

*ONTARIO*  
SUPERIOR COURT OF JUSTICE

BETWEEN:

**LORNE WALDMAN**

Plaintiff

- and -

**THOMSON REUTERS CORPORATION and  
THOMSON REUTERS CANADA LIMITED**

Defendants

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

**FACTUM OF THE MOVING PARTY  
(Motion for Certification)  
(returnable January 30 and 31, 2012)**

January 9, 2012

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**Factum of the Representative Plaintiff/Moving Party  
(Certification)**

**PART I: OVERVIEW**

1. This is a motion to certify this action as a class proceeding. The action concerns the copyright of legal documents (such as factums and pleadings) which are filed in court and subsequently copied, placed in a database and sold by the defendants without permission from the authors or owners of the works. There are approximately 100,000 documents at issue. The plaintiff, Lorne Waldman (“Waldman”) brings this proposed class action on behalf of the authors and/or owners of the works.

2. The single issue on this motion is whether Waldman has satisfied the test for certification pursuant to section 5(1) of the *Class Proceedings Act, 1992* (“CPA”).<sup>1</sup> The focus of this motion is on the form the action will take and not on whether the plaintiff has, at this early stage of the litigation, proven his case. The question before the court is effectively whether it would be more fair and efficient to determine the plaintiff’s allegations in a single class proceeding or in potentially thousands of separate individual proceedings.

3. The plaintiff’s claim is simple and manifestly suitable for resolution on a class-wide basis. The plaintiff asserts that the act of legal drafting gives rise to copyright rights under the *Copyright Act*, R.S.C. 1985, c. C-42. The plaintiff asserts that such rights belong first to the authors of the legal documents, or their employers, and that the authors and the owners of the copyright in the legal documents can be readily identified. Only the owners of copyright-protected material have a right to reproduce them, and perform other acts set out under the *Copyright Act*. The plaintiff alleges that the defendants have infringed these rights.

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<sup>1</sup> S.O. 1992, c. 6.

4. Most, if not all, liability issues can be resolved at a common issues trial or summary judgment motion. The Court can determine, on a class-wide basis, whether legal documents are protected by the *Copyright Act*, and if so, whether the defendants' actions infringe copyright. The Court can similarly determine, on a class-wide basis, whether the defendants' asserted defences of fair dealing, implied license and consent undermine the asserted claims. Moreover, in the event that liability is found, the *Copyright Act* provides for statutory damages for each act of infringement, or a calculation of damages and an accounting of profits, which can be determined on a class wide basis.

5. Following the common issues trial or summary judgment motion, any remaining individual issues can be fairly and efficiently determined on the basis of the aggregate or simplified procedures pursuant to ss. 24 and 25 of the *CPA*.

6. A class proceeding is plainly preferable to thousands of individual claims. It is highly manageable. It will promote access to justice by enabling the advancement of the claim in an easily provable manner. It will promote judicial economy through the adjudication of the claims, especially in a streamlined manner. Lastly, if successful, the action will likely modify the defendants' behaviour, and prevent them from infringing copyright.

## PART II: THE FACTS

### The Parties

7. Lorne Waldman is a lawyer who practices immigration and refugee law in Toronto. He is well known in the legal community and is the recipient of numerous awards and citations for his legal work.<sup>2</sup>

8. The defendants, Thomson Reuters Corporation and Thomson Reuters Canada Limited are companies incorporated pursuant to the laws of the Province of Ontario, with their Canadian offices in the City of Toronto. Thomson Reuters Canada Limited (“TRCL”) is an indirect, wholly owned subsidiary of Thomson Reuters Corporation. Thomson Reuters Corporation is a holding company.<sup>3</sup>

### Litigator’s Court Documents Service

9. Carswell is a division of TRCL. At all material times, Carswell has been a legal publisher, including of electronic publications, many of which are produced under the name Westlaw Canada. Carswell operates a database service known as “Litigator,” which contains a number of products which it markets to its customers under the Westlaw Canada banner.<sup>4</sup> This action is concerned with the 'Court Document Collection' within Litigator,<sup>5</sup> which permits subscribers to search for, download, print, edit and reproduce legal documents copied from court

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<sup>2</sup> Moving Party’s Certification Record, Tab 2, Affidavit of Lorne Waldman sworn October 4, 2010 (“Waldman Affidavit”) at para. 1-4, page 17-18 of Plaintiff’s Record.

<sup>3</sup> Responding Party’s Certification Record, Tab 1, Affidavit of Jilean Bell sworn February 28, 2011 (“Bell Affidavit”) at para. 2-4, page 1-2 of Defendants’ Record.

<sup>4</sup> Bell Affidavit, *supra* at para. 2-4, page 1-2 of Defendants’ Record.

<sup>5</sup> Bell Affidavit, *supra* at para. 5-6, page 2-3 of Defendants’ Record.

files, including pleadings, affidavits, facts and Notices of Motion (the “Works”, and each individually a “Work”).<sup>6</sup>

10. The Court Document Collection consists of approximately 100,000 documents<sup>7</sup> selected by the defendants for inclusion in Litigator. Once the defendants have identified a case of sufficient importance, they retain a process server to attend at the relevant Court registry, and obtain a copy of the court file for that case. A copy of all documents in the court file is made, following which, that copy is scanned and digitized into portable digital format (“.pdf”), and then using optical character recognition technology, transformed into a document that can be searched and edited.<sup>8</sup>

11. The defendants do not alter the content of the document but merely provide a few limited ‘enhancements’ to the Works for the purposes of “improving accessibility.” These consist of the following:<sup>9</sup>

- (a) a citation;
- (b) a hyper-link to other motions/proceedings;
- (c) a classification by legal issue;
- (d) highlighting the relevant procedural rules;
- (e) linking to related cases;
- (f) hyperlinking to the full text of a decision, as well as cites to jurisprudence and secondary sources; and

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<sup>6</sup> Waldman Affidavit, *supra* at para. 14, page 20 of Plaintiff’s Record.

<sup>7</sup> Joint Supplemental Record, at Tab F, Cross-Examination of Jilean Bell (“Bell Cross-Examination”) at p. 65, Question 267, page 256 of Joint Record.

<sup>8</sup> Bell Affidavit, *supra* at para. 17, page 20-21 of Defendants’ Certification Record; Waldman Affidavit, *supra* at para. 19, page 21 of Plaintiff’s Record.

<sup>9</sup> Bell Cross-Examination, *supra* at p. 13, Question 51-61, page 204-206 of Joint Record.

(g) redacting private information.

12. The Works are then uploaded onto the Litigator service with the enhancements. Subscribers may retrieve the Works through keyword searches. The Works may then be downloaded.<sup>10</sup> Every time a Work is uploaded into the Litigator service, or downloaded by a subscriber, a further copy is made.

13. Where Works are downloaded in .pdf format, no enhancements are included;<sup>11</sup> these Works are identical to the documents filed in Court, except with private information redacted. Where Works are downloaded in formats other than .pdf, or are viewed on the Litigator web-site, the enhancements are active.<sup>12</sup> Every download of a Work occurs by way of telecommunication over the internet.

14. Prior to the initiation of this claim, the defendants branded every page of each Work on Litigator, (except those in .pdf form), with a watermark stating:

© [YEAR] © Thomson Reuters Canada Limited or its Licensors. All rights reserved.

Since the initiation of this claim, the defendants have revised their copyright assertion:<sup>13</sup>

© Thomson Reuters Canada limited or its Licensors (excluding individual court documents). All rights reserved.

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<sup>10</sup> Waldman Affidavit, *supra* at para. 14, page 20 of Plaintiff's Record.

<sup>11</sup> Waldman Affidavit, *supra*, at Exhibit J, Arar Factum as downloaded from Litigator in .pdf format, page 76-102 of Plaintiff's Record.

<sup>12</sup> Waldman Affidavit, *supra*, at Exhibit K, Screen shot of Arar Factum from Litigator, page 103-116 of Plaintiff's Record; Waldman Affidavit, *supra*, at Exhibit L, Arar Factum as downloaded from Litigator in Word format, page 117-128 of Plaintiff's Record.

<sup>13</sup> Waldman Affidavit, *supra* at para. 29, page 23 of Plaintiff's Record; Bell Affidavit, *supra* at para. 58, page 13 of Defendants' Record.

15. A subscriber may save a downloaded Work onto his or her own computer, or else download the Work in Microsoft Word, WordPerfect, HTML, plain text format, .pdf format or rich text format.<sup>14</sup>

16. Once downloaded, a subscriber may substantially copy all or some of a Work, incorporate all or any portion of the Work into another work, or use all or any portion of the Work to create other works. Indeed, the defendants, in their marketing material as set out below at paragraphs 20 and 21, invite their subscribers to do so. The defendants also take no steps to limit the infringing acts of their subscribers.<sup>15</sup> The defendants:

- (a) do not put in place a pop-up, or indeed any warning prior to download or on the Litigator site to subscribers about legitimate use of the Works, or caution subscribers not to infringe copyright in the Works;
- (b) do not limit download capabilities;
- (c) do not remind subscribers that the *Copyright Act* governs the use of the Works; and
- (d) do not remind subscribers to contact the authors of the Works before making use of them.

