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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wakelam v. Johnson & Johnson,* 2011 BCSC 1765

Date: 20111222
Docket: S078806
Registry: Vancouver

Between:

Lana Wakelam

Plaintiff

And

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

Defendants

And

The Attorney General of British Columbia

Pursuant to the *Constitutional Questions Act*

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

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Place and Date of Hearing:	Vancouver, B.C. April 26-29 and May 2-4, 2011
Further Written Submissions:	December 7 and 12, 2011
Place and Date of Judgment:	Vancouver, B.C. December 22, 2011

INTRODUCTION

[1] Lana Wakelam has a son who was born on August 12, 2004. During his childhood, she purchased cough and cold syrup on occasion and gave it to him to relieve cough and cold symptoms. The defendants are all manufacturers and/or suppliers of varieties of cough and cold syrup, including the sort purchased by Ms. Wakelam. All of it was packaged with instructions that included recommended doses for children between 2 and 6. This, says Ms. Wakelam, constituted a representation that these medicines were safe and effective for children in that age group.

[2] 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.

[3] In these circumstances, Ms. Wakelam applies for an order certifying this case as a class proceeding. She seeks to bring the action on her own behalf and on behalf of all residents of British Columbia who purchased "Children's Cough Medicine" (as defined) for use by children under the age of 6, that was supplied, offered for sale, advertised or promoted by the defendants between December 24, 1997, and the date of the certification order.

[4] The plaintiff commends this case as ideal for certification. The defendants pronounce it a travesty. They note that no one has been injured or harmed. They point out that they are closely regulated by Health Canada and did nothing that was not specifically authorized by their federal regulators. They oppose certification on all possible grounds, including constitutional, and issued Notice of Constitutional Question pursuant to the *Constitutional Question Act*, R.S.B.C.1996, c. 68.

[5] First, I will describe the claim that the plaintiff presents. Next, I will review the regulatory background that is front and centre to the defence. I will then turn to consider whether the claim meets the requirements for certification set out in section 4(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50.

THE CLAIM

1. **The Medicines**

[6] I have already described the proposed class. At the heart of this proposed class action is a group of medicines, described as "Children's Cough Medicine", defined as meaning:

> ...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;
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> II. Antitussives such as dextromethorphan, dextromethorphan hydrobromide, and diphenhydramine hydrochloride;
>
> III. Expectorants such as guiafenesin; and/or
>
> IV. Decongestants such as ephedrine hydrochloride/sulphate, phenylephrine hydrochloride/sulphate, and pseudoephedrine hydrochloride/sulphate.

[7] This covers most of the cough and cold medicines well known to consumers under trade names such as Tylenol, Benylin, Motrin, Sudafed, Buckley's, Jack & Jill, Triaminic, Robitussin, Advil, Vicks and Dimetapp, as well as house brands in major chain stores. These products did not, of course, each contain all of the drugs listed, but rather contained varying combinations of two or more of them. Any particular product need contain only one particular listed drug to qualify as "Children's Cough Medicine".

[8] Except where it is useful to use the defined term, I will refer to these products as the "medicines".

2. Causes of Action

[9] The amended statement of claim describes four causes of action which the plaintiff alleges entitle the class to claim relief from the defendants: breach of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 (*BPCPA*); breach of the *Competition Act*, R.S.C. 1985, c. C-34; interference with economic relations; and unjust enrichment/waiver of tort/constructive trust.

[10] It is worth noting that the plaintiff does *not* allege: physical injury; negligence (existence and breach of a duty of care); failure to warn; or breach of any regulatory duty vis-à-vis Health Canada.

a. *Breach of the* BPCPA

[11] This cause of action is the principal focus of the claim. It is alleged that each purchase of Children's Cough Medicine was a "consumer transaction" as defined by the *BPCPA*. Allegations that are key not only to this cause of action but also to the others are then pleaded in paragraph 21:

> 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.

[12] It is then alleged that these representations and omissions have the capability, tendency or effect of deceiving or misleading the class, and therefore constitute deceptive acts or practices under section 4 of the *BPCPA*, from which the defendants have gained. As a result, with reference to the *BPCPA*, the plaintiff and class members seek:

a) a declaration pursuant to section 172(1)(a) that those representations and omissions are deceptive acts or practices;

b) an interim and permanent injunction pursuant to section 172(1)(b) restraining the defendants from engaging are attempting to engage in such deceptive acts or practices;

c) an order pursuant to section 172(3)(c) requiring the defendants to advertise to the public the particulars of any judgment, declaration, order or injunction against them; and

d) an order pursuant to section 172(3)(a) that the defendants refund all sums that the class paid to purchase the Children's Cough Medicine, or disgorge all revenue which they made on account of Children's Cough Medicine purchased by the class.

[13] The plaintiff goes on to plead that it is unnecessary for her or any class member to prove that the defendants' deceptive acts or practices caused them to purchase the Children's Cough Medicine to make a claim for relief under section 172 of the *BPCPA*. In the alternative, it is alleged that they did suffer damages because of these acts or practices, and damages are sought.

b. *Breach of the* Competition Act

[14] The plaintiff claims that in making the representations and omissions particularized in paragraph 21, the defendants breached section 52 of the *Competition Act* and therefore committed an unlawful act because the representations and omissions were made for the purpose of promoting their

business interests, were made to the public and were false and misleading in a material respect. As a result, it is alleged that the class suffered damages.

[15] The Class claims those damages as well as their costs of investigation pursuant to section 36 of the *Competition Act*.

c. *Interference with Economic Relations*

[16] Here, the same representations and omissions particularized in paragraph 21 are alleged to constitute unlawful acts undertaken by the defendants with the intent to injure the class, making the defendants liable for the tort of unlawful interference with economic interests. The class allegedly suffered damages as a result.

d. *Unjust Enrichment / Waiver of Tort / Constructive Trust*

[17] This somewhat controversial cause of action is introduced as follows:

> 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.

[18] Those restitutionary principles are then pleaded in the forms of unjust enrichment and constructive trust, concluding with a plea that equity and good conscience require the defendants to hold in trust for the plaintiff and the other members of the Class all of the "illegal revenue" they obtained from the sale of the Children's Cough Medicine purchased by the plaintiff and the other members of the Class.

3. Damages

[19] The plaintiff alleges that the restitution and damages sought can be calculated on an aggregate basis for the Class as provided by the *BPCPA* and by sections 29 and 30 of the *Class Proceedings Act*. This is intended to avoid any need to assess class members' damages individually.

[20] Finally, the plaintiff pleads that the defendants' conduct 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". On this basis, punitive damages are claimed.

THE REGULATORY BACKGROUND

[21] The medicines have been supplied to consumers in both Canada and the United States. They were sold over-the-counter, rather than by prescription.

[22] In the United States, their regulation is overseen by the Food and Drug Administration (USFDA), a federal department. In Canada, their regulation is also a federal responsibility, administered by Health Canada in accordance with the *Food and Drugs Regulations*, C.R.C., c. 870. Those Regulations are made under section 30(1) of the *Food and Drugs Act*, R.S.C. 1985, c. F-27, which authorizes the making of regulations respecting the labelling and packaging, and the offering, exposing and advertising for sale of drugs, the specifications of packages of drugs, and the use of any substance as an ingredient in any drug,

> ...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....

[23] Typically, Health Canada makes decisions regarding Canadian standards based on USFDA precedent and its own extensive review of available data for the medicines in question.

[24] Before selling any drug in Canada, its proprietor must first apply for and obtain a drug identification number (DIN) from Health Canada as required by the Regulations. Health Canada issued guidelines applicable to all DIN applications for the medicines. These guidelines were in effect from early 1995 until 2009. The issuance of a DIN indicates that the product has passed a regulatory review of its formulation, labelling and instructions for use. All the medicines complied with this process and received DINs.

[25] Once labelling has been approved, the proprietor must advise Health Canada of any proposed changes to it, and a further DIN submission may be required.

[26] In the late 1980s, Health and Welfare Canada (as it was then called) convened an expert advisory committee to make recommendations to its Health Protection Branch regarding, among other things, the safety, efficacy and labelling of over-the-counter cough and cold medicines. This committee issued a series of three reports dealing with the different ingredients in such medicines, breaking them down into: cold medication ingredients such as antihistamines and nasal decongestants; cough medication ingredients such as antitussives and expectorants; and combinations of ingredients.

[27] In its first report, the committee concluded that the cold medication ingredients, including the antihistamines and decongestants that are relevant here, were generally safe and effective. It made some label and dosing recommendations for children, including medical supervision when antihistamines were given to children under 6. This recommendation followed that of an American panel that reported to the USFDA in 1976 and was based on safety concerns.

