COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.,* 2014 BCCA 36

Date: 20140130
Dockets: CA039629; CA039633; CA039636

Docket: CA039629

Between:

Lana Wakelam

Respondent
(Plaintiff)

And

Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.

Appellant
(Defendant)

And

Johnson & Johnson, Johnson & Johnson Inc.,
McNeil Consumer Healthcare Canada, Pfizer Canada Inc.,
Novartis Consumer Health Canada Inc./
Novartis Sante Familiale Canada Inc.,
Trillium Health Care Products Inc.,
Vita Health Products Inc., and Procter & Gamble Inc.

Respondents
(Defendants)

And

The Attorney General of British Columbia
The Attorney General of Canada

Pursuant to the
Constitutional Question Act,
RSBC 1996, C.68

- and -

Docket: CA039633

Between:

Lana Wakelam

Respondent
(Plaintiff)

And

Johnson & Johnson, Johnson & Johnson Inc.,
McNeil Consumer Healthcare Canada, and
Pfizer Canada Inc.

Appellants
(Defendants)

And

Novartis Consumer Health Canada Inc./
Novartis Sante Familiale Canada Inc.,
Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.,
Trillium Health Care Products Inc., and
Vita Health Products Inc., and Procter & Gamble Inc.

Respondents
(Defendants)

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The Attorney General of British Columbia
The Attorney General of Canada

Pursuant to the
Constitutional Question Act,
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- and -

Docket: CA039636

Between:

Lana Wakelam

Respondent
(Plaintiff)

And

Novartis Consumer Health Canada Inc./
Novartis Sante Familiale Canada Inc.

Appellant
(Defendant)

And

Johnson & Johnson, Johnson & Johnson Inc.,
McNeil Consumer Healthcare Canada,
Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.,
Pfizer Canada Inc., Trillium Health Care Products Inc.,
Vita Health Products Inc., and Procter & Gamble Inc.

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Pursuant to the
Constitutional Question Act,
RSBC 1996, C.68

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Garson

On appeal from: An order of the Supreme Court of British Columbia, dated December 22, 2011 (*Wakelam v. Johnson & Johnson*, 2011 BCSC 1765, Vancouver Docket No. S078806).

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Place and Date of Hearing:	Vancouver, British Columbia December 11 and 12, 2013
Written Submissions Received:	January 16 and 23, 2014
Place and Date of Judgment:	Vancouver, British Columbia January 30, 2014

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Frankel

Concurred in by:
The Honourable Madam Justice Garson

Summary:

The plaintiff's class action against manufacturers of children's cold medicines was certified by trial court, and certification order was challenged on appeal. APPEAL ALLOWED.

In late 2008, Health Canada, acting on new studies, decided that cold and cough medicines were not generally effective for children or were unsafe when dosage requirements were not followed. The ministry ordered that they were not to be marketed for children under age six, and required re-labelling to this effect. Manufacturers, including the defendants, duly complied with new labelling rules; but plaintiff claimed that in selling the medicines prior to December 2008, the defendants had engaged in "deceptive acts or practices" under the (provincial) Business Practices and Consumer Protection Act ("BPA") and had made misleading representations to the public contrary to s. 36 of the (federal) Competition Act. These statutes provide private rights of action for persons who suffer loss or damage due to breach of the statute.

In her pleading, the plaintiff sought to marry the (assumed) statutory breaches with restitutionary remedies, seeking the benefits defendants had received from the sale of the medicines between 1997 and 2008. She deposed (but did not plead) that she had bought five bottles of the medicines over a number of years, but did not allege she had given medicine to her child or that the child had suffered any injury. The Court of Appeal held that:

1. *As held by the certification judge, the Food and Drug Act and ss. 171-2 of BPA did not "conflict" in the constitutional sense and accordingly, the second branch of the paramountcy doctrine (based on "frustration" of the purposes of the federal legislation) did not apply to make the BPA inapplicable to this case. The primary purpose of FDA was to protect Canadians' health and safety by regulating food and drugs, and to permit rather than compel the sale of safe products; and this case was more analogous to the Spraytech and Rothmans decisions of the SCC than to Mangat or Lafarge Canada (SCC 2007). Adding further protection by applying the BPA would not frustrate the purpose of the FDA, although it was possible a conflict might arise in future between the two statutes on different facts.*

2. *CA followed Koubi v. Mazda (BCCA) to hold that BPA is an "exhaustive code" regulating consumer transactions and that restitutionary remedies (including waiver of tort, unjust enrichment, disgorgement and constructive trust) sought by plaintiff are not available at law for breach of the BPA. Saskatchewan Wheat Pool applied. With respect to plaintiff's claim for personal damages under s. 171 of the BPA, no causal connection between the (assumed)*

deceptive act or practice and some loss or damage suffered by her had been pleaded, and no material facts that would support such claim had been pleaded. Thus no cause of action for monetary relief under the BPA had been disclosed. However, non-monetary causes referred to in s. 172 of BPA were available, at least in theory.

3. *Similarly, the Competition Act, enacted under the federal criminal law and trade and commerce powers, was a "well-integrated scheme" and s. 36 was not intended to create a "private right of action at large", as stated in General Motors v. City National Leasing (SCC 1989). Section 36 referred to loss or damage suffered by a plaintiff, but did not contemplate the restitutionary remedies sought here. With respect to plaintiff's own damage claim, s. 36 required proof of causation between the loss or damage and the statutory breach, which again had not been pleaded here.*

4. *The "aggregate damage" provisions of the Class Proceedings Act ("CPA"), being procedural in nature (see Pro-Sys v. Microsoft (SCC 2013)), could not provide a cause of action.*

5. *The court below had not erred in principle in finding that plaintiff had complied with s. 4(1)(b) of CPA, even though only one plaintiff had been named in the pleading.*

In the result, only the causes of action arising under s. 172 of the BPA were left in the pleading. Certification order was set aside, but plaintiff was free to seek the re-certification of what remained.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] On December 18, 2008, Health Canada reversed a longstanding policy that had permitted the sale in Canada of certain non-prescription cough and cold medicines for use by children. Manufacturers of such medicines had already voluntarily withdrawn them from the market for use in children under age two, but Health Canada now required them to re-label the medicines to instruct consumers that they should not be used in children under six. As stated by the ministry in a press release at the time:

> Cough and cold medicines have a long history of use in children; however, there is limited evidence supporting the effectiveness of over-the-counter cough and cold medicines in children. This is partly due to the fact that for many years it was assumed that cough and cold medicines worked the same way in children and adults. Therefore, the products for children were approved based on estimations from studies on adults. However, there is a better understanding now of how the ingredients found in cough and cold medicines can behave differently in children than adults.
>
> Reports of misuse, overdose and rare but serious side-effects have also raised concerns about the safety of these products in children. While the link between the adverse events and the products cannot be definitively proven by these reports, they are signs that Health Canada cannot ignore.
>
> . . .
>
> As a result of Health Canada's decision, the labelling of cough and cold medicines for use in children must be changed by fall 2009 to say they should not be used in children less than 6 years of age. These products will also require enhanced labelling for children aged 6 to under 12, child resistant packaging, and the inclusion of dosing devices for all liquid formulations. ...

There is no suggestion that the manufacturers, including the defendants herein, failed to comply with the new labelling rules within the nine months allowed.

[2] Health Canada's decision was the culmination of studies that had been ongoing for some years in connection with various categories of cold and cough medicines in Canada and the U.S. In the late 1980s, Health and Welfare Canada had convened an expert advisory committee to make recommendations regarding the safety, efficacy and labelling of over-the-counter cough and cold medicines. In two reports, the committee had found that the cold medication ingredients and the

antitussives and expectorants included in some of the medicines were generally safe and effective; but in a third report, had made more specific recommendations for dosing children aged two to twelve. In response, Health Canada initiated further study by paediatric experts of issues relating to "safety, efficacy, labelling, availability, and dosage, including the concept of standard paediatric dosing units and dosing by narrower age groups". Ultimately, the decision of December 2008 was taken. (In fairness, I note that the defendants strongly challenge the conclusion that their cold and cough medicines are generally ineffective for children or unsafe in the specified dosages. They have filed various expert reports in support of their position in this proceeding.)

The Statement of Claim

[3] Ms. Wakelam commenced this action by statement of claim filed on June 5, 2008. A copy of the pleading (as subsequently amended) is appended to these reasons. It is remarkable more for what it does *not* assert than for what it does. Although it defines "Class" to mean "all persons resident in British Columbia who purchased Children's Cough Medicine for use by children under the age of six, that was supplied, offered for sale, advertised or promoted by the Defendants between December 24, 1997, to present", Ms. Wakelam does not plead directly that she purchased any of the impugned medications. Instead she asserts that she is a member of the Class. In her supporting affidavit she deposes:

> My son was born on August 12, 2004. He is now four and a half years old.
>
> Over the past three years, in British Columbia and during the Class Period as defined in the Statement of Claim, I have purchased approximately five bottles of cough syrup at Walmart and London Drugs retailers to relieve my son's cough and cold symptoms. Attached as Exhibit "A" to this Affidavit are true laser photocopies of packaging and three of the bottles of cough syrup that I have purchased. [Emphasis added.]

Ms. Wakelam does not say she gave the cough syrup she purchased to her son, nor that (if her son did take any) the cough syrup was not effective, nor that it caused him any injury or harm. Indeed she makes no allegation of physical harm, negligence, or any common law tort (other than intentional interference with

economic relations, which she concedes was rightly struck out by the certification judge) or breach of contract. Nor does she allege any wilful or reckless misconduct by the defendants – although she does seek punitive damages.

[4] The crux of Ms. Wakelam's claims is that in marketing the medicines for use in children under age six, the defendant manufacturers engaged in "deceptive acts or practices" contrary to the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("*BPA*") and made representations to the public that were false or misleading in a material respect, contrary to s. 52 of the *Competition Act*, R.S.C. 1985, c. C-34. Thus the court below summarized her complaint:

> Ms. Wakelam now understands that these cough and cold medicines were ineffective for children between the ages of 2 and 6. They are no longer marketed in Canada for that age group. Buying it, she says, was a waste of money. Moreover, she alleges, as it offered no benefit to balance the risks of taking the medication, it exposed her son to a real and unnecessary risk of harm. Consequently, she asserts, the defendants are all guilty of misrepresentation and nondisclosure. [Para. 2.]

[5] As I understand Ms. Wakelam's case, she hopes to win not just damages or reimbursement for her "waste of money", but the disgorgement of any benefits received by the defendants as a result of their alleged contraventions of the two statutes. Thus she hopes to marry the breaches of statute – which by their terms require that a plaintiff have suffered a loss or damage caused by the breach, and appear to limit recovery to the resulting damages – with "anti-harm" or restitutionary remedies not contemplated by the *BPA* or the *Competition Act*; and to do so by means of a class action.

[6] Ms. Wakelam's application for certification under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ("*CPA*"), came before the judge below in April 2011. He issued his reasons, granting certification on substantially the terms sought, on December 22, 2011. (See 2011 BCSC 1765.) I do not intend to summarize his reasons at this point, partly because this appeal turns in large measure on the release, subsequent to December 2011, of decisions of the Supreme Court of Canada and of this court which in the defendants' submission have changed or

clarified the law. In addition, the various issues raised on the appeal are better approached separately, such that it will be more helpful to describe the judge's findings as part of the discrete analysis of each issue.

[7] The defendants in their factum framed their grounds of appeal as relating to the overall question of preferability under the *CPA*. In their oral submissions, however, they approached the issues somewhat differently. In my view, the issues raised may best be stated as follows:

> 1. Did the certification judge err in finding that the *BPA* (in particular ss. 171 and 172 thereof) is not inconsistent with the relevant provisions of the *Food and Drugs Act*, R.S.C. 1985, c. F-27 ("*FDA*"), such that the doctrine of paramountcy does not apply to make the *BPA* inoperative in this case?
>
> 2. Did the certification judge err in finding that Ms. Wakelam's pleading discloses a cause of action consisting of a breach of the *BPA* for which a court might grant:
>
> > i. a restitutionary award;
> >
> > ii. injunctive relief restraining the defendants from engaging in deceptive acts or practices as defined in the *BPA*;
> >
> > iii. a declaration that the acts or practices engaged in by the defendants contravened the *BPA*; or
> >
> > iv. an order requiring the defendants to advertise the court's judgment or declaration?
>
> 3. Did the certification judge err in finding that the pleading discloses a cause of action consisting of a breach of the *Competition Act* for which a court might grant a restitutionary remedy?
>
> 4. Did the certification judge err in finding that ss. 29-30 of the *CPA* may provide the plaintiff with a cause of action for "aggregate damages"?

> 5. Did the certification judge err in finding that an "identifiable class of 2 or more persons" existed as required by s. 4(1)(b) of the *CPA*?

[8] The Supreme Court of Canada has not to date commented at length on the standards of review to be applied by appellate courts under class action legislation. Obviously, while the court "must" certify an action that meets the requirements in s. 4(1) of the *CPA*, the overall question of preferability involves considerable discretion and the decisions of certification judges are to be accorded deference. However, item 1 above, the paramountcy question, is obviously one of law to be reviewed on a correctness standard. The same is true of whether the causes of action referred to in items 2, 3 and 4 are available at law to Ms. Wakelam. (See *Koubi v. Mazda Canada Inc.* 2012 BCCA 310, at para. 15, and *Hyrniak v. Mauldin* 2014 SCC 7, at para. 84.) These questions stood to be decided on the *Hunt v. Carey* 'test' (see [1990] 2 S.C.R. 959) that normally applies to the striking-out of pleadings for failure to disclose a cause of action – i.e., whether it was "plain and obvious" the cause could not succeed or had "no reasonable prospect of success": see *R. v. Imperial Tobacco Canada Ltd.* 2011 SCC 42 at para. 1. This is determined by reference to the statement of claim alone, and on the assumption that what is pleaded is true. The fact that the case is a weak one, or raises a novel point requiring investigation, is not enough to strike it: see *Minnes v. Minnes* (1962) 39 W.W.R. 112 (B.C.C.A.) at 122, cited with approval in *Hunt v. Carey* at 978-9.

[9] The final issue, regarding compliance with s. 4(1)(b) of the *CPA* – which requires an "identifiable class of 2 or more persons" – appears to involve some discretion as well as law and fact. Canadian appellate courts have differed on what standard of review applies to it: see *Canada (Attorney General) v. Anderson* 2011 NLCA 82 at para. 38; *Jameson Livestock Ltd. v. Toms Grain & Cattle Co.* 2006 SKCA 20 at paras. 14-18; *Soldier v. Canada (Attorney General)* 2009 MBCA 12 at paras. 22-5. I will proceed on the basis that a higher standard of review is likely applicable, requiring an overriding error of fact or principle before this court may interfere.

Paramountcy

The Certification Judge's Conclusions

[10] The certification judge dealt at paras. 46-64 of his reasons with the question of whether Ms. Wakelam's claims based on an alleged breach of the *BPA* were doomed to fail on what he called "jurisdictional" grounds – i.e., interjurisdictional immunity, paramountcy, or the "regulated conduct doctrine". The defendants took the position that although the *BPA* is constitutionally valid, the *FDA* was intended by Parliament to apply to food and drugs sold in Canada and to apply *exclusively*. The judge explained:

> The main thrust of the defendants' argument is that Health Canada is provided with the sole authority in this country to regulate packaging and labelling and to prosecute consumer deception involving drugs such as the medicines. The declaratory and injunctive relief sought by the plaintiff would require the court to usurp the function of Health Canada in directing the defendants as to how they may label, market and advertise their products, and how they ought to have done so. Thus, assert the defendants, to allow the [*BPA*] to have the effect sought would result in a quick descent from the expert national regulation of medicines by Health Canada into a morass of episodic, inconsistent and *ad hoc* local regulation by individual judges by whom the different consumer claims are scrutinized. This would, they argue, supersede and frustrate the federal regulatory scheme by which the defendants had governed their actions. Moreover, it would put them in a position where compliance with federal regulatory requirements exposes them to liability under provincial legislation. These are results, they say, that the constitutional principles of interjurisdictional immunity and paramountcy are intended to avoid. [At para. 48; emphasis added.]