17. There are approximately 12,000 to 13,000 different lawyers' names on the court documents in Litigator. There are approximately 6,500 different firm names listed.<sup>16</sup>

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<sup>14</sup> Waldman Affidavit, at Exhibit A, Statement of Claim ("Statement of Claim") at para. 32, page 45 of Plaintiff's Record.

<sup>15</sup> Statement of Claim at para. 48, page 49 of Plaintiff's Record.

<sup>16</sup> Bell Affidavit, *supra* at para. 63, page 14-15 of Defendants' Record.

18. At no point have the defendants paid any fee to law firms for access to the Works.<sup>17</sup> Nor do the defendants take any steps to secure the permission of owners and/or authors of the Works.

19. While the defendants assert that they have the right to deal in the Works in any manner in which they see fit, they have, “as a gesture of good faith”, acceded to requests from lawyers to remove their individual Works from the database.<sup>18</sup>

### The Marketing of Litigator

20. The marketing material created by the defendants is replete with invitations to subscribers that they copy substantial portions of the Works, and that they use the Works as the basis for their own document creation. To that end, the marketing material contains the following statements that authorize their subscribers to copy Works, infringing the *Copyright Act*. The marketing material states:

- (a) "more than 50,000 superbly organized actual court documents .... Save[s] you endless hours of tedious work digging for information—letting you present a polished case with much less effort";<sup>19</sup>
- (b) "reduce the time you spend preparing for and arguing motions with access to thousands of materials right from your desktop";<sup>20</sup>
- (c) "get a head start on your own document creation";<sup>21</sup>

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<sup>17</sup> Bell Cross-Examination, *supra* at p. 11, Question 43-44, page 202 of Joint Record.

<sup>18</sup> Bell Affidavit, *supra* at Exhibit EE, Letter from Michael Doody to Harvey Strosberg dated May 18, 2007, page 240 of Defendants' Record.

<sup>19</sup> Waldman Affidavit, *supra* at Exhibit C, "Informed Litigators Leave Nothing to Chance" ("Informed Litigators") page 63 of Plaintiff's Record.

<sup>20</sup> *Ibid.* at 64 of Plaintiff's Record.

<sup>21</sup> Waldman Affidavit, *supra* at Exhibit E, "Westlaw Canada: How can it help you?" ("Westlaw Canada") at page 66 of Plaintiff's Record.

- (d) "representing only leading-edge reported cases so you don't have to search for precedents in old paper files or rely on inaccurate filing structures";<sup>22</sup> and
- (e) "providing precedents from many lawyers and law firms so you'll always have access to the fresh and novel drafting".<sup>23</sup>

21. The defendants acknowledge in their marketing material the central importance played by the putative class members in the creation of the Works :

- (a) the Works are "written by counsel that have the skill and ingenuity to yield exceptional results";<sup>24</sup>
- (b) the Works are "prepared by the lawyers of record in the case, arguing real cases in real courts";<sup>25</sup>
- (c) subscribers may "[a]ccess a database of pleadings prepared by Canadian lawyers on topics of interest to you";<sup>26</sup> and
- (d) "The name of the authoring lawyer and firm are retained for each document, providing immediate insight into the document quality and reliability".<sup>27</sup>

22. No payments were made to any lawyers or law firms for the use of their 'skill and ingenuity', nor were they ever even asked whether they wished their materials included in the

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<sup>22</sup> Waldman Affidavit, *supra* at Exhibit F, "Litigator: Law Firms" at page 67 of Plaintiff's Record.

<sup>23</sup> *Ibid.*

<sup>24</sup> Waldman Affidavit, *supra* at Exhibit D, "Court Document Galleries" at page 65 of Plaintiff's Record.

<sup>25</sup> Westlaw Canada, *supra* at page 66 of Plaintiff's Record.

<sup>26</sup> Informed Litigators, *supra* at page 64 of Plaintiff's Record.

<sup>27</sup> Waldman Affidavit, *supra* at Exhibit G, "Litigator: Sole Practitioners" ("Litigator: Sole Practitioners") at page 69 of Plaintiff's Record.

Litigator database, for the defendants' profit.<sup>28</sup>

### The Arar Factum

23. Waldman was counsel to Maher Arar, and on his behalf obtained standing as an intervenor in Court File No. C38925 before the Ontario Court of Appeal. Waldman drafted a factum on behalf of Arar, which was filed at the Court of Appeal in Toronto.<sup>29</sup>

24. Prior to the initiation of this claim, the Arar Factum could be downloaded on Litigator.<sup>30</sup> The defendants did not ask for permission from the plaintiff before copying the Arar Factum and putting it on Litigator. The defendants have, similarly, failed to ask for permission from any of the other authors or owners of the Works.

25. Waldman has registered a claim with the Canadian Intellectual Property Office over the copyright in the Arar Factum.<sup>31</sup>

### Other Services

26. The certification record references four other Canadian services where some publicly-filed court documents can be accessed and downloaded. Unlike Litigator, none of these services are for profit and each includes a specific caution against copyright infringement. By contrast, as described above at paragraphs 20 and 21, Litigator's marketing materials encourage copyright infringement. The non-profit services are described below.

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<sup>28</sup> Bell Cross-Examination, *supra* at p. 11, Question 44, page 202 of Joint Record.

<sup>29</sup> Waldman Affidavit, *supra* at para. 26, page 22-23 of Plaintiff's Record.

<sup>30</sup> *Ibid.* at para. 27-30, page 23 of Plaintiff's Record.

<sup>31</sup> Waldman Affidavit, *supra* at Exhibit M, Certificate of Registration of Copyright, page 129 of Plaintiff's Record.

- (a) The Supreme Court of Canada permits users to download facta filed with that Court. The Supreme Court of Canada, under a heading entitled “Important Notices” cautions users that “Appeal factums on this website are prepared by or on behalf of the parties to proceedings. To obtain information concerning copyright ownership and restrictions on reproductions of appeal factums on this site, please contact the author directly”.<sup>32</sup>
- (b) Legal Aid Ontario operates LAO Law, a collection of primary and secondary legal materials including court documents, available to Ontario lawyers representing clients who have legal aid certificates. The LAO Website provides that “access is provided while respecting the copyright of the publishers of such materials including Legal Aid Ontario in keeping with the fair dealing provisions in the Canadian *Copyright Act*.”<sup>33</sup>
- (c) The National Class Actions Database run by the Canadian Bar Association provides information and actual court documents, such as pleadings and motions records from class proceedings. The National Class Actions Database contains a Terms of Use and Disclaimer cautioning users against violating copyright.<sup>34</sup>
- (d) B.C. Court Services Online website run by the British Columbia Ministry of the Attorney General provides online access to court documents and

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<sup>32</sup> Bell Cross-Examination, *supra* at p. 46, Question 196, page 237 of Joint Record; Exhibit 4 to Bell Cross-Examination, pg 5 of 6 of Print-Out, “Appeal Factums Restrictions”, page 275 of Joint Record.

<sup>33</sup> Bell Affidavit, *supra* at para 60(a), page 13-14 of Defendants’ Record; Bell Cross-Examination, *supra* at p. 18-19, 30 Questions 74, 77, 78, 120, pages 209-210, 221 of Joint Record; Document “A”, Legal Aid Ontario Terms of Use, page 315 of Joint Record.

<sup>34</sup> Bell Affidavit, *supra* at para. 60(b), page 13-14 of Defendants’ Record; Bell Cross-Examination, *supra* at p. 33, Question 133-138, page 224 of Joint Record; Document “C”, National Class Actions Database Terms of Use, page 318 of Joint Record.

files. The B.C. Court Services web-site provides an automatic pop-up upon first visitation warning users against infringing copyright.<sup>35</sup>

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<sup>35</sup> Bell Affidavit, *supra* at para. 60(c), page 13-14 of Defendants' Certification Record; Bell Cross-Examination, *supra* at p. 34, Question 142-146, 154-158, page 225-226 of Joint Record; Exhibit 2, "Disclaimer", page 264-265 of Joint Record.

### PART III: ISSUES & THE LAW

27. The sole issue on this motion is whether Waldman has met the test under section 5(1) of the *CPA* to have this action certified as a class proceeding.

#### General Principles

28. Section 5(1) is to be construed generously in order to promote the three goals of class proceedings: access to justice, judicial economy and behaviour modification. A certification motion is not the time for an assessment of the merits of the plaintiff's claim.<sup>36</sup>

29. Section 5(1) of the *CPA* requires the Court to certify a class proceeding if:<sup>37</sup>

- (a) the pleadings or the notice of application disclose a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant 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 for the class, an interest in conflict with the interests of other class members.

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<sup>36</sup> *Hollick v. Toronto (City)*, [2001] 3 SCR 158 at para. 14-16 (“*Hollick*”); *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (ON CA) at para. 27-28 (“*Cloud*”); *Hickey-Button v. Loyalist College of Applied Arts & Technology*, 2006 CanLII 20079 (ON CA) at paras 25-28 (“*Hickey-Button*”).

