SUPREME COURT OF NOVA SCOTIA
Citation: MacQueen v. Sydney Steel Corporation, 2011 NSSC 484

Date: 20100624 and 20110706
Docket: Hfx No. 218010
Registry: Halifax

Between:

Neila Catherine MacQueen, Joseph M. Pettipas,
Ann Marie Ross, and Kathleen Iris Crawford

Plaintiffs

v.

Sydney Steel Corporation, a body corporate; The Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of Nova Scotia; and the Attorney General of Canada representing Her Majesty the Queen in right of Canada

Defendants

Judge: The Honourable Justice John D. Murphy

Heard: December 7, 8, 9; 15, 16, 17, 18, 2009
January 20, 21; April 22, 23; June 21, 22, 23, 24;
September 21; October 18; 27; December 15; July 6, 2010 in Halifax, Nova Scotia

Final Written Submissions: February 11, 2011

Written Decision: January 19, 2012
{Decisions rendered orally June 24, 2010 and July 6, 2011.}

Counsel: Ray Wagner, Scott Ritchie, Q.C., Michael Robb, Michael Dull, for Plaintiffs;
Angela Green, Michael F. Donovan/Paul Evraire,Q.C., Melissa Chan, for Defendants-DOJ-Can;
Agnes MacNeil, Alison Campbell, for Defendants-AGNS, SYSCO

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I Introduction

[1] The plaintiffs have requested the court to certify this lawsuit as a class proceeding, and to establish class boundaries. By oral decision delivered in June 2010, I advised the parties that class action was the preferable procedure for at least some aspects of the case, but that certification would not be ordered unless the plaintiffs amended their motion to substantially reduce the sizes of the proposed classes and modified their litigation plan. The plaintiffs amended their statement of claim and motion for certification, and in a second oral decision delivered in July 2011, I informed the parties that I would order certification of the claim as a class proceeding, and established boundaries for Residential Class Members and Property Owner Class Members.

[2] When giving both oral decisions, I outlined the bases for my conclusions and advised that written reasons would follow prior to issuance of the certification order. I now provide those reasons, which reflect reorganization of my oral remarks and expanded reference to and analysis of facts, issues, and relevant authorities, while maintaining the result expressed orally.

II Summary of the Claim and Litigation to Date

[3] This claim arises from operation of a Steel Works in Sydney Nova Scotia – an industrial facility which opened in 1903 and comprised coke ovens which closed in 1998 and a steel mill which ceased production in 2000. The plaintiffs owned land and lived near the Steel Works, and claim that the facilities emitted products, including lead, arsenic and PAH's, which contaminated their properties and posed risk to health. They allege breach of fiduciary duty, advance a wide range of tort claims, and seek remedies including damages for loss of use and enjoyment and remediation of property, as well as compensation for exposure to pollutants and funding of a medical-monitoring process.

[4] This lawsuit was commenced in 2004, naming as defendants private and public owners and operators of the Steel Works and adjacent facilities. As a result of settlements and abandonment, claims against private operators are no longer being pursued, so that the only remaining defendants are the Governments of Canada and Nova Scotia. The allegations now being advanced relate to operation of the Steel Works between 1967 and 2000. Canada operated the coke ovens and Nova Scotia operated the steel mill between 1968 and 1974; Nova Scotia operated

both the coke ovens and the steel mill from 1974 until the coke ovens closed in 1988, and the Province continued to operate the steel mill until it closed in 2000. The plaintiffs filed notice in September 2007 seeking certification of the action as a common law class proceeding and an order defining two classes of plaintiffs: Property Owner and Residential. While the certification issue remained outstanding, by Order granted during September 2008 the action was continued under new legislation, the *Class Proceedings Act*, S.N.S. 2007, c.28 (the "Act").

[5] During the more than seven years since this proceeding commenced, including while the certification issue has been pending, the scope of the plaintiffs' claim has been substantially reduced. The defendants have not filed a notice of defence; pursuant to section 4(6) of the Act they are not required to do so until 45 days after certification order is issued, and the court dismissed a plaintiffs' motion seeking earlier filing. Nevertheless, the defendants have demonstrated the intention to dispute all aspects of the claim. A motion brought during 2006 to strike claims was considered by this court and by the Court of Appeal, and in written and oral submissions throughout the certification process the defendants repeatedly signaled that every cause of action advanced and remedy sought would be contested. The court has struck out claims for negligence and breach of fiduciary duty in relation to regulation of the Steel Works, and the plaintiffs have decided to narrow the claims, including by reducing the scope of negligence alleged and abandoning pursuit of some remedies, such as compensation for diminution of property value and for personal injuries. The plaintiffs continue to seek a medical-monitoring program to identify and provide information about health risks resulting from defendants' conduct, but they no longer seek damages for individual health problems.

[6] Despite the statement of claim being amended approximately nine times, usually to reduce rather than expand the causes of action and remedies sought, the proceeding remains complex, with the most recent consolidated amended statement comprising more than 100 paragraphs, containing allegations of battery, strict liability and nuisance, trespass, negligence and breach of fiduciary duty.

[7] The process seeking certification as a class action has been complex, vigorously contested, and prolonged. The parties attended case management meetings and brought procedural motions, including a defence motion concerning conducting both cross examinations and discovery of affiants, which was ultimately resolved by the Court of Appeal.

III Certification: The Original Motion

A. Order Sought, Issues, and Conclusions

[8] Prior to making oral submissions on the Original Certification Motion during four days in June 2010, the parties filed approximately 16 affidavits, the majority of which were sworn by expert witnesses, discovery examinations producing about 2,400 pages of transcript were conducted, and affiants were cross examined in court over approximately 11 days between December 2009 and April 2010. At the June 2010 hearing, the plaintiffs sought an order certifying the action as a class proceeding, with two classes of plaintiffs:

(1) a Property Owner Class, consisting of persons who beneficially owned real property within a 3.5 mile radius of the Steel Works; and

(2) a Residential Class, being persons who had lived within the same boundary for a minimum of three years after January 5, 1968.

[9] Scientists who filed affidavits and testified on plaintiffs' behalf claimed expertise in epidemiology, toxicology and occupational medicine, and public risk assessment. Evidence on the defendants' behalf was provided by persons claiming expertise in epidemiology, transport of chemicals in the environment (including risk assessment and remedial design), hydrogeology and soil contamination, and toxicology (in particular assessing and communicating the human health impacts of chemicals found in the environment and in consumer products). Large portions of the more than 400 pages of written submissions filed by the parties addressed the conflicting testimony of the scientific experts, and many of the 46 exhibits filed and relied upon at the Original Motion hearing were detailed scientific studies authored by or referred to in the evidence of those witnesses. The difficulty which the defendants experienced distinguishing the issues to be addressed at the certification stage from the merits of the claim contributed substantially to the hearing's complexity.

[10] The conclusion which I expressed following the June 2010 hearing that a class action would be the preferable procedure for at least some aspects of this case for some of the proposed plaintiffs if amendments were made to the Original Motion, and my decision to certify the proceeding delivered in July 2011 after

hearing the Amended Certification Motion, were reached after considering the evidence and submissions presented by the parties in context of sections 7(1), 7(2) and 8(1) of the Act. Sections 7(1) and 8(1) provide as follows (section 7(2) is quoted in para. 55 of these reasons):

> **Certification by the court**
>
> 7 (1) The court shall certify a proceeding as a class proceeding on an application under Section 4, 5 or 6 if, in the opinion of the court,
>
> (a) the pleadings disclose 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 a representative party;
>
> (c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute; and
>
> (e) there is a representative party who
>
>> (i) would fairly and adequately represent the interests of the class,
>>
>> (ii) has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and
>>
>> (iii) does not have, with respect to the common issues, an interest that is in conflict with the interests of other class members.
>
> ...
>
> **Adjournment of application and effect of certification**
>
> 8 (1) The court may adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence to be introduced.

[11] Section 7 mandates that the court shall certify a claim as a class action if the judge is of the opinion that the criteria prescribed are satisfied. Following the Original Motion hearing, I concluded that a class action was the preferable procedure for some of the causes of action pleaded and common issues proposed, and that certification of the claim advanced by the representative plaintiffs could be warranted, subject to determining an identifiable class or classes as required by section 7(1)(b).

[12] Before addressing the circumstances of this case in the context of section 7, it is important to recognize several important principles, not inconsistent with the directions provided in the Nova Scotia legislation, which have been enumerated by other Canadian Courts:

(1) As remedial legislation intended to facilitate access to justice, judicial economy and behavior modification, the Act should be given generous, broad, liberal and purposive interpretation. (*Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 [“**Hollick**”])

(2) At the certification stage, the merits of the claim are not adjudicated; rather, the court determines the form in which the case will advance, or the procedural route it will follow. (*Hollick*, *supra*, para 16)

(3) Evidence adduced at certification must support some basis in fact for each of the certification criteria. (Cloud v. Canada (Attorney-General) (2004), 73 O.R. (3d) 401 (C.A.) at para. 50 (leave to appeal to S.C.C. refused [“**Cloud**”])

(4) The plaintiff's burden at certification is modest; the burden upon defendants seeking to displace the plaintiff's evidence is onerous. (*Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 (S.C.J.) at para. 68; *Walls v. Bayer Inc.*, [2005] M.J. No. 4 (Q.B.) at para. 22 (appeal dismissed [2005] M.J. No. 286 (C.A.); leave to appeal refused [2005] S.C.C.A. No. 409 (S.C.C.))