[28] In its second report, the committee came to a similar conclusion concerning the antitussives and expectorants included in the medicines: they were considered to be generally safe and effective.

[29] In coming to these conclusions, the committee recognized that the question of the safety and efficacy of these ingredients was not without controversy.

[30] In its third report, the committee approved various combinations of these ingredients, including those used in the medicines, and made recommendations for dosing children aged 2 through 12.

[31] After receiving these reports, the Health Protection Branch sought comments and input from others, including the manufacturers of the medicines in question. It then issued an Information Letter on November 22, 1990, setting out its regulatory

proposals. The discussion concerning antihistamines, for instance, proceeded as follows:

> 1. ANTIHISTAMINES (1, page 4)
>
> 1.1 GENERAL COMMENTS (1.1, page 4)
>
> 1.1.1 Efficacy For Relief Of Allergic Symptoms (1.1.1, page 4)
>
> The Committee did not make any recommendations on the usefulness of antihistamines in treating allergies. Four respondents requested that claims for both the relief of cold and allergy symptoms continue to be allowed for antihistamines where appropriate. The Health Protection Branch agrees with this request....
>
> 1.1.2 Children's Doses (1.1.5, page 5)
>
> The Committee agreed with the recommendation of the [American panel] that medical supervision is recommended when children under 6 years of age are given antihistamines. This recommendation was based on general safety considerations. Individuals vary widely in the degree to which adverse effects, particularly drowsiness, occur when given antihistamines. Respiration may be depressed and this effect can be serious in infections involving the airway. As it is difficult to assess adverse effects in children, use without medical supervision was not recommended.
>
> Four respondents objected to the Committee's recommendation concerning restriction of antihistamines availability for children under age 6 years. The availability of a number of nonprescription products in Canada for this age group without any apparent adverse consequences was pointed out, as was the increased burden to physicians and the health care system if this recommendation were adopted.
>
> As the Committee's recommendation was based on general safety considerations and not on specific data, and because of the existence of marketed products in Canada without apparent ill effects, the Health Protection Branch proposes the following:
>
> > *The safety and efficacy of antihistamines in children under age 6 years, and of nonprescription cough and cold products in general in children, needs further study. It is, therefore, proposed that a committee of paediatric experts be formed to study this issue. Issues relating to safety, efficacy, labelling, availability, and dosage, including the concept of standard paediatric dosing units and dosing by narrower age groups, should be considered by this committee. In the interim, marketing of existing products will be permitted. If a manufacturer applies for a Drug Identification Number (DIN) for an antihistamine-containing product promoted for use by children under age 6 years, and if the formulation or dosage regimen differs from that currently on the market, then data to support the safe and effective use of the product in children under age 6 will be required. Furthermore, products which are not presently registered as Proprietary Medicines will not be accepted in this category until the committee has studied the issue.*

[32] In the result, the defendants were authorized to continue marketing the medicines as before, which marketing included in their labelling recommended doses for children between the ages of 2 and 6.

[33] On October 11, 2007, Health Canada issued a Public Advisory recommending that nonprescription cough and cold products, including the medicines, not be administered to children under 2 years of age unless instructed to do so by a healthcare practitioner. This was based on the reporting to the USFDA of life-threatening adverse events, including unintentional overdoses, associated with the use of those products in children under 2. On the same date, members of the Nonprescription Drug Manufacturers Association of Canada announced the voluntary withdrawal of oral cough and cold medicines intended for use in children under the age of 2 years.

[34] In March of 2008, Health Canada convened another expert advisory committee to advise it on the safety of and appropriate labelling for nonprescription paediatric cough and cold medications sold in Canada.

[35] Then on December 18, 2008, Health Canada released a decision requiring manufacturers to re-label nonprescription cough and cold medicines that have dosing information for children to indicate that they should not be used in children under 6. This requirement was to be completed by Fall 2009, "in time for the next cough and cold season". In the meantime, Health Canada advised parents and caregivers not to use such medicines in children under 6. This decision, described as an expansion of the recommendations of October 11, 2007, was the result of:

> ...a Health Canada review of these medicines, including the input of a Scientific Advisory Panel convened in March 2008. Health Canada has concluded that while cough and cold medicines have a long history of use in children, there is limited evidence supporting the effectiveness of these products in children. In addition, reports of misuse, overdose and rare side-effects have raised concerns about the use of these medicines in children under 6. The rare but serious potential side-effects include convulsions, increased heart rate, decreased level of consciousness, abnormal heart rhythms and hallucinations.

[36] By Notice to market authorization holders (which would include the defendants) issued on the same date, Health Canada communicated its decision that, by Fall 2009,

> ...the labelling of marketed orally administered paediatric nonprescription cough and cold products belonging to the therapeutic categories listed above are to include a statement to the effect of: "Do not use in children under 6 years of age." In addition, these products are also to have: (1) Enhanced labelling; (2) Child resistant packaging; and (3) The inclusion of dosing devices for all liquid formulations.

In the meantime, market authorization holders were strongly encouraged to effect any necessary labelling changes as soon as possible.

[37] Health Canada released its Final Guidance Document: *Nonprescription Oral Paediatric Cough and Cold Labelling Standard* on February 6, 2009

[38] There is no allegation that any of the defendants failed to comply with any of Health Canada's directives, regulations, standards or requirements. Any such failure would have put the offending party afoul of the provisions of section 31 of the *Food and Drugs Act*, which make a breach of the Act or Regulations an offence punishable by fine or imprisonment or both.

[39] At the core of the defendants' position is the notion that their admitted representation before 2009 that the medicines were safe and effective for use in children under 6 cannot fairly be considered to have been deceptive given that Health Canada had determined in 1988 that they *were* safe and effective for such use, and so informed the public, the industry, and the medical and pharmacy professions. Even now, they note, these medicines may be administered to children under 6 on the advice of a physician. I observe, however, that while the Health Canada regime is no doubt intended to protect consumers from misrepresentation and deception, whether it is also intended to insulate manufacturers of drugs from civil liability to consumers is a different question.

[40] With this background in mind, I turn to consider whether this proposed class proceeding meets the requirements for certification.

CERTIFICATION REQUIREMENTS

[41] The requirements are set out in section 4 of the *Class Proceedings Act*:

> **4.** (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

Section 4(1) is mandatory. If the case meets the requirements set out in subparagraphs (a) through (e), then it *must* be certified as a class proceeding. I will consider them in turn after a brief review of some legal principles.

DISCUSSION

[42] No two cases are exactly the same. Nevertheless, it is fundamental that like cases should be decided alike, and each side proffered a particular precedent as a template for this decision. The plaintiff relies on *Knight v. Imperial Tobacco Canada Ltd.*, 2005 BCSC 172, 43 B.C.L.R. (4th) 169; appeal allowed in part, 2006 BCCA 235, 54 B.C.L.R. (4th) 204. The defendants nominate *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, 87 C.P.C. (6th) 276. Not surprisingly, the former was certified as a class action, but the latter was not. Both involved alleged misrepresentations concerning products sold to consumers. In *Knight*, the product was cigarettes marketed as "light" or "mild". In *Singer*, the product was sunscreen. The issue of the effect of federal regulation, however, did not arise in the *Knight* case. It did in *Singer.*

[43] In *Knight,* the Court of Appeal for British Columbia reminds us at paragraph 20 that class proceedings legislation ought to be construed generously, and that while it is necessary that a statement of claim disclose a cause of action, the certification stage is not a test of the merits of the action. The focus is on the form of the action and the key question is whether the suit or portions of it are appropriate for the trial of common issues. If so, then class actions serve judicial economy by avoiding unnecessary duplication in a multiplicity of actions, improve access to justice, and serve to modify wrongful behaviour. If not, then as noted in *Singer* at paragraph 205, the class format is unmanageable and inefficient.

[44] As I review the requirements for certification, it is important to bear in mind that the burden is on the plaintiff to show some basis in fact for each of them, other than the first requirement, that the pleadings disclose a cause of action. In *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272 ("*Infineon*"), the Court of Appeal noted that in conformity with a liberal and

purposive approach to certification, this evidentiary burden is not an onerous one, requiring only a "minimum evidentiary basis". As the Court of Appeal for Ontario stated in *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, 247 D.L.R. (4th) 667 at para. 50 (leave to appeal to SCC refused, [2005] 1 S.C.R. vi):

> ...[O]n a certification motion the court is ill equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis in fact for the certification requirement in issue.