<sup>37</sup> *CPA*, s. 5(1).

30. Furthermore, s. 6 of the *CPA* expressly provides that the following are not bars to certification:<sup>38</sup>

- (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
- (b) the relief claimed relates to separate contracts involving different class members;
- (c) different remedies are sought for different class members;
- (d) the number of class members or the identity of each class member is not known; and
- (e) the class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

31. A plaintiff's evidentiary burden on the balance of the certification motion is very low.<sup>39</sup> For sections 5(1)(b) through (e), the plaintiff need only show "some basis in fact." That a fact is in dispute does not militate against certification. The question at the certification motion is not whether the claim is likely to succeed, but whether it is appropriately prosecuted as a class proceeding.<sup>40</sup> In contrast, a defendant's burden is inversely heavy. A defendant must show that there is *no* basis in the evidence for the claims asserted by the plaintiff.<sup>41</sup>

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<sup>38</sup> *CPA*, s. 6.

<sup>39</sup> *Grant v. Canada (Attorney General)*, 2009 CanLII 68179 (ON SC) at para. 20-21 ("*Grant*"); see also 2038724 *Ontario Ltd. v. Quizno's Canada Restaurant Corporation*, 2009 CanLII 23374 (ON SCDC) at para. 31 ("*Quizno's Div. Ct.*"), aff'd 2010 ONCA 466 (CanLII) ("*Quizno's CA*").

<sup>40</sup> *Hollick*, *supra* at para. 14-16.

<sup>41</sup> *Lambert v. Guidant Corporation*, 2009 CanLII 23379 (ON SC) at para 68.

### Section 5(1)(a): Cause of Action

32. The principles to be applied under section 5(1)(a) are identical to those applicable to a motion to strike a pleading as disclosing no cause of action.<sup>42</sup> In particular:

- no evidence is admissible, with the exception of documents that are specifically referenced in the statement of claim;
- all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proved;
- the pleadings will only be struck if it is plain and obvious and beyond a scintilla of doubt that the plaintiff's claim cannot succeed and that the action is certain to fail;
- the novelty of the cause of action will not militate against sustaining the plaintiff's claim;
- matters of law which are not fully settled by the jurisprudence must be allowed to proceed; and
- the pleading must be generously read to allow for drafting inadequacies.

33. The statement of claim in this action asserts tenable causes of action. It alleges that class members have copyright in the Works, and that the defendants have infringed their copyright, thereby entitling them to relief.<sup>43</sup>

#### (i) The Works have Copyright Protection

34. Copyright is a creature of statute, and the rights and remedies provided under the *Copyright Act* are exhaustive.<sup>44</sup> Copyright law protects the expression of ideas, including original literary, dramatic, musical and artistic works. Copyright exists in every literary work where the

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<sup>42</sup> *Hollick, supra* at para. 25; *Sauer v. Canada (Agriculture)*, 2008 CanLII 43774 (ON SC) at para.17 (“*Sauer*”); *Hunt v. Carey Canada Inc.*, [1990] S.C.J. No. 93 at para. 33; *Cloud, supra* at para 41.

<sup>43</sup> Statement of Claim, *supra* at page 35-54 of Plaintiff's Record.

<sup>44</sup> *Theberge v. Galerie D'art du Petit Champlain Inc.*, [2002] 2 S.C.R. 336 at para. 5.

exercise of skill and judgment required to produce the work was not so trivial that it could be characterized as a purely mechanical exercise.<sup>45</sup>

35. Copyright extends to legal documents. The drafting of legal works is a skill. The arrangement of facts, word choice, sentence structure and analysis are all forms of expression.<sup>46</sup> It is the lawyer's craft to place these facts, words, sentences and analysis into a format that is persuasive, and advances the client's cause.<sup>47</sup> The defendants acknowledge the skill inherent in the drafting of legal works and, indeed, seek to exploit that skill to persuade customers to buy their service. In this regard, as set out above, the defendants' marketing material boasts that the Works are "written by counsel that have the skill and ingenuity to yield exceptional results." (emphasis added)

36. Under section 13 of the *Copyright Act*, the author of a Work becomes the first owner of copyright. Where the author of a work was in the employment of some other person at the time of the creation of the work, the author remains the author of the Work (which categorization encompasses certain rights in favour of the author), but the employer becomes the owner of copyright in the Work.<sup>48</sup>

37. Where a defendant puts in issue in a civil proceeding either the existence of copyright in a work or the title of the plaintiff thereto, copyright shall be presumed, unless the contrary is

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<sup>45</sup> *Copyright Act*, s. 5(1); *CCH Canada Limited v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 ("CCH") at para. 25.

<sup>46</sup> Lisa P. Wang, "The Copyrightability of Legal Complaints", (2004) 45 B.C. L. Rev. 705.

<sup>47</sup> Davida H. Isaacs, "The Highest Form of Flattery? Application of the Fair Use Defense against Copyright Claims for Unauthorized Appropriation of Litigation Documents" (2006), 71 Missouri Law Review 391 at 406.

<sup>48</sup> *Copyright Act*, s. 13(1), (3).

proved, to subsist in the work. The *Copyright Act* presumes that a person named on a work as the author is the author.<sup>49</sup>

38. The owners of copyright are granted the exclusive right to reproduce a work, publish a work, translate a work, or communicate the work to the public by way of telecommunication.<sup>50</sup>

39. An author of a work who is not an owner still maintains certain rights under the *Copyright Act*, most notoriously, a right to the integrity of the work, and a right to be associated with the work as its author by name. By statute, these are referred to as moral rights, and they cannot be assigned.<sup>51</sup>

(ii) Copyright Infringement

40. The statement of claim alleges that the defendants have infringed copyright owned by the plaintiff and other class members.

41. Notwithstanding that the defendants now admit that they do not own any copyright in the individual court documents obtained from the public court file,<sup>52</sup> the defendants, with full knowledge of the “the name of the authoring lawyer and firm”,<sup>53</sup> copy, telecommunicate, publish the Works and translate them into different electronic formats. The plaintiff alleges that, by performing these acts without consent, the defendants have committed “primary” copyright infringement as defined by the *Copyright Act*.<sup>54</sup>

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<sup>49</sup> *Copyright Act*, s. 34.1(1), (2).

<sup>50</sup> *Copyright Act*, s. 3(1).

<sup>51</sup> *Copyright Act*, s. 14.1.

<sup>52</sup> Answers to Undertakings, Bell Cross-Examination, at p. 69-70, Question 287.

<sup>53</sup> Litigator: Sole Practitioners, *supra* note 27, page 69 of Plaintiff’s Record.

<sup>54</sup> *Copyright Act*, s. 3 (1).

42. Under s. 27(1) of the Copyright Act, it is an infringement of copyright for anyone to do anything that the Act only permits owners to do, including authorizing the exercise of an owner's rights.<sup>55</sup> Where an owner has the exclusive right to authorize reproduction of a Work, or a substantial part of a Work, the defendants, who are not owners of copyright in the Work, cannot authorize their subscribers to reproduce the Work. Nevertheless, the defendants invite their subscribers to incorporate all or any portion of the Works into their own work, use all or any portion of the Works to create other works, and place no real restrictions on their subscribers' conduct. They further invite their subscribers to "get a head start on [their] own document creation".<sup>56</sup> In authorizing the subscribers to reproduce the class members' Works, the defendants again infringe the exclusive rights granted to copyright owners.

43. The *Copyright Act* also prohibits "secondary" infringement, which includes selling or renting out copies of Works that the defendants knew, or should have known, infringed copyright.<sup>57</sup> The plaintiff alleges that the defendants engage in secondary infringement.

44. Finally, the plaintiff alleges that the defendants have infringed his "moral rights", as well as those of the class as a whole, by asserting that they are the owners of copyright in the Works.<sup>58</sup>

#### Section 5(1)(b): Identifiable Class

45. The plaintiff proposes that the class be defined as follows:

All persons who are the authors of original legal documents, and all persons, law firms, or other legal entities who own copyright in the pleadings, affidavits, facts, notices of motion and other legal documents

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<sup>55</sup> *CCH, supra* at para. 37-38.

<sup>56</sup> *Westlaw Canada, supra* at page 66 of Plaintiff's Record.

<sup>57</sup> *Copyright Act*, s. 27 (1), (2).

<sup>58</sup> *Ibid.*, s. 28.1, 28.2.

that the defendants have copied, used or otherwise dealt with in connection with the Litigator service.

