by a class description that is less restrictive as well as considerably less complex, such as simply all those who purchased or ingested Vioxx. After all, if Vioxx is shown to be a defective or dangerous product, all such persons could be said to have at least a potential or colourable claim, on the arguments advanced by Winkler J. in *Attis*.

[112] This question takes us back to consideration of the basis upon which Klebuc C.J. decided to define the class as he did, rather than in the broader and more general terms that had originally been proffered by the respondents. That discussion, in turn, leads to a consideration of what I perceive as a general lack of clarity in relation to the nature of the claims asserted by the respective subclasses. Because these questions are related to the question of whether Klebuc C.J. erred in his identification of common issues, this discussion will also serve as background for that analysis.

[113] As I earlier indicated, the rationale for the decision to define the class in terms of an array of subclasses, rather than accept the simpler and more general definition originally proposed by the respondents, was set out in the judgment below of February 15, 2008.

[114] In his analysis of whether the within action should be certified as a class action, Klebuc C.J. placed some emphasis on a number of decisions from other jurisdictions in which product liability claims initiated by persons who purchased or ingested prescription drugs had been certified. These included the following:

(a) *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (Ont. Sup. Ct.), leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 88 (QL), was a case involving Ponderal and Redux, weight loss drugs alleged to cause primary pulmonary hypertension, valvular heart disease and valvular regurgitation. The action was certified on behalf of a national class (excluding Quebec) of all persons who were prescribed and ingested the drugs plus those with a derivative claim.

(b) *Bouchanskaia v. Bayer Inc.,* 2003 BCSC 1306, involved the drug Baycol, taken to reduce cholesterol and alleged to cause rhabdomyolysis, a potentially fatal condition. It was certified as a class action brought on behalf of all residents of British Columbia who ingested Baycol.

(c) *Wheadon v. Bayer Inc., supra,* also involved the drug Baycol. This action, as mentioned above, was certified on behalf of all residents of the Atlantic provinces who were prescribed and

ingested Baycol and who claimed personal injury as a result, plus those with derivative claims.

(d) *Boulanger v. Johnson & Johnson Corp.* (2007), 40 C.P.C. (6th) 170 (Ont. Sup. Ct.), involved the drug Prepulsid, prescribed to treat gastroesophageal reflux disease and alleged to cause serious, specified, cardiac reactions. The national class (excluding Quebec) certified was defined as all persons who ingested Prepulsid plus those with derivative claims.

(e) *Heward v. Eli Lilly & Co.* (2007), 39 C.P.C. (6th) 153 (Ont. Sup. Ct.), involved the anti-psychotic drug Zyprexa, alleged to give rise to significantly increased risk of diabetes and related complaints. A national class (excluding Quebec and British Columbia) on behalf of all persons who were prescribed and ingested Zyprexa, plus those with a derivative claim, was certified.

[115]The decisions in these cases were extensively relied upon by Klebuc C.J. as authority to support various conclusions in relation to the certification application, and, in particular, to answer many of the appellants' arguments in relation to the viability of common issues proposed and as to whether a class action was the preferable procedure in light of the number and complexity of individual issues that would remain even if the plaintiffs succeeded on the common issues identified. Interestingly, however, Klebuc C.J. did not follow these decisions when it came to defining the class.

[116] In relation to the question of the class description, Klebuc C.J. noted one of Merck's objections, as follows:

> [53] …it argued the plaintiffs have failed to provide an identifiable class because their "highly complicated array of classes and subclasses" violate the requirements spelled out in *Dutton*. More specifically, it argued the proposed class and subclass definitions cannot be easily used by potential class members to determine if they are bound by the proposed proceeding, or by the Court to determine the identity of persons for whom the class action is brought.