1. Do the pleadings disclose a cause of action?

[45] In considering this first requirement, no evidence is admissible. The court must assume that the facts pleaded in the statement of claim can be proved. The test is whether, on that basis, it is plain and obvious that the plaintiff's claim cannot succeed. With this test in mind, I will consider each of the causes of action pleaded.

a. *Breach of the* BPCPA

[46] The defendants submit, first, that as a matter of law, the plaintiff's claims based on a breach of the *BPCPA* cannot succeed for jurisdictional reasons. All parties accept that the *BPCPA* is valid provincial legislation. As legislation enacted for the protection of consumers, it is within the province's legislative civil rights power, just as the *Food and Drugs Act*, aimed at protecting public health and safety, is a valid exercise of the federal legislative criminal law power. The defendants argue, however, that the *BPCPA* is inapplicable to them in this context due to the constitutional doctrine of interjurisdictional immunity, is inoperable due to the constitutional doctrine of paramountcy, and is unenforceable due to the regulated conduct doctrine.

[47] Both the plaintiff and the Attorney General of British Columbia submitted that it was premature to determine the constitutional questions, on the ground that a proper evidentiary basis would be required, and at this stage there is no proper factual record. They maintained that these should properly be decided as common issues after certification. I ruled that the defendants could argue these defences at

this stage as issues of law, but would not be at liberty to adduce evidence in their support.

[48] 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 *BPCPA* 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.

[49] I am unable to accept either that the relief sought by the plaintiff would have so profound an effect in fact, or that constitutional principles are so engaged in law.

[50] I accept that the subject matter of this claim has a double aspect. By this I mean that the subject matter of protecting consumers from misrepresentation and deceit engages both federal and provincial heads of power: see, for instance, *Standard Sausage Co. v. Lee*, [1934] 1 W.W.R. 81 (B.C.C.A.), and Peter W. Hogg: *Constitutional Law of Canada,* 5th ed. supplemented, vol. 1, looseleaf (Carswell: Toronto, 2007) at 21-28.

[51] In this way, the jurisdictions do overlap. Each is constitutionally endowed with the power to prevent the deceptive marketing of pharmaceuticals: the federal government pursuant to its criminal law power; the provincial government as a matter of property and civil rights. Although they overlap, these powers are not co-

extensive. The provincial power is limited to the marketing aspect, and does not include other aspects of the wider federal power such as approving new drugs.

[52] The courts have recognized that such overlaps are "the 'inevitable' indicia of cooperative federalism" and are not inherently problematic: *Jim Pattison Enterprises Ltd. v. British Columbia (Workers' Compensation Board)*, 2011 BCCA 35 at para. 86; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 18, [2009] 1 S.C.R. 624 at para. 32.

[53] In these circumstances, the preferred constitutional analysis is that of paramountcy rather than interjurisdictional immunity. Not only is it "much better suited to contemporary Canadian federalism" (*Canadian Western Bank* at para. 69), but it is also analytically more appropriate: *Jim Pattison Enterprises* at para. 123 *et seq*. This is because both jurisdictions have validly enacted applicable legislation, and the issue is the manner in which their power is to be exercised in this case, not whether the defendants, as federal undertakings, ought to be immune from provincial regulation. See, for instance, *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536 at para. 62 ("*Pilots Association*").

[54] The doctrine of federal legislative paramountcy dictates that where there is an inconsistency between validly enacted but overlapping provincial and federal legislation, the provincial legislation is inoperative to the extent of the inconsistency: *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188 at para. 11.

[55] The test was enunciated in the *Pilots Association* case in this way:

> [64] Claims in paramountcy may arise from two different forms of conflict. The first is operational conflict between federal and provincial laws, where one enactment says "yes" and the other says "no", such that "compliance with one is defiance of the other": *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191, *per* Dickson J. In *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, at p. 155, La Forest J. identified a second branch of paramountcy, in which dual compliance is possible, but the provincial law is incompatible with the purpose of federal legislation: see also *Law Society of*

> *British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113, at para. 72; *Lafarge Canada*, at para. 84. Federal paramountcy may thus arise from either the impossibility of dual compliance or the frustration of a federal purpose: *Rothmans*, at para. 14.

[56] We are here concerned with both forms of conflict. As to the first, the defendants argue that the manner in which the plaintiff seeks to enforce the provincial legislation threatens to render them liable in circumstances where they have complied as they must with federal regulations designed to protect those same consumers. This raises the sort of operational conflict between federal and provincial laws to which the Supreme Court of Canada referred. As to the second, the defendants assert that although both legislative regimes are aimed at protecting consumers, it is the wider purpose of the federal legislation of effecting and maintaining a uniform national food and drug regime that will be frustrated by the *ad hoc* approach of courts adjudicating claims under the provincial legislation.

[57] These arguments, however, do not succeed as a matter of law. As the Court of Appeal stated in the *Jim Pattison Enterprises* case:

> [137] ...The trend of co-existing of federal and provincial legislation on "double aspect" matters was acknowledged in [*Multiple Access Ltd. v. McCutcheon,* [1982] 2 S.C.R. 161] where Mr. Justice Dickson, for the majority, stated at 190-191:
>
> > With Mr. Justice Henry I would say that duplication is, to borrow Professor Lederman's phrase, "the ultimate in harmony". The resulting "untidiness" or "diseconomy" of duplication is the price we pay for a federal system in which economy "often has to be subordinated to [...] provincial autonomy" (Hogg, at p. 110). Mere duplication without actual conflict or contradiction is not sufficient to invoke the doctrine of paramountcy and render otherwise valid provincial legislation inoperative.
> >
> > [Emphasis added by the Court of Appeal]

[58] Here, while there may be duplication, the necessary actual conflict does not arise. There is no basis for concluding either that dual compliance is impossible, or that a federal purpose is frustrated.

[59] The federal legislation and regulations did not compel the defendants to market the medicines as safe and effective for children between 2 and 6. It

permitted them to do so, notwithstanding that there was acknowledged controversy over the issue and Health Canada recognized that further study was required. If the plaintiff is able to demonstrate factually that, over the period in question, the defendants engaged in deceptive practices as far as consumers were concerned, then I see nothing in the federal regulatory scheme that appears intended to insulate the defendants from answering to consumers for that conduct.

[60] 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.

[61] Similarly, what federal purpose is frustrated if the defendants are found to have misrepresented the safety and effectiveness of their products although they followed all of Health Canada's requirements? It will not expose Canadians to drugs that have not been reviewed and approved by Health Canada, nor will it remove approved drugs from the market. It does not threaten to dismantle a national, unified regulatory scheme. That will remain; the federal power is left untrammelled. It simply adds 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.

[62] By way of example, after Health Canada's Public Advisory of October 11, 2007, the members of the Nonprescription Drug Manufacturers Association of Canada announced the withdrawal of oral cough and cold medicines intended for use in children under the age of 2 years. That withdrawal was not mandated by Health Canada, but was voluntary. Presumably, those same members could have voluntarily withdrawn oral cough medicines intended for use in children between 2 and 6; they were not required to continue marketing their products as before, but

they were permitted to do so, and they did (compare *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241 ("*Spraytech*"), and *Rothmans, Benson & Hedges*.

[63] In these circumstances, it seems to me that as a matter of law, it is open to the plaintiff to allege, and to attempt to establish in fact, that in continuing to market the medicines as authorized by Health Canada up to 2009, instead of withdrawing them earlier on the basis of the information available to them, the defendants engaged in misrepresentation and nondisclosure concerning the medicines' safety and effectiveness. It may be a steep climb for the plaintiff, but it is an ascent that, in law, she is entitled to attempt.

[64] I conclude that, as a matter of law, the doctrine of paramountcy is not engaged and there is no constitutional basis for concluding that the plaintiff's claim under the *BPCPA* is bound to fail. The same logic, in my view, applies to the regulated conduct doctrine, though I will deal with that argument more fully in relation to the claim under the *Competition Act*, where it was principally advanced. Although the issue appears to have been argued differently, the existence of a comprehensive regulatory regime was also rejected as dispositive of claims under the *BPCPA* in *Stanway v. Wyeth Canada Inc.*, 2011 BCSC 1057 at para. 73.

[65] I therefore turn to consider whether the *BPCPA* claim is bound to fail for other reasons.

[66] In this regard, the defendants submit that the deceptive acts or practices alleged in paragraph 21 of the amended statement of claim are not actionable as pleaded, and that the remedies sought are not available in law.

[67] With respect to paragraph 21, the defendants note that the first particularized act is a representation that the medicines were effective when they were not. The second and third are failures to disclose: that they were ineffective; and that they could be dangerous.