46. The proposed class definition encompasses both authors and owners. The author is the person who actually made the Work,<sup>59</sup> or “the person who expresses the work in an original form.”<sup>60</sup> In the case of a sole author of a legal document, the author is the drafter or compiler.<sup>61</sup> A Work may have more than one author, if each collaborates with the other, and the contribution is not distinct from the contribution of the other author or authors.<sup>62</sup> Under the *Copyright Act*, an author is the first owner of copyright in a Work.<sup>63</sup>

47. The class definition meets the requirements of s. 5(1)(b) of the *CPA*.<sup>64</sup> In particular, the class definition:

- (a) identifies those persons who have a potential claim for relief against the defendants;
- (b) defines the parameters of the lawsuit so as to identify those persons who are bound by its result;
- (c) describes who is entitled to notice pursuant to the *Act*.
- (d) is defined by reference to objective criteria such that a person can be identified to be a class member without reference to the merits of the action;
- (e) is bounded in the sense that it is not unlimited; and

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<sup>59</sup> David Vaver, *Intellectual Property Law*, 2nd ed. (Toronto: Irwin Law, 2011) (“Intellectual Property”) at p. 116.

<sup>60</sup> John S. McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, 4th. ed. (looseleaf), (Toronto, ON: Carswell, 2009) at p. 17-1.

<sup>61</sup> David Vaver, *Copyright in Legal Documents*, (1993) 31 OHLJ 661 at 665; *Intellectual Property*, *supra* at p. 117.

<sup>62</sup> *Copyright Act*, s. 2, definition “work of joint authorship”.

<sup>63</sup> *Copyright Act*, s. 13(1).

<sup>64</sup> *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.) at para. 10 (“*Bywater*”); *Hollick*, *supra* at para. 17; *Western Canadian Shopping Centres v. Dutton* [2001] S.C.R. 534 (S.C.C.) at para. 38 (“*Dutton*”); *Griffin v. Dell Canada*, 2009 CanLII 3557 at para 67; *Cloud*, *supra* at para. 45.

- (f) is not over-inclusive, in the sense that it is not capable of being narrowed further without arbitrarily excluding from the class persons who share the same interest in the resolution in the common issues.

48. The class definition in this case is similar to those approved by courts in other certified copyright class actions. For example:

- (a) in *Robertson*, the Court approved a class definition which defined the class as “all person who were the authors or creators of original literary works or original artistic works”;<sup>65</sup> and
- (b) in *Electronic-Rights Defence Committee ERDC c. Southam Inc.*,<sup>66</sup> the Court certified a class consisting of freelance writers “whose articles or works have been reproduced without authorization or consent”.<sup>67</sup>

49. The defendants have already “retained” “the name of the authoring lawyer and firm”,<sup>68</sup> identifying the authors of the Works who presumptively are the owners of copyright.<sup>69</sup>

#### Section 5(1)(c): Common Issues

50. The *CPA* defines common issues as: “(a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.”<sup>70</sup>

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<sup>65</sup> *Robertson v. Thomson Corp.*, [1999] O.J. No. 280 (“*Robertson*”) at para 24. On appeal, the Supreme Court of Canada restricted the class definition to exclude newspaper staff writers, applying s. 13(3) of the *Copyright Act* (2006 SCC 43 at para 60, 62).

<sup>66</sup> [2009] Q.J. No. 2936 (Q.S.C.) (“*ERDC*”).

<sup>67</sup> *Ibid.* at para. 4, 117.

<sup>68</sup> Litigator: Sole Practitioners, *supra* at page 69 of Plaintiff’s Record.

<sup>69</sup> *Copyright Act*, s. 34.1.

51. The “common issues” requirement is a “low bar.” Courts must take a purposive approach to section 5(1)(c) in order to further the objectives of the *CPA*.<sup>71</sup> The definition of “common issues” in the *CPA* demonstrates a “conscious attempt by the Ontario legislature to avoid setting the bar for certification too high.”<sup>72</sup> Consistent with the purposive approach to the *CPA* advocated by the Supreme Court, the task posed by section 5(1)(c) is “to test whether there are aspects of the case that meet the commonality requirement rather than to elucidate the various individual issues which may remain after the common trial.”<sup>73</sup>

52. Courts have consistently found that while a common issue must be necessary to the resolution of a class member’s claim, it need not resolve a class member’s claim. Rather, the common issues need only advance the litigation by avoiding duplication of fact-finding or legal analysis.<sup>74</sup> A common issue may make up only a limited part of the liability question, and many individual issues may remain after its resolution.<sup>75</sup> Furthermore, while there must be a rational connection between the common issues and the class definition, there is no requirement that all class members have suffered harm.<sup>76</sup>

#### Factual Basis for Commonality

53. As set out above, at paragraphs 7 to 19, the claims of the class members arise from a common factual matrix. In particular, there is an evidentiary foundation that:

- the Works were drafted by lawyers;

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<sup>70</sup> *CPA*, section 1.

<sup>71</sup> *Cloud*, *supra* at para. 51-53.

<sup>72</sup> *Carom v. Bre-X Minerals Ltd.*, 2000 CanLII 16886 (ON CA) at para. 40–41.

<sup>73</sup> *Cloud*, *supra* at para. 53.

<sup>74</sup> *Hollick*, *supra* at para. 18; *Cloud*, *supra* at para. 83; *Quizno’s (Div. Ct.)*, *supra* at para. 31.

<sup>75</sup> *Cloud*, *supra* at para. 53-55.

<sup>76</sup> *Sauer*, *supra* para 32; *Hollick*, *supra* at para. 26; *Tiboni v. Merck Frosst Canada Ltd.*, 2008 CanLII 37911 (ON SC) at para. 78; *Bywater*, *supra* at para 12.

- the Works were filed in Court as part of legal proceedings;
- the Works were selected by the defendants as being of interest to their subscribers;
- the Works were copied by the defendants from Court files;
- the Works were translated by the defendants into electronic format, being searchable and editable;
- the Works were coded with the Enhancements, including the defendants' assertion of copyright ownership;
- the Works were uploaded into Litigator;
- the Works were made available for download by telecommunication over the internet;
- the Works were marketed in the manner set out above; and
- the defendants copied the Works without permission or license and sold the Works to their subscribers without providing any payment to the authors or owners of the Works.

#### The Plaintiff's Proposed Common Issues

54. The plaintiff's proposed common issues are attached as Schedule "C" to this factum. They relate to the pleaded causes of action, the exceptions (defences) to copyright infringement, and the relief available to the class. All of the issues are essential to each class member's claim and will substantially advance the litigation. The specific common issues are discussed below:

#### **1. Copyright in Legal Documents**

(a) Does copyright subsist in legal documents filed in Court, including, but not limited to Statement of Claim, Statements of Defence, facta, notices of motion and affidavits ( the "Works" and each a "Work")?

#### **2. Ownership of Copyright**

(a) Does the defendants' Litigator service contain Works authored by Class Members?

(b) Does the defendants' Litigator service contain Works whose copyright is owned by Class Members?

(c) If yes, what rights, if any, do Class Members have over the legal documents they authored?

55. These issues are at the heart of the litigation. The plaintiff and other members of the class assert that they own copyright in the Works. The defendants deny that the plaintiff, and by extension all members of the class, possess copyright in the Works.<sup>77</sup> If the issue is resolved in favour of the plaintiff and the class, their claims will be substantially advanced. Conversely, if the issue is resolved against them, the litigation will be at an end.

56. The resolution of these issues does not require individual fact-finding. On the contrary, they are fundamentally questions of law.

### **3. Infringement**

(a) Have the defendants' activities infringed the rights of Class Members by dealing in the Works in a manner that only the author or owner had the right to do, including by way of any of:

- (i) reproducing Works authored or owned by Class Members?
- (ii) publishing Works authored or owned by Class Members?
- (iii) making Works authored or owned by Class Members available to the public by way of telecommunication?
- (iv) selling or renting copies of the Works authored or owned by Class Members?
- (v) translating the Works?
- (vi) authorizing its subscribers to infringe Class Members' copyright?
- (vii) holding itself out as the owner or author of the Works?
- (viii) infringing the moral rights of the authors of the copyrighted documents?

(b) If so, which rights have been infringed?

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<sup>77</sup> Joint Supplemental Record, Tab B, Statement of Defence, ("Statement of Defence") at para. 21, 27, page 25, 26 of Joint Record.

57. These issues can similarly be resolved on a class-wide basis. Indeed, there is no factual dispute that, in the event that class members own copyright in the Works, the defendant engages in acts that would constitute infringement of copyright. Moreover, there is nothing individual about the manner in which the defendants deal with the Works. On the contrary it deals with each of the Works (and each class member) in an identical manner.

58. With respect to issue 3(a)(vii), there is additional evidentiary support in the defendants' responding record. As set out above, after receiving the statement of claim, the defendants revised the copyright notification printed on all of the Works (excepting .pdf documents), from "© [year] Thomson Reuters Canada Limited or its Licensors All rights reserved" to "© [year] Thomson Reuters Canada Limited or its Licensors (**excluding individual court documents**). All rights reserved." The defendants explained the revision as follows:<sup>78</sup>

After receiving the lawsuit and also Mr. Waldman's affidavit, we recognized that it was possible that customers could misunderstand some of our copyright notices, and mistakenly believe that Carswell was claiming copyright on the individual court documents. As a result, we have changed the copyright notice that accompanies downloaded or printed materials to say [emphasis added]:

© Thomson Reuters Canada Limited or its Licensors (**excluding individual court documents**). All rights reserved.