(5) Expert evidence adduced at a certification hearing should not be subjected to the exacting scrutiny required at trial. (*Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (Ont. S.C.J.) at para. 76; *Pro-Sys Consultants Ltd. v. Infineon Technologies*, AG 2009 CarswellBC 3035 (B.C.C.A.) at para. 66)

[13] In opposition to the plaintiffs' motion, the defendants raised substantive, evidentiary and procedural issues, many of which were more suitable for debate at a future stage in the proceeding when the plaintiffs would have a greater burden warranting more critical examination of expert testimony and the merits of the claim. Although I have considered all representations which have been made, these reasons address only certification of the claim as advanced in the plaintiffs' pleading, in context of the Act and jurisprudence. It is unrealistic and premature at this stage of the proceeding to assess potential shortcomings in lay or expert evidence which may arise as the plaintiffs advance the merits of the claim. Direction to resolve procedural issues will likely have to be provided during the judicial case management process mandated by the Act.

B. Analysis: Causes of Action, Common Issues, Preferable Procedure, Representative Party

[14] I will summarize my reasons for determining at the end of the first hearing that, subject to some refinement of the causes of action advanced and common issues proposed, a proceeding with Property Owner and Residential Classes would meet certification criteria and be the preferable procedure to resolve the dispute, but only if the class definitions/boundaries initially proposed by the plaintiffs were substantially altered.

[15] As the plaintiffs exercised the option under section 8(1) of the Act to amend the motion and proceed to a second hearing seeking certification for classes with reduced geographical area and longer residence requirement, it is unnecessary to explain why I rejected the boundaries initially proposed. I will simply indicate that, based on the evidence at the original hearing, a class boundary based upon a 3.5 mile radius from the Steel Works would encompass an area too large and divergent to spawn common issues and permit a manageable class proceeding. Similarly, the short three-year residence requirement was not justified by the evidence, and would likely result in an administratively-difficult and unworkable proceeding. Later in these reasons, I will indicate why certification based on boundaries proposed by the Amended Motion, with adjustment, is warranted. I also defer comment on the plaintiffs' litigation plan, which was revised when the Amended Motion was filed.

(i) Causes of Action

[16] The requirement under section 7(1)(a) of the Act that pleadings disclose a cause of action is assessed strictly on the pleadings, assuming all facts pleaded to be true and reading the claim generously realizing that drafting deficiencies can be addressed by amending the pleadings (Ward Branch, *Class Actions in Canada*, Aurora, ON, Canada Law Book, 2009 para 4.80).

[17] The plaintiffs and defendants disagreed concerning the approach the court should take addressing cause of action. Relying on this court's decision in **Morrison Estate v. Nova Scotia (Atty. Gen.)** 2010 NSSC 196 (which was reversed on appeal **Nova Scotia (Health) v. Morrison Estate** 2011 NSCA 68 after the certification motion in this case was heard), the plaintiffs maintained that they only needed to establish that the pleadings disclosed a single cause of action, and claimed that threshold had been crossed in this case when the court dismissed an earlier defendant's motion to strike the plaintiffs' claim for breach of fiduciary duty, a ruling which the Nova Scotia Court of Appeal upheld and the Supreme Court of Canada declined to review. The defendants conceded that for purposes of the certification hearing the issue of whether the pleadings disclosed a cause of action for breach of fiduciary duty in this case was *res judicata*, but they contended that this court decided **Morrison Estate** incorrectly, and that I should scrutinize under section 7(1)(a) each cause of action raised in the pleadings.

[18] I agreed with the view expressed by Canada that it is preferable where the viability of causes of action pleaded is in doubt to consider the question at the certification stage so that only arguable claims are certified, and during a case management meeting, I advised counsel of my intention to address the adequacy of every cause of action pleaded. The plaintiffs, while maintaining their original position, provided a supplemental brief arguing that each cause of action asserted in the claim was adequately pleaded.

[19] Prior to the motion hearing, in addition to conceding the adequacy of the breach of fiduciary duty pleading, Nova Scotia acknowledged the sufficiency of pleadings in negligence, nuisance and strict liability, but claimed causes of action were not disclosed by the pleadings in trespass, battery and negligent battery. Canada continued to challenge the pleading of all causes of action except fiduciary duty.

[20] I advised the parties which causes of action could be included in a certified class proceeding as soon as I made determinations, in order that counsel would

have context in which to prepare their Amended Motion addressing class boundaries.

[21] At the conclusion of the 2010 hearing, I acknowledged the earlier ruling that the pleadings disclosed a cause of action for breach of fiduciary (for both property owner claimants and resident claimants). I also indicated that, subject to class definition, the proceeding could be certified for both classes of claimants for causes of action in strict liability and nuisance, and that a cause of action in negligence would be certified for property owner claimants. Plaintiffs' counsel advised after June 2010 that the plaintiffs no longer sought to pursue a negligence *simpliciter* claim on behalf of the residential class.

[22] At a case management meeting during September 2010 I advised that, subject to establishing workable class boundaries, a class proceeding would be certified for causes of action about which I had not previously ruled battery, negligent battery, and trespass for both Property Owner Class and Residential Class.

[23] When delivering the rulings concerning the certifiable causes of action, I reserved the right to provide reasons for my conclusions at a later time.

[24] The written and oral submissions by the defendants (especially Nova Scotia) and the plaintiffs' response at the June 2010 motion hearing included intensive examination of the allegations in the statement of claim in the context of authorities which prescribe requirements for and components of the causes of action pleaded. These reasons will neither dissect the way every cause of action has been framed, nor analyze the scientific evidence and opinions advanced in affidavits filed by expert witnesses who underwent extensive cross examination. In my view, to do so would be to exceed the assessment contemplated by section 7(1)(a) of the Act. I will, however, refer generally to some of the allegations and testimony, including from the four representative plaintiffs, which disclose the causes of action for which I have found a class proceeding will be certified. Some of the background relevant to my determining which causes of action should be certified will also be found later in these reasons when I address the common issues proposed for inclusion in the certification order.

[25] The plaintiffs maintain that during the approximately 33 years when one or both defendants operated a facility the Steel Works:

(a) They spread contaminants which are known to be harmful to the environment and human health into the air, water and soil;

(b) The plaintiffs did not consent to discharge of the contaminants;

(c) Release of the contaminants from the defendants' properties resulted in damage to the health and lands of persons to be included within class boundaries;

(d) The presence and the consequences of the contaminants remain, and their escape from the Steel Works facility continues;

(e) The defendants have not taken steps to clean up the contaminants;

(f) Scientific studies available to the defendants disclosed the presence and effect of the contaminants, and the defendants misrepresented the conclusions of the studies and the effects of the contaminants to the plaintiffs.

[26] The defendants raised particular concerns about some causes of action for example, they argued the claims for trespass, battery and negligent battery could not succeed because the facts pleaded cannot establish requisite elements such as directness or physical interference. Nevertheless, I have determined that the statement of claim and evidence at the certification hearing disclose sufficient information to support certifying the causes of action which are challenged by the defendants. The distinctions among nuisance, trespass and negligent or intentional battery and the mental element required for each can be subtle (see G.H.L. Fridman, The Law of Torts in Canada 2d ed., (Toronto: Carswell, 2002), at pp. 37-8 and **Philips v. California Standard Co.**, [1960] 31 W.W.R. 331 (Alta.S.C.) at para. 7). In this case, there is no indication to date of any independent or intervening agency interrupting "direct" deposit of contaminants, and it is debatable whether material emitted may be deemed non-physical because it consisted of small particles.

[27] The defendants have also questioned whether the claim discloses a cause of action necessary to support the medical-monitoring program which plaintiffs seek as a remedy. The plaintiffs allege that the defendants' conduct has resulted in

exposure to hazardous materials which cause or contribute to health risks (Statement of Claim amended October 5, 2010, paras. 6 and 101), and they propose availability of a medical-monitoring remedy as a common issue for certification. In my view, remedy availability should not be ruled out at this early stage in the proceeding, when the topic being considered is whether the court should approve causes of action in a claim that the plaintiffs ask to have certified. At this time, the plaintiffs need only identify the remedies they seek and show the existence of some relationship between a claim advanced and relief sought; whether the plaintiffs should obtain particular relief in the context of the causes of action which they pursue can be addressed when entitlement to remedy is considered, if the merits are adjudicated in the plaintiffs' favor.

[28] The availability of a medical-monitoring remedy has been deemed a common issue for certification in other class actions in Canada (**Heward v. Eli Lilly & Co.**, [2007] O.J. No. 404 (S.C.J.) at para. 93, aff'd [2008] O.J. No. 2610 (Div. Ct.) ["**Howard**"] and **Andersen v. St. Jude Medical Inc.** (2003), 67 O.R. (3d) 136 (S.C.J.) at para. 63, leave to appeal denied, [2005] O.J. No. 269 (Div. Ct.) ["**Andersen**"]). It would be premature at this stage to preclude the possibility that an allegation of harm could be established within the context of the facts and causes of action pleaded, or to rule that a medical-monitoring remedy should be unavailable.