[11] The judge accepted that the subject matter of the plaintiff's claim had a double aspect such that the provincial and federal jurisdictions overlap – the provincial government's jurisdiction over property and civil rights and the federal government's criminal law power, which has been held to authorize legislation that prohibits or regulates the manufacture, labelling and marketing of pharmaceuticals. Given this overlap, the certification judge observed, the preferred constitutional analysis was that of paramountcy rather than interjurisdictional immunity. (Para. 53.) None of this is challenged on this appeal –

although as will be seen below, the *FDA* has been held to fall under the federal trade and commerce power as well as under criminal law.

[12] The judge noted the two "forms of conflict" between federal and provincial laws which may now lead to the application of paramountcy – an "operational conflict ... where one enactment says 'yes' and the other says 'no', such that 'compliance with one is defiance of the other'" (see *Multiple Access Ltd. v. McCutcheon* [1982] 2 S.C.R. 161 at 191); or where dual compliance is possible but the provincial law is incompatible with the *purposes* of the federal law. (See *Law Society of British Columbia v. Mangat* 2001 SCC 67 and *Rothmans, Benson & Hedges Inc. v. Saskatchewan* 2005 SCC 13 at para. 14, both discussed in *Quebec (Attorney General) v. Canadian Owners and Pilots Association* 2010 SCC 39 at paras. 62-74.)

[13] The certification judge stated that both types of conflict were raised in this case, but that as in *Jim Pattison Enterprises Ltd. v. British Columbia (Workers' Compensation Board)* 2011 BCCA 35, neither succeeded as a matter of law. (Para. 57.) First, he noted, the *FDA* and regulations thereto did not *compel* the defendants to market the medicines as safe and effective for children between ages two and six; rather it *permitted* them to do so – even though there was some controversy over the issue and Health Canada recognized that further study was required. (Para. 59.) If it could be shown that the defendants had engaged in deceptive practices, he saw nothing in the *FDA* regulatory scheme that purported to insulate manufacturers from "answering to consumers for that conduct". He added:

> In all of the circumstances, the defendants' answer may well prove to be that the plaintiff's claim must fail *as a matter of fact* for the same reasons that led Health Canada in 1990 to authorize them to continue marketing the medicines. Compliance is not, however, an answer *in law* to anything other than a criminal charge under the *Food and Drugs Act*. Conduct that avoids exposure to criminal prosecution has never guaranteed freedom from civil liability; nor can it be said that compliance with the federal regulations necessarily constituted defiance of the provincial legislation. [At para. 60.]

[14] As for the argument based on frustration of the purpose of the *FDA*, the Court observed that if the defendants were found to have misrepresented the safety or effectiveness of their products despite complying with all of Health Canada's requirements, Canadians would not be exposed to drugs that had not been reviewed and approved by Health Canada, nor would approved drugs be removed from the market. The federal power would be "left untrammelled". The application of the *BPA* to the medicines in issue would simply add "an additional layer of protection for the consumer by telling the marketers and manufacturers of drugs that compliance with all that Health Canada requires may not be enough, though difficulties of proof may abound." (Para. 61.)

[15] In the result, the judge ruled that as a matter of law, the doctrine of paramountcy was not engaged and that there was no constitutional basis for concluding that Ms. Wakelam's claim under the *BPA* was bound to fail. He added that the same logic applied to the "regulated conduct" defence, which he dealt with in greater detail in connection with the plaintiff's claim under the *Competition Act*, where it was principally advanced. (At para. 101; see para. 76 below.)

On Appeal

[16] In this court, the defendants do not challenge the finding that no operational conflict exists between the *BPA* and the *FDA*. They rely on the second branch of the paramountcy doctrine, submitting that the purposes of the *FDA* would be frustrated if the *BPA* were to apply to the packaging, labelling and sale of the medicines in question.

[17] On this branch (which finds its genesis in *Bank of Montreal v. Hall* [1990] 1 S.C.R. 121), the Supreme Court's decision in *Canadian Owners and Pilots*, *supra*, provides a good starting point for analysis. Chief Justice McLachlin there stated:

> … To determine whether the impugned legislation frustrates a federal purpose, it is necessary to consider the regulatory framework that governs the decision to establish an aerodrome. The party seeking to invoke the doctrine of federal paramountcy bears the burden of proof: *Lafarge*

> *Canada*, at para. 77. That party must prove that the impugned legislation frustrates the purpose of a federal enactment. To do so, it must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose. The standard for invalidating provincial legislation on the basis of frustration of federal purpose is high; permissive federal legislation, without more, will not establish that a federal purpose is frustrated when provincial legislation restricts the scope of the federal permission: see *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241. [At para. 66; emphasis added.]

[18] The Chief Justice went on at para. 69 to illustrate the distinction between a federal purpose sufficient to attract the doctrine of paramountcy on the one hand, and the "absence of specific purpose" on the other, by reference to *114957 Canada Ltée v. Hudson (Town)* 2001 SCC 40 ("*Spraytech*"), and *Mangat*. In *Spraytech*, she noted, the federal pesticide legislation in question had been *permissive*, allowing the manufacture and use of pesticides regulated under the legislation. At issue was the applicability of a municipal bylaw which *prohibited* the use of pesticides in the municipality even though they were permitted under the federal scheme. The Court reasoned that:

> In this case, there is no barrier to dual compliance with By-law 270 and the *Pesticides Act*, nor any plausible evidence that the legislature intended to preclude municipal regulation of pesticide use. The *Pesticides Act* establishes a permit and licensing system for vendors and commercial applicators of pesticides and thus complements the federal legislation's focus on the products themselves. Along with By-law 270, these laws establish a tri-level regulatory regime. [At para. 40; emphasis added.]

The Court in *Spraytech* also emphasized that a *potential* conflict was not sufficient to invalidate a law – "there must be a real conflict." (At para. 47.) In the result, the "frustration" branch of paramountcy was not engaged and the two laws could co-exist.

[19] In *Mangat*, by contrast, the federal legislation had established the Immigration and Refugee Board for the hearing of immigration appeals. The statute specifically permitted "aliens" to be represented before the Board by barristers or solicitors or "other counsel" for a fee. The *Legal Profession Act* of British Columbia, however, prohibited anyone other than a barrister and solicitor

duly called to the bar from engaging in the practice of law. ("Practice of law" was defined to include appearing as counsel or an advocate for a fee.) The Court found that *both* branches of the paramountcy doctrine were engaged. The Court reasoned as follows:

> In this case, there is an operational conflict as the provincial legislation prohibits non-lawyers to appear for a fee before a tribunal but the federal legislation authorizes non-lawyers to appear as counsel for a fee. At a superficial level, a person who seeks to comply with both enactments can succeed either by becoming a member in good standing of the Law Society of British Columbia or by not charging a fee. Complying with the stricter statute necessarily involves complying with the other statute. However, following the expanded interpretation given in cases like *M & D Farm* and *Bank of Montreal, supra*, dual compliance is impossible. To require "other counsel" to be a member in good standing of the bar of the province or to refuse the payment of a fee would go contrary to Parliament's purpose in enacting ss. 30 and 69(1) of the *Immigration Act*. In those provisions, Parliament provided that aliens could be represented by non-lawyers acting for a fee, and in this respect it was pursuing the legitimate objective of establishing an informal, accessible (in financial, cultural, and linguistic terms), and expeditious process, peculiar to administrative tribunals. Where there is an enabling federal law, the provincial law cannot be contrary to Parliament's purpose. Finally, it would be impossible for a judge or an official of the IRB to comply with both acts. [Para. 72; emphasis added.]

[20] Chief Justice McLachlin in *Canadian Owners and Pilots* described the operation of the second branch of paramountcy in *Mangat* as following from the "express purpose" of the federal legislation – to permit the informal and expeditious determination of claims before the Immigration and Refugee Board. (See *Mangat* at paras. 25-30.) Presumably, it had not been the "purpose" of the federal pesticide legislation in *Spraytech* to ensure that the permitted products could be sold – only to ensure that those products permitted to be sold were safe.

[21] What, then, is the "purpose" of the *FDA*? In *Canadian Owners and Pilots*, the Chief Justice observed that the purpose of a law may be determined by examining intrinsic evidence, such as purposive clauses and the general structure of the Act, as well as extrinsic evidence such as Hansard. (Para. 18.) We were not referred to any excerpts from Hansard regarding the *FDA*, and the Act itself does not provide any statement of general purpose. As far as pharmaceuticals

are concerned, however, the most salient provisions of the *FDA* appear to be ss. 8 and 9, which provide:

> **8.** No person shall sell any drug that
>
> (*a*) was manufactured, prepared, preserved, packaged or stored under unsanitary conditions; or
>
> (*b*) is adulterated.
>
> **9.** (1) No person shall label, package, treat, process, sell or advertise any drug in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.
>
> (2) A drug that is not labelled or packaged as required by, or is labelled or packaged contrary to, the regulations shall be deemed to be labelled or packaged contrary to subsection (1).

Section 31 creates an offence and provides penalties for contraventions of the Act and Regulations.

[22] Part II of the *FDA* permits the Minister to designate inspectors for enforcing the Act; to designate any person as an analyst to carry out analyses required for enforcement purposes; and contemplates the enactment of regulations "for carrying the purposes and provisions of this Act into effect", and in particular regulations respecting:

> > (i) the labelling and packaging and the offering, exposing and advertising for sale of food, drugs, cosmetics and devices,
> >
> > (ii) the size, dimensions, fill and other specifications of packages of food, drugs, cosmetics and devices,
> >
> > (iii) the sale or the conditions of sale of any food, drug, cosmetic or device, and
> >
> > (iv) the use of any substance as an ingredient in any food, drug, cosmetic or device,
>
> to prevent the purchaser or consumer thereof from being deceived or misled in respect of the design, construction, performance, intended use, quantity, character, value, composition, merit or safety thereof, or to prevent injury to the health of the purchaser or consumer…..[s. 30(1)(b)]

[23] The purpose(s) of the *FDA* have been judicially considered in the course of rulings on its constitutional validity. The seminal case is *R. v. Wetmore* [1983]

2 S.C.R. 284, in which the Court was asked to decide whether ss. 8, 9 and 26 (now s. 31) of the *FDA* depended on s. 91(27) of the then *British North America Act* (the criminal power); and if so, whether Parliament could authorize the Attorney General of Canada to prefer indictments and conduct proceedings in respect of alleged violations of the *FDA*. The majority of the Court, *per* Chief Justice Laskin, began its analysis by noting that the *FDA* "goes beyond mere prohibition to bring it solely within s. 91(27) but that it also involves a prescription of standards, including labelling and packaging as well as control of manufacture." He continued:

> The ramifications of the legislation, encompassing food, drugs, cosmetics and devices and the emphasis on marketing standards seem to me to subjoin a trade and commerce aspect beyond mere criminal law alone. There appear to be three categories of provisions in the [*FDA*]. Those that are in s. 8 are aimed at protecting the physical health and safety of the public. Those that are in s. 9 are aimed at marketing and those dealing with controlled drugs in Part III of the Act are aimed at protecting the moral health of the public. One may properly characterize the first and third categories as falling under the criminal law power but the second category certainly invites the application of the trade and commerce power.
>
> However, it is unnecessary to pursue this issue and it has been well understood over many years that protection of food and other products against adulteration and to enforce standards of purity are properly assigned to the criminal law. [At 288-9; emphasis added.]

[24] In a companion case released at the same time as *Wetmore*, *Attorney General (Canada) v. Canadian National Transportation, Ltd.* [1983] 2 S.C.R. 206, the majority confirmed that the Attorney General of Canada could prefer indictments and conduct prosecutions for violations of otherwise valid federal legislation. On this point, the majority endorsed the view expressed by Spence J. in *R. v. Hauser* [1979] 1 S.C.R. 984 that:

> Indeed it is difficult to understand how much of the federal legislative field could be dealt with efficiently by other methods. Much of the legislation in such fields is in essence regulatory and concerns such typically federal matters as trade and commerce, importation and exportation and other like matters. The administration of such fields require decisions of policy and certainly would include the establishment of a policy as to the means of and methods of enforcement. It would be a denial of the basic concept of federalism to permit the provincial authorities to have exclusive control of the enforcement of such legislation and the sole determination as to

> how and when the legislation should be enforced by institution of prosecution or against whom such prosecution should be instituted. [At 1003-4.]

[25] In 1987, in *C.E. Jamieson & Co. (Dominion) v. Canada (Attorney General)* (1987) 46 D.L.R. (4th) 582 (F.C.T.D.), ss. 8, 9 and 26 of the *FDA* were tested again. This time, the plaintiffs argued that although these provisions fell within Parliament's authority to enact criminal law, the Act in fact went "beyond mere prohibition with penal consequences and inter-regulation" and thus beyond Parliament's powers. The Court rejected this argument, reasoning in part:

> Such a contention cannot withstand the force of reasoning in the *Standard Sausage* judgment and the *Kripps Pharmacy* judgment, both carefully considered by the Supreme Court of Canada. The defendants submit that criminal law does not need to be, and has not been, interpreted in such a narrow sense as urged by the plaintiffs. This court agrees with the defendants' submission … that where the "legitimate" purpose – that is, the "pith and substance" – of the legislation is the protection of the public health and safety, supplemented by the suppression of deception and fraud, and not an attempt to protect or to suppress a particular trade or business, it is open to Parliament to legislate on the footing of criminal law.
>
> It is noteworthy, also, that Parliament does not attempt, in this regard, to regulate the prices or quantities of goods. The legislation, including the regulations, is not named at one sector or market for either promotion or derogation of another or others. Further, the regulation of product standards is exacted only insofar as the health and safety of the public are concerned…. When, however, it comes to the manufacturing, labelling and marketing throughout Canada of ingestible substances which, depending on the dosages could be poisonous, capable of altering moods or just plain lethal, it cannot be reasoned that regulation by the Health Protection Branch (HPB), in the protection of public health and safety including informed buying and ingestion, is too heavy a burden for valid criminal law to bear: see *James Richardson & Sons Ltd. v. M.N.R.*, [1983] 1 F.C. 3 ... regarding legislative jurisdiction.
>
> This court finds that the *Food and Drugs Act* in its specific provision, s. 25(1)(o), delegating the power to make regulations, and the general tenor of the impugned regulations, … are supportable pursuant to head 27 of s. 91 of the *Constitution Act, 1987* as criminal law and as legislation necessarily incidental to that criminal law. [At 607-8; emphasis added.]

(*Jamieson* was noted with apparent approval in *Canadian Generic Pharmaceutical Ass'n. v. Canada (Minister of Health)* 2010 FCA 334 at para. 127

(*lve. to app. dism'd* [2011] S.C.C.A. No. 54) and in *Saputo Inc. v. Canada (Attorney General)* 2011 FCA 69 at para. 71.)

[26] It appears, then, that the purpose of the *FDA* insofar as pharmaceuticals are concerned is to protect the health and safety of the public – by testing drugs and authorizing them as safe for use by Canadians; by prohibiting false, misleading or deceptive marketing; and by regulating the labelling and packaging of drugs so that purchasers or consumers will not be deceived or wrongly dosed.