59. Irrespective of whether or not the defendants intended to assert copyright over the Works, there is a basis for a common issues judge to determine that the defendants have effectively admitted that the prior copyright notice was an assertion of copyright, infringing the class members' copyright.

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<sup>78</sup> Bell Affidavit, *supra* at para. 58, page 13 of Defendants' Record.

#### 4. Defences

If the answer to 3 is affirmative, do the defendants have a defence under the *Copyright Act* for these acts of infringement?

60. The defendants have served a statement of defence that asserts defences to the plaintiff's claim which apply equally to all class members' claims. In particular, the defendants assert that the subscribers of Litigator are subject to terms and conditions that accord with the *Copyright Act*,<sup>79</sup> that they did not engage in translation within the meaning of s. 3 of the *Copyright Act*,<sup>80</sup> that their conduct constituted "fair-dealing" pursuant to s. 29 and s. 29.1 of the *Copyright Act*,<sup>81</sup> that they had consent and/or an implied license to copy and sell the plaintiff's work,<sup>82</sup> and that they somehow have a right, sanctioned by s. 2(b) of the *Charter of Rights and Freedoms*, to copy and sell the Works.<sup>83</sup> All of these defences can be tried on a class-wide basis. An individual, detailed inquiry will not be required to determine whether there was explicit or implicit authorization for a Work's reproduction: the issue to be determined is a "larger issue" not hinging on each class member's individual relationship with the defendants, or his or her individual state of mind regarding reproduction. What is at issue is the scope of copyright protection especially in electronic rights.<sup>84</sup>

#### 5. Relief

(a) Are Class Members entitled to statutory damages pursuant to section 38.1 of the *Copyright Act* for each act of infringement carried out by the defendants? If the answer to this question is "yes", what is the quantum of the statutory damages to which the Class Members are entitled?

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<sup>79</sup> Statement of Defence, *supra* at para. 20-24, page 25-26 of Joint Record.

<sup>80</sup> *Ibid.* at para. 17, page 25 of Joint Record.

<sup>81</sup> *Ibid.* at para. 21, page 25 of Joint Record.

<sup>82</sup> *Ibid.* at para. 30-32, page 27-28 of Joint Record.

<sup>83</sup> *Ibid.* at para. 29, page 27 of Joint Record.

<sup>84</sup> ERDC, *supra* at para. 69-72.

- (b) What other damages or, alternatively, other heads or categories of damages, are Class Members entitled to?
- (c) Is there a reasonable likelihood that damages can be determined (in whole or in part) on an aggregate basis on behalf of the Class?
- (d) If the answer to (c) is “yes”, how is a damages award to be calculated and distributed to the Class?
- (e) If the answer to (c) or (d) above is “yes” what is the quantum of those damages?
- (f) Does the defendants’ conduct justify an award of aggravated, exemplary, or punitive damages?
- (g) Are the Class Members entitled to injunctive relief against the defendants under section 34(1) of the *Copyright Act*?

61. The proposed common issues concerning remedy are answerable at a common issues trial. They are common to all class members and focussed on the defendants’ conduct.<sup>85</sup>

62. The *Copyright Act* provides a mechanism by which statutory damages may be assessed against an infringing defendant:

**38.1** (1) Subject to this section, a copyright owner may elect, at any time before final judgment is rendered, to recover, instead of damages and profits referred to in subsection 35(1), an award of statutory damages for all infringements involved in the proceedings, with respect to any one work or other subject-matter, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$500 or more than \$20,000 as the court considers just.<sup>86</sup>

63. Statutory damages focus on the conduct of the infringer, not the economic damage or lost profit suffered by the owner or author. As such, they are ideally suited for a determination in the aggregate. In awarding statutory damage, the Court directs itself to:

- (a) the good faith or bad faith of the defendant;

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<sup>85</sup> *Robertson, supra* at para. 33-37.

<sup>86</sup> *Copyright Act*, s. 38.1.

- (b) the conduct of the parties before and during the proceedings; and
- (c) the need to deter other infringements of the copyright in question.<sup>87</sup>

64. Even if individual determinations are required to sort out the ownership and authorship of the Works, having the Court assess the quantum to be paid for each act of infringement is a determination that would significantly advance the litigation. There would be no purpose served in having multiple trials litigate, and then re-litigate, the ‘good or bad faith’ of the defendants, or its conduct after the claim was issued. The quantification of statutory damages should be certified as a common issue.

65. The *Copyright Act* also provides that a plaintiff may elect instead of statutory damages an accounting and disgorgement of profit. The *Copyright Act* provides that in assessing profits, the plaintiff shall be required to prove only receipts or revenues derived from the infringement and the defendant shall be required to prove every element of cost that it claims.<sup>88</sup> A determination of these revenues or costs can be determined on a class wide basis, should the class elect a remedy of disgorgement of profit.

#### Aggregate Assessment

66. There is plainly a basis to ask whether there is a reasonable likelihood of an aggregate assessment (pursuant to s. 24 of the *Class Proceedings Act*) given the allegations of class-wide breach of copyright and consequential liability.<sup>89</sup> While it is ultimately for the common issues trial judge to determine whether an aggregate assessment of damages is appropriate in the

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<sup>87</sup> *Copyright Act*, s. 38.1(5).

<sup>88</sup> *Copyright Act*, s. 35(1), (2).

<sup>89</sup> *Markson v. MBNA Canada Bank*, 2007 ONCA 334 (CanLII) (“*Markson*”); *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781 (“*Cassano*”).

circumstances of a particular case, the aggregate assessment of damages may be certified as a common issue where there is a “reasonable likelihood” that the pre-conditions for an aggregate damages award will be met.<sup>90</sup>

#### Punitive Damages

67. Common issue 5(f) asks whether the defendants’ conduct justifies an award of aggravated, exemplary, or punitive damages. This type of issue has been repeatedly certified by this Court.<sup>91</sup> Unlike questions concerning the quantum of punitive damages, this question requires no individual assessment.

#### Injunctive relief

68. Copyright class proceedings have certified claims that include requests for permanent injunctions.<sup>92</sup> If the conduct of the defendants is to be enjoined, this determination can clearly be made on a collective basis.

69. The *Copyright Act* explicitly contemplates jurisdiction for the Court to order a “wide” injunction, which may further enjoin the defendants from infringing copyright in “any other work or subject matter” where the class members satisfy the court that they own copyright in the Works (including Works not in Litigator at the time the claim was commenced), and the defendants will likely infringe copyright in “those other works or subject-matter unless enjoined by the court from doing so”.<sup>93</sup>

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<sup>90</sup> *Quizno’s (Div. Ct.)*, *supra* at para. 120-123; *Markson*, *supra* at para. 44-45; *Irving Paper Ltd. v. Atofina Chemicals Inc.* [2009] O.J. No. 4021 (S.C.J.), *aff’d* 2010 ONSC 2705 (CanLII) (“*Irving Paper*”); *Grant*, *supra* at para. 110.

<sup>91</sup> *McCracken v. Canadian National Railway Co.*, 2010 ONSC 4520 at para. 360-361; *Robinson v. Medtronic*, [2009] O.J. No. 4366 (S.C.J.), *aff’d* [2010] O.J. No. 3056 (Div. Ct.).

<sup>92</sup> *ERDC*, *supra* at para. 126.

<sup>93</sup> *Copyright Act*, s. 39.1.

### Section 5(1)(d): Preferable Procedure

70. A class proceeding is the preferable procedure where it presents a fair, efficient and manageable method of determining the common issues that arise from the claims of the class, and where such determination will advance the proceeding in accordance with the three goals of the *CPA*: judicial economy, access to justice, and behaviour modification.<sup>94</sup>

71. In considering the preferability requirement, the Court must consider the common issues in relation to the claims as a whole. The more numerous the common issues in the litigation, and the more central those issues are to the outcome of the litigation, the stronger will be the argument for a class proceeding.<sup>95</sup>

72. The availability of aggregate or simplified procedures for the assessment of damages pursuant to ss. 23, 24 or 25 of the *CPA* ensures that the claims of the class can be efficiently and manageably adjudicated in a class proceeding. The Court of Appeal has repeatedly emphasized that courts ought to strive to find ways to make use of the powerful tools of the *CPA* to meet the preferability requirement.<sup>96</sup>

73. A class proceeding is much more efficient than thousands of individual actions. Even if some or all class members would pursue their claims in the absence of a class proceeding, resolving all issues at once will enable the Court to manage what would otherwise be burdensome, repetitive litigation. The mechanisms available under the *CPA* will assist in the efficient advancement of class members' claims.

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<sup>94</sup> *Hickey-Button, supra* at para. 54; *Hollick, supra* at para. 27-31.

<sup>95</sup> *Hickey-Button, supra* at para. 55.

<sup>96</sup> *Cassano, supra* at para 64; *Quizno's (C.A.), supra* at para. 59; *Cloud, supra* at para. 90.