[117] Klebuc C.J. addressed this argument in the following passage:

> [57] The drug product cases reviewed above confirm that a detailed class definition is not essential, so long as it meets the requirements stated in *Hollick* and *Dutton*. This point is demonstrated by the class definitions in *Wilson* where the court indicated that if a distinct issue arose in relation to specific members of the class, it could be dealt later by means of subclasses. In *Bouchanskaia*, a global class definition akin to the one used in *Wilson* was approved notwithstanding the action raised causes of action based on the *Competition Act* and the *Trade Practice Act*. Nonetheless, I remain of the view that the introduction of subclasses as part of the class definition at an early date is appropriate in the absence of any material prejudice to persons potentially interested in the action.
>
> [58] In the within action, the proposed subclasses will assist persons in determining whether they qualify as a member of the class and will assist the Court in more readily identifying the relationship between the common issues, the class and its subclasses, and the underlying causes of action than otherwise would be possible if a global all-inclusive class definition were employed similar to the one used in *Wilson*.
>
> [59] A potential member, who purchased Vioxx but did not ingest it, would not have to concern himself with matters pertaining to ingestion of Vioxx or potential injuries resulting when determining whether he or she was a member of the class proposed herein. In my view, there is no greater difficulty for a potential member to identify whether he or she falls within the proposed defined class by reviewing the applicability of particular subclasses than he or she would in making a similar determination if a class definition of the kind in *Wilson* or *Bouchanskaia* were used.
>
> [60] The four distinct subclasses of "induced subclass", "purchaser subclass", "injured cardiovascular subclass" and "injured gastrointestinal subclass" also lend themselves to compliance with the provisions of s. 8(1) of the *C.A.A.* should a separate representative plaintiff be required for any subclass.

[118]In my respectful view, the reasons for rejecting the simpler approach are, in some respects, puzzling. For example, while it might be true that "a potential member, who purchased Vioxx but did not ingest it, would not have to concern himself with matters pertaining to ingestion of Vioxx or potential injuries resulting when determining whether he or she was a member of the class proposed herein," that would be equally true were the class described more simply as anyone who purchased or ingested Vioxx. Moreover, since any *relevant* "claim" that Merck engaged in unfair marketing practices or breached statutory warranties would be based on allegations of "potential injuries resulting", as we will see, it does not seem to me to be strictly true that those who purchased but did not ingest Vioxx would not have to be concerned with this question in order to decide whether they were members of a subclass. Further, as I have said above, it is not reasonable to expect an individual to make an informed decision as to whether he or she is one who claims that Vioxx breached statutory warranties or prohibitions against unfair marketing practices, themselves complex legal concepts depending on factual allegations that are not apparent in the definition. Simply determining whether one has purchased or taken Vioxx, by contrast, presents no similar problem, and, in fact, is quite straight forward.

[119] Accordingly, Klebuc C.J. erred, in my view, in concluding that the proposed subclasses would better assist persons in determining whether they met the criteria for class membership than would the simpler definition, and, indeed, in not recognizing the significant problems in that regard that the subclass definitions posed.

[120] Again, while it *might* have proved desirable, as the action proceeded, to require separate representation for a particular subclass of a more generally described class, it is not obvious, at the certification stage whether or why that should be so. Normally, division into subclasses with separate representation is necessary either because a conflict of interest has emerged (not evident at this stage in this case) or, after resolution of the common issues, it becomes apparent that different procedures will be required for the resolution or settlement of the individual issues for different groups, in light of the resolution of the common issues. It is difficult, if not impossible, to make that determination at this stage of the proceeding and certainly not necessary to do so.

[121] Circumstances that necessitate defining subclasses at the certification stage would, however, include the circumstance where a subclass of the generally described class raises common issues that could be determined in the class proceeding but are not shared by other members of the class. This is permitted by s. 8 of *The Class Actions Act*, which provides:

> 8. Notwithstanding section 6, if a class includes a subclass whose members have claims that raise common issues not shared by all the class members and, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court may, in addition to the representative plaintiff for the class, appoint a representative plaintiff for each subclass who:
>
> (a) would fairly and adequately represent the interests of the subclass;
>
> (b) has produced a plan for the action that sets out a workable method of advancing the action on behalf of the subclass and of notifying subclass members of the action; and
>
> (c) does not have, on the common issues for the subclass, an interest that is in conflict with the interests of other subclass members.