[27] The defendants in the case at bar argue, however, that the statute goes farther and endeavours to "effect a balance between the duty to protect Canadians from unsafe drugs and the need to ensure access to safe and effective new drugs." In support, they cite *Glaxo Canada Inc. v. Canada (Minister of National Health and Welfare)* [1988] 1 F.C. 422 (T.D.). It concerned a ministerial decision to approve the marketing of a new drug in Canada. In the course of its reasons, the Court said this:

> The legislative scheme set out in the *Food and Drug Act* and the Regulations provides a mechanism whereby the safety and efficacy of a new drug on the Canadian market is assessed and monitored. The Regulations contemplate a process in which the manufacturer of a new drug acquires the right to sell or advertise that drug for sale only when the Minister is satisfied that the claims made by the manufacturer for the drug are substantiated. The Minister signifies his satisfaction by issuing a notice of compliance. The Minister's decision to issue such a notice is discretionary. In exercising his discretion, the Minister weighs the benefit of the drug against the foreseeable risk of adverse reaction to it. … The Minister's determination is one made in contemplation of public health and represents the implementation of social and economic policy. [At para. 38; emphasis added.]

[28] Similar observations were made in *Canadian Generic*, *supra*, where the Federal Court of Appeal observed:

> It cannot be disputed that a prohibition without any exceptions would certainly protect the public from unsafe drugs. However, that effort would be self-defeating in that no new drug would ever enter the market. Hence, public health and safety would suffer because efforts to discover and market new drugs would not materialize. Consequently, an exception was created so as to counter the negative effects of a total ban on new drugs whereby under the exception, drug manufacturers are permitted to

> demonstrate to the Minister that their new drug is safe and effective by submitting a [New Drug Submission] or an [Abbreviated New Drug Submission]. In other words, the Government has attempted to balance its duty to protect Canadians from unsafe drugs and its duty to provide Canadians with safe and effective new drugs. [Para. 105.]

[29] From this, the defendants submit that the purpose of the *FDA* is not only to protect Canadians from unsafe or ineffective drugs, but also to *promote* Canadians' access to beneficial drugs. On this view, the regulatory regime established under the *FDA* is not merely permissive, but prescriptive: Health Canada decides by means of appropriate testing and consulting what new drugs are safe and appropriate for what purposes, on what terms they may be marketed, to whom they may be given, and in what dosages. As *Canadian Generic* suggests, this involves the "balancing" of safety and health considerations. In this sense, it is said, the *FDA* is unlike the federal pesticide legislation in *Spraytech*, in respect of which the only interest of the federal government was to prohibit or regulate rather than to encourage the development and marketing of new products. Indeed, the defendants here suggest that once a product has been found to be beneficial by Health Canada, the ministry has a *duty* to ensure that it is made available to the public.

[30] As well, the defendants note, the scheme established by the *FDA* is a comprehensive one. A single federal "decisional authority" is created to oversee all aspects of drug marketing in Canada by means of a uniform set of laws that apply across the country. This scheme, the defendants say, would be frustrated by the application of provincial legislation. They pose the spectre of a "balkanized" system of drug regulation under which a provincial regulator (or court of law) acting under the *BPA* would become the arbiter of drug labelling in a particular province, "usurping" Health Canada's decisional role in fostering the marketing of beneficial drugs to all Canadians. In particular, if injunctive relief could be obtained under the *BPA* in respect of the labelling, marketing or sale of pharmaceuticals that have been approved by Health Canada, the court would become a "*de facto* drug regulator in substitution for Health Canada." Thus the statement of the certification judge at para. 61 of his reasons that if the

defendants were found to have misrepresented the effectiveness of their products, "approved drugs" (i.e., approved by Health Canada) would "not be removed from the market", is incorrect. (See para. 14 above.) The sale of products thought to be beneficial by Health Canada could be enjoined in a particular province, denying the benefit thereof to some Canadians.

[31] Finally, the defendants point to *British Columbia (Attorney General) v. Lafarge Canada Inc.* 2007 SCC 23, one of the few cases in which paramountcy has been applied to resolve an inconsistency between federal and provincial laws. In *Lafarge*, the contest was between the Vancouver Port Authority, a federal undertaking created under the *Canada Marine Act*, and a municipal bylaw. On its face, the bylaw required that a project proposed by the Port Authority comply with municipal requirements relating to the issuance of development permits. These included a 30-foot height restriction and various requirements regarding noise and pollution that would be created by normal port activities. The plaintiffs sought to have the bylaw enforced in respect of the project. They contended that since the Port Authority could comply with both laws, no conflict arose between the two.

[32] The Supreme Court disagreed. It held that there was a conflict between the federal legislation and the municipal bylaw, which conflict was "easily resolved" on the basis of federal paramountcy. (Para. 4.) In the Court's analysis:

> (i) The Existence of an Operational Conflict
>
> Operational conflict is present here. Reference has already been made to the City's 30-foot height restriction. The record confirms other areas of conflict in respect of noise and pollution from the offloading activity and the subsequent loading of the aggregates.
>
> If the Ratepayers had succeeded in persuading the City to seek an injunction to stop the Lafarge project from going ahead without a city permit, the judge could not have given effect both to the federal law (which would have led to a dismissal of the application) and the municipal law (which would have led to the granting of an injunction). That is an operational conflict, as held in *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961.
>
> (ii) Frustration of Federal Legislative Purpose
>
> Such an application of the relevant municipal standards would frustrate the federal purpose. Although the VPA should seek to cooperate with the

> municipalities of the Greater Vancouver area, it retains the final say in respect of all matters falling within valid federal jurisdiction, in case of conflict.
>
> Assistance can be drawn from *Mangat* where provincial legislation prohibited non-lawyers from appearing for a fee before a tribunal, but the federal legislation authorized non-lawyers to appear as counsel for a fee. *Mangat* confirms that the second prong of the test should not be interpreted as a return to the doctrine of the "occupied field". Rather it intends to capture those instances where it might be possible to comply with the letter of both laws, but where such compliance would frustrate the purpose intended by Parliament. In *Mangat*, it was argued that both enactments could be complied with, if would-be advocates either became a member in good standing of the Law Society of British Columbia or refrained from charging a fee. However, Gonthier J. held at para. 72 that "[t]o require 'other counsel' to be a member in good standing of the bar of the province or to refuse the payment of a fee would go contrary to Parliament's purpose in enacting ss. 30 and 69(1) of the *Immigration Act*.... Where there is an enabling federal law, the provincial law cannot be contrary to Parliament's purpose." Here, the *CMA* has authorized the VPA to make its decision about the project and has enabled Lafarge to proceed on the basis of that authorization. [At paras. 81-4; emphasis added.]

[33] The defendants argue that similarly here, Parliament has authorized (or "enabled") Health Canada to act as the decision-maker concerning what drugs should and should not be marketed in Canada. The interposition of a court or other provincial authority acting under the *BPA* would restrict both the manufacturer's right to market, and the public's right of access to, the drug in question. In the alternative, they contend that this issue should be left for trial when the underlying facts are known and the effect of remedies that might be granted under the *BPA* can be assessed.

[34] The plaintiff characterizes the defendants' argument as "clearly designed to avoid the need to demonstrate any actual incompatibility between the federal and provincial legislative provisions by suggesting that the federal regime is meant to be exclusive and exhaustive and that therefore the mere application of any provincial law to the subject matter would be inconsistent with the purpose of the legislative scheme." She submits that the "trigger" for paramountcy always depends on whether the "actual effects" of the provincial legislation are incompatible with the federal legislation. On this point, counsel cites this court's observation in *Jim Pattison Enterprises*, *supra*, that paramountcy is "now triggered

only ‘when the operational effects of provincial legislation are incompatible with federal legislation’”. (At para. 138, citing in turn *Canadian Western Bank v. Alberta* 2007 SCC 22, at para. 69.) The majority in *Pattison* continued:

> This clarification of the "frustration of federal purpose test" suggests that the critical factor in determining if the doctrine is engaged is the identification of an operational conflict. … In order to succeed, it must be shown either "that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law" …. [At para. 138.]

[35] The Court’s reference in *Pattison* to “operational effects”, however, is not restricted to situations in which compliance with one law necessarily entails disobedience to the other. The Supreme Court in *Canadian Western Bank* acknowledged that in some instances, an obligation to comply with provincial legislation would “in effect frustrate the purpose of a federal law even though it did not entail a direct violation of the federal law's provisions.” In *Bank of Montreal v. Hall* itself, for example, the Court ruled that a chartered bank seeking to enforce certain security under the *Bank Act* could not be required to comply with an additional condition imposed by the Saskatchewan *Limitation of Civil Rights Act*. Speaking for the Court, La Forest J. reasoned:

> … as we have seen, dual compliance will be impossible when application of the provincial statute can fairly be said to frustrate Parliament's legislative purpose. In this instance, as I have already noted, Parliament's legislative purpose in defining the unique security interest created by ss. 178 and 179 of the *Bank Act* was manifestly that of creating a security interest susceptible of uniform enforcement by the banks nationwide, that is to say a lending regime *sui generis* in which, to borrow the phrase of Muldoon J. in *Canadian Imperial Bank of Commerce v. R.* [(1984) 52 C.B.R. 145 (F.C.T.D.)], the "bank obtains and may assert its right to the goods and their proceeds against the world, except as only Parliament itself may reduce or modify those rights" …. This, of course, is merely another way of saying that Parliament, in its wisdom, wished to guard against creating a lending regime whereby the rights of the banks would be made to depend solely on provincial legislation governing the realization and enforcement of security interests.
>
> …
>
> … the determination that there is no repugnancy cannot be made to rest on the sole consideration that, at the end of the day, the bank might very well be able to realize on its security if it defers to the provisions of the

> provincial legislation. A showing that conflict can be avoided if a provincial Act is followed to the exclusion of a federal Act can hardly be determinative of the question whether the provincial and federal acts are in conflict, and, hence, repugnant. That conclusion, in my view, would simply beg the question. The focus of the inquiry, rather, must be on the broader question whether operation of the provincial Act is compatible with the federal legislative purpose. Absent this compatibility, dual compliance is impossible. Such is the case here. The two statutes differ to such a degree in the approach taken to the problem of realization that the provincial cannot substitute for the federal.
>
> I have dealt with this case on the basis of paramountcy to meet the arguments put forward by counsel. But the issue can, I think, be answered more directly. At the end of the day, I agree with counsel for the Attorney General of Canada that this is simply a case where Parliament, under its power to regulate banking, has enacted a complete code that at once defines and provides for the realization of a security interest. There is no room left for the operation of the provincial legislation and that legislation should, accordingly, be construed as inapplicable to the extent that it trenches on valid federal banking legislation. [At 154-5.]

(See also *Husky Oil Operations Ltd. v. Minister of National Revenue* [1995] 3 S.C.R. 453 at paras. 65-79, where the Court ruled that allowing provincial laws relating to set-off to apply in a bankruptcy context would 'balkanize' the "scheme of bankruptcy priorities across the country".)

[36] The Court in *Canadian Western Bank* went on to endorse a narrow interpretation of "incompatibility" and to observe that the mere existence of a "duplication of norms" at the federal and provincial levels does not itself constitute a degree of conflict capable of triggering paramountcy. Moreover, a provincial law might in principle "add requirements that supplement the requirements of federal legislation" (citing *Spraytech* as an example). In both cases, the Court observed, "the laws can apply concurrently, and citizens can comply with either of them without violating the other." (Para. 72.)

[37] In *Canadian Western Bank* itself, a provincial law requiring a licence for the promotion of insurance in Alberta was held *not* to be inconsistent with provisions of the *Bank Act* that authorized banks to promote various types of insurance. The majority rejected the contention that the case was analogous to *Mangat*, and continued:

> Here, as in *Rothmans*, the federal legislation is permissive. Section 416(1) provides that "[a] bank shall not undertake the business of insurance *except to the extent permitted* by this Act or the regulations". This formulation bears some similarity to the law under consideration in *Spraytech* which held the federal law controlling pesticides to be "permissive, rather than exhaustive" (para. 35). Parliament did not intend to fully regulate pesticide use, nor was its purpose to authorize their use. The federal pesticide legislation itself envisioned the existence of complementary municipal by-laws; see paras. 40 and 42. Similarly, the federal legislation at issue in this case, while permitting the banks to promote authorized insurance, contains references that assume the relevant provincial law to be applicable. Section 7(2) of the [Regulations] reads:
>
> > 7 (2) Notwithstanding subsection (1) and section 6, a bank may exclude from a promotion referred to in paragraph (1)(e) or 6(b) persons
> >
> > > (a) in respect of whom the promotion would contravene an Act of Parliament *or of the legislature of a province* ...
>
> …
>
> These reasons focus, as did those of Hunt J.A., on the banks' arguments on paramountcy related to the provincial requirement of licences and the alleged conflict in the definition of agent. Other more specific conflicts were argued before the trial judge, and rejected by him. Those objections were not carried forward in the Court of Appeal or this Court. Should an issue arise in future with respect to a conflict not dealt with here or in the reasons of the courts below, it would, of course, be open to the banks to pursue a paramountcy argument on the basis of the facts as they may then appear. [At paras. 103 and 109; emphasis by underlining added.]

[38] The majority also warned against giving "too broad a scope" to *Bank of Montreal*, *Mangat* and *Rothmans*, and against confusing the second branch of the paramountcy doctrine with the "occupied field" test of constitutional *vires* rejected in *O'Grady v. Sparling* [1960] S.C.R. 804. (At para. 75; see also the discussion in Peter W. Hogg, *Constitutional Law of Canada* (2005 looseleaf) at § 16.4.) As Professor Hogg notes, it is difficult to distinguish between cases where the provincial law frustrates the purpose of a federal law and those in which the imputation that the federal law intended to cover the field or foreclose supplementary provincial law is rejected. He concludes on this point that the court must "make a judgment" bearing in mind the compatibility of the provincial law not

only with the literal requirements of the federal law, but also with the purpose of the federal law. (At 16-14.)

[39] The certification judge in the case at bar ruled that the effect of applying the *BPA* in this case would simply be to add an "additional layer of protection" for the consumer. This is what had occurred in *Spraytech* and in *Rothmans*, where the Court observed that because the criminal law power is "essentially prohibitory in character", statutory provisions enacted under it (such as s. 30 of the *Tobacco Act* in *Rothmans*) do not usually create "freestanding rights" that limit the ability of provinces to legislate in the area more strictly than Parliament. (At para. 19.) Thus in the case at bar, if the primary purpose of the *FDA* is to protect Canadians against unsafe or ineffective drugs, it is difficult to argue that that purpose would be frustrated by a provincial law providing *additional* protection.

[40] The notion of valid federal laws co-existing with more restrictive provincial laws did not save the provincial legislation in *Lafarge* or *Mangat*. The federal legislation in those instances was regarded as "enabling" or having a "specific purpose" inconsistent with the provincial law. *Lafarge* of course involved a federal undertaking in connection with which the "final decisional authority" rested with the Port Authority. Arguably in *this* case, the "final decisional authority" for the marketing of pharmaceuticals is intended to rest with Health Canada, which commands considerable expertise in assessing drugs. On the other hand, *Spraytech* and *Rothmans* indicate that a federal law that creates a permit and licensing system will not be frustrated by a provincial or municipal law that imposes "parallel regulation of one aspect of the same activity". Indeed the Court at para. 38 of *Spraytech* seemed to approve a very narrow view of paramountcy said to have been formulated in *British Columbia Lottery Corp. v. Vancouver (City)* (1999) 169 D.L.R. (4th) 141 (B.C.C.A.) to the effect that "A true and outright conflict can only be said to arise when one enactment compels what the other forbids." (At 147-8). (With respect, I note that this court acknowledged at para. 14 that paramountcy was a "misnomer" in *Lottery Corp*. and that it was referring more properly to legislative conflict.) In the case at bar, of course, the *FDA* does

not *compel* the defendants to market their medicines; it only *permits* them to do so under specific conditions.