[29] I am satisfied that the current pleading, which is detailed, contains allegations of fact in support of each cause of action for which the plaintiffs now seek to have the claim certified as a class proceeding breach of fiduciary duty, nuisance, strict liability, trespass, battery and negligent battery for both a Property Owner Class and Residential Class of plaintiffs, and negligence *simpliciter* for a property class only. All causes of action advanced include arguable claims. Testimony at the motion hearing provided some evidentiary basis for each cause of action it is not plain or obvious that any will not succeed. Each raises an issue to be tried and should be certified. My conclusion does not preclude either re-evaluation of causes of action being advanced or pleading amendment if additional information is developed as the claim progresses; however, progress of the case should not be delayed by more inquiry at this stage.

(ii) Common Issues

[30] Section 7(1)(c) of the Act directs the court, if the other statutory requirements are met, to certify a class proceeding “if the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members.” Section 2(e) 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.

[31] Common issues must “advance the litigation", but their resolution need not determine the outcome of a class member's claim. The Newfoundland Court of Appeal in **Ring v. Canada (Attorney General)** 2010 NLCA 20, at paras. 80 and 82, [“**Ring**”], although refusing to certify an action, summarized as follows the principles for determining whether a common issue exists (references deleted from quotation):

> There is no real dispute about the principles involved in determining if a common issue exists. An issue will be common “only where its resolution is necessary to the resolution of each class member’s claim”: It is not common unless the issue is a substantial ingredient of each class member’s claim. However, it is not necessary that common issues predominate over non-common issues (s.5(1)(c)) or that the resolution of the common issues be determinative of each class member’s claim or that all members benefit from the resolution thereof to the same extent.
>
> ...
>
> The fact that there are numerous individual issues to be determined in addition to the common issues does not undermine the commonality conclusion, but it is a matter to be considered in the assessment of whether a class action would be the preferable procedure.

[32] The common issues question should be addressed purposively to determine whether a class action format will avoid duplication of fact-finding or legal analysis. In **Western Canadian Shopping Centres Inc. v. Dutton** 2001 SCC 46, [“**Dutton**”], MacLaughlin C.J. for a unanimous court, stated as follows at para. 39:

> [...] The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative

> one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the commons issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.

[33] The plaintiffs identify the following 17 issues that they maintain are important to each class member's claim and for which they request certification:

(a) Did the Defendants cause or permit the emission or escape of the Contaminants onto the properties and persons living within the Class Boundaries during the Class Period?

(b) If the answer to (a) is yes, do the Contaminants emitted pose a risk to the use [*and*] enjoyment..of properties contaminated by them?

(i) Are Lead, PAHs and Arsenic appropriate proxies for the Contaminants?

(ii) If the answer to (i) is yes, what is the appropriate background rate for PAHs, Arsenic and Lead emitted from the Steel Works, above which exposure is deemed harmful to property and to health?

(c) Are the Defendants or any of them strictly liable to Class Members for damages in tort pursuant to the principle in **Rylands v. Fletcher** for the emission or escape of the Contaminants from the properties of the Defendants?

(d) Did the Defendants know, should they have known, or were they reckless or wilfully blind when they were causing or permitting the emission or escape of the Contaminants that they created a risk to the use, [and] enjoyment..of properties contaminated by them? If so, when did they have or should they have had such knowledge?

(e) Did the discharge of the Contaminants onto the properties and persons, and the presence of the Contaminants on the lands and in the homes of persons living within the Class Boundaries during the Class Period constitute a nuisance?

(f) Did the Defendants owe the Class Members a duty of care to take steps to contain, reduce, minimize or eliminate the emission or escape of the Contaminants?

(g) Did the Defendants breach the duty of care owed to Class Members by failing to take available steps to contain, reduce, minimize or eliminate the emission or escape of Contaminants including but not limited to the implementation of emissions controls, the introduction of cleaner processes, and the use of cleaner raw materials?

(h) Did the Defendants or any of them intentionally cause the Contaminants to come into contact with Class Members so as to constitute a battery at law?

(i) Did the Defendants or any of them carelessly emit or permit the escape of the Contaminants when they knew or ought to have known that they would come into contact with the Class Members so as to constitute a negligent battery at law?

(j) Does the deposition of the Contaminants by the Defendants on the properties within the Class Boundaries constitute a trespass at law?

(k) Did Canada and/or Nova Scotia either or both Defendants owe the Class Members a fiduciary duty to act in the best interests of Class Members in dealing with the dissemination of information concerning the existence of contamination within the Class Boundaries and the remediation of the contamination within the Class Boundaries? If so, did they breach that duty by:

   (i) Concealing the known nature and effects of the Contaminants;

   (ii) Concealing the health risks associated with exposure to the Contaminants from the Plaintiffs and Class Members by, among other things, advising them that the Contaminants did not represent a risk to property and persons;

(iii) Continuing to spread the Contaminants within the Class Boundaries in spite of that knowledge; and

(iv) Declining to remediate the contamination now present on the lands in the within..Class Boundaries?

(l) Is the definitive epidemiological study, proposed by the Plaintiffs, an appropriate remedy?

(m) Are the Defendants required to ameliorate the ongoing exposure of Property Owner Class Members to Contaminants they emitted or permitted to escape onto the properties of Class Members within the Class Boundaries either by remediating those properties, or where not possible to effectively do so, by bearing the cost of relocating such Class members to reasonably equivalent property that does not present such a risk?

(n) Are the Defendants liable to compensate members of the Residential Class for their exposure to the Contaminants on the basis of location and duration of residence?

(o) Are the Defendants jointly and severally liable for the remedies set out in issues (m) and (n) or otherwise for the conduct set out in the Statement of Claim?

(p) Is this an appropriate case for assessing some or all damages in the aggregate, pursuant to ss. 32-33 of the *Class Proceedings Act*, S.N.S. 2007, c. 28?

(q) Should the Defendants or any of them be liable to pay punitive damages in the aggregate and, if so, what is an appropriate amount of such aggregate damages?

[34] The defendants scrutinize each proposed issue and suggest that almost all are neither supported by evidence nor truly common, but only stated in overly-broad or general terms to give an appearance of commonality. The defendants' submissions that the claim does not raise common issues were made prior to my ruling that the pleadings disclose causes of action; however, they continued to maintain at the Amended Motion hearing that common issues should not be certified on the basis

that no rational connection exists between the proposed amended class definition and the common issues enumerated.

[35] I am satisfied that common issues arise from the claim put forth by the plaintiffs. At this stage, it is not necessary to assess the evidentiary basis for all assumptions which may underlie the common issues proposed, nor should the court at certification weigh conflicting expert evidence to predict how issues may ultimately be resolved. The defendants' intense critique of the proposed common issues is inconsistent with the plaintiffs' burden to identify issues important to each class member which will substantially advance the litigation.

[36] Consideration of the historical background to this case helps to demonstrate why common issues are apparent, distinguishing this claim from other "pollution" or "contamination" situations for which certification as a class action was denied, such as those reviewed in **Ring**, *supra*, and in **Bryson v. Canada (Attorney General)** 2009 NBQB 204 ["**Bryson**"].

[37] The Steel Works operated in Sydney from 1903-2000; during the most recent of those 97 years Canada operated the coke ovens for approximately six years, and Nova Scotia operated the steel plant for 33 years and both facilities for about 26 years. Dispersal of emissions from the facilities and their effect on land and residents in surrounding areas has been a very significant issue in the community for many years.

[38] Long before this litigation commenced, there was concern about the possible effects pollutants originating from the Steel Works had on the property and health of Sydney area residents. The impact of the operation of the facilities by the defendants and others has been thoroughly examined, with experts expressing widely divergent opinions about the effect of the industrial operations on persons and land. The statement of claim identifies some 20 studies between 1959 and 2004, mostly undertaken by environmentalists, health professionals and other scientists, and in some cases commissioned by the defendants, which assessed emissions, possible health risks, and soil contamination. Additional analyses, with conflicting results and recommendations, were made by several of the experts who testified at the certification hearings. The statement of claim and representative plaintiffs' affidavits refer to a $400,000,000 commitment by the defendants to remediate the industrial site where the steel mill and coke ovens operated. The pleadings also describe communication between the defendants and area residents

concerning property repair and reduction of exposure to contaminants from residents' properties.

[39] Although the defendants have not filed pleadings addressing the claims made in the litigation, pending determination of the certification motion, it is apparent from the submissions presented during the certification hearing that they deny liability to potential class members, and suggest that any responsibility to the plaintiffs rests with other operators of the facilities. (See, for example Nova Scotia brief June 7, 2010 paras. 29-30; Canada brief June 7, 2010 paras. 2, 121, and 157.)

[40] I do not accept the defendants' position that the plaintiffs’ claims do not raise common issues. The extensive study (including investigations by the defendants) and controversy that has taken place over the last approximately 45 years with respect to industrial operations in Sydney and the impact of those activities on neighborhood residents and properties lead to the conclusion that there is an arguable case with respect to the defendants’ potential liability to the proposed classes of plaintiffs.

[41] As this litigation has evolved, its thrust has become more directed toward community than individual focus. This is illustrated by the plaintiffs' amendments to the statement of claim, including by removing requests for compensation for individual personal injuries and diminution in property values, which give the remaining issues in this case greater commonality, distinguishing it from others, such as **Ring**, *supra*, and **Bryson**, *supra*, in which the common issues proposed did not warrant certification.