[122] Section 9(e) of the *Act* provides that a court shall not refuse to certify a class action by reason only that the class includes a subclass whose members have claims that raise common issues not shared by all the class members, and s.13(1)(b) provides that unless the court otherwise orders, common issues for a subclass must be determined together.

[123] It seems that it is this possibility that was in the mind of Klebuc C.J. in his suggestion that:

> [58] …the proposed subclasses…will assist the Court in more readily identifying the relationship between the common issues, the class and its subclasses, and the underlying causes of action than otherwise would be possible…

[124] This conjecture is supported by the fact the certification order described the distinct claims in relation to various subclasses, as I discussed above.

[125] What the statutory provisions would appear to envision, however, is not that the identifiable class should be entirely composed of an array of subclasses, each with its own distinct set of claims and common issues, but, rather, that there should be a single, over-riding class, with its set of issues common to all members of a class, some of whom might form a subclass with a distinct additional set of issues common to its members but not other members of the class as a whole. This seems to be required by the statutory definition of "class" in s. 2 of the *Act* as "two or more persons with common issues respecting a cause of action or a potential cause of action," together with the certification requirement in s. 6(1)(b) that there be ***an*** identifiable class. Clearly, the more the subclasses are seen to have in common only

issues distinct from one another, the less likely it is that a single class, or, indeed, a single class action, has been identified.

[126] This is the view adopted by Winkler J. in *Caputo v. Imperial Tobacco Ltd.*(2004), 236 D.L.R. (4th) 348 (Ont. Sup. Ct.), a case in which certification was refused in relation to a claim sought to be brought on behalf of all residents of Ontario, whether living or dead, who have ever smoked cigarette products manufactured, marketed, or sold by the defendants plus persons with derivative claims under the *Family Law Act*, R.S.O. 1990, c. F-3. The proposed claim was based on the assertion that the defendants designed, manufactured and placed into the stream of commerce an inherently defective and dangerous product in the form of cigarettes. The claim related to allegations that the defendant knew of the addictive quality of cigarettes and that this caused injury to smokers unable to quit smoking. The defendants objected, *inter alia*, on the basis that it was necessary to distinguish persons who began smoking prior to 1972, when express warnings came into existence and that there was no reference to time or amount smoked and the definition included persons who had successfully quit smoking. All attempts to amend the definition, according to Winkler J., ran into the difficulty that they contained arbitrary exclusions of persons who shared the same interest in the resolution of the common issue. Winkler J. concluded:

> [45] In my view, the present action is an amalgam of potential class proceedings that make it impossible to describe a single class sharing substantial "common issues", the resolution of which will significantly advance the claim of each class member, which is the test to be applied according to *Hollick*. Moreover, this is not a case where the creation of subclasses will address the primary class definition deficiency. *Subclasses are properly certified where there are both common issues for the class members as a whole and other issues that are common to some but not all*

> *of the class members.* This is not the case here. Rather, ***the plaintiffs have melded a number of potential classes into a single proceeding***. The result is an ambitious action that vastly overreaches and which, consequently, is void of the essential element of commonality necessary to obtain certification as a class proceeding. Simply put, the reason that no acceptable class definition has been posited is that no such definition exists. [emphasis added]

[127] Many factors distinguish the situation in *Caputo* from the instant case, and whether the difficulty identified in that case applies here depends very much on how one understands the relationship of the subclasses and the class as a whole to the causes of action and the common issues identified. Significantly, none of the issues identified in the certification judgment or order as a common issue is expressly identified as common only to the members of a subclass, as opposed to the class as a whole, despite the requirement of s. 13(1)(b), noted above. In the passage quoted above, Klebuc C.J. suggested that the division of the class into subclasses in this manner would itself assist the trial judge in clarifying these relationships. Unfortunately, as we will see when we turn to an analysis of the common issues, this task is fraught with difficulty.

[128] In my view, much of this difficulty arises from two choices made by the respondents in fashioning this action: (1) the choice to combine in one action a number of diverse and not necessarily related claims; and (2) the choice to define those claims vaguely so as not to confine the plaintiffs to particular factual allegations.