74. Trial judges have a great deal of discretion in fashioning efficient procedures to resolve any individual issues, and certification judges have rightly expressed scepticism of the commonly-made argument that class actions will break down into a monster of complexity incapable of fair resolution.<sup>97</sup>

75. The costs that would be saved if this action is certified are substantial. A class proceeding would avoid the repetitious determination of the same issues of fact and law.

76. Moreover, as noted by the Court in *Robertson*,

to suggest that these issues should be resolved by individual suits by each creator of copyright material is, from a practical perspective, to suggest that the issues should never be resolved. If the plaintiff is correct and the defendants are guilty of breach of copyright... then the plaintiff will have shown that the defendants are guilty of wrongdoing on a widespread basis. The modification of behaviour goal would plainly be met.<sup>98</sup>

#### Section 5(1)(e): Representative Plaintiff and Litigation Plan

##### *Representative Plaintiff*

77. A representative plaintiff must be a genuine representative of the class, have a common interest with other class members and must be willing and able to vigorously prosecute the claims of the class.<sup>99</sup> In order to be approved, a representative plaintiff needs to be motivated to

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<sup>97</sup> *Ormrod v. Etobicoke (Hydro-Electric Commission)*, 53 OR (3d) 285, 2001 CanLII 28045 (“*Ormrod*”) at para 8; *Kranjcec v. Ontario*, 69 OR (3d) 231, 2004 CanLII 17687 (“*Kranjcec*”) at para. 60-61.

<sup>98</sup> *Robertson*, *supra* at 38.

<sup>99</sup> *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 (S.C.J.) at para. 36-45; *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 (S.C.J.) at para. 40, *aff’d* [2003] O.J. No. 4708 (C.A.), *McCracken*, *supra* note 91 at para. 458.

prosecute the claim, able to bear the costs of the litigation and to have retained competent counsel to prosecute the claim.<sup>100</sup>

78. Provided that the representative plaintiff has his or her own cause of action, the representative plaintiff can assert a cause of action against a defendant on behalf of other class members that he or she does not assert personally, so long as the causes of action all share a common issue of law or of fact.<sup>101</sup>

79. Waldman meets these criteria. He is an engaged, genuine and determined plaintiff who understands his duties to the class and his role in the action. Indeed, Waldman, in his own legal practice has represented plaintiffs in class proceedings. Waldman understands and is committed to his role and responsibilities as the representative plaintiff.<sup>102</sup> He will fairly and adequately represent the interests of the class.

### Litigation Plan

80. At the certification stage, the litigation plan must necessarily be tentative, and not all procedural details need be provided. Its purpose at this stage is to assist the motions judge to determine whether the goals of the legislation will be served by certification, not to provide a

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<sup>100</sup> *McCracken, supra* at para. 460; *Dutton, supra* at para. 41.

<sup>101</sup> *McCracken, supra* at para. 459; *Boulangier v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 (S.C.J.) at para. 22, varied (2003), 64 O.R. (3d) 208 (Div. Ct.) at para. 41, 48, varied [2003] O.J. No. 2218 (C.A.); *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (S.C.J.) at para. 71-77; *Voutour v. Pfizer Canada Inc.*, [2008] O.J. No. 3070 (S.C.J.); *LeFrancois v. Guidant Corp.*, [2008] O.J. 1397 (S.C.J.) at para. 55.

<sup>102</sup> Waldman Affidavit, *supra* at para. 42-44, page 48-49 of Plaintiff's Record.

finalized plan set in stone with all procedural elements spelled out in detail. The litigation plan can be modified as necessary as the litigation progresses.<sup>103</sup>

81. Waldman has proposed a satisfactory litigation plan for the prosecution of this action.<sup>104</sup>

His litigation plan addresses the following:<sup>105</sup>

- (a) ongoing reporting to the class;
- (b) mechanisms for responding to inquiries from class members;
- (c) the intended process for marshalling documentary production, conducting examinations for discovery and retaining experts;
- (d) if individual issues remain after the determination of the common issues, what plan is proposed for resolving those individual issues; and
- (e) a plan for how damages or any other forms of relief are to be assessed or determined after the common issues have been decided.

82. Waldman submits that his proposed litigation plan meets the requirements of section 5(1)(e).

83. The parties have agreed that the notice plan may be further refined following certification.<sup>106</sup>

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<sup>103</sup> *Andersen v. St. Jude Medical Inc.*, 2004 CanLII 17808 (ON SC) at para. 14; *Kranjcec*, *supra* at para. 70-71; *Ormrod*, *supra* at para. 36.

<sup>104</sup> Waldman Affidavit, at Exhibit O, page 133 of Plaintiff's Record.

<sup>105</sup> *Bellaire v. Independent Order of Foresters*, [2004] O.J. No. 2242 (S.C.J.) at para. 53.

<sup>106</sup> Joint Supplemental Record, at Tab D, Cross-Examination of Lorne Waldman, at page 4, question 4, page 39 of Joint Record.

**PART IV: ORDER SOUGHT**

84. The plaintiff seeks an order certifying this action as a class proceeding.

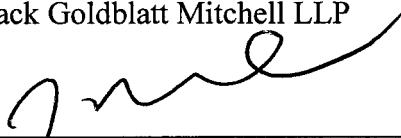
85. The parties have agreed that the successful party on this motion shall be entitled to costs in the cause fixed at \$15,000.00, inclusive.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**, this 9th day of January , 2011.



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**Louis Sokolov**  
Sack Goldblatt Mitchell LLP



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**Jordan Goldblatt**  
Sack Goldblatt Mitchell LLP

### Schedule “A” – Authorities

- 1 *Hollick v. Toronto (City)*, [2001] 3 SCR 158
- 2 *Cloud v. Canada (Attorney General)*, 2004 CanLII 45444 (ON CA)
- 3 *Hickey-Button v. Loyalist College of Applied Arts & Technology*, 2006 CanLII 20079 (ON CA)
- 4 *Grant v. Canada (Attorney General)*, 2009 CanLII 68179 (ON SC)
- 5 *2038724 Ontario Ltd. v. Quizno’s Canada Restaurant Corporation*, 2009 CanLII 23374; *2038724 Ontario Ltd. v. Quizno’s Canada Restaurant Corporation*, 2010 ONCA 466
- 6 *Lambert v. Guidant Corporation*, 2009 CanLII 23379 (ON SC)
- 7 *Sauer v. Canada (Agriculture)*, 2008 CanLII 43774 (ON SC)
- 8 *Hunt v. Carey Canada Inc.*, [1990] S.C.J. No. 93
- 9 *CCH Canada Limited v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339
- 10 *Theberge v. Galerie D’art du Petit Champlain Inc.*, [2002] 2 S.C.R. 336
- 11 Lisa P. Wang, “The Copyrightability of Legal Complaints”, (2004) 45 B.C. L. Rev. 705
- 12 Davida H. Isaacs, “The Highest Form of Flattery? Application of the Fair Use Defense against Copyright Claims for Unauthorized Appropriation of Litigation Documents” (2006), 71 Missouri Law Review 391
- 13 David Vaver, *Intellectual Property Law* (2011), Second Ed. At pg. 116
- 14 John S. McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, 3rd. Ed. (Scarborough, ON: Carswell, 2000) at pg. 312
- 15 David Vaver, *Copyright in Legal Documents*, (1993) 31 OHLJ 661
- 16 *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.)
- 17 *Western Canadian Shopping Centres v. Dutton* [2001] S.C.R. 534 (S.C.C.)
- 18 *Griffin v. Dell Canada Inc.*, 2009 CanLII 3557 (S.C.J.)

- 19 *Electronic-Rights Defence Committee ERDC c. Southam Inc.*, [2009] Q.J. No. 2936 (Q.S.C.)
- 20 *Carom v. Bre-X Minerals Ltd.*, 2000 CanLII 16886 (ON CA)
- 21 *Tiboni v. Merck Frosst Canada Ltd.*, 2008 CanLII 37911 (ON SC)
- 22 *Robertson v. Thomson Corp.*, [1999] O.J. No. 280 *Markson v. MBNA Canada Bank*, 2007 ONCA 334 (CanLII); *Robertson v. Thomson Corp.*, 2006 SCC 43
- 23 *Markson v. MBNA Canada Bank*, 2007 ONCA 334 (CanLII)
- 24 *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781
- 25 *Irving Paper Ltd. v. Atofina Chemicals Inc.*, [2009] O.J. No. 4021 (S.C.J.); *Irving Paper Ltd. v. Atofina Chemicals Inc.*, 2010 ONSC 2705 (CanLII)
- 26 *McCracken v. Canadian National Railway Co.*, 2010 ONSC 4520
- 27 *Robinson v. Medtronic*, [2009] O.J. No. 4366 (S.C.J.); *Robinson v. Medtronic*, [2010] O.J. No. 3056 (Div. Ct.)
- 28 *Ormrod v. Etobicoke (Hydro-Electric Commission)*, 53 OR (3d) 285, 2001 CanLii 28045 (S.C.J.)
- 29 *Kranjcec v. Ontario*, 69 OR (3d) 231, 2004 CanLII 17687
- 30 *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 (S.C.J.)
- 31 *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 (S.C.J.); *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 4708 (C.A.)
- 32 *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 (S.C.J.); *Boulanger v. Johnson & Johnson Corp.*, 64 O.R. (3d) 208 (Div. Ct.); *Boulanger v. Johnson & Johnson Corp.*, [2003] O.J. No. 2218 (C.A.)
- 33 *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (S.C.J.)
- 34 *Voutour v. Pfizer Canada Inc.*, [2008] O.J. No. 3070 (S.C.J.)
- 35 *LeFrancois v. Guidant Corp.*, [2008] O.J. 1397 (S.C.J.)
- 36 *Andersen v. St. Jude Medical Inc.*, 2004 CanLII 17808 (ON SC)



## Schedule “B” – Statutes

### *Class Proceedings Act, 1992, SO 1992, c 6*

#### **Definitions**

1. In this Act,

“common issues” means,

- (a) common but not necessarily identical issues of fact, or
- (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts; (“questions communes”)

#### **Certification**

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

- (a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant 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 for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1).