[42] It was apparent during the cross examinations conducted by the defendants at the hearing, and from their submissions, that they dispute the source of alleged contaminants, suggesting they either occur naturally in the environment , came from locations other than the Steel Works, or were emitted while others operated the facilities. This case raises a common issue of pollutant source, distinguishing it from single-event environmental claims in which the origin of an offending substance is not in question and the court’s focus is directed more toward losses suffered by individual claimants.

[43] While I have questioned the extent to which it was appropriate at the certification stage for the defendants to debate the source and effect of contamination, and indicated that challenging the conclusions of expert witnesses

and attempting to analyze comparative mapping of pollutant deposits should be left until merits of the claim are being determined, it is clear that these issues exist, and are germane to all potential claims.

[44] In my view, the factual background and the causes of action advanced spawn the common issues which the plaintiffs now propose. In the statement of claim the plaintiffs plead that the defendants deposited contaminants and as operators of the facilities created or exacerbated a situation, thereby entitling the plaintiffs to remedies. Evidence has been introduced from representative plaintiffs to illustrate that there have been emissions and there is substantial expert evidence with respect to contamination. The plaintiffs seek three primary remedies: property remediation, remedy for nuisance and battery, and medical monitoring to inform and educate the community and the medical profession. I am satisfied that there are common issues concerning the existence, source, and impact of emissions on the persons or properties of proposed class members, and whether remedies should be available. I agree with the plaintiffs' submission (pre-certification reply brief June 14, 2010) that the common issues proposed as part of the certification motion address the following fundamental concepts, which are primarily focused on the defendants' conduct:

(a) Did the Defendants emit the Contaminants from the Steel Works when they operated there?

(b) Where were the Contaminants deposited?

(c) Are the contaminants toxic and therefore hazardous to the properties and persons of the Plaintiffs and Class Members?

(d) Is or was the knowledge and/or conduct of the Defendants in emitting the Contaminants such that the Plaintiffs and Class Members are entitled to a remedy in negligence, strict liability, nuisance, trespass, breach of fiduciary duty and/or battery in respect of the deposition of these Contaminants by the Defendants onto their properties and persons?

(e) If no entitlement to a remedy can be established on a Class-wide basis, what individual issues must a Class Member prove in order to establish his or her entitlement to a remedy?

[45] A class action can be the appropriate forum for determining common issues in an environmental property damage case (**Pearson v. Inco Ltd.**, 2005 CarswellOnt 6598 (C.A.) [“**Pearson**”]. The health-related remedy sought in this case involves addressing risk of harm, not providing compensation for personal injuries. Canadian Courts have previously certified a common issue addressing whether a defendant should be required to implement a medical monitoring regime, and if so, its characteristics (**Andersen**, *supra*, at para. 63; **Heward**, *supra*, at para. 93).

[46] The common issue test can be met, even though individual issues will remain to be decided after resolution of common elements. This is apparent from the wording of section 7(1)(c) of the Act, which recognizes that common issues need not predominate over issues affecting only individual members, and is acknowledged by courts which have considered similar legislative provisions (**Cloud**, *supra*) including in environmental pollution cases (**Windsor v. Canadian Pacific Railway**, 2007 CarswellAlta 1262 (Alta. C.A.) [“**Windsor**”], **Hollick**, *supra*, and **Pearson**, *supra*). The comment by the Ontario Court of Appeal, which addressed the corresponding section of that province’s legislation in **Cloud** at para. 53, is helpful:

> ...an issue can constitute a substantial ingredient of the claims and satisfy s. 5(1)(c) even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. In such a case the task posed by s. 5(1)(c) is to test whether there are aspects of the case that meet the commonality requirement rather than to elucidate the various individual issues which may remain after the common trial. This is consistent with the positive approach to the *CPA* urged by the Supreme Court as the way to best realize the benefits of that legislation as foreseen by its drafters.

[47] In this case, the matters raised by the proposed common issues can be determined with respect to each class member without the direct participation of every class member, thereby substantially advancing each class member's claim. Resolving these questions once at a common issues trial may determine whether any of the plaintiffs has a claim, and will significantly advance the dispute as a whole. The potential, by addressing common issues, to avoid duplicate findings of fact and multiple determinations of legal questions, thereby likely reducing expenditure of time and money, are factors favoring certification (**Rumley v. British Columbia**, [2001] 3 S.C.R. 184 (S.C.C.) [“**Rumley**”], **Cloud**, *supra*, and **Hollick**, *supra*).

[48] I do not intend to review the detailed parsing of the proposed common issues which the defendants undertook, beyond noting that the critiques were overly merits-focused and tended to rely upon cases where remedies for individual health effects were sought.

[49] The plaintiffs have elected to request certification of common issues expressed in more detail than the summary enumeration of concepts referenced in para. 44. The manner in which they have expressed the 17 issues (listed earlier in para. 33) proposed for certification is consistent with the format previously approved in cases alleging environmental pollution. The plaintiffs properly refer to the following at para. 125 of their June 2010 brief:

> (a) In *Hollick*, the Supreme Court found that there were bound to be common aspects of any class member's claim, such as whether the defendant emitted pollution into the air; *Hollick, supra*, at para 19.
>
> (b) In *Pearson*, the Court of Appeal identified several common issues of fact and law relating to the source of the contamination alleged, the fact of contamination, the common law duties owed by the defendant, whether the defendant breached those duties, and whether the conduct of the defendant generated liability for nuisance, strict liability or punitive damages; *Pearson, supra*, at para 64.
>
> (c) In *Windsor*, the court certified common issues relating to the presence of contaminants, their origins, the defendant's common law duties, whether those duties were breached, and liability for nuisance, strict liability, trespass and negligence; and *Windsor, supra*, at para 108.
>
> (d) In *Ring*, the Trial Division Court certified common issues concerning whether the conduct of the defendants had created an unreasonable risk by discharging a contaminant, and whether the contaminant discharged can cause or contribute to the development of particular conditions (general causation), the knowledge of the defendant concerning its actions, whether the defendant breached its duties to the class, punitive damages, and the costs of testing for exposure to the contaminants in question. While the Court of Appeal ultimately overturned certification, it held that the "common issues meet the test of commonality required for certification". *Ring, supra*, at paras 5 and 155.

[50] The common issues proposed are framed as a progression of questions that rely on answers to preceding questions. The sequence is logical, and provides a

clear outline of how the plaintiffs intend to attempt to establish their case. The proposed statement meets the plaintiffs' obligations to identify common elements which will advance the litigation, and it is not appropriate for the court to impose a different statement format. The evidentiary threshold required to certify the proposed common issues has been met; some evidence was presented in affidavits and during cross examination to support each issue; further assessment of evidence goes to the merits of the claims.

[51] As the litigation goes forward, particularly as it progresses to the merits stage, the list of common issues can be modified (**Cloud**, *supra*, para. 72; **Robertson v. Thomson Corp.** (1999) 43 O.R. (3d) 161 (Gen. Div.) at para. 173) [“**Robertson**”].

[52] Subject to removing the reference to value of properties from issues identified as (b) and (d) to correspond with amendments which have been made to the statement of claim, I find that the proposed common issues, as restated in the amended notice of motion filed October 5, 2010, are consistent with the causes of action pleaded. They relate to the source, extent and nature of contamination allegedly emitted by the defendants, the defendants' knowledge, duty and conduct, and the type of remedies potentially available to class members. The common issues for which the plaintiffs seek certification are rationally connected to the proposed class members, and their resolution will advance the lawsuit.

[53] At the first motion hearing, plaintiffs' counsel specified the proposed common issues that relate to the Property Owner Class of plaintiffs and those that concern the Residential Class, and also indicated the causes of action giving rise to each common issue. As both the causes of action and statement of issues have evolved since that time, I direct the plaintiffs to provide an updated summary identifying the class(es) of plaintiffs and cause(s) of action associated with each common issue.

[54] I also suggest (but do not require) that the plaintiffs consider deleting subparas. (i) and (ii) of issue (b) from the list proposed; the basis for this recommendation will be apparent when the proposed class definitions are examined, *infra*.

(iii) Preferable Procedure

[55] Section 7(1)(d) directs the court to certify a class proceeding when that procedure is preferable for the fair and efficient resolution of the dispute. Section 7(2) provides guidance as follows:

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the dispute, the court shall consider
>
> > (a) whether questions of fact or law common to the class members predominate over any questions affecting only individual members;
> >
> > (b) whether a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings;
> >
> > (c) whether the class proceeding would involve claims or defences 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; and
> >
> > (f) any other matter the court considers relevant.

[56] At the conclusion of the June 2010 hearing I ruled that a class action would be the preferable procedure for the fair and efficient resolution of this dispute, subject to redefining the class boundaries which were proposed at that time. In reaching this decision, I considered the factors enumerated in section 7(2) of the Act. In the absence of previous Nova Scotia decisions applying that provision, I also reviewed authorities provided by counsel which interpreted similar legislative provisions in other Canadian provinces.