[68] A failure to disclose, the defendants assert, is not capable of constituting a "deceptive act or practice" within the meaning of that phrase as defined in section 4 of the *BPCPA* - unless it constitutes a failure "to state a material fact, if the effect is misleading" as set out in section 4(3)(b)(vi). This, the defendants argue, imposes a different standard from the objective test that is contained in the language of section 4(1): "[representation or conduct] that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor", and requires that the effect *is* misleading; otherwise the nondisclosure is not actionable. The flaw here, the defendants say, is that the plaintiff has failed to plead that the alleged non-disclosures were misleading.

[69] Moreover, the defendants submit, this is not a mere defect in pleading that can be cured by amendment. Rather, they say, it is fundamental to the structure of the case given the plaintiff's pleading in paragraph 28 that it is unnecessary to prove that the defendants' deceptive acts or practices caused any member of the class to purchase the medicines in order to make out a claim for relief under section 172 of the *BPCPA*. Thus, they assert, the plaintiff has built her case on a reliance-free foundation, necessitated by the reality that reliance is an issue that is individual, rather than common to the class.

[70] In support of this argument, the defendants rely on references in the authorities to the significance of the change in the legislation. The *Trade Practice Act*, R.S.B.C. 1996, c. 457, provided as follows in relation to deceptive acts or practices:

> **3.** (1) For the purposes of this Act, a deceptive act or practice includes
>
> (a) an oral, written, visual, descriptive or other representation, *including a failure to disclose*; and
>
> (b) any conduct
>
> having the capability, tendency or effect of deceiving or misleading a person.
>
> [Emphasis added]

[71] The words "including a failure to disclose" were omitted from the *BPCPA*, which provides:

> **4.** (1) In this Division:
>
> "**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....

[72] Both provisions are followed by examples of representations and conduct that constitute deceptive acts or practices, "without limiting subsection (1)". In the *BPCPA*, as noted, one of these examples refers to "a representation" that "uses exaggeration, innuendo or ambiguity about the material fact or that fails to state a material fact, if the effect is misleading": subparagraph 4(3)(b)(vi).

[73] In the *Knight* case in this Court, Satanove J. (now Kloegman J.) considered an argument by the defence that the new legislation had eliminated any right to sue for allegedly failing to disclose material facts, and held that such rights that had accrued under the *Trade Practice Act* were substantial, and remained available notwithstanding the new provision. Her Ladyship went on to note:

> [49] As discussed under [the] heading of cause of action, I have found that it may not be necessary for the plaintiff to show individual reliance on the conduct of the defendant to establish certain breaches of the [*Trade Practice Act*] or *BPCPA*. *With the exception of a failure to disclose contrary to the BPCPA, the defendant's conduct does not have to actually mislead consumers to be actionable.*
> [Emphasis added]

This indicates, submit the defendants, that a failure to disclose under the *BPCPA* must in fact mislead each claimant.

[74] Similarly, in *Blackman v. FedEx Trade Networks Transport & Brokerage (Canada), Inc.*, 2009 BCSC 201 (which, significantly, was not brought under the

Class Proceedings Act), Garson J., then of this Court, relied on Satanove J.'s judgment in *Knight* in coming to this conclusion:

> [67] I agree with the defendants' contention that the removal of the "failure to disclose" portion of the definition of deceptive practice does foreclose the plaintiff from seeking redress under the *BPCPA* for a complaint that he was deceived by a failure to disclose....

[75] When the Court of Appeal entertained the *Knight* case, it had this to say:

> [26] ... As I observed, *supra*, it seems to me that the question of whether or not it can be established by the plaintiff that there have been deceptive acts or practices committed by the defendant in marketing cigarettes is central to the claims advanced on behalf of the plaintiff. Given the broad definition of deceptive acts or practices which includes acts or practices capable of deception, the question of deception or no deception is something that can, in my opinion, be litigated without reference to the circumstances of the plaintiff for individual class members. The situation with respect to this issue is somewhat analogous to that in [*Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184], where there was an allegation of systemic negligence made against a defendant.... Here, too, the question is one of a systemic course of conduct engaged in by the appellant, not limited by intention or effect to any one potential consumer.

[76] Relying on that decision, Dardi J. took a different approach in *Koubi v. Mazda Canada Inc.*, 2010 BCSC 650, in response to the defendants' argument that the plaintiff would have to show individual reliance on a failure to disclose a material fact:

> [124] In my view, the critical component is proving that Mazda Canada committed a deceptive act or practice. The focus of this inquiry is on Mazda Canada's knowledge of the alleged defect and its conduct, and on whether the alleged conduct had the "capability, tendency, or effect of deceiving or misleading a consumer" and not whether a particular plaintiff was deceived or not....

[77] As I see it, the comments of Satanove J. concerning the effect of the new legislation's omission of the words "including a failure to disclose" on what must be demonstrated to satisfy subparagraph 4(3)(b)(vi) are *obiter* given her conclusion that the *Trade Practice Act* continued to govern the plaintiff's rights in that case. With the

greatest respect to Satanove J., I prefer the approach taken by Dardi J. in *Koubi* and the Court of Appeal in *Knight*.

[78] It seems to me that the deletion of the words "including a failure to disclose" from the portion of the *BPCPA* definition relating to representations does not affect the exceedingly wide inclusion as a "deceptive act or practice" of "any conduct ... that has the capability, tendency or effect of deceiving or misleading a consumer...", which width is not to be limited by any of the ensuing examples. Specifically, it ought not to be interpreted as excluding from such conduct a failure to disclose if that failure satisfies the rest of the definition. It is therefore sufficient, in my view, for the plaintiff to have pleaded that the representations and omissions particularized in paragraph 21 of the amended statement of claim "have the capability, tendency or effect of deceiving or misleading the Class" (amended statement of claim, paragraph 22).

[79] In this regard, I consider it noteworthy that the requirement in subparagraph 4(3)(b)(vi) that "the effect is misleading", arguably a higher onus then the concluding words of subsection (1), is not specific to a failure to state a material fact (nondisclosure). Rather, it applies to the whole subparagraph, which refers to "a representation...that uses exaggeration, innuendo or ambiguity about a material fact or that fails to state a material fact, if the effect is misleading". One can, of course, be guilty of significant nondisclosure without making any representations at all.

[80] Moreover, when I look at subparagraph 4(3)(b)(vi), I am unable to agree that "if the effect is misleading" means "if a consumer is in fact misled". Rather, it seems to me to accomplish precisely the same end as the requirement in subsection 1 that the representation or conduct in question "has the capability, tendency or effect of deceiving or misleading a consumer...", which is to set an objective standard. Given that the legislation is intended to prohibit suppliers from committing or engaging in deceptive acts or practices in consumer transactions, and empowers the court, among other things, to declare that an act or practice "about to be engaged in by a supplier in respect of a consumer transaction contravenes this Act" (s. 172(1)(a)), it

seems evident to me that the test is intended to remain objective. What is or would be the effect of the conduct, including a failure to disclose a material fact, that has occurred or is about to occur? If the effect is or would be misleading, the supplier must answer for it. If "effect" is intended to mean the subjective impression of a specific consumer, then the inclusion of the word in subsection (1) would be quite unnecessary.

[81] I must confess parenthetically that I find it difficult to conceive of a failure to disclose a material fact that would *not* have a misleading effect. One would have thought that if the nondisclosure had no such effect, then the undisclosed fact could not have been material.

[82] Still speaking parenthetically, I must further admit to finding this argument rather artificial. The defendants concede that they represented the medicines to be safe and effective, from which it follows that they made no disclosure that they were unsafe and ineffective. These are two sides to the same coin. The real issue, then, is whether this was a deceptive practice, or otherwise unlawful, and that is clearly raised in the pleadings. The resolution of that issue will not depend on questions of disclosure or nondisclosure, representation or misrepresentation.

[83] I conclude that the plaintiff's claim under the *BPCPA* is not bound to fail by reason of the failure to plead that the plaintiff was in fact misled by the defendants' alleged failure to disclose that the medicines were ineffective and unsafe.

[84] I turn next to consider the defendants' argument concerning the remedies that the plaintiff seeks: damages pursuant to subsection 171(1) of the *BPCPA*, and a restoration order pursuant to paragraph 172(3)(a). The defendants submit that the plaintiff's failure to plead a causal link between the alleged contravention of the *BPCPA*, and the remedies claimed, is fatal to the entirety of the claim under the *BPCPA*, including the first particularized 'deceptive act or practice'.

[85] There is no doubt that subsection 171(1) refers to "damage or loss due to a contravention of this Act", while paragraph 172(3)(a) refers to the restoration of "any

money ... that may have been acquired because of a contravention of this Act". Both provisions accordingly require a causal relationship between the alleged contravention of the *BPCPA* and the damage claimed by the consumer, or the money acquired by the supplier.

[86] What the plaintiff has pleaded is this:

> 27. The Plaintiff, and the other members of the Class, seek an order pursuant to section 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....
>
> 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 a claim for relief under section 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 section 171 of the *BPCPA*.