#### **Idem, subclass protection**

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,

- (a) would fairly and adequately represent the interests of the subclass;

- (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and
- (c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members. 1992, c. 6, s. 5 (2).

#### **Evidence as to size of class**

(3) Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class. 1992, c. 6, s. 5 (3).

#### **Adjournments**

(4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence. 1992, c. 6, s. 5 (4).

#### **Certification not a ruling on merits**

(5) An order certifying a class proceeding is not a determination of the merits of the proceeding.

#### **Certain matters not bar to certification**

6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
2. The relief claimed relates to separate contracts involving different class members.
3. Different remedies are sought for different class members.
4. The number of class members or the identity of each class member is not known.
5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

#### **Statistical evidence**

23. (1) For the purposes of determining issues relating to the amount or distribution of a monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics. 1992, c. 6, s. 23 (1).

**Idem**

(2) A record of statistical information purporting to be prepared or published under the authority of the Parliament of Canada or the legislature of any province or territory of Canada may be admitted as evidence without proof of its authenticity. 1992, c. 6, s. 23 (2).

**Notice**

(3) Statistical information shall not be admitted as evidence under this section unless the party seeking to introduce the information has,

- (a) given reasonable notice of it to the party against whom it is to be used, together with a copy of the information;
- (b) complied with subsections (4) and (5); and
- (c) complied with any requirement to produce documents under subsection (7). 1992, c. 6, s. 23 (3).

**Contents of notice**

(4) Notice under this section shall specify the source of any statistical information sought to be introduced that,

- (a) was prepared or published under the authority of the Parliament of Canada or the legislature of any province or territory of Canada;
- (b) was derived from market quotations, tabulations, lists, directories or other compilations generally used and relied on by members of the public; or
- (c) was derived from reference material generally used and relied on by members of an occupational group. 1992, c. 6, s. 23 (4).

**Idem**

(5) Except with respect to information referred to in subsection (4), notice under this section shall,

- (a) specify the name and qualifications of each person who supervised the preparation of statistical information sought to be introduced; and
- (b) describe any documents prepared or used in the course of preparing the statistical information sought to be introduced. 1992, c. 6, s. 23 (5).

**Cross-examination**

(6) A party against whom statistical information is sought to be introduced under this section may require, for the purposes of cross-examination, the attendance of any person who supervised the preparation of the information. 1992, c. 6, s. 23 (6).

## **Production of documents**

(7) Except with respect to information referred to in subsection (4), a party against whom statistical information is sought to be introduced under this section may require the party seeking to introduce it to produce for inspection any document that was prepared or used in the course of preparing the information, unless the document discloses the identity of persons responding to a survey who have not consented in writing to the disclosure. 1992, c. 6, s. 23 (7).

## **Aggregate assessment of monetary relief**

24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

- (a) monetary relief is claimed on behalf of some or all class members;
- (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
- (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members. 1992, c. 6, s. 24 (1).

## **Average or proportional application**

(2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis. 1992, c. 6, s. 24 (2).

## **Idem**

(3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members. 1992, c. 6, s. 24 (3).

## **Court to determine whether individual claims need to be made**

(4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order. 1992, c. 6, s. 24 (4).

## **Procedures for determining claims**

(5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims. 1992, c. 6, s. 24 (5).

## **Idem**

(6) In specifying procedures under subsection (5), the court shall minimize the burden on class members and, for the purpose, the court may authorize,

- (a) the use of standardized proof of claim forms;
- (b) the receipt of affidavit or other documentary evidence; and
- (c) the auditing of claims on a sampling or other basis. 1992, c. 6, s. 24 (6).

## **Time limits for making claims**

(7) When specifying procedures under subsection (5), the court shall set a reasonable time within which individual class members may make claims under this section. 1992, c. 6, s. 24 (7).

## **Idem**

(8) A class member who fails to make a claim within the time set under subsection (7) may not later make a claim under this section except with leave of the court. 1992, c. 6, s. 24 (8).

## **Extension of time**

- (9) The court may give leave under subsection (8) if it is satisfied that,
- (a) there are apparent grounds for relief;
  - (b) the delay was not caused by any fault of the person seeking the relief; and
  - (c) the defendant would not suffer substantial prejudice if leave were given. 1992, c. 6, s. 24 (9).

## **Court may amend subs. (1) judgment**

(10) The court may amend a judgment given under subsection (1) to give effect to a claim made with leave under subsection (8) if the court considers it appropriate to do so. 1992, c. 6, s. 24 (10).

## **Individual issues**

**25.** (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,

- (a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;
- (b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and

(c) with the consent of the parties, direct that the issues be determined in any other manner. 1992, c. 6, s. 25 (1).

#### **Directions as to procedure**

(2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity. 1992, c. 6, s. 25 (2).

#### **Idem**

(3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,

- (a) dispense with any procedural step that it considers unnecessary; and
- (b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate. 1992, c. 6, s. 25 (3).

#### **Time limits for making claims**

(4) The court shall set a reasonable time within which individual class members may make claims under this section. 1992, c. 6, s. 25 (4).

#### **Idem**

(5) A class member who fails to make a claim within the time set under subsection (4) may not later make a claim under this section except with leave of the court. 1992, c. 6, s. 25 (5).

#### **Extension of time**

(6) Subsection 24 (9) applies with necessary modifications to a decision whether to give leave under subsection (5). 1992, c. 6, s. 25 (6).

#### **Determination under cl. (1)(c) deemed court order**

(7) A determination under clause (1) (c) is deemed to be an order of the court. 1992, c. 6, s. 25 (7).

*Copyright Act, R.S.C., 1985, c. C-42.*

**Definitions**

2. In this Act,

[...]

“work of joint authorship” means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors;

**Copyright in works**

3. (1) For the purposes of this Act, “copyright”, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

(a) to produce, reproduce, perform or publish any translation of the work,

(b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,

(c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,

(d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,

(e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

(g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,

(h) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program, and

(i) in the case of a musical work, to rent out a sound recording in which the work is embodied,

and to authorize any such acts.

**Simultaneous fixing**

(1.1) A work that is communicated in the manner described in paragraph (1)(f) is fixed even if it is fixed simultaneously with its communication.

### **Conditions for subsistence of copyright**

5. (1) Subject to this Act, copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work if any one of the following conditions is met:

(a) in the case of any work, whether published or unpublished, including a cinematographic work, the author was, at the date of the making of the work, a citizen or subject of, or a person ordinarily resident in, a treaty country;

(b) in the case of a cinematographic work, whether published or unpublished, the maker, at the date of the making of the cinematographic work,

(i) if a corporation, had its headquarters in a treaty country, or

(ii) if a natural person, was a citizen or subject of, or a person ordinarily resident in, a treaty country; or

(c) in the case of a published work, including a cinematographic work,

(i) in relation to subparagraph 2.2(1)(a)(i), the first publication in such a quantity as to satisfy the reasonable demands of the public, having regard to the nature of the work, occurred in a treaty country, or

(ii) in relation to subparagraph 2.2(1)(a)(ii) or (iii), the first publication occurred in a treaty country.

### **Ownership of copyright**

13. (1) Subject to this Act, the author of a work shall be the first owner of the copyright therein.

### **Engraving, photograph or portrait**

(2) Where, in the case of an engraving, photograph or portrait, the plate or other original was ordered by some other person and was made for valuable consideration, and the consideration was paid, in pursuance of that order, in the absence of any agreement to the contrary, the person by whom the plate or other original was ordered shall be the first owner of the copyright.

### **Work made in the course of employment**

(3) Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement

to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine or similar periodical.

### **Assignments and licences**

(4) The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner's duly authorized agent.

### **Ownership in case of partial assignment**

(5) Where, under any partial assignment of copyright, the assignee becomes entitled to any right comprised in copyright, the assignee, with respect to the rights so assigned, and the assignor, with respect to the rights not assigned, shall be treated for the purposes of this Act as the owner of the copyright, and this Act has effect accordingly.