[57] The factors enumerated in subsections (b) and (c) of section 7(2) are not at play in this motion. Defence counsel did not suggest that a significant number of the class members have a valid interest in individually controlling the prosecution of separate proceedings there is no evidence to support that proposition. There is only one other proceeding advancing the same claims an action commenced

by a self-represented litigant in which the claim is largely based on an earlier version of the statement of claim in this case. That action has not progressed significantly beyond the filing of the initial pleading, and the defendants do not characterize it as a factor that affects the present motion for the purposes of section 7(2)(c).

[58] Although the *Ontario Class Proceedings Act*, 1992, S.O. 1992 c.6, s.5(1)(d) requires that a class action be the preferable procedure for the "resolution of the common issues" while the Nova Scotia Act refers to "resolution of the dispute", courts appear to treat Ontario legislation as requiring the class proceeding to be preferable for resolution of the entire dispute, consistent with the Supreme Court of Canada's recommendation in **Hollick**, *supra*, to take into account the importance of the common issues in relation to the claims as a whole.

[59] In **Carom v. Bre-X Ltd.** (1999), 44 O.R. (3d) 173 at 239, Justice Winkler (then a member of the Superior Court of Justice) outlined the conditions present whenever a class proceeding is the preferable procedure:

> A class proceeding is the preferable procedure where it presents a fair, efficient and manageable method of determining the common issues which arise from the claims of multiple Plaintiffs and where such determination will advance the proceeding in accordance with the goals of judicial economy, access to justice and the modification of behaviour of wongdoers.

The Court of Appeal did not express any disagreement with this statement in **Carom v. Bre-X Minerals Ltd.**, 51 O.R. (3d) 236, when it certified an additional claim. The test prescribed in **Carom** can be applied in Nova Scotia, particularly if "resolving the dispute" is substituted for "determining the common issues" in the passage quoted.

[60] I find that the plaintiffs have satisfied their burden to establish that the considerations prescribed in section 7(2)(a), (d) and (e) favor a class proceeding as the fair, efficient and manageable method of resolving this dispute.

[61] Although jurisprudence from other jurisdictions suggests that plaintiffs seeking certification can meet the preferability requirement even if common issues do not predominate over individual ones (**Hollick**, *supra*, at para. 30), and section 7(1)(c) of the Nova Scotia Act recognizes that common issues need not

predominate over issues affecting only individual class members, section 7(2)(a) directs the court to consider whether questions of fact or law common to class members predominate over those affecting only individual members. I have done so and determined that in this case, despite the inevitability that at least some of the individual issues predicted by defendants will arise, common issues will predominate. Trial of this action will center significantly on the source of contaminants, defendants' knowledge and conduct, the nature of any duty upon the defendants and whether it was breached, and expert evidence addressing scientific questions, including chemical compositions and potential health effects of omissions. Those matters are common to the claims of all potential class members. Furthermore, it is apparent from the evidence at the certification hearing that a large volume of documentation pertinent to liability will be produced by the defendants, and those materials will be relevant to all claims. Also suitable for resolution as a common issue in a class proceeding is the availability of class-wide remedies such as medical monitoring programs; matters relating to individual claims, including property ownership and individual soil assessment results (once class-wide criteria are established) will likely be relatively minor.

[62] The defendants referred to several environmental contamination claims which courts have declined to certify as class actions, including allegations involving coal dust (**Roberts v. Canadian Pacific Railway,** 2006 BCSC 1649) and spraying of Agent Orange and other herbicide chemicals (**Ring**, *supra*, **Bryson**, *supra*). In my view those cases are distinguishable because they lack common elements present in this case, such as pollutant source and toxicity level, and because individual personal injury was a major factor in those disputes.

[63] The background for property claims in this case differs substantially from many other situations in which pollution claims have been advanced. Much study has already been undertaken in Sydney, some with defendants’ participation or sanction, to assess soil condition and the possible need for remediation, relocation or other remedies. This activity has occurred on a community or neighborhood basis, and is not limited to the context of individual claims. The parties will no doubt develop more evidence as litigation proceeds; however, substantial work relevant to common issues has already been undertaken, a factor consistent with proceeding in class-action format.

[64] In this case, questions of fact and law common to class members predominate over individual member issues, a factor favoring class proceeding under section 7(2).

[65] Subsections 7(2)(d) and (e) direct the court to consider whether other means of resolving the plaintiffs' claims are less practical or less efficient than proceeding by class action, and whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means. After considering how this action has evolved to date as well as the evidence at the hearing and counsel's submissions, I readily agree with the plaintiffs' position that any attempt to resolve the claims by other means would be less practical and less efficient than proceeding by class action. Administering the class proceeding will not create difficulties approaching those likely to be experienced if relief were sought by any other method.

[66] The defendants maintain the issues should be resolved in individual proceedings or test cases. In my view that would be a nonstarter it would simply be too unwieldy and expensive for individual plaintiffs to litigate this sort of case. The representative plaintiffs' evidence indicates they are persons with modest means, and there is no suggestion other potential class members can finance protracted expensive proceedings. The defendants' argument that separate actions would be a better alternative seems to presume that the major focus of the proceeding will be evidence addressing individual health situations and medical conditions. Personal injury claims and compensation for personal medical conditions are not being pursued the health-related claims and the remedies sought have a community scope, and claims related to the property are dominated by allegations respecting source of contamination, defendants' conduct and responsibility issues which are common. Canada suggests that a class action is not the preferable procedure because "most members of the proposed class do not have viable claims that would be worth pursuing [on] an individual basis" this argument in opposition to certification is flawed because it is merits based, and it is inconsistent with the Legislature's decision to enact class action legislation. The high cost inevitably associated with litigating the types of issues which are raised by the pleadings in this case precludes individual actions and would deprive plaintiffs of "their day in court.” Even if some individual claims could be started, they would be repetitive, inefficient, and inconsistent with principles of broad access to justice and judicial economy, criteria which ought to be addressed when considering certification, even if they are not specified in Nova Scotia legislation.

Although Canada and Nova Scotia suggest plaintiffs pursue individual claims, there is no indication the defendants would facilitate that process, or that their response would differ from that in this case   vigorous denial of responsibility, contest of procedural choices, and challenge to every issue by engagement of experts with international reputations to advance defences grounded in complex scientific disciplines.   The costs and inefficiencies associated with multiple actions would overburden not only the parties, but also the judicial system, which would have limited capacity to administer a multitude of claims.

[67]   The defendants say that behavior modification, a commonly-recognized goal which class actions are intended to advance, is not at play in this case because the Steel Works facilities no longer operate. In my view addressing behavior in a class action can have a broader focus than deterring particular defendants from repeat activity   certification of class proceedings in pollution cases can highlight obligations which parties pursuing industrial activity have to the public, thus fostering behavior of general benefit to society.

[68]   The plaintiffs have met their burden to establish that class proceeding is a fair, efficient and manageable method of advancing this claim, preferable to any other reasonably available means of resolving class members' disputes.

(iv) Representative Party

[69] Section 7(1) of the Act requires that there be a representative party who will fairly and adequately represent the interests of the class, has produced a plan setting out a workable method to advance the proceeding and notify potential class members, and who is not in conflict of interest.

[70] Both defendants expressed concern about the plaintiffs' proposed litigation plan; as that topic was also addressed during the second hearing, I will discuss it at the conclusion of these reasons. Nova Scotia did not otherwise object to the representative plaintiffs. Canada expressed concern that one plaintiff no longer owns property within the proposed class boundary and also maintains he is in conflict of interest because he was employed in the Steel Works and is therefore a potential joint tortfeasor who could be liable with the defendants to other class members. Canada also objected that one of the representative plaintiffs owned residential rental properties within class boundaries, and her tenants would have the same causes of action against her as against the defendants, placing her in conflict of interest with other members of the plaintiff class.

[71] I communicated at the conclusion of the June 2010 hearing my finding that the four named representative plaintiffs are suitable persons to advance the class action. Although Mr. Pettipas no longer owns property within class boundaries, he qualifies as a residential class member, and like the other proposed representatives, has testified concerning his understanding of the issues and commitment to responsibilities as a class representative. The representative plaintiffs have a common interest, and they need not be in identical situations with all other plaintiffs (**Anderson v. Wilson** (1999), 44 O.R. (3d) 673 (C.A.)).

[72] The potential conflicts of interest identified by Canada are in my view too remote to disqualify at this stage representative plaintiffs who have displayed commitment to the proceeding, without demonstrating any inappropriate self interest, for almost eight years. There is no evidence that anyone has suggested holding a residential landlord responsible for exposing tenants to contaminants, or that claim would be made against any person arising from employment at the Steel Works. Any conflict is merely hypothetical at this time, and if an actual conflict develops as the litigation proceeds it can be addressed through case management or designation of sub-class representatives.