[87] In the *Singer* case, the court noted, and the defendants here 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.

[88] In that case, in the context of the *Competition Act*, Strathy J. said this:

> [108] Section 52(1.1) only removes the requirement of proving reliance for the purpose of establishing the contravention of section 52(1). The separate cause of action, created by section 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.
>
> [Emphasis original]

[89] That reasoning does not, however, apply to the *BPCPA*. As Satanove J. noted in *Knight*:

> [32] As mentioned earlier, the main difference between the *BPCPA* and the *TPA* is in the definition of deceptive act or practice. The *BPCPA* 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 section 172(3). A restoration order under this section will still be contingent on the supplier's in breach [*sic*] of the statute that resulted in the supplier's acquisition of benefits from the consumer.
>
> [33] None of the cases cited to me specifically considered what needs to be proved in order to obtain a restoration remedy under section 18(4) of the *TPA* or section 172(3) of the *BPCPA*. However, I am of [sic] 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.
>
> ...
>
> [34] Section 22(1)(a) of the *TPA* and section 171(1) of the *BPCPA* clearly require the consumer to prove loss or damage suffered by the consumer (as an individual) in reliance upon the alleged deceptive act or practice....
>
> [35] The plaintiff submits that he can satisfy the onus of proof in ... section 171 of the *BPCPA* 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).
>
> [36] 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 section 22(1)(a) and section 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.

[90] The Court of Appeal found no fault with this reasoning. I conclude that the plaintiff's pleading in paragraphs 27 through 29 of the amended statement of claim is

sufficient in terms of the causal links required between the alleged contravention of the *BPCPA* and the remedies sought.

[91] It follows that the pleadings do disclose a cause of action for breach of the *BPCPA*. I will proceed to consider the other claims pleaded so that if I find that any do not disclose a cause of action, we may dispense with them at this stage.

b. *Breach of the* Competition Act

[92] As noted, the plaintiff alleges that in making the representations and omissions particularized in paragraph 21 of the amended statement of claim, the defendants committed an unlawful act by breaching section 52 of the *Competition Act*, and that the class suffered damages as a result of this unlawful breach. The damages are sought pursuant to section 36 of the Act.

[93] Section 52 of the *Competition Act* falls under *Part VI: Offences in Relation to Competition*, and reads in part:

> *False or misleading representations*
>
> **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 interests, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.
>
> *Proof of certain matters not required*
>
> (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;
>
> (*b*) any member of the public to whom the representation was made was within Canada; or
>
> (*c*) the representation was made in a place to which the public had access.

[94] Section 36 provides:

> *Recovery of damages*
>
> **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.

[95] The defendants submit that this claim is bound to fail for two reasons: the failure of the plaintiff to plead causation in relation to the loss claimed under section 36; and the application of the regulated conduct doctrine.

[96] We have already seen how Strathy J. of the Ontario Superior Court of Justice approached the *Competition Act* causation issue in the *Singer* case. His Honour considered that it was not enough for the plaintiff simply to plead the conclusory statement that the class suffered damages "as a result of" the unlawful breach, although that is the language used in section 36. Thus, it is argued, although section 52 requires no reliance to establish the offence, reliance must be pleaded to establish the right to collect damages.

[97] That argument is undoubtedly consistent with the approach of at least some judges in Ontario: in addition to *Singer*, see, for instance, *Magill v. Expedia Canada Corp.*, 2010 ONSC 5247 at paras. 99-107 (pleading struck out with leave to amend). No case has been cited to me where that approach has been adopted, at least expressly, in British Columbia. In *Holmes v. United Furniture Warehouse LP*, 2009 BCSC 1805, Madam Justice Fisher said only this:

> [35] A claim for damages under section 36 of the *Competition Act* is a possible cause of action. However the plaintiffs have not pleaded this clearly and concisely....
>
> [36] The particulars of this claim must be set out clearly. A reference to [false and misleading representations] "as particularized above" in a pleading of this kind is insufficient. *In addition, the pleading should include an allegation that the plaintiffs have suffered loss or damage as a result of this particular conduct, in order to properly bring this claim within section 36.*
>
> [Emphasis added]

[98] 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 *BPCPA*. 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.

[99] I therefore turn to consider the defence of the regulated conduct doctrine. The defendants argue that the conduct alleged to be in breach of the *Competition Act* is expressly authorized and regulated by valid legislation (the *Food and Drugs Act*, and the *Food and Drugs Regulations*), thereby providing the defendants with an unanswerable defence to this part of the claim. The doctrine provides that conduct that is *required or authorized* by provincial legislation is exempted from the reviewable conduct or criminal of provisions federal legislation such as the *Competition Act*: see, for instance, D. Jeffrey Brown ed., *Competition Act & Commentary, 2009* (Markham, LexisNexis Canada Inc., 2008) at pp. 2-3, and *A.G. Canada v. Law Society of B.C.*, [1982] 2 S.C.R. 307.

[100] Whether it applies equally where the authorizing legislation is also federal, as the defendants assert, is not free from doubt. But even if it does, it is clear that where the statutes can be interpreted so as not to interfere with each other, that interpretation is to be preferred: *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 at para. 76.

[101] In this case, the conduct alleged to be in breach of the *Competition Act* is the same conduct alleged to constitute deceptive acts or practices under the *BPCPA*: one misrepresentation and two incidents of nondisclosure relating to the safety and efficacy of the medicines. The *Food and Drugs Act* does not authorize misrepresentation or nondisclosure, but is intended to prevent it. As I noted above, the scheme it created permitted but did not compel the defendants to market the

medicines as safe and effective for children between 2 and 6. They could have complied with their obligations under the regulatory scheme without so marketing the medicines. If, as a matter of fact, the plaintiff can demonstrate that such marketing did indeed give rise to the misrepresentation and nondisclosures alleged, then I am unable to conclude, as a matter of interpretation, that the scheme under the *Food and Drugs Act* was intended to exempt the defendants from the provisions of the *Competition Act*. The circumstances of this case are wholly distinguishable, in my respectful view, from those considered by the Federal Court in *Society of Composers, Authors and Music Publishers of Canada v. Landmark Cinemas of Canada Ltd.* (1992), 60 F.T.R. 161, 45 C.P.R. (3d) 346.

[102] I conclude that it is not plain and obvious that the plaintiff's claim under the *Competition Act* must fail, and that the pleadings adequately disclose a cause of action in this regard.

c. *Interference with Economic Relations*

[103] The defendants submit that this claim, as pleaded, cannot succeed, because essential elements of the tort are missing.

[104] The tort of unlawful interference consists of deliberately interfering with the trade, business or economic interests of another by unlawful means: *Poirier v. Community Futures Development Corp.*, 2005 BCCA 169; *OBG Ltd. v. Allan*, [2007] UKHL 21, [2008] 1 A.C. 1.

[105] Of relevance here, the "economic relations" in question must consist of trade or business relations between the plaintiff and a third party, with which the defendant deliberately interferes by unlawful means. Merely causing economic loss by unlawful means is not enough: *Alleslev-Krofchak v. Valcom Ltd.*, 2010 ONCA 557, 322 D.L.R. (4th) 193. No allegation of such relations is discernible in the amended statement of claim, nor is it one that could sensibly be made in the circumstances.

[106] The plaintiff argues that this tort is evolving, and to the extent that a novel argument may be made at trial, the question of whether it can succeed should be

determined on the basis of a full factual record. That position would have merit if the issue here concerned such questions as whether the conduct alleged could properly be described as unlawful. But that is not the issue. We are here concerned with a fundamental element of the tort that is nowhere to be found in the amended statement of claim, and could not be supported by any of the material facts alleged.

[107] In the circumstances, I conclude that this claim is bound to fail and that paragraphs 32 and 33 of the amended statement of claim should accordingly be struck.

d. *Unjust Enrichment / Waiver of Tort / Constructive Trust*

[108] The defendants' submissions in relation to this pleading are premised largely on the success of their arguments that the plaintiff's claims under the *BPCPA*, the *Competition Act* and the tort of intentional interference with economic relations were bound to fail. As the defendants have succeeded on striking out just one of those three claims, that premise disappears.

[109] With respect to unjust enrichment, the defendants advance two further arguments. Both relate to the constituent elements: enrichment of the defendant with corresponding deprivation of the plaintiff; and the absence of a juristic reason for the enrichment.