### **Assignment of right of action**

(6) For greater certainty, it is deemed always to have been the law that a right of action for infringement of copyright may be assigned in association with the assignment of the copyright or the grant of an interest in the copyright by licence.

### **Exclusive licence**

(7) For greater certainty, it is deemed always to have been the law that a grant of an exclusive licence in a copyright constitutes the grant of an interest in the copyright by licence.

### **Limitation where author is first owner of copyright**

14. (1) Where the author of a work is the first owner of the copyright therein, no assignment of the copyright and no grant of any interest therein, made by him, otherwise than by will, after June 4, 1921, is operative to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of twenty-five years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period shall, on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal representatives as part of the estate of the author, and any agreement entered into by the author as to the disposition of such reversionary interest is void.

### **Infringement generally**

27. (1) It is an infringement of copyright for any person to do, without the consent of the

owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

### **Secondary infringement**

(2) It is an infringement of copyright for any person to

- (a) sell or rent out,
- (b) distribute to such an extent as to affect prejudicially the owner of the copyright,
- (c) by way of trade distribute, expose or offer for sale or rental, or exhibit in public,
- (d) possess for the purpose of doing anything referred to in paragraphs (a) to (c), or
- (e) import into Canada for the purpose of doing anything referred to in paragraphs (a) to (c),

a copy of a work, sound recording or fixation of a performer's performance or of a communication signal that the person knows or should have known infringes copyright or would infringe copyright if it had been made in Canada by the person who made it.

### **Infringement generally**

**28.1** Any act or omission that is contrary to any of the moral rights of the author of a work is, in the absence of consent by the author, an infringement of the moral rights.

### **Nature of right of integrity**

**28.2** (1) The author's right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author,

- (a) distorted, mutilated or otherwise modified; or
- (b) used in association with a product, service, cause or institution.

### **Where prejudice deemed**

(2) In the case of a painting, sculpture or engraving, the prejudice referred to in subsection (1) shall be deemed to have occurred as a result of any distortion, mutilation or other modification of the work.

### **When work not distorted, etc.**

(3) For the purposes of this section,

- (a) a change in the location of a work, the physical means by which a work is exposed or the physical structure containing a work, or

(b) steps taken in good faith to restore or preserve the work

shall not, by that act alone, constitute a distortion, mutilation or other modification of the work.

### **Research or private study**

29. Fair dealing for the purpose of research or private study does not infringe copyright.

### **Criticism or review**

29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
  - (i) author, in the case of a work,
  - (ii) performer, in the case of a performer's performance,
  - (iii) maker, in the case of a sound recording, or
  - (iv) broadcaster, in the case of a communication signal.

### **Copyright**

34. (1) Where copyright has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

### **Presumptions respecting copyright and ownership**

34.1 (1) In any proceedings for infringement of copyright in which the defendant puts in issue either the existence of the copyright or the title of the plaintiff thereto,

- (a) copyright shall be presumed, unless the contrary is proved, to subsist in the work, performer's performance, sound recording or communication signal, as the case may be; and
- (b) the author, performer, maker or broadcaster, as the case may be, shall, unless the contrary is proved, be presumed to be the owner of the copyright.

### **Liability for infringement**

35. (1) Where a person infringes copyright, the person is liable to pay such damages to the owner of the copyright as the owner has suffered due to the infringement and, in addition to

those damages, such part of the profits that the infringer has made from the infringement and that were not taken into account in calculating the damages as the court considers just.

### **Proof of profits**

(2) In proving profits,

(a) the plaintiff shall be required to prove only receipts or revenues derived from the infringement; and

(b) the defendant shall be required to prove every element of cost that the defendant claims.

### **Statutory damages**

38.1 (1) Subject to this section, a copyright owner may elect, at any time before final judgment is rendered, to recover, instead of damages and profits referred to in subsection 35(1), an award of statutory damages for all infringements involved in the proceedings, with respect to any one work or other subject-matter, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$500 or more than \$20,000 as the court considers just.

#### **Where defendant unaware of infringement**

(2) Where a copyright owner has made an election under subsection (1) and the defendant satisfies the court that the defendant was not aware and had no reasonable grounds to believe that the defendant had infringed copyright, the court may reduce the amount of the award to less than \$500, but not less than \$200.

#### **Special case**

(3) Where

(a) there is more than one work or other subject-matter in a single medium, and

(b) the awarding of even the minimum amount referred to in subsection (1) or (2) would result in a total award that, in the court's opinion, is grossly out of proportion to the infringement,

the court may award, with respect to each work or other subject-matter, such lower amount than \$500 or \$200, as the case may be, as the court considers just.

#### **Collective societies**

(4) Where the defendant has not paid applicable royalties, a collective society referred to in section 67 may only make an election under this section to recover, in lieu of any other remedy of a monetary nature provided by this Act, an award of statutory damages in a sum of not

less than three and not more than ten times the amount of the applicable royalties, as the court considers just.

### **Factors to consider**

(5) In exercising its discretion under subsections (1) to (4), the court shall consider all relevant factors, including

- (a) the good faith or bad faith of the defendant;
- (b) the conduct of the parties before and during the proceedings; and
- (c) the need to deter other infringements of the copyright in question.

No award

(6) No statutory damages may be awarded against

(a) an educational institution or a person acting under its authority that has committed an act referred to in section 29.6 or 29.7 and has not paid any royalties or complied with any terms and conditions fixed under this Act in relation to the commission of the act;

(b) an educational institution, library, archive or museum that is sued in the circumstances referred to in section 38.2; or

(c) a person who infringes copyright under paragraph 27(2)(e) or section 27.1, where the copy in question was made with the consent of the copyright owner in the country where the copy was made.

### **Wide injunction**

**39.1** (1) When granting an injunction in respect of an infringement of copyright in a work or other subject-matter, the court may further enjoin the defendant from infringing the copyright in any other work or subject-matter if

- (a) the plaintiff is the owner of the copyright or the person to whom an interest in the copyright has been granted by licence; and
- (b) the plaintiff satisfies the court that the defendant will likely infringe the copyright in those other works or subject-matter unless enjoined by the court from doing so.

### **Application of injunction**

(2) An injunction granted under subsection (1) may extend to works or other subject-matter

- (a) in respect of which the plaintiff was not, at the time the proceedings were commenced, the owner of the copyright or the person to whom an interest in the copyright has been granted by licence; or
- (b) that did not exist at the time the proceedings were commenced.

## *Canadian Charter of Rights and Freedoms*

### **Fundamental Freedoms**

2. Everyone has the following fundamental freedoms:

[...]

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

## **SCHEDULE “C”- COMMON ISSUES**

### **1. Copyright in Legal Documents**

- (a) Does copyright subsist in legal documents filed in Court, including, but not limited to Statement of Claim, Statements of Defence, facta, notices of motion and affidavits ( the “Works” and each a “Work”)?

### **2. Ownership of Copyright**

- (a) Does the defendants’ Litigator service contain Works authored by Class Members?
- (b) Does the defendants’ Litigator service contain Works whose copyright is owned by Class Members?
- (c) If yes, what rights, if any, do Class Members have over the legal documents they authored?

### **3. Infringement**

- (a) Have the defendants’ activities infringed the rights of Class Members by dealing in the Works in a manner that only the author or owner had the right to do, including by way of any of:
  - (i) reproducing Works authored or owned by Class Members?
  - (ii) publishing Works authored or owned by Class Members?
  - (iii) making Works authored or owned by Class Members available to the public by way of telecommunication?

- (iv) selling or renting copies of the Works authored or owned by Class Members?
  - (v) translating the Works?
  - (vi) authorizing its subscribers to infringe Class Members' copyright?
  - (vii) holding itself out as the owner or author of the Works?
  - (viii) infringing the moral rights of the authors of the copyrighted documents?
- (b) If so, which rights have been infringed.

**4. Defences**

- (a) If the answer to 3 is affirmative, do the defendants have a defence under the Copyright Act for these acts of infringement?

**5. Relief**

- (a) Are Class Members entitled to statutory damages pursuant to section 38.1 of the Copyright Act for each act of infringement carried out by the defendants? If the answer to this question is "yes", what is the quantum of the statutory damages to which the Class Members are entitled?
- (b) What other damages or, alternatively, other heads or categories of damages, are Class Members entitled to?
- (c) Is there a reasonable likelihood that damages can be determined (in whole or in part) on an aggregate basis on behalf of the Class?

- (d) If the answer to (c) is “yes”, how is a damages award to be calculated and distributed to the Class?
- (e) If the answer to (c) or (d) above is “yes” what is the quantum of those damages?
- (f) Does the defendants’ conduct justify an award of aggravated, exemplary, or punitive damages?
- (g) Are the Class Members entitled to injunctive relief against the defendants under section 34(1) of the Copyright Act?

Waldman  
Plaintiff

and  
Thomson Reuters Corporation et al  
Defendants

Court File No: CV-10-40366700CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

**FACTUM OF THE MOVING PARTY**

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