C. Other Issues: Limitation

[73] The defendants urged me to consider application of limitation periods as part of the determination whether to certify a class action. Canada suggested that I follow **Knight v. Imperial Tobacco Canada Limited**, 2006 BCCA 235, and refuse to include claims outside a limitation period as common issues, because in order to have valid claims individuals would have to establish postponement of limitation. In my view, it is premature to address limitation periods at the certification stage in this proceeding. Courts should assume all facts pleaded to be true and read claims generously at the certification stage in this case the plaintiffs have pleaded suspension of limitation periods based upon discoverability and equitable fraud. Prescription is a defence or response to a claim, generally raised in a pleading made by defendants; in this case, despite plaintiffs' request that they do so, the defendants have declined to file a pleading pending resolution of certification. Accordingly, limitation is not an issue presently before the court. If pleaded by defendants, it may become a substantial defence to be evaluated at a common issues trial, or to be resolved after conclusion of a common issues trial when issues, such as discoverability, are addressed for individual claims. This approach is consistent with that adopted by other courts, including the Ontario Court of Appeal in **Cloud**, *supra*, and the British Columbia Supreme Court in **Pausche v. British Columbia Hydro & Power Authority**, [2000] B.C.J. No. 2125, aff'd [2002] BCJ No. 196 (B.C.C.A.).

D. Result

[74] The parties were advised following the Original Motion hearing that a class action would be the preferable procedure for the representative plaintiffs to advance this litigation. For the reasons which I have outlined, causes of action and common issues were approved for certification, subject to suitable definition of property owner and residential classes.

IV Certification: The Amended Motion

[75] The plaintiffs' Amended Motion for certification, which was filed in October 2010 and heard in December 2010, proposed certification of class boundaries with a reduced area and an extended seven-year habitation requirement for the residential class. The parties provided additional affidavit evidence with

respect to the revised boundary proposals, as well as detailed written and oral submissions.

[76] The parties and the court approached the December 2010 hearing as addressing an amendment to the Original Motion, not a replacement for the motion which had been presented at the earlier sessions. It was, in effect, a "continuation." Accordingly, the evidence from the Original Motion and the June 2010 submissions, as well as documentation filed and submissions made after that hearing, were part of the record for deliberation in December 2010. Consistent with that approach, previous evidence and submissions did not have to be repeated, and, indeed, defence counsel sometimes referred to the evidence and the plaintiffs' argument from the initial hearing to dispute the boundaries proposed in the Amended Motion.

[77] The defendants continue to maintain that no aspect of the plaintiffs' claim should be certified as a class action and forcefully challenge the revised class definitions and boundaries proposed in the Amended Motion. Although nothing was conceded, and they object to certification on behalf of both potential property owner and residential claimants, the defendants did not appear to seriously dispute that if, despite their objection, the proceeding on behalf of the potential claimants on whose behalf the representative plaintiffs commenced the action were to be certified, it would be appropriate to have two plaintiff classes property owner and residential.

[78] It is apparent from the statement of claim and representative plaintiffs' evidence that there are differences between the causes of action and common issues advanced and the remedies sought on behalf of plaintiffs who owned property and those who did not. Subject to satisfactory definitions, the plaintiffs' proposal to establish two classes of claimants property owner and residential is reasonable and logical and will facilitate the management and advancement of the case.

[79] It is also sensible, as plaintiffs propose, that the geographic boundaries for both classes be the same. There is no evidence to suggest that locations in which residents would be affected by defendants' impugned activity would differ from areas where real property would be contaminated. The defendants (while maintaining full opposition to proposed boundaries) did not specifically challenge having common boundaries for both classes, if certification were ordered. In my

view, defining the same geographic boundary for each class, as plaintiffs have done in the statement of claim and motion, is necessary to facilitate introduction of evidence and administration of the proceeding.

A. Class Boundaries

[80] The revised proposal for geographic boundaries differed substantially from the original instead of requesting inclusion of all property within a three and one-half mile radius of the Steel Works, the plaintiffs suggested that boundaries be determined based upon studies by one of their expert witnesses, Dr. Lambert. He was presented as an expert in public risk assessment, and made findings about the extent of soil contamination throughout the Sydney area after conducting investigation described in his affidavits and accompanying reports. Dr. Lambert was vigorously cross examined on three of his four affidavits his final supplementary affidavit was filed after the first hearing.

[81] The plaintiffs' Amended Motion requested approval of class boundaries defined in a revised statement of claim filed October 5, 2010, which were based on Dr. Lambert's findings with respect to lead concentration in soil. He deemed lead to be a proxy for other contaminants, and the plaintiffs' position is that class boundaries should encompass areas of Sydney where lead concentration exceeds the Canadian Council of Ministers of the Environment (CCME) Guidelines.

[82] The proposed boundary is set out in a 'metes and bounds' description, and also depicted on maps provided as exhibits. It comprises five areas or neighbourhoods in Sydney, and can be summarized as most of the residential part of Whitney Pier, all of the North End, the northwestern one-third to one-half of Ashby, a small part (approximately one-quarter) of Hardwood Hill, and approximately two-thirds of an area described as the South End, St. Rita's and the Shipyard.

[83] Those sections of Sydney are illustrated on a map which I received during February of 2011, identified as Exhibit C-50. The parties agree that document outlines the neighbourhoods in Sydney and they agree to perimeters for those neighbourhoods, except for dispute about borders for the St. Rita's area which I will address later. (Although neighbourhood perimeters are not generally in issue, the defendants do not agree that areas within the perimeters should be included in property class boundaries.)

[84] In deciding whether to accept the revised boundary proposal, I did not only consider new evidence introduced at the hearing of the Amended Motion. Rather, my determination was based on all of the evidence relevant to class boundaries from Dr. Lambert and from all the other witnesses, as well as all the exhibits presented by all parties at the Original Motion hearing and the continuation hearing after the amendment. I have not treated the boundary definition as an issue to be determined only by choosing either to accept or reject the plaintiffs' position based on Dr. Lambert's third supplementary affidavit, nor have I approached it as simply a contest between Dr. Lambert's work versus the results of JDAC Environment Limited's soil sampling, which were addressed in the affidavits of Rebecca Summers and Alana Devanney introduced by the defendants in the Fall of 2010.

[85] I agree with the following summary of the jurisprudence relating to "identifiable class" provided in the plaintiffs' briefs (June 2010, para. 74 and December 2010, para. 10), and I have been guided by the principles enumerated as follows:

> (a) membership in the Class should be determined by objective criteria that do not depend on the outcome of any substantive issue in the litigation; *Dutton, supra*, at para. 38
>
> (b) the Class definition should bear a rational relationship to the common issues; *Dutton, supra*, at para. 38
>
> (c) the Class must be bounded and not of unlimited membership; *Hollick, supra*, at para. 17
>
> (d) it is not necessary to identify every, or even most of the Class Members at the certification stage; *Robertson, supra*, at para. 169; *Cloud, supra*, at para. 45
>
> (e) there is a further obligation, although not onerous, to show that the Class is not unnecessarily broad and could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issues; *Hollick, supra*, at paras. 20, 21

(f) a proper Class definition does not need to include only those persons whose claims will be successful; *Frohlinger v. Nortel Networks Corporation*, [2007] O.J. No. 148 (S.C.J.) at paras. 23-28

(g) all Class Members need not have an equivalent likelihood of success. The defining aspect of Class Membership is an interest in the resolution of the proposed common issues; *Dutton, supra*, at paras. 38 and 54

(h) "The possibility that some Class Members will be unable to prove damages almost invariably exists." But this possibility does not impact on Class definition; and *Taylor v. Canada (Minister of Health)*, [2007] O.J. No. 3312 (S.C.J.) at para. 62, leave to appeal refused December 10, 2007

(i) the Class definition is the group to be bound by the result, including to the extent the claims fail. *Ring, supra*, at para. 62 citing *Attis v. Canada (Minister of Health)* (2007), 46 C.P.C. (6th) 129, (Ont. S.C.J.) at para. 53.

[86] The testimony of the four representative plaintiffs concerning areas of Sydney allegedly affected by the defendants' operations is particularly important, especially at the certification stage where the court does not weigh expert evidence to assess the merits of the plaintiffs' case.

[87] Dr. Lambert is the only expert upon whose opinion the plaintiffs rely for the class boundaries issue. He says lead is a proxy for arsenic and PAH's and the plaintiffs submit, as I have indicated, that boundaries should be determined based on application of the CCME Guidelines to his lead mapping, which is illustrated in documents provided to the court, in particular Exhibit C-38 and the maps which form part of that exhibit. The plaintiffs say that where Dr. Lambert's findings from soil sampling and analysis exceed CCME Guidelines, the area should be included in class boundaries. The plaintiffs say I should totally accept his evidence on that issue.

[88] The defendants take the position that Dr. Lambert's findings are not supportable and that I should therefore decline to grant the Amended Motion to Certify the Proceeding. They suggest there are flaws in his sampling methods, research, and analysis. The defendants say that I should prefer other evidence submitted in affidavits from Ms. Summers and Ms. Devanney, determine that lead is not a proxy for other contaminants, and find that Dr. Lambert's soil sampling results are unreliable and not a proper basis on which to set boundaries.

[89] Exhibit C-38 and especially Dr. Lambert's maps show areas of lead, arsenic, PAH and iron deposits in Sydney. In the context of the other information provided at the June 2010 hearings, using lead as a marker for other contaminants is not unreasonable as a component of the boundary-setting process. Dr. Lambert's work and the relevant maps indicate that the distribution of lead is much less far reaching than some other chemicals, particularly arsenic and PAH, and that there is a significant overlap between lead deposits and arsenic deposits and also, although to a lesser extent, between lead and PAH's.