[129] In relation to the diversity of claims, it seems clear, at least, that the claim for damages for personal injury in relation to gastrointestinal injuries or conditions is completely unrelated to the claim that Vioxx increased the risk for certain adverse cardiovascular events and, indeed, would have a distinct factual basis (in terms of the nature of the medical evidence to be presented, the scope of Merck's knowledge, and the content of Merck's disclosures and warnings, for example) as well as implicating a distinct subclass of plaintiffs. The only commonality between the two complaints would seem to be the defendants. It is hard to state this with complete certainty for, as I have indicated, while the factual allegations in relation to thrombotic cardiovascular injury are fairly clear, this is far from the case in relation to the gastrointestinal injury claims. Nonetheless, on the face of it, the distinctness of these two claims portends significant difficulty in establishing the commonality requisite for a class action. The claim that Merck improperly exaggerated the superiority of the gastrointestinal protective qualities of Vioxx in relation to other NSAIDs to inflate the price of Vioxx (if, indeed, such a claim is intended) is likely a further, separate, claim, probably related to the allegation of unfair marketing practices, as opposed to personal injury, although, again, it is hard to be certain on the record before the Court. Further, as has already been mentioned, even in relation to the claims of cardiovascular and gastrointestinal injury the respondents apparently seek to advance significantly diverse claims under each heading, many of which would seem to entail different factual bases. For example, although this, again, is not expressly set out in the pleadings, the affidavits of potential class members filed indicate that the respondents intend to advance apparently unrelated

claims in relation to high blood pressure (among other things) in addition to claims of thrombotic cardiovascular injury.

[130] In relation to lack of clarity for the basis of various claims, I have already noted the failure to set out allegations of fact in relation to any of the claims asserted apart from the claim that Vioxx increased the risk of clotting, and that Merck knew or ought to have known that to be so and improperly withheld that knowledge. In relation to the gastrointestinal risk, it is entirely unclear whether the respondents are simply claiming that Merck overstated the gastrointestinal *benefit* of the COX-2 selective drug, related to the claim that the price for Vioxx was inflated, or that it increased the risk, or that it failed to adequately warn of the risk that existed, related to causing injury, or all of these. I have already indicated that, while an unfair marketing practice is alleged, it is not specified. Similarly, the claims of breach of statutory warranty are left vague as to what breaches are being alleged, although it would be fair to assume that these are related to the allegations of unacceptable risks posed by Vioxx, and Merck's knowledge or imputed knowledge of those risks and failure to warn of them, as opposed, for example, to allegations that Vioxx was ineffective in relieving pain.

[131] In the result, however, these difficulties combine to make it difficult, if not impossible, for this Court to determine with any certainty whether the defects in the definitions of the subclasses that I have found above could be resolved by amending the class definition, or, indeed, whether or to what extent elimination of those subclasses would substantially change the nature of the case that has been certified.

[132] I would conclude that Klebuc C.J. erred in determining that there was an identifiable class within the meaning of s. 6(1)(b) of *The Class Actions Act.*

B. Did the learned certification judge err in concluding that the claims of the class members raise common issues?

[133] Section 2 of *The Class Actions Act* defines "common issues" to mean: (a) common but not necessarily identical issues of fact; or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts. Section 6(1)(c) requires that the court be satisfied that the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members. Section 9(e) indicates that the court shall not refuse to certify an action because the class includes a subclass whose members have claims that raise common issues not shared by all the class members.

[134] In *Dutton*, McLachlin C.J. emphasized that the courts should approach the question of whether a putative class action raised common issues purposively. She had said this:

> [39] Second, there must be issues of fact or law common to all class members. Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. 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. It is not essential that the class members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the

> claims of each class member with the same particularity as would be required in an individual suit.
>
> [40] Third, with regard to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests.