[110] The defendants submit, first, that there is a juristic reason for the alleged enrichment: Health Canada's authorization of the continued marketing of the medicines for children between 2 and 6. Here, however, the defendants again assume as established what in fact is in issue. They submit that it is not a misrepresentation to tell the public what the regulator permits you to tell the public. But this ignores the fact that the suppliers are not puppets dancing on the regulator's strings. To tell the public what the regulator permits but does not compel the defendants to say may or may not be a misrepresentation. That will depend on the facts. The process that led the regulator to act as it did may also shield the defendants. But it is not inevitable that it will do so. The issue remains to be

litigated. Accordingly, whether there is a juristic reason for the alleged enrichment remains to be seen. It cannot be determined on the pleadings.

[111] The defendants' second argument focuses on the elements of enrichment and corresponding deprivation. The plaintiff pleads that the defendants have been enriched by the receipt of revenue from the sale of the medicines purchased by the plaintiff and other members of the class, and that the plaintiff and other members of the class have suffered a corresponding deprivation in the amount of the purchase price.

[112] In attacking this plea, the defendants rely on the decision of the Ontario Court of Appeal in *Boulanger v. Johnson & Johnson Corp.* (2003), 174 O.A.C. 44, a proposed class action on behalf of users of the prescription drug Prepulsid, manufactured by the defendant. One of the claims pleaded was that the plaintiff was entitled to reimbursement for the full purchase price paid for the product. On that issue, Goudge J.A., for the court, said this:

> [20] Third, the appellant seeks to support these paragraphs on the basis of unjust enrichment. In my view this argument also fails. The difficulty is that the purchase price for which the appellant seeks reimbursement was paid to the retailer not to the respondents. Any benefit to the respondents from this payment was indirect and only incidentally conferred on the respondents. Unjust enrichment does not extend to permit such a recovery.

[113] The present case is different. Although the plaintiff cites the purchase price of the medicines as the amount by which the plaintiff and other members of the class were deprived, she does not claim reimbursement of that purchase price, but rather seeks recovery of the amount by which the defendants were unjustly enriched through their receipt of revenue.

[114] Notwithstanding this distinction, on which he did not comment, Strathy J. applied *Boulanger* in the *Singer* case in concluding that the claim before him based on unjust enrichment did not disclose a cause of action because the plaintiff purchased the products in question from a retailer and not directly from the defendants.

[115] I do not see the issue as quite so cut and dried. In my view, it is not in line with authority in this province, including *ICBC v. Lo*, 2006 BCCA 584, 278 D.L.R. (4th) 148, *Innovex Foods 2001 Inc. v. Harnett Rovers et al.*, 2004 BCSC 928, and *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2006 BCSC 1047, 57 B.C.L.R. (4th) 323. I am therefore not prepared, at the certification stage, to pronounce it plain and obvious that the plaintiff's claim for unjust enrichment as pleaded must fail because the members of the class will presumably prove to have purchased the medicines from a retailer rather than from the defendants.

[116] Given my conclusion that the pleadings disclose a cause of action in relation to the claim for unjust enrichment, it seems to me to follow that an arguable claim also exists for a constructive trust. The two go together, and will depend on the evidence. I therefore do not need to consider whether the claim for a constructive trust can survive independently of a claim for unjust enrichment in the circumstances of this case.

[117] With respect to the waiver of tort claim, the defendants concede that it is properly pleaded so long as the allegations of wrongdoing have survived the defendants' submissions concerning the other causes of action. For the most part, they have.

e. *Limitation Periods*

[118] Finally, the defendants argue that it is plain and obvious that any surviving causes of action are mostly limited to a shorter time than the proposed class period. Accordingly, they submit, such causes of action should only be certified as to those shorter periods.

[119] I am unable to agree. There is no pleading of any limitation defence as yet, the onus of establishing which is on the defendants. Whether any such defence succeeds will ultimately be fact specific, depending upon such matters as discoverability. In these circumstances it cannot be said to be plain and obvious at this stage. If this action is certified, the appropriate class period will be the longest

one possible (10 years), subject to the class being amended should the evidence establish that different periods apply; see, for instance, *Chace v. Crane Canada Inc.* (1997), 44 B.C.L.R. (3d) 264 (C.A.) at para. 19.

f. *Conclusion*

[120] The requirement of paragraph 4(1)(a) of the *Class Proceedings Act* that the pleadings disclose a cause of action has been met.

2. Is there an identifiable class of two or more persons?

[121] As discussed, with respect to this and all further requirements of subsection 4(1) of the *Class Proceedings Act*, the burden is on the plaintiff to show a minimum evidentiary basis for the requirement. The court will, of course, consider all of the evidence placed before it in determining whether this burden has been satisfied.

[122] The defendants submit that the plaintiff has failed to provide any evidentiary basis to support the existence of other individuals who share her complaint and who are desirous of having their complaint litigated through the mechanism of a class proceeding. They argue that a bald assertion that a class exists is insufficient: *Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301 (Ont. Sup. Ct. J.) at para. 23. Rather, there must be evidence of a real and subsisting group of persons who are desirous of having their common complaint determined through the class action process: *Bellaire v. Independent Order of Foresters* (2004), 5 C.P.C (6th) 68 (Ont. Sup. Ct. J.) at para. 33.

[123] I am satisfied that, for the purposes of certification, the proposed class (all residents of British Columbia who purchased the medicines during the proposed class period) is adequately defined in accordance with the principles discussed in cases such as *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Ct. J. Gen. Div.), *Steele* and *Knight*.

[124] At the hearing of this application, however, there was no evidence of the existence of more than one individual member of that class who shares the plaintiff's desire to have the pleaded complaint determined through this mechanism of a class action or at all. It was therefore necessary to consider the extent to which such evidence is required in the circumstances of this case.

[125] In *Chartrand v. General Motors Corp.*, 2008 BCSC 1781, 75 C.P.C. (6th) 221, Martinson J. considered a certification application in relation to a claim arising out of an allegedly defective and dangerous spring clip used in parking brakes on certain vehicles with automatic transmissions manufactured by the defendant. Her Ladyship had this to say:

> [53] 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.
>
> [54] 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. ... 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.
>
> [55] I have not overlooked the fact that members, or some members, of the proposed group may not know about the spring clip issue; Ms. Chartrand did not know about it. However, there is no evidentiary basis for concluding that they would have reason to complain that it was dangerously defective or that GM was unjustly enriched, even if they did not know about it.
>
> ...
>
> [60] If the group of automatic vehicle owners found in the proposed class can, by reason of ownership alone, be viewed as an identifiable class ..., there must still be some rational relationship between that class and the proposed common issues. This is implicit in the identifiable class requirement: *Hollick* at para. 20. The requirement is not an onerous one. The representative plaintiff does not have to show that everyone in the class shares the same interest in the resolution of the asserted common issues. The class, however, must not be unnecessarily broad: *Hollick* at para. 21.
>
> [61] 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.

[126] Other cases relied upon by the plaintiff, such as *Hoy v. Medtronic, Inc.*, 2001 BCSC 1343, aff'd 2003 BCCA 316, 14 B.C.L.R. (4th) 32, *Lambert v. Guidant Corp.* (2009), 72 C.P.C (6th) 120 (Ont. Sup. Ct. J.), and *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2010 BCSC 922, rev'd 2011 BCCA 187, did not assist in this analysis. In all of those cases, at least two individual members of the proposed class were clearly identified.

[127] The question therefore became whether it was sufficient, as the plaintiff argued was suggested by Martinson J. in *Chartrand*, 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.

[128] We must bear in mind, of course, the premise of the claim as pleaded: that contrary to the defendants' admitted representation, the medicines were neither safe nor effective for children between 2 and 6, and the defendants therefore engaged in deceptive acts or practices.

[129] The evidence before me at the hearing established that the defendants' medicines were widely marketed and sold to persons in British Columbia for, among other things, the use of children between 2 and 6. The evidence further established there were adverse events reported by at least some of the defendants to Health Canada over the period 2002-2008, and also that there were numerous calls to the British Columbia Drug and Poison Information Centre concerning the pediatric use of the medicines. Typically, however, these calls did not involved adverse reactions. Rather, they concerned unintentional overdoses, and incidents of child self-medication in the absence of parental supervision.

[130] Notwithstanding that the evidentiary burden on the plaintiff is light, I was unable to conclude that I could draw sufficient inferences from this evidence to satisfy the requirement that the plaintiff demonstrate that there is at least one more identifiable class member who shares her complaint. 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.

[131] Counsel for the plaintiff advised that he had an unfiled affidavit that identifies other interested parties, and points to the following passage from *Lambert*:

> [100] ... In the present case, however, ...plaintiffs' counsel informed me that they have been in contact with a number of other putative class members who expressed an interest in the proceeding. If the defendants are not willing to accept that assurance, I would give leave to the plaintiffs to deliver an affidavit of one of their counsel for the [*sic*] purpose.