[90] Dr. Lambert's analysis indicates that deposits of lead, more so than other substances, are closer to the facilities operated by the defendants, and that is consistent with other evidence that areas likely to have been most affected by the defendants' operations are those reasonably proximate to the steel mill and coke ovens. The amended boundaries which the plaintiffs propose based on Dr. Lambert's evidence are much more workable than were set out in the original proposal.

[91] Accordingly I conclude in principle that using lead distribution maps prepared by Dr. Lambert may be a reasonable formula or approach to setting class boundaries, or at least of assistance in setting those boundaries or a component of the boundary-setting process, provided that his conclusions are either not contradicted by other evidence or are preferable to those supported by other evidence. Although I am not determining the merits of the case, I must consider Dr. Lambert's evidence in the context of the other evidence which has been presented.

[92] The four representative plaintiffs in their testimony described defendants' activities with reference to distinct Sydney neighbourhoods Whitney Pier, the North End, Ashby, Hardwood Hill and the Shipyards/St. Rita's /South End area. Expert witnesses in their reports and during cross examination referred to those neighbourhoods, which were identified in various studies introduced in evidence.

[93] The defendants say I should take an 'all or nothing' approach - if I do not grant the plaintiffs' motion certifying a class with the boundaries they propose, then they maintain that I should totally reject the motion and allow the plaintiffs to propose a further amendment.

[94] The plaintiffs, on the other hand, request that I prescribe alternate boundaries if I do not certify the action with the boundaries they propose. The defendants say I should not do that; in fact, they say I cannot do that. The issue arises in the context of section 15 of the Act which provides:

> The court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and for that purpose may impose on one or more of the parties the terms or conditions the court considers appropriate.

[95] The plaintiffs say if I am not satisfied with the boundaries proposal, I am not required to completely reject the motion, but have the authority under section 15 to do something different from exactly what the motion requests, and establish other class boundaries   the defendants disagree.

[96] The court must determine claims fairly and expeditiously   this applies to all cases, and is highlighted by section 15 in the class action context. This lawsuit has experienced extensive proceedings to date, including several statement of claim amendments, which unlike in many cases, have reduced rather than expanded the scope of the claim. Reductions include abandoning claims for personal injuries and for diminution in property value. Allegations of pollution and contamination generated by the Steel Works have been advanced repeatedly in the public domain over the last 45 years. Sydney is a city with distinct areas and neighbourhoods, and the parties have generally agreed to the boundaries of those neighbourhoods. To proceed expeditiously, a class action in this type of claim requires manageable, workable boundaries which are not so large as to preclude common issues and if the plaintiffs succeed, realistic remedies. In my view, those class boundaries must be determined now, despite the defendants' contention that if I certify the proceeding using boundaries other than those suggested by the plaintiffs, the court would be inappropriately descending into the fray.

[97] I have considered the authorities that the defendants cite to support their 'all or nothing' argument, but nevertheless conclude that if I do not accept the boundaries proposed by the plaintiffs, I can make adjustments within reasonable limits, provided that revisions I make to boundaries proposed are supported by evidence. I prefer the authorities such as **Brown v. Canada (Attorney General)**, 2010 CarswellOnt. 3613 (S.C.J.) on this issue in the circumstances of this case.

[98] In a broader context it is not unusual for a court to grant partial relief sought in a motion, but not everything. Judges regularly grant some but not all remedies requested, they award lesser amounts of money than are claimed, they direct conveyances of tracts of land in smaller quantities than sought by a moving party; in my view, these principles can be applied when setting class boundaries.

[99] I have concluded that my authority to fix boundaries other than those proposed should be exercised only to set smaller rather than larger class areas, at least in the circumstances of this case.

[100] Although the defendants are very reluctant to acknowledge preference for a lesser rather than a greater area, choosing to challenge as either too large or too restrictive any proposal made by the plaintiffs, in my view it would be unfair to define boundaries exceeding those suggested in the notice which the plaintiffs delivered to opposing parties.

[101] There are also practical considerations related to my exercising an option to fix alternate boundaries if I am not satisfied that those proposed by the plaintiffs are acceptable. If I reject the proposed boundaries in this case, and suggest the plaintiffs make yet another amended motion, will the court be in any better position to set boundaries after a further hearing?

[102] I am satisfied after considering all the evidence and submissions that the plaintiffs have put their best foot forward, and it is unlikely that they can provide more evidence to assist the court in setting boundaries. The defendants have made it clear during the hearing that they will oppose any boundaries suggested. They have adopted the role of critics of the plaintiffs' proposals, and do not consider it their mandate to make positive suggestions.

[103] During the hearing of the Amended Motion, defence counsel challenged the plaintiffs' submissions by suggesting they were inconsistent with earlier representations made by the plaintiffs on the Original Motion, arguments the defendants had vehemently criticized on the earlier occasion. The defendants strongly opposed the plaintiffs' Original Motion on the basis that proposed boundaries were too broad, but when the plaintiffs narrowed the boundary proposal, one of the defendants’ tactics was to refer to the evidence and adopt the arguments which the plaintiffs had made in support of the original broader boundary definition request.

[104] Therefore, given the position of the parties to date, there is no indication that a further amendment would produce evidence or submissions which would be more helpful than those I have already received. I must also consider the time which has elapsed since this matter was begun. The presumption in the legislation is that certification is a preliminary matter which should be expedited. The Act contemplates resolution within 120 days, not the seven years which have elapsed so far in this case.

[105] Accordingly, if I am not satisfied that the boundaries suggested by the plaintiffs are appropriate, I will reduce them, if necessary, to correspond with the evidence, although I will not expand what has been requested.

(i) Whitney Pier, Ashby, North End

[106] The four representative plaintiffs, expert witnesses and the various studies and reports exhibited consistently refer to the Sydney areas most affected by emissions from facilities which the defendants operated as being Whitney Pier, Ashby and the North End.

[107] In the Amended Motion the plaintiffs have proposed class boundaries encompassing parts of those three neighbourhoods. The areas which the plaintiffs propose for inclusion in the boundaries are outlined on maps and exhibits and they are described in the schedule attached to the latest amended statement of claim. The portions of those districts the plaintiffs seek to have within the class boundaries are supported by the evidence introduced at the Original Motion, although at that time the plaintiffs sought a much larger class definition.

[108] The evidence in Dr. Lambert's third supplementary affidavit filed in the Fall of 2010 identified the portions of Whitney Pier, Ashby and the North End which the plaintiffs seek to have within the class boundaries as the most affected by lead deposits, and his mapping also indicates that there is arsenic and PAH within those areas. While there may be dispute about the applicable standards or the degree of concentration of pollutants and chemicals, the evidence presented strongly suggests that the parts of Whitney Pier, North End and Ashby the plaintiffs have put within the amended proposed boundaries, would, if the plaintiffs' claim succeeds, be the areas found to be most affected by the defendants' activities. The proposed portions of those neighbourhoods the plaintiffs now suggest for inclusion within the class boundaries, in my view, are manageable. Given the homogeneous nature of neighbourhoods in Sydney and the difficulty which would be involved if the court attempted to draw precise boundaries within neighbourhoods when the claim involves airborne and other pollutants that do not start and stop on straight lines, it would not be practical or proper for the court to micromanage boundary lines within potentially-affected neighbourhood areas.
There is no evidentiary basis to suggest more appropriate boundaries within those neighbourhoods, and it is not the court's role to second guess definition of boundaries supported by evidence.

[109] After considering all of the evidence and applying the criteria set out in para. 85, I direct that the class boundary definition include the portions of Whitney

Pier, Ashby and the North End described in the plaintiffs' Amended Motion, as they are set out in the schedule attached to the amended statement of claim and on Exhibit C-50.

(ii) St. Rita's, South End, Shipyard

[110] I will now address the parts of St. Rita's, the South End, and Shipyard neighbourhoods (which I will collectively refer to as "St. Rita's") that the plaintiffs seek to include within the class boundaries. I note at the outset that I accept the defendant Nova Scotia's view instead of the plaintiffs' position as to what constitutes St. Rita's in the context of this motion. After reviewing all of the evidence referring to that area, I am satisfied that the testimony and various studies relate to the larger neighbourhood identified by the pink perimeter on Exhibit C-50, and not only to the immediate area surrounding the hospital site as the plaintiffs contend.

[111] The evidence supporting the inclusion of part of St. Rita's is not nearly as persuasive as was testimony supporting inclusion of the North End and parts of Whitney Pier and Ashby. Support for inclusion of St. Rita's is limited to very general testimony at the first hearing concerning distribution of emissions throughout the entire Sydney region, and more particularly, Dr. Lambert's studies addressing concerning lead, arsenic and PAH.

[112] With respect to St. Rita's, Dr. Lambert's findings stand alone. His conclusions suggest lead and other substances are present in the northern part of the area, as shown in Exhibit C-38, but those results are not corroborated and in fact they are at variance with other evidence including testimony from the representative plaintiffs who indicated St. Rita's was not as affected as other neighbourhoods, the Band and Camus Study which described the area as low exposure, Dr. Lewis' Report and the Atwell Study. Dr. Lambert admitted on cross examination that those other investigations showed St. Rita's to be a lesser affected area.