[135] In *Rumley,* the Chief Justice added that a court should avoid framing commonality between class members in overly broad terms, stating, "It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms" (at para. 29). At the same time, the Court indicated that although the resolution of a common issue had to be essential to the claim of each class member, it was not essential that the resolution be determinative of each member's claim or that all members benefit from the resolution thereof to the same extent, speaking of "limited differentiation amongst the class members as and if such differentiation becomes evident" in a "nuanced" answer that might distinguish amongst different members of the class (at para. 32).

[136] Turning to the instant case, it is my view that all of the difficulties identified above recur in this context. In short, the diversity of claims sought to be asserted, combined with the lack of clarity of what facts are alleged in relation to each, present insurmountable challenges, in my view, to the identification of issues which are common to all claims and therefore to all members of the class.

[137] I will address each of the common issues certified in the judgment below.

Common Issue # 1: Whether Vioxx can cause or exacerbate cardiovascular or gastrointestinal conditions.

[138] Klebuc C.J. was of the view that the answer to this question was of "fundamental importance" to all members of the class and all of the causes of action approved, for if it were answered in the negative, all of the claims would fail. Thus, the claims of even the induced and purchaser subclasses were seen as linked to the claims of cardiovascular and gastrointestinal conditions.

[139] The appellants object to this issue on a number of grounds. First, it is argued, it lacks the necessary element of commonality.

[140] The appellants deny that this issue necessarily applies to the claims of the induced and purchaser subclasses, for, they say, the complaint of those members might simply be that Vioxx was ineffective in relieving pain. While I agree that the nature of the complaints of these subclasses is not made explicit in the statement of claim, it is clear that Klebuc C.J. assumed that their claims were restricted to claims in relation to adverse risks created by Vioxx. For the moment, at least, we can assume that this is the nature of the claims certified.

[141] Further, the appellants say that the issue is not common even to members of the two "injured" subclasses because the question of whether Vioxx "can" cause or has the potential to cause adverse cardiovascular or gastrointestinal effect depends to a large extent on the physical characteristics

of the persons taking it. The answer might be clearly “no” in relation to a person with no cardiovascular or gastrointestinal risk factors, in small doses, over a short period of time, and clearly “yes” in relation to those with more significant risk factors, taking Vioxx in larger doses or over a longer period of time.

[142] Further still, it is argued, the issue is also not susceptible to a single answer at a more abstract level, for it must be separately asked and answered across the broad array of cardiovascular and gastrointestinal effects alleged by the plaintiffs. Clearly, the question of whether Vioxx “can” cause adverse cardiovascular conditions is distinct from the question of whether it “can” cause adverse gastrointestinal effects. Whether it can cause high blood pressure is different from whether it can cause blood clotting.

[143]Finally, the appellants argue that the resolution of the question could not, in any case, contribute substantially to any class member’s claim of injury because the question of individual causation would turn on many factors other than the inherent properties of Vioxx. The appellants argue that “a class-wide” determination of whether Vioxx “can” cause or exacerbate “cardiovascular conditions” in the abstract would not alleviate in any significant respect a particular class member’s obligation to prove that Vioxx caused his or her particular cardiovascular conditions.

[144] While Klebuc C.J. was faced with some of these same arguments, he relied on the fact that similar arguments had been raised and rejected in other class actions involving pharmaceutical drugs. To the argument that a general

answer to the question of whether Vioxx poses an increased risk of, for example, heart attack or stroke does not go far in "proving" that an individual's heart attack or stroke was caused by his having taken Vioxx, other judges have pointed out that legal proof need only be on the balance of probabilities and that the certainty of scientific proof is not required. Thus, compelling epidemiological or statistical evidence might be sufficient to establish individual causation, or go a long way to doing so. Moreover, it is not appropriate at the certification stage to try to anticipate the extent to which the plaintiffs will succeed in relation to the common issues.

[145] However, the wide diversity of complaints to which this issue is addressed was not considered below. In my respectful view, this diversity is fatal to consideration of this issue as a "common" issue. Clearly it is not susceptible to a single answer that would apply to the claims of all members of the class. Thus, while it is conceivable that proof that Vioxx significantly increased the risk of, for example, high blood pressure, might support the claims of the induced or purchaser subclasses (and I am by no means certain that it would), it would be irrelevant to those who claim other unrelated adverse conditions or injuries.