[41] I share the concerns raised by the defendants concerning the possibility of different (provincial) laws applying across Canada to the labelling and marketing of drugs, and of beneficial drugs being denied to some Canadians as a consequence. However, it seems to me that the case at bar is more analogous to *Spraytech* and *Rothmans* than it is to *Mangat* or *Lafarge*. Like the *Tobacco Act* discussed in *Rothmans*, the *FDA* is rooted in the criminal law and trade and commerce powers. Its primary purpose is to protect public health and safety by monitoring and regulating the marketing, advertisement and labelling of drugs, rather than to *compel* the marketing of drugs that are judged to be safe and beneficial. As such, even though Health Canada aims in a general sense to improve the health of Canadians, the *FDA* is primarily permissive. It does not "enable", or create a specific (or in counsel's word, positive) right in a manufacturer or in a consumer in the same way, for example, as *Mangat* created a specific right for non-lawyers to advocate before the Refugee Board.

[42] The case law reviewed above indicates that the doctrine of paramountcy is to be applied only in rare cases and that otherwise valid legislation is to be upheld if at all possible. Given all of the foregoing, I am not persuaded that the application of the *BPA* (and specifically ss. 171-2, discussed in detail below) to the marketing and sale of cold medicines would necessarily 'frustrate' the purposes of the *FDA*. I conclude that the certification judge did not err in rejecting the defendants' paramountcy argument that the *BPA* should be "rendered inoperative" (see Hogg, at § 16.06) in this context.

[43] Having said this, I do not foreclose an inconsistency arising, at a future time and on different facts, between the *FDA* and *BPA*. At present, however, no "real conflict" (see *Spraytech* at para. 41) has in my view been demonstrated.

Common Law Tort

[44] I turn next to the question of whether the plaintiff's statement of claim in the case at bar discloses a cause, or causes, of action. As mentioned above, the only common law wrong alleged by Ms. Wakelam was the tort of unlawful interference with economic relations. The certification judge struck out that allegation because there was no assertion of a trade or business relationship between the plaintiff and a third party, with which the defendants were alleged to have interfered by unlawful means. In his words, this fundamental element of the tort was "nowhere to be found" and could not be supported by any of the material facts alleged. (Para. 106.) His order striking out this tort as bound to fail was not challenged on appeal.

Cause(s) of Action Under BPA?

[45] In general terms, Ms. Wakelam's claim under the *BPA* is that the defendants engaged in numerous deceptive acts or practices in supplying, soliciting, offering, advertising and promoting the impugned medicines, and in particular that:

> i. In every consumer transaction in which the Class purchased Children's Cough Medicine, the Defendants represented that Children's Cough Medicine provides effective relief from cough symptoms when in fact the Children's Cough Medicine was not effective in children under the age of six;
>
> ii. the Defendants failed to disclose the material fact that Children's Cough medicine is not effective for children under the age of six; and
>
> iii. the Defendants failed to disclose the material fact that Children's Cough Medicine can be dangerous when it is used by children under the age of six.

[46] The plaintiff asserts that the alleged representations and omissions "had the capability, tendency or effect" of deceiving or misleading the plaintiff Class and therefore constituted deceptive acts or practices as defined by ss. 4-5 of the *BPA*:

> "**deceptive act or practice"** means, in relation to a consumer transaction,
>
> > (a) an oral, written, visual, descriptive or other representation by a supplier, or
> >
> > (b) any conduct by a supplier
>
> that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor; ...
>
> 5 (1) A supplier must not commit or engage in a deceptive act or practice in respect of a consumer transaction.
>
> (2) If it is alleged that a supplier committed or engaged in a deceptive act or practice, the burden of proof that the deceptive act or practice was not committed or engaged in is on the supplier.

The plaintiff also invokes ss. 171 and 172 of the *BPA*, which provide in material part:

> 171 (1) Subject to subsection (2), if a person, other than a person referred to in paragraphs (a) to (e), has suffered damage or loss due to a contravention of this Act or the regulations, the person who suffered damage or loss may bring an action against a
>
> > (a) supplier,
> >
> > …
>
> who engaged in or acquiesced in the contravention that caused the damage or loss.
>
> …
>
> 172 (1) The director or a person other than a supplier, whether or not the person bringing the action has a special interest or any interest under this Act or is affected by a consumer transaction that gives rise to the action, may bring an action in Supreme Court for one or both of the following:
>
> > (a) a declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction contravenes this Act or the regulations;
> >
> > (b) an interim or permanent injunction restraining a supplier from contravening this Act or the regulations.
>
> …
>
> (3) If the court grants relief under subsection (1), the court may order one or more of the following:
>
> > (a) that the supplier restore to any person any money or other property or thing, in which the person has an interest, that may have been acquired because of a contravention of this Act or the regulations;

> (b) if the action is brought by the director, that the supplier pay to the director the actual costs, or a reasonable proportion of the costs, of the inspection of the supplier conducted under this Act;
>
> (c) that the supplier advertise to the public in a manner that will assure prompt and reasonable communication to consumers, and on terms or conditions that the court considers reasonable, particulars of any judgment, declaration, order or injunction granted against the supplier under this section. [Emphasis added.]

[47] Ms. Wakelam seeks a declaration under s. 172(1)(a) that the alleged representations and omissions were deceptive acts or practices; injunctive relief under s. 172(1)(b) restraining the defendants from engaging in such acts or practices; an order under s. 172(3)(c) requiring them to advertise the particulars of any judgment; and an order under s. 172(3)(a) that they refund all sums paid by the Class to purchase the impugned medicines or disgorge all revenues which they "made on account of Children's Cough Medicine purchased by the Class, together with any further relief which may be available under the [*BPA*]."

[48] The pleading (a copy of which is appended to these reasons) goes on to state at para. 28 a legal conclusion that should not appear in a statement of claim:

> It is unnecessary for the Plaintiff or any member of the Class to prove that the Defendants' deceptive acts or practices caused such persons to purchase the Children's Cough Medicine to make out a claim for relief under sections [sic] 172 of the [*BPA*].

In the alternative, Ms. Wakelam asserts that she and other members of the Class "suffered damages because of the defendants' acts or practices and seek damages pursuant to s. 171 of the [*BPA*]." This statement (also a conclusory one) does not state or refer to the material facts upon which it is based.

The Certification Judge's Reasons

[49] The certification judge began his consideration of the remedies sought by the plaintiff under the *BPA* at para. 84 of his reasons. The defendants submitted that Ms. Wakelam's failure to plead a "causal link" between the alleged contravention of the *BPA* and the remedies she claimed, was fatal to her *BPA* claims. The judge said there was no doubt that both ss. 171(1) and 172(3)(a)

require a "causal relationship between the alleged contravention of the [*BPA*] and the damage claimed by the consumer, or the money acquired by the supplier." (Para. 85.)

[50] He referred to *Singer v. Schering-Plough Canada Inc.* 2010 ONSC 42, where the Court had emphasized:

> … the difference between the question of whether actual reliance is necessary to establish a breach of the statute (here a deceptive act or practice; it is not), and the question of whether reliance on a misrepresentation is necessary to establish the required causal link between breach and loss. [Certification judge, at para. 87.]

The Court in *Singer* had also said this concerning a claim asserted under the *Competition Act*:

> Section 52(1.1) only removes the requirement of proving reliance for the purpose of establishing the contravention of s. 52(1). The separate cause of action, created by s. 36 in Part IV of the *Competition Act*, contains its own requirement that the plaintiff must have suffered loss or damage "*as a result*" of the defendant's conduct contrary to Part VI. It is not enough to plead the conclusory statement that the plaintiff suffered damages as a result of the defendant's conduct. The plaintiff must plead a causal connection between the breach of the statute and his damages. In my view, this can only be done by pleading that the misrepresentation caused him to do something - i.e., that he relied on it to his detriment. [At para. 108; emphasis added.]

[51] In light of *Knight v. Imperial Tobacco Canada Limited* 2005 BCSC 172, however, the certification judge ruled that this reasoning did *not* apply to the *BPA*. *Knight* involved a claim brought under the former *Trade Practice Act*, R.S.B.C. 1996, c. 457 (the "*TPA*"). The plaintiff had pleaded that ss. 18 and 22 of the *TPA* did not require him to prove causation or actual reliance; alternatively, that reliance should be assumed or inferred; and in the final alternative, that he and other class members had acted in reliance on the defendant's misrepresentations to their detriment when purchasing the defendant's products. (Para. 7.)

[52] Although by the time the reasons in *Knight* were issued, the *BPA* had replaced the *TPA*, Satanove J. ruled that neither the substantive provisions of the new statute nor its transitional provisions operated to deprive the plaintiff of the

right to continue his action under the *TPA*. (Para. 21.) She nevertheless considered both s. 18(4) of the *TPA* and s. 172(3) of the *BPA*, observing that:

> As mentioned earlier, the main difference between the [*BPA*] and the *TPA* is in the definition of deceptive act or practice. The [*BPA*] definition states, among other things, that a representation by a supplier that fails to state a material fact is a deceptive act or practice *if the effect is misleading*. Although this revised definition suggests a higher onus of proof with respect to misrepresentation by silence or omission as opposed to misrepresentation by express statement, it does not materially alter the causation requirement in s. 172(3). A restoration order under this section will still be contingent on the supplier's [being] in breach of the statute that resulted in the supplier's acquisition of benefits from the consumer.
>
> None of the cases cited to me specifically considered what needs to be proved in order to obtain a restoration remedy under s. 18(4) of the *TPA* or s. 172(3) of the [*BPA*]. However, I am satisfied on a plain reading of the statutes that the necessary proof of causation under these sections does not mandate proof of reliance on the deceptive act or practice by the individual consumer. [Paras. 32 and 33; emphasis by underlining added.]

With respect to s. 171(1), on the other hand, Satanove J. continued:

> Section 22(1)(a) of the *TPA* and s. 171(1) of the [*BPA*] clearly require a consumer to prove loss or damage suffered by the consumer (as an individual) in reliance upon the alleged deceptive act or practice (*McKay v. CDI Career Development Institutes Ltd.* (1999), 64 B.C.L.R. (3d) 386 (S.C.); *Rushak v. Henneken* (1991), 84 D.L.R. (4th) 87 (B.C.S.C.); and *Robson v. Chrysler Canada Inc.* (2002), 2 B.C.L.R. (4th) 1 (C.A.)).
>
> The plaintiff submits that he can satisfy the onus of proof in s. 22(1)(a) of the *TPA* or s. 171 of the [*BPA*] without the need for individual evidence, by tendering economic and statistical evidence showing that the entire market place was distorted by the defendant's deceptive practice, and that all class members paid too much for a product which did not truthfully exist. In other words, the plaintiff expects to show that all purchasers of the defendant's light cigarettes paid an amount which exceeded the product's true market value (i.e. what purchasers would have paid had they known the truth).
>
> I am not at all convinced that this theory of causation of damages which has had some measure of success in American jurisdictions would succeed in a British Columbia action under the *TPA*, but I am not prepared at the certification stage to pronounce it plain and obvious that it will fail. The cause of action under s. 22(1)(a) and s. 171(1) should be allowed to proceed to trial as framed, and for the purposes of certification I will assume that the plaintiff will not be proving reliance on the alleged deceptive acts and practices of the defendant by individual members of the proposed class. [At paras. 34, 35 and 36; emphasis added.]

[53] On appeal in *Knight*, this court stated that no issue arose as to whether the pleadings disclosed a cause of action: see 2006 BCCA 235 at para. 22. At issue instead were "whether the suit or portions of it [were] appropriate for the trial of common issues." (Para. 20.) The Court ultimately ruled that none of the claims advanced under s. 18 of the *TPA* was amenable to certification as a class action but that several of the claims under the *BPA* had been properly certified. Importantly for purposes of this case, the question of whether the practices alleged were deceptive (which included "capable of deception") could go ahead as a common issue without reference to the circumstances of individual class members. (Para. 26.)

[54] The certification judge in the case at bar noted at para. 90 of his reasons that the Court of Appeal in *Knight* had found no fault with Satanove J.'s reasoning quoted above and that Ms. Wakelam's pleading was "sufficient in terms of the causal links required between the alleged contravention of the [*BPA*] and the remedies sought." Thus in his analysis, the pleadings *did* disclose a "cause of action for breach of the [*BPA*]." (Para. 91.)

On Appeal

[55] As I understand the defendants' argument on appeal, it is that in addition to the *damages* that might be available to her individually under s.171 of the *BPA*, Ms. Wakelam seeks recovery under restitutionary principles (for "unjust enrichment, waiver of tort and constructive trust") premised on breach of the *BPA*. As Mr. Mogerman for the plaintiff put it, she relies on the alleged statutory breach as an "element" (the wrongful act) of the three purported causes of action, but the remedy sought is the restitution or disgorgement of money received by the defendants as a result of the alleged statutory breach, rather than her own damages or losses that are expressly contemplated by the *BPA*.

[56] Claims of this kind have been asserted in class actions in British Columbia before, especially in connection with the controversial creature called "waiver of tort", and have passed the low threshold of the "plain and obvious" test. However,

the defendants point out that in a judgment released after the certification judge's decision in the case at bar, this court in *Koubi v. Mazda*, *supra*, unpacked the ongoing debate regarding waiver of tort from the more fundamental issue of whether a breach of the *BPA* can found the "wrong" for purposes of a claim in unjust enrichment or other restitutionary relief not contemplated by the statute. The Court held that the *BPA* is an "exhaustive code" for the regulation of consumer transactions and that so called "anti-enrichment" claims premised on breach of the *BPA* are *not* available in law.

[57] The facts of *Koubi* were somewhat similar to the facts of this case. The plaintiff complained of a defect in the door locks in certain Mazda vehicles, one of which she had purchased before Mazda Canada announced a program to correct the problem. Her vehicle was not broken into but she became concerned about its security and contacted Mazda Canada about those concerns. Soon after, she was notified that she could have a remedial device installed at her local dealership, which she did in September 2007. Nevertheless, Ms. Koubi initiated a class action on the basis that Mazda Canada's representations as to the quality of its components, including door locks, were "deceptive acts" by a "supplier" contrary to ss. 4 and 5 of the *BPA*. Madam Justice Neilson for this court described her claims:

> While Ms. Koubi's claim states individual owners have suffered damages, such as loss of use of their vehicles and the cost of replacing stolen items or repairing vehicle damage, it does not seek recovery of those losses. Instead, Ms. Koubi claims "restitutionary damages" and "a declaration for the disgorgement of profits earned by the Defendants arising from waiver of tort. She alleges the appellants engaged in a period of "deceptive marketing" because they did not take timely action to notify class members of the defects after learning about the defective locks and instead continued to produce deceptive promotional information about the vehicles. Ms. Koubi claims the class is therefore entitled to restitution for any profits earned by the appellants as a result of knowingly marketing an unfit product for profit. [At para. 10; emphasis added.]