[132] It is not immediately apparent why that affidavit was not filed in support of the certification application, although the focus of the defendants' opposition was clearly elsewhere. After considering this issue, I decided that it was appropriate to grant leave to file the affidavit, and to give the defendants an opportunity to comment on its adequacy, before coming to a conclusion as to whether this requirement has been met. In my view, there was a sufficient air of reality to the linkage between the plaintiff's claim and the proposed class that the application for certification ought not to founder on this rock alone if the appropriate evidence were readily at hand.

[133] In response to my invitation, plaintiff's counsel filed an affidavit sworn May 4, 2011, identifying several individuals who purchased Children's Cough Medicine over the period in question, and who have indicated that they are 'interested in and support the class proceeding'.

[134] The defendants argue that this is not enough. They submit that there remains no evidence of two or more persons who complain, were deceived, suffered harm or found the medicine ineffective. Moreover, they assert, the proffered evidence is

insufficiently specific to establish that the products purchased consisted of Children's Cough Medicine as defined.

[135] The difficulty with these submissions is twofold: first, it is well established as noted above that the evidentiary burden on the plaintiff is not an onerous one, and requires only a "minimum evidentiary basis" (*Infineon*); second, the deficiency I had found was a lack of evidence that others were interested in pursuing the matter, not that others had, on the premise of the claim, found themselves in the same position as the plaintiff vis-à-vis the alleged misrepresentations.

[136] In my view, the evidence filed by the plaintiff is sufficient to correct the deficiency that concerned me. It follows that the plaintiff has met the requirement of paragraph 4(1)(b) of the *Class Proceedings Act*

3. Do the claims of the class members raise common issues?

[137] There is no doubt that this requirement is satisfied. The claims of the class members do indeed raise common issues, as the defendants concede. The real question is which of the issues that the plaintiff proposes for certification as common issues ought to be so certified. Those proposed common issues are set out in Schedule "A" to these reasons.

[138] The Supreme Court of Canada explained the nature of the enquiry into whether the claims of the potential class members raise common issues in *Hollick*:

> [18] ...[T]he underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". Thus an issue will be common "only where its resolution is necessary to the resolution of each class member's claim" [*Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 at para. 39 ("*Dutton*")]. Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial ... ingredient" of each of the class members' claims.

[139] With respect to the *BPCPA* claim, the defendants concede that the issues set out in subparagraphs (a) through (d) and (f) through (h) are indeed common issues. The same is not true, they assert, with the issues set out in subparagraph (e), which

is whether the defendants engaged in deceptive acts or practices in the solicitation, offer, advertisement and promotion of the medicines. They note that this is the critical issue in the *BPCPA* claim and maintain that it is an individual issue because of the need for the individual members of the class to prove that he or she was in fact misled by any failure to disclose a material fact. For the reasons discussed above in paragraphs 68 through 83, I am unable to accept that submission. I consider that issue (e) is also a common one as explained in *Hollick*.

[140] The defendants then point to issue (i) which is whether, if the defendants are found to have engaged in deceptive acts or practices contrary to the *BPCPA*, a monetary award should be made in favour of the class, and in what amount. This issue, they assert, requires an individual inquiry because to the extent the medicines worked for any particular individual, then that buyer got what he or she bargained for and suffered no loss. They rely on evidence indicating that children vary widely in their response to drugs such as those contained in the medicines, from which it follows that at least some class members probably suffered no economic harm. Accordingly, they assert, any claim for damages under subsection 171(1) of the *BPCPA*, or for restoration under section 172, must be individual, as causation is required and the evidence simply does not support an aggregation approach pursuant to section 29 of the *Class Proceedings Act*.

[141] The defendants take a similar approach to the plaintiff's proposed common issues in the *Competition Act* claim. They concede that issues (a) and (b) are common, but contend that the meat of the claim is in issue (c), which they say is not common. That issue is whether the class suffered damages as a result of the defendants' alleged unlawful breach of section 52 of the Act.

[142] Turning to the unjust enrichment, waiver of tort and constructive trust claims, the defendants maintain that all of the issues proposed by the plaintiff are individual.

[143] The defendants assert that however one approaches it, these issues will require an individual assessment for each member of the class, and that the plaintiff has failed to adduce evidence that supports a class-wide basis for assessing

damages whether on the loss side (the class) or the gain side (the defendants). In particular, say the defendants, there is no evidence that the aggregated approach proposed by the plaintiff is plausible in the circumstances of this case.

[144] These arguments were rejected by the Court of Appeal in *Infineon*, largely because the trial of the issues on common evidence had at least the potential to decide liability and damages without resort to individualized inquiries. They were also rejected by Dardi J. in *Koubi v. Mazda Canada Inc.*, 2011 BCSC 59.

[145] Here, too, it seems to me that the defendants are getting ahead of themselves. The extent to which individual inquiries will be necessary in relation to these claims, and the availability of an aggregated damages approach, remain to be determined. They should be "worked out in the laboratory of the trial court" (*Knight*, CA, at para. 40). The plaintiff has provided expert evidence to support the contention that there are class-wide methods available to determine these issues. The plaintiff does not have to establish that these methods must succeed. Much will depend on the nature of the findings to be made on the evidence, expert and otherwise, in relation to what I consider (as I have previously stated) to be the primary issue in this case: whether the defendants engaged in deceptive acts or practices/unlawful activity as particularized in paragraph 21 of the amended statement of claim.

[146] The defendants argue that *Infineon* is distinguishable because of the nature of the expert evidence put forward in that case. Naturally the evidence there was different from the evidence here, but I fail to see any valid distinction. The cases are sufficiently alike, and at para. 66 the Court of Appeal warned against embarking upon too exacting a scrutiny of the expert opinion evidence adduced at a certification hearing. The defendants' argument here depends upon such scrutiny, and upon assumptions being proven correct, issues of admissibility being determined in their favour, and opinions (opposed or otherwise) being accepted or rejected, none of which can or should be accomplished at this stage.

[147] In my view, it follows that it is appropriate to certify these issues as common issues at this time. If, in the further course of this litigation, it becomes clear that they cannot be managed as common issues, then appropriate steps can be taken to deal with them otherwise. For the present, I am satisfied that the plaintiff should be permitted to attempt to establish the appropriate remedies on a class-wide basis. These remedies should include the issue of entitlement to prejudgment interest, which must depend upon any findings as to damages.

[148] The claim for punitive damages, of course, is concerned not with compensating the class for any loss, whether individual or class-wide, but rather with punishing the defendants for their allegedly egregious conduct. That, too, is an appropriate common issue.

[149] I accept the submission of the defendants that the issue of distribution of damages and/or trust funds is an administrative issue and ought not to be included as a common issue.

4. Is a class proceeding the preferable procedure for the fair and efficient resolution of the common issues?

[150] The inquiry here is directed at two questions: first, whether the class proceeding would be a fair, efficient and manageable method of advancing the claim; and second, whether the class proceeding would be preferable to other procedures: *Hollick* at paras. 28-31; *Rumley* at para. 35.

[151] In British Columbia, the *Class Proceedings Act* provides express guidance as to how a court should approach the preferability question by listing five non-exhaustive factors to be considered in section 4(2). In this case, the defendants rely on subparagraphs 4(2)(a), (d) and (e). These raise the questions of whether: common issues of fact or law predominate over questions affecting only individual members; other means of resolving the claims are less practical or less efficient; and the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[152] The defendants also rely upon on the general principles of assessing preferability: whether a class proceeding will promote access to justice, judicial economy and behaviour modification.

[153] Access to justice has been described as a more important goal than judicial economy: *Endean v. Canadian Red Cross Society* (1997), 36 B.C.L.R. (3d) 350, 148 D.L.R. (4th) 158 (S.C.), at para. 54. In this case, there is no doubt that the expense of litigation would deny access to any person pursuing an individual claim of this sort. In weighing that, however, one must take into account that no one has suffered injury, that any individual out-of-pocket losses are minimal, and that there are other regulatory means for the pursuit of consumer dissatisfaction.

[154] Contextually, the defendants argue that individual issues are so predominant in this case that a class action would be unmanageable. In this regard they point to the hundreds of medicines that meet the definition of Children's Cough Medicine, varying in their labelling, their ingredients, the times over which they were marketed, and the reasons for consumer selection. They point to the absence of evidence supporting a class-wide assessment of damages or gain (as to which see the discussion above in paragraphs 139 *et seq.*). They point to the absence of any pressing need for access to justice on the evidence, as just discussed. And they point to the role of Health Canada as gatekeeper and to the sanctions available to Health Canada, which, they argue, eliminate the need for this proceeding to promote behaviour modification.