[146] While, in theory, this lack of commonality across the class could be addressed by reference to subclasses (more refined and detailed, to be sure, than those identified in the certification order), it is significant that no attempt was made at the certification stage to do so, even though the class was divided into subclasses at that stage. In fact, any realistic attempt to break the question down into an array of distinct questions in a way that would apply to every

claim asserted shows how very complex the question is. The appellants do not exaggerate, in my view, when they assert that this issue would require the court to determine and evaluate all of the effects that Vioxx may have on all of the gastrointestinal and cardiovascular body systems. The answers would almost necessarily vary from one sub-subclass complaint to another. This is a far cry, in my respectful view, from the "limited differentiation amongst class members" envisaged in the suggestion, in *Rumley*, of the possibility of a "nuanced" answer, where there might be variations in the answer to a common issue among class members.

Common Issue # 2: Assuming the answer to issue # 1 is yes, whether Merck knew or should have known that Vioxx can cause or exacerbate cardiovascular or gastrointestinal conditions.

[147] The answer to this question depends on when it is asked, for Merck's knowledge will have changed over the five years that Vioxx was on the market. More significantly, however, it would clearly vary from one possible cardiovascular or gastrointestinal condition to the next. While a complex answer might be acceptable were the first variation the only one to consider, and a single enhanced risk at issue, all semblance of commonality is lost, in my view, when the variety of conditions and injuries at issue is considered, and the answer must address the state of Merck's knowledge with respect to each.

Common Issue # 3: Whether Vioxx is defective or unfit for the purpose for which it was intended as designed, developed, fabricated, manufactured, sold, imported, distributed, marketed, or otherwise placed into the stream of commerce in Canada by Merck.

[148] The principal argument of the appellants is that the question of fitness for purpose is essentially individual, since, in relation to pharmaceutical drugs, it is always necessary to weigh relative benefits and risks in light of the particular needs, on the one hand, and susceptibilities, on the other, of the individuals taking the drug.

[149] Were the allegations in this action focused on a single defect, said to make the drug so defective that it should not have been put on the market, this objection would have substantially less weight. This was the nature of the allegation, for example, in *Harrington v. Dow Corning Corp.*, 2000 BCCA 605, where it was alleged that no silicone gel filled breast implants should have been manufactured and distributed, given the inherent dangers in that product. In that case, this question of "generic" fitness was permitted as a common issue.

[150] In the instant case, however, the fact that members of the subclasses, and even within subclasses, raise a wide range of varied and distinct allegations, the common benefit of a question such as that approved in *Harrington* is lost. For example, should the answer to the question, so interpreted, be affirmative in relation to the propensity of Vioxx to cause adverse thrombotic cardiovascular events, that finding would be irrelevant to those claiming adverse gastrointestinal conditions or injuries, or unrelated cardiovascular events or conditions.

[151] Moreover, it is not at all clear, in my view, that this issue can plausibly be interpreted as a question of *generic* unfitness in relation to the propensity

of Vioxx to cause or exacerbate gastrointestinal conditions or injuries, or high blood pressure, for example, for the main complaint in relation to these injuries appears to relate more to a failure of adequate warning than to an inherent and fatal defect in the drug. As I have mentioned, this case, unlike *Harrington*, involves a pharmaceutical drug, which will almost necessarily carry risks of some side effects that must be balanced against its benefits. Even a potentially serious side effect will not necessarily render a drug inherently unfit.

[152] However, even assuming that each of these allegations can be viewed in this way, it is clear that this issue, like the previous ones, is not really one question at all, but a myriad of questions, susceptible to different answers in relation to each of the risks or defects of Vioxx alleged, each of which is relevant to only a portion of the class certified.