[58] The lower court in *Koubi* certified the claims pursuant to the *CPA*, but this court allowed the appeal, ruling that in respect of the pleadings for restitutionary damages, disgorgement of profits, and waiver of tort, no cause of action was

disclosed. The Court carried out a long and carefully reasoned analysis, focusing first on "waiver of tort". Neilson J.A. described it as follows:

> Waiver of tort is a restitutionary doctrine that permits a plaintiff to recover benefits a defendant has obtained by its wrongdoing instead of damages measured by the plaintiff's loss. In *Serhan v. Johnson & Johnson* (2006), 85 O.R. (3d) 665, 269 D.L.R. (4th) 279 (Div. Ct.), Justice Epstein, writing for the majority, defined the concept as follows at para. 50:
>
> > I start with an explanation of the concept of waiver of tort. Its origin lies in the expression "waiver of tort and suit in *assumpsit*", the latter being the historical antecedent of many modern common law "quasi-contract" restitutionary claims. In invoking waiver of tort, the plaintiff gives up the right to sue in tort and elects to base the claim in restitution, thereby seeking to recoup the benefits the defendant has derived from his wrongful conduct. The practical purpose behind it is that in certain situations, where a wrong has been committed, it may be to the plaintiff's advantage to seek recovery of an unjust enrichment accruing to the defendant rather than normal tort damages.
>
> The advantage to which she refers has been embraced in class actions and the doctrine has experienced a resurgence in that context, since it may be used to present damages as a common issue based on benefits obtained by the defendant through its wrongful conduct, thereby avoiding individual proof of loss by each class member. [At paras. 16-17; emphasis added.]

[59] The Court reviewed the ongoing judicial and academic debate as to whether waiver of tort is an "independent" cause of action or merely "parasitic" in the sense that it provides an alternative remedy once the plaintiff has established an actionable wrong. (Paras. 27-39.) Neilson J.A. concluded that the law on this point was unsettled and that accordingly, the court below had not erred in ruling that the claim was not bound to fail (see para. 40; but cf. para. 121 of *Arora v. Whirlpool Canada LP* 2013 ONCA 657, released after *Koubi*.)

[60] Neilson J.A. then turned to the distinct issue of whether statutory breaches (in *Koubi*, of the *BPA* and *Sale of Goods Act*) may provide the "predicate wrongdoing" for claims "beyond the realm of tort." In her analysis:

> Waiver of tort is historically rooted in "proprietary" torts as opposed to "personal" torts such as assault and battery, as the latter do not typically enrich the defendant: Maddaugh and McCamus at 24-9. That delineation

> retains some currency in the authorities that recognize a distinction between "anti-enrichment" and "anti-harm" torts: *Reid, Strata Plan LMS 3851, Infineon*.
>
> The proliferation of wrongful acts that have been certified as a potential foundation for waiver of tort, however, weaken the usefulness of these traditional guidelines. These include not only "anti-harm" torts such as negligence and nuisance, but claims beyond the realm of tort, such as breach of contract (*Anderson v. Bell Mobility*, 2010 NWTSC 65; *Griffin*) and breaches of the *Competition Act* (*Infineon*, *Steele*), the *SGA* (*Griffin*) and the [*BPA*] (*Wakelam v. Johnson & Johnson*, 2011 BCSC 1765). As Perell J. observed in *Haddad* at para. 41, while the defendant must have done something wrong, there is great uncertainty as to the scope of the wrongdoing that will support a claim for waiver of tort.
>
> Unfortunately, little express analysis has accompanied this expansion. It appears to be generally rooted in doctrinal uncertainty and the resulting difficulty of finding it is "plain and obvious" that these novel claims will not succeed… [At paras. 42-44; emphasis added.]

[61] She took as her starting point the seminal case of *R. v. Saskatchewan Wheat Pool* [1983] 1 S.C.R. 205, where the Court rejected the English position under which a new nominate tort of statutory breach had emerged (see *London Passenger Transport Board v. Upson* [1949] 1 All E.R. 60 (H.L.)), and ruled that in Canada, such a breach should in general be regarded only as *evidence* of negligence. Thus Dickson J. (as he then was) stated for the Court:

> The use of breach of statute as evidence of negligence as opposed to recognition of a nominate tort of statutory breach is, as Professor Fleming has put it, more intellectually acceptable. It avoids, to a certain extent, the fictitious hunt for legislative intent to create a civil cause of action which has been so criticized in England. It also avoids the inflexible application of the legislature's criminal standard of conduct to a civil case. Glanville Williams is of the opinion, with which I am in agreement, that where there is no duty of care at common law, breach of non-industrial penal legislation should not affect civil liability unless the statute provides for it. As I have indicated above, industrial legislation historically has enjoyed special consideration. Recognition of the doctrine of absolute liability under some industrial statutes does not justify extension of such doctrine to other fields, particularly when one considers the jejune reasoning supporting the juristic invention. [At 222-3.]

After explaining various other factors in favour of this result, he concluded:

> For all of the above reasons I would be adverse to the recognition in Canada of a nominate tort of statutory breach. Breach of statute, where it has an effect upon civil liability, should be considered in the context of the general law of negligence. Negligence and its common law duty of care

> have become pervasive enough to serve the purpose invoked for the existence of the action for statutory breach. [At 225.]

(See also *Frame v. Smith* [1987] 2 S.C.R. 99, at 113-4.)

[62] This principle has been applied in countless cases since *Saskatchewan Wheat Pool*. As Neilson J.A. observed, for example, these included a tobacco case involving alleged violations of the *Trade Practices Act* of Newfoundland, *Sparkes v. Imperial Tobacco Canada Ltd.* 2008 NLTD 207 (*aff'd* 2010 NLCA 21), and this Court's decision in *Macaraeg v. E Care Contact Centers Ltd.* 2008 BCCA 182. In the latter, Chiasson J.A. for the Court suggested that an important factor in deciding whether an exception to the general rule in *Saskatchewan Wheat Pool* should be made is whether the statute "provides effective enforcement of the right" conferred thereby. (At para. 74; see also Ruth Sullivan, *Sullivan on the Construction of Statutes* (2008, 5th ed.) at 441.)

[63] Applying *Saskatchewan Wheat Pool* to the *BPA*, the Court in *Koubi* found that it provided an "exhaustive code regulating consumer transactions", providing for the establishment, administration and enforcement of statutory rights and obligations and giving extensive powers and remedies to a statutory director and an investigative staff to ensure compliance with the statutory requirements. (Para. 63.) Nothing in the *BPA* indicated that the Legislature intended to augment the statutory remedy by permitting consumers to mount restitutionary actions. In Neilson J.A.'s analysis:

> I am satisfied the chambers judge erred in this cursory treatment of the [*BPA*]. A close examination of the statute's legislative objectives and provisions reveals a clear intent to provide an exhaustive code regulating consumer transactions, directed to both protection of consumers and fairness and consistency for all parties in the consumer marketplace. The Act has over 200 provisions that comprehensively establish, administer, and enforce statutory rights and obligations directed to the regulation of consumer transactions in a multitude of circumstances. It provides extensive powers and remedies to a statutory director and investigative staff to ensure compliance with its requirements. These include investigation, collection of evidence, and enforcement through undertakings, compliance orders, prohibition orders, court-appointed receivers or property freezing orders, in addition to recourse to court

> proceedings as set out in ss. 171 and 172. It also enacts a panoply of statutory sanctions for suppliers and other offenders who breach the statutory rights of consumers, including administrative penalties of up to $50,000 for a corporation, and offences with penal consequences that include fines of up to $100,000 for a corporate offender.
>
> I discern nothing in the [*BPA*] to support the view that the legislature intended to augment its statutory remedies by permitting consumers to mount an action against a supplier for restitutionary relief based on the novel doctrine of waiver of tort. Such a conclusion is inconsistent with the express language of ss. 171, 172(3)(a) and 192, which clearly limit recovery for pecuniary loss to restoration of the consumer's own damages or loss arising from a deceptive act.
>
> I conclude the chambers judge erred in failing to comprehensively address the objectives and provisions of the [*BPA*]. Had she done so, I am satisfied she would have recognized it represents a comprehensive and effective scheme for the administration and enforcement of the statutory rights and obligations it creates. In essence, it has occupied the field of consumer rights and remedies arising from deceptive acts by suppliers. Mazda's statutory wrongdoing under ss. 4 and 5 of the Act cannot therefore provide the predicate unlawful act required for a cause of action based on waiver of tort and restitutionary damages. Ms. Koubi is restricted to the remedies provided by the Act. I am satisfied Ms. Koubi's claim for restitutionary damages and disgorgement of profits arising from waiver of tort does not disclose a cause of action. [At paras. 63-65; emphasis added.]

[64] In so ruling, she acknowledged that it is "admittedly difficult" to strike a claim as having no prospect of success in the context of recent class action decisions. The issue was, however, a matter of law alone which did not require a factual record for determination. (Para. 80.) As she explained:

> I find support for those conclusions in the recent decision of Justice Lax in *Andersen* [*v. St. Jude Medical, Inc.* 2012 ONSC 3660], which encourages a summary appraisal of a claim in waiver of tort where circumstances permit. Further, her final comment at para. 594 of her decision countenances a role for the legislature in developing the doctrine, a view consistent with the result I have reached:
>
> > Given the philosophical and policy considerations mentioned above, it is my view that the fundamental question for a court to answer is whether the recognition (or not) of the waiver of tort doctrine is within the capacity of a court to resolve, or whether it has such far-reaching and complex effects that it is best left to consideration by the Legislature. On the basis of my experience, the answer to this and the other questions surrounding the waiver of tort doctrine is not dependent on a trial with a full factual record and may require no evidence at all.

> I have considered whether this result unreasonably interferes with the objectives of class proceedings described by Chief Justice McLachlin in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at 27-29, [2001] 2 SCR 534. I appreciate that while striking Ms. Koubi's claim at this early stage may serve judicial economy, it may thwart access to justice for the class and may not serve the objective of deterring the appellants and other manufacturers and sellers from similar actions. Nevertheless, while one might admire the strategic and creative use of a novel doctrine to transform individual loss to a common issue in a class proceeding, I am satisfied it does not benefit the parties or the court to permit such a claim to proceed when it has no hope of success. [At paras. 81-82; emphasis added.]

I fully agree with these observations (by which I am bound in any event) and would add that scarce judicial resources may be squandered when difficult questions of law are continually side-stepped in the class action context. Certainly the *Hunt v. Carey* test is an easy one to meet, but it is not surmounted in *all* cases. As recent decisions of the Supreme Court of Canada discussed below illustrate, it is likely to be beneficial to all concerned, including the justice system, if such questions are directly addressed when raised at an early stage, rather than left for a trial that may never take place, or for another court in another case.

[65] The plaintiff in her factum did not attempt to distinguish *Koubi* insofar as it applies to the *BPA*, and indeed did not take issue with the conclusion that it is an exhaustive code that cannot underpin a claim for waiver of tort. Ms. Wakelam was more anxious to argue that similar reasoning does not apply to a breach of the *Competition Act* – a matter to which I will return presently.

[66] In my view, the reasoning in *Koubi* applies not only to the allegation of waiver of tort advanced by Ms. Wakelam but also to her claims for unjust enrichment and constructive trust insofar as they are based on breach of the *BPA*. Although I might not have used the phrase "occupying the field" (which has constitutional connotations), I see no legislative intent to create restitutionary causes of action arising from or based on breaches of the *BPA*; nor has the plaintiff sought to argue that the *BPA* provides only 'ineffective enforcement'.

Constructive Trust

[67] Ms. Wakelam's claim for constructive trust is also foreclosed by the decision of the Supreme Court of Canada in *Pro-Sys Consultants Ltd. v. Microsoft Corporation* 2013 SCC 57, which was released in October 2013. In that case, the plaintiff advanced a claim in unjust enrichment and as a remedy therefor, submitted that an amount equal to the alleged "overcharge" from sales of Microsoft operating systems and applications software in British Columbia should be held by the defendant in trust for members of the plaintiff class. (See para. 90.) Rothstein J. for the majority explained why such a claim could not succeed:

> *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, is the relevant controlling authority on constructive trusts. In *Kerr*, Justice Cromwell explains that in order to find that a constructive trust is made out, the plaintiff must be able to point to a link or causal connection between his or her contribution and the acquisition of specific property:
>
> > . . . the constructive trust is a broad and flexible equitable tool used to determine beneficial entitlement to property (*Pettkus*, at pp. 843-44 and 847-48). Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour (*Pettkus*, at pp. 852-53; *Sorochan*, at p. 50). [para. 50]
>
> In the present case, there is no referential property; Pro-Sys makes a purely monetary claim. Constructive trusts are designed to "determine beneficial entitlement to property" when "a monetary award is inappropriate or insufficient" (*Kerr*, at para. 50). As Pro-Sys's claim neither explains why a monetary award is inappropriate or insufficient nor shows a link to specific property, the claim does not satisfy the conditions necessary to ground a constructive trust. On the pleadings, it is plain and obvious that Pro-Sys's claim that an amount equal to the overcharge from the sale of Microsoft operating systems and Microsoft applications software in British Columbia should be held by Microsoft in trust for the class members cannot succeed. The pleadings based on constructive trust must be struck. [At paras. 91-92; emphasis added.]

(See also *Sun-Rype Products Ltd. v. Archer Daniels Midland Company* 2013 SCC 58 at paras. 39-41 and *Sun Indalex Finance, LLC v. United Steelworkers* 2013 SCC 6 at paras. 228-9, *per* Cromwell J.)

[68] As I understand it, Ms. Wakelam concedes that the remedy of constructive trust is not available to her in light of *Pro-Sys v. Microsoft*. For similar reasons, I also find that a restorative order under s. 172(3)(a) of the *BPA* is not available to her. This provision allows the court to order the restoration of property or money only to a person *who has an interest therein*. The pleadings do not suggest that any such interest could arise in this case. Thus para. 27 of the statement of claim is bound to fail.

[69] In the result, I conclude that paras. 34-38 inclusive and subparas. (e) and (f) of the prayer for relief in the statement of claim are bound to fail insofar as they are based on an alleged breach or breaches of the *BPA*. In terms of monetary relief, this leaves the claim for the plaintiff's own damages in para. 29 of the pleading. As we have seen, however, such a claim is dependent on proof of a causal connection between a contravention of the *BPA* by the defendants, and loss or damage suffered by the plaintiff. No such causal connection has been pleaded, with the result that it is also bound to fail.

Injunctive and Declaratory Relief

[70] As for the claims for a declaratory order and injunction sought under s. 172(1), however, I am not persuaded they are bound to fail. Certainly an injunction is unlikely to be granted when, as in this instance, the conduct complained of has already ceased and is unlikely to be repeated: see *Snell's Equity* (29th ed., 1990) at 647-48, 653-54, citing *Proctor v. Bayley* (1889) 42 Civ. D. 390; *Wilcox v. Steel* [1904] 1 Ch. 212; and *Barber v. Penley* [1893] 2 Ch. 447. However, the matter is discretionary and the continuing nature of the conduct complained of is only one of many 'equities' to be considered. In this instance, the equities would include the "public" nature of the remedies provided by s. 172: see *Seidel v. Telus Communications Inc.* 2011 SCC 15, at para. 32, where the Court contrasted ss. 171 and 172.

[71] With respect to declaratory relief under s. 172(1)(a), the defendants submitted that the phrase "a practice engaged in or about to be engaged in"

should not be construed to include a practice that occurred in the past but has been discontinued. Mr. Neave, counsel for the defendants, cited no authority in support of this view, which rests on a very technical interpretation of "engaged". While again it seems unlikely a court would grant a declaratory order regarding conduct no longer being "engaged in", I cannot say at this point that no such order would be available in law. The authorities suggest that the key question is whether a "useful purpose" would be served by granting the order: see Lord Woolf and J. Woolf, *The Declaratory Judgment* (3rd ed., 2002) at § 4.092; A.H. Hudson, "Declaratory Judgments in Theoretical Cases: The Reality of the Dispute", (1976-7) 3 *Dal. L.J.* 706; *Greater Vancouver Regional District v. British Columbia (Attorney General)* 2011 BCCA 345; at paras. 50-52. In theory at least, a useful *public* purpose might be found to exist in this case.