[155] In *Singer*, Strathy J. concluded that a class proceeding would not be a preferable procedure:

> [205] I am satisfied that a class proceeding would decidedly *not* be a preferable procedure for the following reasons. First, I am convinced that a class action, at least as envisaged by this plaintiff, would be unmanageable and inefficient. The multiplicity of products, product ingredients and advertising and labelling claims would make the resolution of the common issues extraordinarily complex.
>
> [206] Second, I am not satisfied that access to justice considerations are deserving of particular concern in this case for the reasons discussed under the subject of the identifiable class requirement. I am not even satisfied that

> Mr. Singer has a real complaint or that he has suffered any damages, but if he wishes to make a point of principle, it could be appropriately pursued in the Small Claims Court or as a test case. An individual action would permit him to pursue claims that would not be available in the class action, such as a common law claim for negligent misrepresentation and claims under the *Competition Act*, provided he can show reliance. Those actions are likely to be more effectively and efficiently prosecuted based on individual allegations of reliance and damages.
>
> [207] Third, there is an appropriate statutory and regulatory regime in place concerning the labelling and advertising of sunscreen products. That regime considers scientific evidence concerning the efficacy of sunscreen products and determines what representations can appropriately be made about each product. If there are concerns about representations made concerning specific products, those concerns can be addressed to the regulator. There is, therefore, a built-in behaviour modification process. To the extent that the plaintiff believes that there have been transgressions that require sanctions, complaints can be directed to the appropriate regulators under the *Food and Drugs Act* and the *Competition Act*.

[156] The defendants argue that these comments apply with equal force in this case. I disagree.

[157] First, although there is in this case, as there was in *Singer*, a multiplicity of products and ingredients, the allegation of misrepresentation here is the same in relation to each. That was not so in *Singer*, where the representations varied depending on the product and the label.

[158] Second, there is in this case no basis for concluding that access to justice can be appropriately achieved through a Provincial Court (Small Claims) action or a test case. Given the volume of expert evidence filed on this application, the suggestion that a point of principle could be satisfactorily made via that route is startling to say the least. Moreover, it would be inappropriate to assess the 'reality' of Ms. Wakelam's complaint at this stage, having found that her pleading discloses a cause of action. That was not the finding in *Singer*. Finally, for the reasons I have discussed above, it cannot be assumed, as it was in *Singer*, that individual issues of reliance arise to the same extent, if at all.

[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....

[160] I conclude that the *Singer* case is not, after all, very much like this one.

[161] I find that, notwithstanding the individual issues that may arise, a class proceeding is a preferable procedure to resolve the common issues, and that those common issues are not overwhelmed by individual issues. Appropriate management will ensure that that remains the case. The only factor weighing against the preferability of a class proceeding is the access-to-justice issue that arises from the absence of any evidence of one or more persons other than the plaintiff being interested in pursuing the matter. That defect has now been cured.

[162] The plaintiff has therefore met the requirement of paragraph 4(1)(d).

5. Is there an appropriate representative plaintiff?

[163] The plaintiff is required to satisfy the court that she would fairly and adequately represent the interests of the class, that she is in a position to fulfill her responsibilities, and that she has no interest in the common issues that would conflict with the interests of other class members. Ms. Wakelam has deposed that

she is unaware of any conflict, that she understands the role of a representative plaintiff, and that she is prepared to undertake those responsibilities and make herself available to counsel as necessary to fulfill them.

[164] In addition, the court should be satisfied that the plaintiff is represented by experienced and capable counsel. That point is beyond doubt.

[165] Finally, the plaintiff must produce a plan for the proceeding that sets out a workable method of advancing it on behalf of the class, and of notifying class members of the proceeding. The plaintiff has done so. The plan may not be perfect, and may require amendment. Nevertheless, it sufficiently addresses the requisite issues and demonstrates that the representative plaintiff and class counsel have devoted sufficient thought to the process.

[166] I conclude that the plaintiff has satisfied the requirement of paragraph 4(1)(e) of the *Class Proceedings Act.*

CONCLUSION

[167] As the plaintiff has met all of the requirements of subsection 4(1) of the *Class Proceedings Act*, it follows that I must certify this action as a class proceeding, and I do so, subject to this: the claim for damages for unlawful interference with economic relations, as pleaded in paragraphs 32 and 33 of the amended statement of claim, is struck.

[168] The common issues proposed by the plaintiff as set out in Schedule "A" are suitable for certification with the exception of those relating to unlawful interference with economic interests (3 (a) - (d)) and the distribution of damages and/or trust funds (7 (a)).

[169] The parties should schedule a hearing to deal with case planning issues at their earliest convenience.

"GRAUER, J."

Schedule "A"

Common Issues

The plaintiff proposes the following common issues:

1. ***Business Practices and Consumer Protection Act "BPCPA"***

   (a) Are the sales of the Children's Cough Medicine to the class "consumer transactions" as defined in the *BPCPA*?

   (b) Are the solicitations and promotions of the Children's Cough Medicine to the class "consumer transactions" as defined in the *BPCPA*?

   (c) With respect to the sales of the Children's Cough Medicine to the class, are the defendants "suppliers" as defined in the *BPCPA*?

   (d) Are the class members "consumers" as defined in the *BPCPA*?

   (e) Did the defendants engage in deceptive acts or practices in the solicitation, offer, advertisement and promotion of the Children's Cough Medicine contrary to the *BPCPA*, as alleged in the statement of claim?

   (f) If the court finds that the defendants, or any of them, have engaged in deceptive acts or practices contrary to the *BPCPA*, should an injunction be granted restraining those defendants from engaging or attempting to engage in those deceptive acts or practices?

   (g) If the court finds that the defendants, or any of them, have engaged in deceptive acts or practices contrary to the *BPCPA*, should a declaration be granted that these acts or practices in engaged in by the defendants in respect of consumer transactions contravene the *BPCPA*?

   (h) If the court finds that the defendants, or any of them, engaged in deceptive acts or practices contrary to the *BPCPA*, should the defendants be required to advertise the court's judgment, declaration, order or injunction and, if so, on what terms or conditions?

   (i) If the court finds that the defendants, or any of them, has engaged in deceptive acts or practices contrary to the *BPCPA*, should a monetary award be made in favour of the class and, if so, in what amount?

2. ***Competition Act***

   (a) Did the defendants make the representations and omissions to the public as particularized in the statement of claim?

   (b) If so, did the defendants breach s. 52 of the *Competition Act,* R.S.C. 1985, c.C-34, and thereby commit 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?

(c) Did the class suffer damages as a result of the defendants' unlawful breach of s.52 of the *Competition Act* and, if so, in what amount?

(d) Is the class entitled to their costs of investigation, pursuant to s. 36 of the *Competition Act* and, if so, in what amount?

3. ***Unlawful Interference with Economic Interests***

(a) Did the defendants, or any of them, intend to injure the class?

(b) Did the defendants, or any of them, interfere with the economic interests of the class by unlawful or illegal means?

(c) Did the class suffer economic loss as a result of the defendants' interference?

(d) What damages, if any, are payable by the defendants, or any of them, to the class?

4. ***Unjust Enrichment, Waiver of Tort and Constructive Trust***

(a) Have the defendants, or any of them, been unjustly enriched by the receipt of the revenue that they acquired from the sale of Children's Cough Medicine?

(b) Has the class suffered a corresponding deprivation in the amount of the revenue that the defendants, or any of them, acquired from the sale of Children's Cough Medicine?

(c) Is there a juridical reason why the defendants, or any of them, should be entitled to retain the revenue that they acquired from the sale of Children's Cough Medicine to the Class?

(d) What restitution, if any, is payable by the defendants, or any of them, to the class based on unjust enrichment?

(e) Should the defendants, or any of them, be constituted as constructive trustees in favour of the class for any or all of the revenue that they acquired from the sale of Children's Cough Medicine?

(f) What is the quantum of the revenue, if any, that the defendants hold as a constructive trust for the class?

(g) What restitution, if any, is payable by the defendants to the class based on the doctrine of waiver of tort?

(h) Are the defendants, or any of them, liable to account to the class for the wrongful revenues, or profits, that they obtained on the sale of Children's Cough Medicine to the class based on the doctrine of waiver of tort?

5. *Punitive Damages*

(a) Are the defendants, or any of them, liable to pay punitive or exemplary damages having regard to the nature of their conduct and if so, how much?

6. *Interest*

(a) What is the liability, if any, of the defendants, or any of them, for court order interest?

7. *Distribution of Damages and/or Trust Funds*

(a) What is the appropriate distribution of any damages (including punitive or exemplary damages), restitution and/or trust funds and interest to the class and who should pay for the cost attributable to that distribution?