[153] Klebuc C.J. said this about common issue # 3 (called "common issue # 2" in his judgment, because he treated the first two issues as one):

> [99] In sum, I am satisfied that all members of the class will have to establish that Vioxx was defective or unfit to a varying degree, regardless of whether his or her claim is founded in the torts of negligence, deceit or battery, or statutory causes pursuant to the *C.P.A.*, or the *Competition Act*, and also that Merck knew or ought to have known that Vioxx was unfit or not acceptable quality. Thus, the determination of Merck's knowledge would move all claims forward in a manner meeting the objectives of [*The Class Actions Act*]. Common issue #2, therefore is approved.

[154] This is a case, in my respectful view, where description of an issue in a general way gives the impression of commonality, where commonality in fact does not exist. While it may be true that each claim depends on

establishing that Vioxx was, in some sense, "defective", the various claims mentioned in this paragraph vary not merely in the *degree* of defectiveness alleged, but in the very nature of the defect alleged.

Common Issues #4 and #5: Whether Vioxx should have been sold on the market or sold with more appropriate warnings and withdrawn sooner than it was, and whether Merck provided adequate warnings with respect to Vioxx's potential side effects and misrepresented Vioxx's safety and efficacy.

[155] Whether these issues are equivalent to the "generic" interpretation of the previous common issue, or raise separate issues as to the nature of Merck's knowledge and communication of the risks posed by Vioxx, the same comments apply. The questions in fact encompass a large number of sub-issues, the answers to which may vary, one from the other, depending on which "potential side effect" is relevant to a particular class member. As before, the answer to a particular sub-issue will not be relevant to the claims of all members of the over-all class.

Common Issue # 6: Whether Merck's conduct relating to the design, testing, manufacturing, marketing, and withdrawal of Vioxx deserves to be rebuked with punitive damages.

[156] Whether punitive damages can be raised as a common issue in class proceedings where the amount of compensatory damages is left to individual determination has been raised in several cases. The problem arises because, in accordance with the test for punitive damages set out in *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 and *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678, punitive damages will

only be awarded if compensatory damages are inadequate to punish the defendant.

[157] In ***Rumley,*** the Supreme Court approved common issues both in relation to whether the defendant was guilty of conduct that justified an award of punitive damages and the amount of such damages to award, if so. McLachlin C.J. commented as follows.

> [34] As noted above, Mackenzie J.A. certified as common not only the standard-of-care issue but also the punitive damages issues. Here, too, I agree with his reasoning. In this case resolving the primary common issue—whether JHS breached a duty of care or fiduciary duty to the complainants—will require the court to assess the knowledge and conduct of those in charge of JHS over a long period of time. This is exactly the kind of fact-finding that will be necessary to determine whether punitive damages are justified…. Clearly, the appropriateness and amount of punitive damages will not always be amenable to determination as a common issue. Here, however, the respondents have limited the possible grounds of liability to systemic negligence—that is, negligence not specific to any one victim but rather to the class of victims as a group. In my view the appropriateness and amount of punitive damages is, in this case, a question amenable to resolution as a common issue: see *Chace* [*v. Crane Canada Inc.* (1996), 26 B.C.L.R. (3d) 339], at para. 30 (certifying punitive damages as a common issue on the grounds that the plaintiffs' negligence claim was "advance[d]…as a general proposition" rather than by reference to conduct specific to any one plaintiff).

[158] In ***Fakhri v. Alfalfa's Canada, Inc.***, 2004 BCCA 549, the Court pointed out that there are two stages in deciding a punitive damages claim: the assessment of whether the defendant's behaviour deserves a punitive response, and the assessment of quantum. In the instant case, the common issue certified relates only to the former question. There are sufficient allegations in the statement of claim, in my view, to support such a claim, although, again, it is open to question whether the claim is identical across the class as a whole.

[159] Nonetheless, whether or not such an issue could be certified as a common issue, in the abstract, it is clear that it could not go forward as the sole common issue to be determined in a class action such as the present one. As the appellants point out, this issue only becomes relevant if Merck is first found liable.

Conclusion in Relation to Common Issues

[160] It is my conclusion that the fragmentation of the class into subclasses, together with the range and diversity of claims asserted by members of the subclasses against the appellant, have together posed an insurmountable challenge to the quest for commonality in relation to the proposed common issues. The result is that each of the first five proposed common issues necessarily encompasses a significant number of sub-issues, none of which is common across the class, and the combination of which renders each of the common issues and its proposed resolution unacceptably complex.