[72] In addition to seeking injunctive and declaratory relief under s. 172(1), Ms. Wakelam sought an order under s. 172(3)(c) that the defendants advertise to the public the particulars of any order granted against them under s. 172. Such an order may be made *if* the court grants relief under s. 172(1). Again, it cannot be said this aspect of the relief sought is not available in law.

Cause(s) of Action Under Competition Act?

[73] As an alternative "element" (again, the wrong) underlying her claims under unjust enrichment, waiver of tort and constructive trust, Ms. Wakelam also asserts breaches of the *Competition Act*. The relevant sections are ss. 36 and 52, which provide in part:

> 36. (1) Any person who has suffered loss or damage as a result of
>
> (a) conduct that is contrary to any provision of Part VI, or
>
> (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

. . .

(4) No action may be brought under subsection (1),

(a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from

(i) a day on which the conduct was engaged in, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later;

. . .

52. (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

(1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that

(a) any person was deceived or misled;

. . .

(1.2) For greater certainty, a reference to the making of a representation, in this section or in section 52.1, 74.01 or 74.02, includes permitting a representation to be made.

(2) For the purposes of this section, a representation that is

(a) expressed on an article offered or displayed for sale or its wrapper or container,

(b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale,

(c) expressed on an in-store or other point-of-purchase display,

(d) made in the course of in-store, door-to-door or telephone selling to a person as ultimate user, or

(e) contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public,

is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained, subject to subsection (2.1).

. . .

> (5) Any person who contravenes subsection (1) is guilty of an offence and liable
>
> > (a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both; or
> >
> > (b) on summary conviction, to a fine not exceeding $200,000 or to imprisonment for a term not exceeding one year, or to both.
>
> [Emphasis added.]

(Section 52 is in Part VI of the Act.) Section 62, also in Part VI, clarifies that nothing in that Part is to be construed as depriving any person of any civil right of action.

The Certification Judge's Reasons

[74] After noting the foregoing sections of the *Competition Act* at paras. 93 and 94 of his reasons, the certification judge alluded to the following passage from *Singer*:

> As I have noted, s. 52(1) does not create a cause of action. The cause of action, or right of action, is created by s. 36. The plain language of that section makes it clear, as the defendants assert, that the plaintiff must show both a breach of s. 52 and loss or damage suffered by him or her as a result of that breach. That can only be done if there is a causal connection between the breach (the materially false or misleading representation to the public) and the damages suffered by the plaintiff. A consumer of sunscreen products cannot recover damages, in the abstract, simply by proving that the manufacturer made a false and misleading representation to the public. The failure of the plaintiff to plead a causal link is fatal to this claim.
>
> Section 52(1.1) only removes the requirement of proving reliance for the purpose of establishing the contravention of s. 52(1). The separate cause of action, created by s. 36 in Part IV of the *Competition Act*, contains its own requirement that the plaintiff must have suffered loss or damage "*as a result*" of the defendant's conduct contrary to Part VI. It is not enough to plead the conclusory statement that the plaintiff suffered damages as a result of the defendant's conduct. The plaintiff must plead a causal connection between the breach of the statute and his damages. In my view, this can only be done by pleading that the misrepresentation caused him to do something – i.e., that he relied on it to his detriment. [At paras. 107-108; emphasis added.]

(See also *Magill v. Expedia Canada Corp.* 2010 ONSC 5247 at paras. 99-107.)

[75] However, the certification judge here noted, no case had been cited to him in which these comments had been adopted in British Columbia. In *Holmes v. United Furniture Warehouse LP* 2009 BCSC 1805, the Court had stated simply in connection with the *Competition Act* that the pleadings should include an allegation that the plaintiffs had suffered loss or damage as a result of the particular conduct in question, in order to bring the claim within s. 36. The Court in the case at bar continued:

> I am unable to see any logical distinction between the defendants' argument of insufficient pleading of causation in relation to section 36 of the *Competition Act*, and that same argument in relation to the [*BPA*]. Both, in my view, are met by the reasoning of Satanove J. in paragraphs 32 through 36 of *Knight*, as quoted above, upheld in the Court of Appeal; see also *Steele v. Toyota Canada Inc*., 2011 BCCA 98, and *Infineon*. In the circumstances, given the whole of the pleadings, I am not prepared to hold that the plaintiff's pleading in relation to section 36 of the *Competition Act* is fatal. [At para. 98.]

[76] The certification judge also rejected the defendants' submission that the "defence of regulated conduct" would apply such that the claim under the *Competition Act* was bound to fail. He noted again that the scheme created by the *FDA* permitted but did not *compel* the defendants to market the impugned medicines as safe and effective for children between two and six. If the plaintiff could demonstrate that the defendants' marketing did give rise to the misrepresentations and nondisclosures alleged by the plaintiff, the judge said he was "unable to conclude, as a matter of interpretation, that the scheme under the [*FDA*] was intended to exempt the defendants from the provisions of the *Competition Act*." (Para. 101.)

[77] Accordingly, the pleadings were found to have disclosed a cause of action under the *Competition Act*.

On Appeal

[78] The defendants' first argument on appeal is that Ms. Wakelam's claims for restitutionary remedies under the *Competition Act* are "juridically indistinguishable" from those advanced under the *BPA* in *Koubi*.

[79] I turn at the outset, however, to *Pro-Sys v. Microsoft,* in which the plaintiff not only advanced a claim under s. 36 of the *Competition Act,* but also alleged the torts of conspiracy and unlawful interference with economic interests (see para. 72) and sought restitution for unjust enrichment, constructive trust, and waiver of tort (see para. 64). The Supreme Court's judgment was concerned mainly with the question of whether a purchaser who has not purchased directly from the defendant, but from a third party who has "passed on" the losses claimed, may properly sue the "overcharger" at the top of a distribution chain. Having answered that question in the affirmative, the Court went on to rule that it was not plain and obvious the claim in unjust enrichment could not be made out in an "indirect" relationship, and that the defendants' "juristic reason justification" should not be resolved prior to trial. (Para. 88.) Accordingly, the claim in unjust enrichment was allowed to proceed.

[80] I have already described the Court's reasoning in *Pro-Sys* with respect to the unavailability of a constructive trust remedy. (See para. 67 above.) The Court also noted the open question of whether waiver of tort is "its own cause of action intended to disgorge a defendant's unjust enrichment gained through wrongdoing, as opposed to merely a remedy for unjust enrichment." (Para. 95.) It ruled that this question should not be decided at this stage, and that it was not plain and obvious a cause of action in waiver of tort would not succeed. (Para. 97.)

[81] It will be recalled that in *Koubi* this court made a similar ruling regarding waiver of tort. Neilson J.A. followed two earlier decisions of this court, *Pro-Sys Consultants Ltd. v. Infineon Technologies AG* 2009 BCCA 503 and *Steele v. Toyota Canada Inc.* 2011 BCCA 98. (See her discussion at paras. 37-40 of *Koubi*.) As we have also seen, however, the Court in *Koubi* went on to find on a review of the *BPA* that it had been intended as an "exhaustive code regulating consumer transactions" and that there was nothing to suggest the Legislature intended to provide consumers with causes of action designed to provide restitutionary relief "based on the novel doctrine of waiver of tort." (Para. 64.)

[82] The defendants at the case at bar contend that just as the *BPA* is a "complete code" for consumer transactions, the *Competition Act* deals comprehensively with anti-competitive and unfair trade practices. It specifies matters that may be referred to the Competition Tribunal, and provides the Commissioner of Competition with extensive powers of enforcement under the Act. These include carrying out inquiries; collecting evidence; obtaining injunctions, compliance orders, prohibition orders and publication orders; entering into consent agreements; freezing property; and imposing penalties for obstruction and non-compliance with orders of the Tribunal. A dense set of regulations has been adopted under the Act supplementing these more general provisions.

[83] The question of whether a breach of the *Competition Act* – here, s. 36 and by reference, s. 52 – can be used to establish the element of the "wrong" for a restitutionary claim has attracted much judicial attention in recent years. Counsel referred us to *Canada Cement LaFarge Ltd. v. B.C. Lightweight Aggregate Ltd.* [1983] 1 S.C.R. 452, which was decided before the *Combines Investigation Act* became the *Competition Act*. At the time, the former did not provide for any private cause of action resembling what is now provided by s. 36. Given this fact, and given that the respondent was suing for the common law tort of conspiracy to injure by means of price-fixing on the part of the appellants, the decision is not of direct assistance to us. One of the questions raised, however, was whether the element of "unlawful means" for the tort of conspiracy could be provided by a breach of the conspiracy section of the *Combines Investigation Act*. The Court declined to comment, observing that:

> On the date the writ of summons was issued the *Combines Investigation Act* did not purport to create a right to recover damages in civil proceedings. Neither did the statute contain a stipulation foreclosing any such recovery by participants in an illegal scheme. The act was entirely neutral. Section 31.1 came into force seven months after the issuance of the writ and purports to authorize the bringing of a civil action to recover losses suffered as a result of certain violations of the Act. This provision has come before the courts in some provinces, and varying views have been expressed as to its constitutionality. This section did not come before

> us for determination in these proceedings and it is not necessary to make any further reference thereto …. [At 477-8; emphasis added.]

(Section 31.1 of the *Combines Investigation Act*, introduced in 1975, effectively became what is now s. 36 by virtue of S.C. 1985, c. C-34. The *Combines Investigation Act* was renamed as the *Competition Act* a year later by S.C. 1986, c. 26.)

[84] The constitutionality of the *Combines Investigation Act* was addressed in *General Motors of Canada Ltd. v. City National Leasing* [1989] 1 S.C.R. 641. In the court of first instance, the defendant had succeeded in arguing that because s. 31.1 purported to create a civil cause of action for certain infractions of the Act, Parliament had gone beyond its legislative powers. The Ontario Court of Appeal had disagreed. By the time the case reached the Supreme Court of Canada, only two questions remained for the Court: whether the *Combines Investigation Act*, either in whole in part, was *intra vires* Parliament under the trade and commerce power, and whether s. 31.1 was within the legislative competence of Parliament. (At 648.) The Court noted at the outset of its analysis that in "numerous cases", federal combines legislation had been upheld as valid under the federal criminal law power. (At 654.) No criticism of these cases was suggested.

[85] In the course of his detailed analysis of the trade and commerce power and the proper approach to determining the constitutionality of specific sections of a statute, Chief Justice Dickson said the first step was to determine whether the impugned provision could be seen as encroaching on provincial powers and if so to what extent. It was obvious, he said, that s. 31.1 did appear to encroach on provincial power "to some extent". He continued:

> In assessing the seriousness of this encroachment, however, three facts must be taken into consideration. The first is that s. 31.1 is only a remedial provision; its purpose is to help enforce the substantive aspects of the Act, but it is not in itself a substantive part of the Act. By their nature, remedial provisions are typically less intrusive *vis-ā-vis* provincial powers. The second important fact is the limited scope of the action. Section 31.1 does not create a general cause of action; its application is carefully limited by the provisions of the Act. The third relevant fact is that it is well-established that the federal government is not constitutionally precluded from creating

> rights of civil action where such measures may be shown to be warranted. This Court has sustained federally-created civil actions in variety of contexts…. [At 673; emphasis added.]

[86] The second step in the Court's analysis was to determine whether the *Combines Investigation Act* contained a regulatory scheme. Again, this question was not difficult to answer:

> The presence of a well-orchestrated scheme of economic regulation is immediately apparent on examination of the *Combines Investigation Act*. The existence of a regulatory scheme is in evidence throughout the entire Act. [At 674; emphasis added.]

The Chief Justice reviewed the various parts of the statute, concluding on this point that:

> … I have no difficulty in concluding that the Act as a whole embodies a complex scheme of economic regulation. The purpose of the Act is to eliminate activities that reduce competition in the market-place. The entire Act is geared to achieving this objective. The Act identifies and defines anti-competitive conduct. It establishes an investigatory mechanism for revealing prohibited activities and provides an extensive range of criminal and administrative redress against companies engaging in behaviour that tends to reduce competition. In my view, these three components, elucidation of prohibitive conduct, creation of an investigatory procedure, and the establishment of a remedial mechanism, constitute a well-integrated scheme of regulation designed to discourage forms of commercial behaviour viewed as detrimental to Canada and the Canadian economy. [At 676; emphasis added.]

The Court found that the statute was "an example of the *genre* of legislation that could not practically or constitutionally be enacted by a provincial government" and that if competition in the "single huge marketplace" of Canada was to be regulated at all, it must be regulated federally. Thus the Act as a whole was *intra vires* Parliament as legislation in relation to general trade and commerce. (At 682-3, citing *Canadian National Transportation*, *supra*.)

[87] The Court next turned to the question of the validity of s. 31.1 in particular. As noted above, this provision had been added to the Act as part of a package of amendments in 1975 (see S.C. 1975, c. 76, s. 12). The enactment followed

recommendations made by the Economic Council of Canada in an interim report on competition policy released in July 1969. Chief Justice Dickson noted:

> The Economic Council suggested in addition to the significant deterrent role played by the threat of criminal sanctions, Parliament should consider including a private right of civil action in the Act's enforcement mechanism. The basic reasons given by the Economic Council for seeking to place some of the Federal Government's economic policy on a civil law basis were "to improve its relevance to economic goals, its effectiveness, and its acceptability to the general public"…. Resting the constitutional foundation on the criminal law power contributed, in the opinion of the Council, to the rigidity and "inflexibility of the law and its administration. Criminal offences must be proved beyond a reasonable doubt. Charges must be expressed and proven in the categorical manner specified in the statute". [At 687.]

[88] The Court saw no constitutional impediment to amending remedies in the *Combines Investigation Act* to "conform with changing economic realities" and concluded that s. 31.1 was an "integral part of the … scheme regulating anti-competitive conduct." However, the Chief Justice added:

> The relationship between the section and the Act easily meets the test for the section to be upheld. This finding should not be interpreted as authority for upholding all provisions creating private civil action that are attached to a valid trade and commerce regulatory scheme or any other particular type of scheme. Section 31.1 is carefully constructed and restricted by the terms of the *Combines Investigation Act*. [At 689; emphasis added.]

He also described s. 31.1 as one of the "arsenal of remedies" created by the statute to discourage anti-competitive practices. Like other remedies – orders of the Restrictive Practices Trade Commission under Part IV.1, interim injunctions under Part IV and criminal sanctions under Part V – it was said to be:

> … intimately linked to the *Combines Investigation Act*. It takes on meaning only by reference to other provisions of the Act and has no independent content. As a result, the section is carefully bounded by the parameters of the *Combines Investigation Act*. It provides a private remedy only for particular violations of the Act and does not create a private right of action at large. [At 684; emphasis added.]

[89] Parliament has not seen fit to amend s. 36 since its predecessor was enacted, nor to provide additional private law remedies for contraventions of Part VI of the Act. We were not referred to anything that suggests the statutory

remedies provided by that Part are "inadequate" (to use the term employed in *Macaraeg, supra*.) The statutory right of action remains "hedged about by restrictions" (to use the phrase of Glanville Williams in "The Effects of Penal Legislation on the Law of Tort" (1960) 23 *M.L.R.* 233, at 244), including the two-year limitation imposed by s. 36(4). The Court in *General Motors* was careful to emphasize that this right of action was part of the "well-integrated scheme" of the whole Act, and that it did not create a right of action "at large". Had it done so, it appears the constitutional verdict in *General Motors* might have been different.