C. Did the learned chambers judge err in holding that a class action would be the preferable procedure for the resolution of the common issues?

[161] In *Hollick,* Chief Justice McLachlin indicated that the concept of preferable procedure was intended to capture two ideas: whether a class action was a fair, efficient and manageable method of advancing the claims of the class members; and whether it was preferable to other procedures such as joinder of actions, test cases and consolidation of actions. This test requires the court to look at the common issues in context and take into account the importance of the common issues in relation to the claim as a whole. The

question of preferability is to be examined through the lens of the three principal advantages of a class action—judicial economy, access to justice, and behaviour modification.

[162] In my respectful view, even if a very liberal notion of "common issue" were adopted, (to admit as a common issue what is in fact a complex array of issues, each common only to a portion of the members of the class as a whole, but none common across the entire class), this very complexity would in this case defeat the requirement that a class action be a fair, efficient and manageable method of advancing the claims of the class members.

[163] The appellants in their factum have described the range of claims sought to be advanced in this action:

> [82] . . .the claims contained within the class of purchasers or ingestors of Vioxx are a sprawling collection of allegations running the gamut from minor gastrointestinal and cardiovascular "conditions" to a more serious list of gastrointestinal and cardiovascular "conditions." In fact, simply compiling a record of the supposed cardiovascular and gastrointestinal ailments asserted by the handful of class members who have filed affidavits in this action produces the following list:
>
> - heart trouble
> - high blood pressure and extreme high blood pressure
> - blood clots
> - stomach pain
> - racing heart
> - sensation of pins and needles in hands
> - dizziness, extreme dizziness and lack of balance
> - strokes
> - chest pain and severe chest pain
> - tightness in the chest

- shortness of breath
- heart attacks
- extreme headaches
- gastrointestinal bleeding
- memory loss
- enhancement of a pre-existing seizure condition

> [83] As a practical matter, this list—even if one accepts the classification of ailments such as "shortness of breath" or "tightness in the chest" as cardiovascular conditions—highlights the absence of common issues in this class. A class member claiming that Vioxx caused him to experience shortness of breath is going to have a very different case—in terms of the nature of the medical evidence that he will need to present, the scope of Merck's knowledge, the content of Merck's disclosures, general medical knowledge—from the case of a class member who claims that Vioxx caused her to experience dizziness, and both cases will vary from the case of a class member who asserts that Vioxx caused her to have high blood pressure.

[164] To this list of claims relating to "injuries" can be added the claim that Merck overcharged for Vioxx on the basis of representations that overstated its protective gastrointestinal qualities relative to other cheaper NSAIDs.

[165] While Klebuc C.J. relied upon the fact that class proceedings in other pharmaceutical cases had been found to be the preferable procedure, in my respectful view, he failed to consider this essential difference between the claims advanced in those cases and the myriad of claims sought to be advanced in this action. It is my view that this action vastly over-reaches what is reasonably manageable in a class action in a fair and efficient way.

D. Multijurisdictional Certification

[166] It is my conclusion, based upon the preceding analysis that the learned certification judge erred in certifying this matter to proceed as a class action.

This conclusion makes it unnecessary to consider whether he also erred in amending the certification order to certify this action as a multijurisdictional class action on an opt-out basis, for that order necessarily falls with the certification order.

VI. Conclusion

[167] It is my conclusion that the learned certification judge erred in finding that the respondents had established an identifiable class, in defining common issues, and in establishing that a class action would be the preferable procedure within the meaning of s. 6 of *The Class Actions Act*. I would allow the appeal and quash the order certifying this action.

DATED at the City of Regina, in the Province of Saskatchewan, this 30th day of March, A.D. 2009.

"SMITH J.A."
SMITH J.A.

I concur "SMITH J.A."
for JACKSON J.A.

I concur "HUNTER J.A."
HUNTER J.A.