[90] Section 36 clearly limits recovery for pecuniary loss to "the loss or damage proved to have been suffered" by the plaintiff, together with possible investigatory costs incurred by the plaintiff. I see nothing in the *Competition Act* to indicate that Parliament intended that the statutory right of action should be augmented by a general right in consumers to sue in tort or to seek restitutionary remedies on the basis of breaches of Part VI. It follows in my view that the certification judge did err in finding that the pleading disclosed a cause of action under the *Competition Act* for which a court might grant restitutionary relief; and that accordingly, paras. 34-38 of Ms. Wakelam's statement of claim do not disclose a cause of action.

[91] In terms of the *Competition Act*, this leaves Ms. Wakelam's claim for "damages" suffered "as a result of" the defendants' breach of Part VI (founded on s. 36) as well as for her costs of investigation under s. 36(1). In this regard, I return to and respectfully agree with the Court's statement in *Singer*, which I reproduce again for convenience:

> … [Section] 52(1) does not create a cause of action. The cause of action, or right of action, is created by s. 36. The plain language of that section makes it clear, as the defendants assert, that the plaintiff must show *both* a breach of s. 52 *and* loss or damage suffered by him or her as a result of that breach. That can only be done if there is a causal connection between the breach (the materially false or misleading representation to the public) and the damages suffered by the plaintiff. A consumer of sunscreen products cannot recover damages, in the abstract, simply by proving that the manufacturer made a false and misleading representation to the public. The failure of the plaintiff to plead a causal link is fatal to this claim.

> Section 52(1.1) only removes the requirement of proving reliance for the purpose of establishing the contravention of s. 52(1). The separate cause of action, created by s. 36 in Part IV of the *Competition Act*, contains its own requirement that the plaintiff must have suffered loss or damage "*as a result*" of the defendant's conduct contrary to Part VI. It is not enough to plead the conclusory statement that the plaintiff suffered damages as a result of the defendant's conduct. The plaintiff must plead a causal connection between the breach of the statute and his damages. In my view, this can only be done by pleading that the misrepresentation caused him to do something - i.e., that he relied on it to his detriment. [At paras. 107-8; emphasis added.]

This reasoning seems consistent with a comment made by the Court at para. 65 of *Pro-Sys v. Microsoft* that s. 36 of the *Competition Act* allows anyone who has suffered loss or damage "as a result of conduct engaged in by any person contrary to Part VI" to "sue for and recover that loss or damage." (My emphasis.)

[92] Since Ms. Wakelam has failed to plead any material facts in support of the required causal connection, we may at this late stage infer that she is unable to do so. Accordingly, her claims under the *Competition Act* must be struck in their entirety.

"Aggregate" Provisions of the CPA

[93] In *Infineon*, *supra*, the plaintiff had sought damages under s. 36(1) of the *Competition Act* on an aggregate basis, and restitutionary awards in unjust enrichment, constructive trust and waiver of tort. (Para. 2.) Masuhara J. in the court below had ruled that the aggregation provisions in the *Class Proceedings Act* (i.e., ss. 29 and 30) could be invoked only after liability had been established, citing *Chadha v. Bayer Inc.* (2003) 63 O.R. (3d) 22 (C.A.), (*lve. to app. dism'd* [2003] S.C.C.A. No. 106). It was this question that occupied this court on appeal. It ultimately followed *Knight* to hold that an aggregate monetary award under the *CPA could* be certified as a common issue "in a claim for disgorgement of the benefits of the defendant's wrongful conduct *without an antecedent liability finding*." (Para. 39, my emphasis.)

[94] This ruling has now been overruled by the Supreme Court in *Pro-Sys v. Microsoft*, which expressly disagreed with *Infineon* and *Steele v. Toyota* on the point. In the analysis of Rothstein J. for the Court:

> I agree with Feldman J.A.'s holding in *Chadha* that aggregate damages provisions are "applicable only once liability has been established, and provid[e] a method to assess the quantum of damages on a global basis, but not the fact of damage" (para. 49). I also agree with Masuhara J. of the BCSC in *Infineon* that "liability requires that a pass-through reached the Class Members", and that "that question requires an answer before the aggregation provisions, which are only a tool to assist in the distribution of damages, can be invoked" (2008 BCSC 575 (CanLII), at para. 176). Furthermore, I agree with the Ontario Court of Appeal in *Quizno's*, that "[t]he majority clearly recognized that s. 24 [of the Ontario *Class Proceedings Act, 1992*, S.O. 1992, c. 6] is procedural and cannot be used in proving liability" (para. 55).
>
> This reasoning reflects the intention of the Attorney General of British Columbia. When he introduced the *CPA* in the British Columbia legislature, he stated that the goal of the legislation was to allow individuals who have similar claims to come together and pursue those individual claims collectively: "In simple terms, all we are doing here is finding a way to enable the access that individuals have to the court to be an access that individuals combining together can have to the court" (Hon. C. Gabelmann, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 20, No. 20, 4th Sess., 35th Parl., June 6, 1995, 15078). The *CPA* was not intended to allow a group to prove a claim that no individual could. Rather, an important objective of the *CPA* is to allow individuals who have provable individual claims to band together to make it more feasible to pursue their claims.
>
> The question of whether damages assessed in the aggregate are an appropriate remedy can be certified as a common issue. However, this common issue is only determined at the common issues trial after a finding of liability has been made.… [At paras. 132-4; emphasis added.]

[95] I conclude that s. 29 of the *CPA* does not avail the plaintiff to provide *restitutionary* claims not otherwise open to her under the *BPA* or *Competition Act*.

"Identifiable Class of Two or More Persons"?

Certification Judge's Reasons

[96] It will be recalled that s. 4(1) of the *CPA* states that the court must certify a proceeding as a class proceeding on an application under s. 2 if all the requirements set forth therein are met, including that "there is an identifiable class of 2 or more persons". Ms. Wakelam, the sole named plaintiff in this proceeding,

argued below that it was sufficient for the evidence to establish that a class of people exists "who would have the same reason to complain as the plaintiff, even if no second individual can be identified."

[97] The defendants in response relied on *Chartrand v. General Motors Corp.* 2008 BCSC 1781. There Martinson J. had stated in part:

> It is not enough to point to a group of people in British Columbia who are owners of specific vehicles with automatic transmissions. There must be some evidence that two or more people have a complaint that GM manufactured a dangerously defective product that caused them a loss and/or that GM was unjustly enriched at their expense.
>
> There is no evidence of such complaints. NHTSA was satisfied with the recall of only the manuals. Transport Canada has no concerns and has received no complaints. The three complaints to Transport Canada relating to parking brakes on GM vehicles had nothing to do with vehicles in the proposed class. The three brake lining wear complaints from British Columbia in the period of September 6, 2001 to February 12, 2007 have not been tied to the spring clip problem and could have been caused in other ways. There is no evidence of complaints or concerns by consumer groups. There is, therefore, not an identifiable class as there is not a group of two or more people with complaints.
>
> …
>
> This requirement has been viewed as an air of reality test, testing the reality of the linkage between the plaintiff's claim and the proposed class: *Samos Investments Inc. v. Pattison*, 2001 BCSC 1790, 22 B.C.L.R. (3d) 46, 2003 BCCA 87, 10 B.C.L.R. (4th) 234; *Nelson v. Hoops L.P., a Limited Partnership*, 2003 BCSC 277, 2004 BCCA 174. [At paras. 53, 54 and 61; emphasis added.]

[98] The certification judge discussed this matter beginning at para. 121 of his reasons. He noted that although the proposed class had been adequately defined in accordance with the relevant case authority, there was no evidence of the existence of more than one individual member of the class who shares Ms. Wakelam's desire to see the action "determined through the mechanism of a class action or at all." It was therefore necessary, he said, to consider "the extent to which such evidence is required in the circumstances of this case." (Para. 124.) Even though the evidentiary burden on the plaintiff in this regard was light, he found that he was unable to draw sufficient inferences from the evidence before him to satisfy this requirement. He continued:

> … Logically, on the premise of the action, it appeared that anyone who purchased the medicines for the stated purpose would be in the same position as the plaintiff. What did not necessarily follow is that any such persons would have any interest in pursuing the matter. This is not, after all, a case involving physical or psychological harm, and the individual losses, on the premise of the claim, are not significant. Accordingly, in the absence of evidence of other interested parties, I was unable to find that the requirement of section 4(1)(b) of the *Class Proceedings Act* has been met. [At para. 130.]

[99] Counsel for the plaintiff advised the Court, however, that he had an unfiled affidavit that "identifies other interested parties". The Court granted Ms. Wakelam leave to file the affidavit and gave the defendants an opportunity to comment on its adequacy. Counsel filed an affidavit of Mr. Green, a member of the law firm representing the plaintiff. The material portion of his affidavit stated that he had "been informed by the following people that each of them are interested in and support the class proceeding". After setting forth the names of these individuals, Mr. Green continued:

> I am advised by each of the individuals … and I verily believe this to be true, that each purchased Children's Cough Medicine as defined in the Amended statement of claim, for children under the age of 6, during the Class Period. For individuals who could not recall the specific brand(s) of Children's Cough Medicine they purchased this is indicated clearly [above].

[100] The trial judge concluded at para. 136 of his reasons that this evidence was "sufficient to correct the deficiency" that had concerned him, and that the plaintiff had met the requirement of s. 4(1)(b) of the *CPA*.

On Appeal

[101] On appeal, the defendants submit that the evidence relied on by the certification judge was insufficient to satisfy the burden on the plaintiff under s. 4(1)(b) of the *CPA*. There seems to be no direct appellate authority on this point, but the defendants cite various decisions of the Supreme Court of British Columbia, beginning with *Chartrand*, *supra*. As well, they note *Lee v. Georgia Properties Partnership* 2012 BCSC 1484, where Savage J. ruled that 4(1)(b) had not been complied with in the absence of evidence that more than one person

had a "complaint that they intend to pursue, that they intend to seek an opinion of the court, or that they would find resolution of the common issue of utility in their considerations." (At para. 42.)

[102] Two decisions of the Supreme Court of Canada have addressed the question of compliance with s. 4(1)(b) (or other provincial counterparts thereof) with reference to *whether the class of plaintiffs has been defined adequately*. In *Hollick v. Toronto (City)* 2001 SCC 68, the Court reasoned:

> … The appellant has defined the class by reference to objective criteria; a person is a member of the class if he or she owned or occupied property inside a specified area within a specified period of time. Whether a given person is a member of the class can be determined without reference to the merits of the action. While the appellant has not named every member of the class, it is clear that the class is bounded (that is, not unlimited). There is, therefore, an identifiable class within the meaning of s. 5(1)(b): see J. H. Friedenthal, M. K. Kane and A. R. Miller, *Civil Procedure* (2nd ed. 1993), at pp. 726-27; *Bywater*, *supra*, at pp. 175-76; *Western Canadian Shopping Centres*, *supra*, at para. 38. [At para. 17.]

[103] More recently in *Sun-Rype*, the majority of the Court noted that "*Hollick* provides that [the] certification requirement will be satisfied by demonstrating 'some basis in fact' to support it … ." (Para. 52.) In *Sun-Rype*, the criterion could not be met because:

> … indirect purchasers, even knowing the names of the products affected, will not be able to know whether the particular item that they purchased did in fact contain HFCS. The appellants have not offered evidence that could help to overcome the identification problem created by the fact that HFCS and liquid sugar were used interchangeably.
>
> Even Ms. Bredin testified that she is unable to state whether the products she purchased contained HFCS. This fact will remain unchanged because, as noted above, liquid sugar and HFCS were used interchangeably and a generic label indicating only "sugar/glucose-fructose" could be used for either type of sweetener. Ms. Bredin presented no evidence to show that there is some basis in fact that she would be able to answer this question. On the evidence presented on the application for certification, it appears impossible to determine class membership. [At paras. 65-6.]

(See also *Western Canadian Shopping Centres Inc. v. Dutton* 2001 SCC 46 at para. 38.)

[104] In *Singer*, the proposed classes of plaintiffs were likely to exceed three million people in each case and there were difficulties with the definition of the classes. In addition, Strathy J. (as he then was) observed:

> The second concern is more fundamental. The defendants submit that there is no evidence of "two or more persons" who assert a claim, as required by s. 5(1)(b) of the *C.P.A.* They say that this criterion has not been satisfied because there is no evidence that anyone other than Mr. Singer asserts a claim in relation to the wrongs alleged in this proceeding. While the plaintiff's counsel has provided some information that other individuals have recently contacted his firm, or responded to a website, there is no evidence about these individuals, no evidence that they ever purchased the defendants' products or that they actually wish to assert a claim against the defendants. [At para. 128; emphasis added.]

The Court referred to *Lau v. Bayview Landmark Inc.* (1999) 40 C.P.C. (4th) 301 (Ont. S.C.J.); *Bellaire v. Independent Order of Foresters* (2004) 5 C.P.C. (6th) 68 (Ont. S.C.J.); *Chartrand*, *supra*; *Ducharme v. Solarium de Paris Inc.* (2007) 48 C.P.C. (6th) 194 (Ont. S.C.J.), ***aff'd*** [2008] O.J. No. 1558 (Div. Ct.); *Poulin v. Ford Motor Co. of Canada* (2008) 65 C.P.C. (6th) 247 (Ont. Div'l Ct.); and *Lambert v. Guidant Corp.* (2009) 72 C.P.C. (6th) 120 (Ont. S.C.J.). In the last-mentioned case:

> … Cullity J. observed that not every case will require evidence that there is a group of putative class members waiting in the wings. The nature of the claims and the circumstances of the case may permit the court to infer the existence of a class looking for a solution. Cullity J. suggested, however, that the analysis of the issue is best considered together with the other factors that bear on the exercise of the court's discretion in the "preferable procedure" analysis. In that case Cullity J. was prepared to give plaintiff's counsel leave, if required, to file evidence to establish that other putative class members had expressed interest in the proceeding. [At para. 135 of *Singer*.]

In *Singer* itself, the Court said there was no evidence of a class of two or more persons "seeking access to justice", although if the other requirements of s. 5(1) of the Ontario *CPA* had been met, it might have been appropriate to follow Cullity J.'s approach in *Lambert*. Strathy J. was of the view, however, that they had not been met in *Singer*. (Para. 136.)

[105] In the case at bar, I am satisfied that the plaintiff did by means of Mr. Green's affidavit demonstrate the existence of an identifiable class of two or more persons in accordance with the authorities and that accordingly, the certification judge did not err on this point.

A Further Comment

[106] As mentioned earlier, the grounds of appeal advanced by the defendants in this case did not extend to the questions of commonality and preferability that are often the subject of appeals from certification orders. Accordingly, I need not recount the certification judge's reasons for his findings that these criteria were met in this instance. I do note, however, that in his discussion of preferability, the judge touched on the matter of behavioural modification, which of course is one of the principal advantages of a class action: see *Markson v. MBNA Canada Bank* (2007) 85 O.R. (3d) 321 (C.A.) at para. 69. He said this at para. 159:

> Third, although there was a statutory and regulatory regime in place concerning the labelling, marketing and advertising of Children's Cough Medicine, I am unable to find that it includes a meaningful built-in behavioural modification process given the premise of this case. That premise is not that the defendants failed to comply with the statutory and regulatory regime. If that were the case, then the regime's sanctions would likely be sufficient. Rather, the premise here is that notwithstanding their compliance with the statutory and regulatory regime, the defendants misrepresented the safety and efficacy of their products. If that proves to be the case, then only through a class proceeding can the defendants be obliged to answer fully for their conduct. As the Supreme Court of Canada pointed out in *Dutton*:
>
> > [29] ...Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation.... [Emphasis added.]

[107] It is not clear whether the certification judge intended to suggest that the plaintiff's "premise" is that the defendants *knowingly or negligently* misrepresented the safety and efficacy of their cold and cough medicines. Certainly Mr. Mogerman suggested this in his oral submissions, and s. 52 of the

Competition Act requires that the misrepresentations have been made knowingly or recklessly. Unless such allegations were intended, it is difficult to understand how the prosecution of this action as framed by the plaintiff could have brought about behavioural modification. If negligent or intentional wrongdoing *was* being asserted, however, it seems to me that in fairness to the defendants, Ms. Wakelam should have made that assertion and stated the material facts giving rise to it in her pleading.

Disposition

[108] For the reasons given above, I would strike out paras. 34-38 of the statement of claim with respect to breaches of both the *BPA* and the *Competition Act*; paras. 23, 27, 28 (the latter being a conclusory statement) and para. 29; paras. 30 and 31; and subparas. (e), (f), (g), (h), (i), (j), (k) and (l) of the prayer for relief. Paragraphs 32-3 have already been struck out. Paragraphs 39 and 40 no longer serve any purpose and should also be struck.

[109] This leaves in place only Ms. Wakelam's claims for a declaration, injunctive relief, and an "advertising order" under s. 172 of the *BPA*. Given this, I see no alternative but to allow the appeal and decertify this proceeding, leaving the plaintiff at liberty to seek the certification of what remains of her action should she so desire. I note that like *Singer*, however, this case involves a "sophisticated and scientifically-supported regulatory system" in the form of the *FDA* regime, which exists for the express purpose of monitoring the marketing of pharmaceuticals in Canada. This 'system' has already brought about the prohibition of the marketing of cold and cough medicines for children under the age of six. If the purpose of class actions is to redress "real injuries suffered by real people" (see *Singer* at

para. 231), it is worth asking whether anything meaningful is likely to be achieved by the pursuit of what remains of this lawsuit.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Frankel"

I agree:

"The Honourable Madam Justice Garson"

Amended pursuant to Rule 24(1), 15(5) and
the Order of Madam Justice Mackenzie pronounced February 12, 2010
Original Statement of Claim filed June 5, 2008

No. S078806
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

LANA WAKELAM

PLAINTIFF

AND:

JOHNSON & JOHNSON, JOHNSON & JOHNSON INC.,
MCNEIL CONSUMER HEALTHCARE CANADA, NOVARTIS CONSUMER HEALTH
CANADA INC./NOVARTIS SANTE FAMILIALE CANADA INC.,
WYETH CONSUMER HEALTHCARE/WYETH SOINS DE SANTE INC.
PFIZER CANADA INC., TRILLIUM HEALTH CARE PRODUCTS INC.,
VITA HEALTH PRODUCTS INC., and PROCTER & GAMBLE INC.

DEFENDANTS

Proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c.50

AMENDED STATEMENT OF CLAIM

DEFINED TERMS

1. The following terms used throughout this pleading have the following meanings:

   a. **"BPCPA"** means the *Business Practice and Consumer Protection Act*, S.B.C. 2004, c. 2, and all regulations thereunder;

   b. **"Class"** means all persons resident in British Columbia who purchased Children's Cough Medicine for use by children under the age of six, that was supplied,

offered for sale, advertised or promoted by the Defendants between December 24, 1997, to present:

c. **"Class Period"** means December 24, 1997, to present;

d. **"Children's Cough Medicine"** means cough medicine supplied, offered, manufactured, produced, advertised, marketed, sold or promoted by the Defendants for use by children under the age of six years old between December 24, 1997, to present containing one or more of the following groups of drugs:

I. Antihistamines such as brompheniramine maleate, chlorpheniramine maleate, dexbrompheniramine maleate, clemastine hydrogen fumerate, diphenhydramine hydrochloride, diphenylpyraline hydrochloride, doxylamine succinate, pheniramine maleate, phenyltoloxamine citrate, promethazine hydrochloride, pyrilamine maleate, and triprolidine hydrochloride;

II. Antitussives such as dextromethorphan. dextromethorphan hydrobromide, and diphenhydramine hydrochloride;

III. Expectorants such as guiafenesin; and/or

IV. Decongestants such as ephedrine hydrochloride/sulfate, phenylephrine hydrochloride/sulphate, and pseudoephedrine hydrochloride/sulphate.

e. **"Defendants"** means, collectively, Johnson & Johnson, Johnson & Johnson Inc., McNeil Consumer Healthcare Canada, Novartis Consumer Health Canada Inc./Novartis Sante Familiale Canada Inc., Wyeth Consumer Healthcare/Wyeth Soins De Sante Inc., Pfizer Canada Inc., Trillium Health Care Products Inc., Vita Health Products Inc., and Procter & Gamble Inc. Inc.

THE PLAINTIFF

2. The Plaintiff, Lana Wakelam, is a resident of New Westminster, British Columbia. The Plaintiff is a member of the Class.

THE DEFENDANTS

3. Johnson & Johnson is a New Jersey corporation which has its principle place of business in New Brunswick, New Jersey.

4. Johnson & Johnson Inc. is a federal corporation with its headquarters in Montreal, Quebec. Johnson & Johnson Inc. is a member of the Johnson & Johnson Family of Companies.

5. McNeil Consumer Healthcare Canada is a corporation incorporated pursuant to the laws of Canada with its head office located in Guelph, Ontario. McNeil Consumer Healthcare Canada is a division of Johnson and Johnson Inc.

6. McNeil Consumer Healthcare Canada, Johnson and Johnson Inc. and Johnson & Johnson supplied, offered, manufactured, produced, advertised, marketed, sold and/or promoted Children's Cough Medicine between December 24, 1997 and the present under various brand names including, inter alia, the brand names of Tylenol, Motrin, Benylin and Sudafed.

7. Novartis Consumer Health Canada Inc./Novartis Sante Familiale Canada Inc. is a corporation incorporated pursuant to the laws of Canada with its head office located in Mississauga, Ontario.

8. Novartis Consumer Health Canada Inc./Novartis Sante Familiale Canada Inc. supplied, offered, manufactured, produced, advertised, marketed, sold and/or promoted Children's Cough Medicine between December 24, 1997 and the present under various brand names including, inter alia, the brand names of Buckley's Jack & Jill and Triaminic.

9. Wyeth Consumer Healthcare/Wyeth Soins De Sante Inc. is a corporation incorporated pursuant to the laws of Canada with its head office located in Mississauga, Ontario.

10. Wyeth Consumer Healthcare/Wyeth Soins De Sante Inc. supplied, offered, manufactured, produced, advertised, marketed, sold and/or promoted Children's Cough Medicine between December 24, 1997 and the present under various brand names including, inter alia, the brand names of Robitussin, Advil and Dimetapp.

11. Pfizer Canada Inc. is a corporation incorporated pursuant to the laws of Canada with its head office located in Kirkland, Quebec.

12. Pfizer Canada Inc. supplied, offered, manufactured, produced, advertised, marketed, sold and/or promoted Children's Cough Medicine between December 24, 1997 and 2006 under various brand names including, inter alia, the brand names of Benylin and Sudafed.

13. Trillium Health Care products Inc. is a corporation incorporated pursuant to the laws of Canada with its head office located in Brockville, Ontario.

14. Trillium Health Care Products Inc. supplied, offered, manufactured, produced, advertised, marketed, sold and/or promoted Children's Cough Medicine between December 24, 1997 and the present for certain large chains who sold the Children's Cough Medicine under their house brand or private label.

15. Vita Health Products Inc. is a corporation incorporated pursuant to the laws of Canada with its head office located in Toronto, Ontario.

16. Vita Health Products Inc. supplied, offered, manufactured, produced, advertised, marketed, sold and/or promoted Children's Cough Medicine between December 24, 1997 and the present for certain large chains who sold the Children's Cough Medicine under their house brand or private label.

17. Procter & Gamble Inc. is a corporation incorporated pursuant to the laws of Canada with its head office located in North York, Ontario.

18. Procter & Gamble Inc. supplied, offered, manufactured, produced, advertised, marketed, sold and/or promoted Children's Cough Medicine between December 24, 1997 and the present under various brand names including, inter alia, the brand names of Vicks and Nyquil.

CAUSES OF ACTION

Breach of the Business Practices and Consumer Protection Act

19. During the Class Period, the Defendants supplied Children's Cough Medicine to the Class and solicited, offered, advertised, and promoted the sale of Children's Cough Medicine to the Class. As such, the Defendants are suppliers within the meaning of section 1 of the *BPCPA*.

20. Each purchase of the Defendants' Children's Cough Medicine by the members of the Class was for primarily personal, family, or household uses and as such was a "consumer transaction" within the meaning of section 1 of the *BPCPA*.

21. The Defendants engaged in numerous deceptive acts or practices in the supply, solicitation, offer, advertisement and promotion of the Children's Cough Medicine. In particular:

    i. in every consumer transaction in which the Class purchased Children's Cough Medicine, the Defendants represented that Children's Cough Medicine provides effective relief from cough symptoms when in fact the Children's Cough Medicine was not effective in children under the age of six;

    ii. the Defendants failed to disclose the material fact that Children's Cough Medicine is not effective for children under the age of six; and

    iii. the Defendants failed to disclose the material fact that Children's Cough Medicine can be dangerous when it is used by children under the age of six.

22. The representations and omissions set out in paragraph 21 above had the capability, tendency or effect of deceiving or misleading the Class and therefore constitute deceptive acts or practices under s.4 of the *BPCPA*.

23. The Defendants gained because of the consumer transactions in which they made the deceptive and misleading representations and omissions set out in paragraph 21 above.

24. The Plaintiff, and the other members of the Class, seek a declaration pursuant to s.172(1)(a) of the *BPCPA* that the Defendants' representations and omissions described in paragraph 21 of this Amended Statement of Claim are deceptive acts or practices.

25. The Plaintiff, and the other members of the Class, seek an interim and a permanent injunction pursuant to section 172(1)(b) of the *BPCPA* restraining the Defendants from engaging or attempting to engage in the deceptive acts or practices described in paragraph 21 of this Amended Statement of Claim.

26. The Plaintiff, and the other members of the Class, seek an order pursuant to s.172(3)(c) of the *BPCPA* requiring the Defendants to advertise to the public the particulars of any judgment, declaration, order or injunction against it in this action on terms and conditions the court considers reasonable and just.

27. The Plaintiff, and the other members of the Class, seek an order pursuant to s.172(3)(a) that the Defendants refund all sums that the Class paid to purchase the Children's Cough Medicine, or that the Defendants disgorge all revenue which it made on account of Children's Cough Medicine purchased by the Class, together with any further relief which may be available under the *BPCPA*.

28. It is unnecessary for the Plaintiff or any member of the Class to prove that the Defendants' deceptive acts or practices caused such persons to purchase the Children's Cough Medicine to make out a claim for relief under sections 172 of the *BPCPA*.

29. In the alternative, the Plaintiff and the other members of the Class suffered damages because of the Defendants' acts or practices and seek damages pursuant to s. 171 of the *BPCPA*.

Breach of the Competition Act

30. The Defendants made the representations and omissions to the public as particularized in paragraph 21 In so doing, the Defendants breached s. 52 of the *Competition Act*, R.S.C. 1985, c.C-34, and thereby committed an unlawful act because the representations and omissions:

i. were made for the purpose of promoting the business interests of the Defendants;

ii. were made to the public; and

iii. were false and misleading in a material respect.

31. The Class suffered damages as a result of the Defendants' unlawful breach of s.52 of the *Competition Act* and seek those damages, as well as their costs of investigation, pursuant to s. 36 of the *Competition Act*.

Unlawful Interference with Economic Relations

32. Further, or alternatively, the acts particularized in paragraph 21 were unlawful acts undertaken by the Defendants with the intent to injure the Class, and the Defendants are liable for the tort of unlawful interference with economic interests.

33. The Class suffered damages as a result of the Defendants' unlawful interference with their economic interests.

Unjust Enrichment, Waiver of Tort and Constructive Trust

34. In the alternative, the Plaintiff waives the tort and pleads that she and the other members of the Class are entitled to recover under restitutionary principles.

35. The Defendants have each been unjustly enriched by the receipt of revenue from the sale of the Children's Cough Medicine that was purchased by the Plaintiff and other members of the Class. The Plaintiff and other members of the Class have suffered a corresponding deprivation in the amount of the purchase price that they paid for the Children's Cough Medicine.

36. Since the money that the Defendants received resulted from the Defendants' wrongful or unlawful acts, there is and can be no juridical reason justifying the Defendants' retaining any part of such revenue and in particular, any contracts upon which the Defendants purport to rely to receive the illegal revenue are void and illegal.

37. The Defendants are constituted as constructive trustees in favour of the members of the Class for all of the illegal revenue because, among other reasons:

(a) the Defendants were unjustly enriched by receipt of the illegal revenue;

(b) the Class suffered a deprivation because they paid the illegal revenue;

(c) the Defendants engaged in criminal conduct and committed a wrongful act in making the deceptive and misleading representations and omissions;

(d) the illegal revenue was acquired in such circumstances that the Defendants may not in good conscience retain it;

(e) justice and good conscience require the imposition of a constructive trust; and

(f) there are no factors that would, in respect of the illegal revenue, render the imposition of a constructive trust unjust.

38. The Plaintiff pleads that equity and good conscience requires the Defendants to hold in trust for the Plaintiff and the other members of the Class all of the illegal revenue.

AGGREGATE DAMAGES

39. The restitution and damages sought by the Plaintiff and other members of the Class in paragraphs 24, 25, 26, 27, 29, 31, 33 and 36 above can be calculated on an aggregate bases for the Class as provided by the BPCPA and ss. 29 and 30 of the Class Proceeding Act.

PUNITIVE DAMAGES

40. The Plaintiff pleads that the Defendants' conduct in the design, development, testing, manufacturing, licensing, assembly, distribution, marketing, sale, instruction and promotion of the Children's Cough Medicine and the representations and omissions as pleaded above, was high-handed, outrageous, reckless, wanton, entirely without care, deliberate, callous, disgraceful, wilful, in intentional disregard of the rights and safety of the Class and their children. Such conduct renders the Defendants liable to pay punitive damages.

WHEREFORE the Plaintiff claims against the Defendants as follows:

a) an order certifying the proceeding as a class proceeding;

b) declaration pursuant to section 172(1)(a) of the *BPCPA*;

c) a permanent injunction pursuant to section 172(1)(b) of the *BPCPA*;

d) an order requiring the Defendants to advertise any adverse findings against them pursuant to section 172(3)(c) of the *BPCPA*;

e) disgorgement and/or restitution by the Defendants pursuant to section 173(3)(a) of the *BPCPA* and/or the doctrine of waiver of tort;

f) a constructive trust over the Defendant's illegally obtained revenue;

g) a declaration that the Defendants are in breach of s. 52 of the Competition Act;

h) damages pursuant to section 36 of the *Competition Act* and/or section 171 of the *BPCPA*;

i) investigation costs pursuant to section 36 of the *Competition Act*;

j) punitive damages;

k) the costs of administering and distributing an aggregate damage award;

l) interest pursuant to the *Court Order Interest Act*, RSBC 1996, c.79; and

m) such further relief and this Honourable Court deems just.

PLACE OF TRIAL: Vancouver, British Columbia

DATED: February 26, 2010

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Reidar Mogerman
Camp Fiorante Matthews
Solicitors for the Plaintiff

This Amended Statement of Claim is filed by Reidar M. Mogerman, Camp Fiorante Matthews, Barristers and Solicitors, 400 - 555 West Georgia Street, Vancouver, British Columbia, V6B 1Z6. Tel: (604) 689-7555 / Fax: (604) 689-7554.