[113] While I accept that Dr. Lambert's mapping of lead, arsenic and PAH is helpful, and although I rely on it together with substantial other evidence in determining that Whitney Pier, Ashby and North End are affected areas, I am unable to reach a similar conclusion with respect to St. Rita's. Dr. Lambert's conclusions about the effect of the defendants' activities on St. Rita's are not

consistent with the testimony from representative plaintiffs or other evidence. Although at the certification stage, it is not appropriate to assess the merits of Dr. Lambert's findings with respect to particular contaminants such as lead, I am unable to conclude that his findings concerning deposits in the northern part of St. Rita's meet the evidentiary threshold required to include that section of Sydney within the class boundary definition.

(iii) Hardwood Hill

[114] The plaintiffs also seek to include a small portion of Hardwood Hill within the class boundary. I have determined for reasons similar to those excluding St. Rita's that it is not appropriate to do so. This area caused me considerable concern and I have carefully analyzed the evidence. As with St. Rita's, the representative plaintiffs did not identify Hardwood Hill as a high-impact area except for one reference by Ms. MacQueen to there being significant quantities of rust-like smoke. However, the section of Hardwood Hill to which she was referring, identified as #7 on Exhibit C-3, is outside the portion of the Hardwood Hill neighbourhood which the plaintiffs proposed to include within the class boundaries.

[115] I have carefully examined the Choquette Report and the data in that document demonstrating plumes or isopleths of polluting material which might have been carried by the wind from the defendants' facilities to the southeast, and I have particularly looked at the 'light green' oval marking on Exhibit C-3 which shows those plumes and isopleths. However, those documents and the witnesses' testimony indicate that the area which may have been affected is a substantial distance east of the Hardwood Hill section the plaintiffs proposed to include within the class boundaries. Dr. Lambert also recognized the portion of Hardwood Hill proposed for inclusion by the plaintiffs to be part of the low exposure area (along with St. Rita's) identified in the Band and Camus Study, as illustrated by a 'light blue' square on Exhibit C-3.

[116] Dr. Lambert's lead mapping analysis in the context of all the other evidence is not sufficient to convince me that any part of Hardwood Hill or any part of St. Rita's should be included in the class boundary.

[117] As requested by the defendants, I considered the affidavits of Ms. Summers and Ms. Devanney which were admitted on defendants' behalf in response to the

Amended Motion, despite the plaintiffs' objections concerning questionable disclosure and hearsay. That evidence had no impact on my decision the conclusion not to include any part of St. Rita's or Hardwood Hill on the basis of Dr. Lambert's lead mapping would have been reached without the Summers and Devanney testimony. Furthermore, their evidence did not significantly contradict Dr. Lambert's finding concerning Ashby, North End or Whitney Pier except with respect to the very northern portion of Whitney Pier which I would not have excluded from the class boundaries in any event. To do so would amount to jumping into the fray and micromanaging boundaries by dividing an established neighbourhood based only on one set of data which relates more to the merits of the case than to the class boundaries.

[118] Setting the boundaries has been much more than a contest between Dr. Lambert's evidence and the mapping of pollutants based on CCME Guidelines. Even if the Summers and Devanney evidence were given the same weight as any other testimony, it would not have changed my conclusion, which is based on all the evidence introduced during the hearing of the Original and Amended Motions.

[119] My decision respecting property boundary definition can be illustrated by drawing on Exhibit C-50 a class boundary line along the border between Ashby and the Hardwood Hill/South End/St. Rita's/Shipyard area by following on that exhibit the pink line indicating the southern boundary of Ashby along Cottage Road, and continuing to the west along the southern boundary of the North End to Sydney Harbour. The plaintiffs should also propose a revised 'metes and bounds' description to replace the present schedules to the amended statement of claim, which can be approved as part of the certification order.

[120] I note that all of the areas within the geographic boundaries for the Residential and Property Owner Classes are within two miles of the defendants' facilities, which is consistent with evidence suggesting that is the area of the greatest potential harm.

(iv) Residential Class

[121] I wish to comment specifically about the temporal limit for the Residential Class. The only relevant evidence addressing the appropriate residence term requirement was given by Nova Scotia's expert toxicologist, Dr. Breecher, who indicated that seven years is a minimum time period often looked at in assessing

chronic exposures. In the absence of contradiction, I accept the seven-year residence period proposed by the plaintiffs as it provides a reasonable parameter to address the plaintiffs' allegation of increased risk of harm to health resulting from exposure and entitlement to a medical-monitoring remedy.

(v) Exclusions

[122] The Attorney General of Canada, not the Attorney General of Nova Scotia, suggested that persons who would otherwise be class members should be excluded if they worked at the steel mill or the coke ovens, on the basis that they may have been exposed at their workplace or they may have participated in creating harmful emissions. I decline to make that exclusion. In my view Canada's concern is not an appropriate topic for consideration at the certification or common issues stage, when individual issues are not being addressed, particularly in a case where claims for personal injury are not being advanced.

(vi) Potential Revision

[123] This decision represents my best assessment at this time of the boundary issue raised by the certification motion. It is not always possible in the early stages of a class proceeding, especially when defences have not been filed, to predict how issues will develop. I emphasize that establishing boundaries does not mean that every potential plaintiff who comes within the defined class will have a successful claim, or the same likelihood as other class members of establishing liability and proving damages. Future amendment to class boundaries and to other components of the certification order could become necessary. Under section 11(4) of the Act, the court may at any time amend a certification order on an application by a party or class member, or on its own motion. I am not suggesting that is going to happen, but it is not impossible.

[124] If the defendants are sincere in their expressed concern that persons within the three and one-half mile radius originally proposed are improperly excluded from the boundaries which I am fixing today, (a concern I find difficult to reconcile with their persistently maintaining that the boundaries originally proposed would permit classes far too inclusive to be manageable), then they can approach the plaintiffs to determine whether there could be an extension of boundaries by consent, or they can bring a motion. Some might say I am calling the defendants' bluff; however, if new developments come to light and any party feels that class boundaries need to be revised, that can be addressed.

B. Litigation Plan

[125] The plaintiffs' most recent proposed litigation plan is an exhibit to the amended notice of motion for certification. The parties should have dialogue before the plan is finalized, in light of the common issues which have been approved and the reasons I have expressed for setting the boundaries prescribed. Some topics for consideration are noted in paras. 52-54 herein and in proposals advanced by the defendants, especially Nova Scotia at paras. 132-147 of its brief filed during December 2010. Concerns about evidence of emissions source and attribution are merits-focused topics which do not need to be assessed at this stage. Also, many of the comments the defendants make about the litigation plan focus on minor procedural details which are ordinarily resolved among the parties or through case management during the course of pre-trial procedures.

[126] I do not at this time make a ruling or provide specific direction to finalize the litigation plan; I only comment that in the context of the boundaries which have been set there seems to be work to do to clarify common issues set out in the most recent plan. Topics inviting prompt attention include the following:

(a) Particularizing the method of proof for the claim based on water-borne emissions, if that aspect is to be pursued.

(b) Plan clause 18(b) concerning lead, arsenic and PAH's as proxies for other contaminants in view of the reasons I have expressed while deciding this motion, the plaintiffs may want to reconsider their position; it is their right to choose the basis by which they wish to establish their case, but they may now want to adopt a different approach, as I have not set boundaries based entirely on Dr. Lambert's conclusions.

(c) Property value diminution claims should be specifically excluded see paras. 23(a) and 27.

(d) The defendants have identified a significant issue with respect to causation: the link between emissions and the risk of harm to class members. To provide context, I refer to paras. 16, 17 and 18 of the plan. Nova Scotia submits that there is a gap because the plan does not require the plaintiffs to establish causation. The Province says the present plan presumes that if contamination is established, then liability results. In my view this ought to be addressed the litigation plan should identify the need for expert evidence to establish that a substance is harmful before its emission is deemed to cause damage and warrant remedy. Present paras. 16 and 17 of the plan seem to contemplate that experts will identify products emitted, but they do not anticipate (and this seems to be the defendants' point) any requirement for evidence showing the substances emitted to be

harmful contaminants. Although this gap may be unintentional, it should be addressed.

(e) Paragraph 8 of the litigation plan refers to responsibility for the cost of disseminating notices. Defendants have expressed concern about the proposal, but as counsel have not fully addressed the issue, they may want to make submissions before I comment.

I invite the parties to discuss these concerns, following which I would be prepared to participate in dialogue at a case management meeting.

[127] The proposed litigation plan outlines a reasonable approach to advance resolution of the claim, and I have no hesitation approving in principle its format and general content. It satisfies the requirements of section 7(1)(e)(ii) of the Act to the extent necessary to allow a certification order to issue. I suggest that the case management process be used to address the issues noted in para. 125 as well as any other procedural, scheduling and logistical matters. As soon as certification of the proceeding is finalized, dissemination of notice to inform class members should be expedited; paragraph numbered 4 of the proposed plan should promptly receive any necessary fine tuning through case management and be implemented, even if other procedural details associated with the plan remain outstanding.

[128] In the meantime, so that a certification order complying with section 11(1)(f) of the Act can be issued, I approve the manner by which a class member may opt out as set out in paragraph numbered 4 of the plan, and I direct that the opt-out deadline be addressed by the parties' proposing a number of days following dissemination of the final notice of certification.

C. Result

[129] The plaintiffs' amended motion for certification is accordingly granted, with the revisions reflected in these reasons.

[130] The parties may address costs of the motion by written submissions to be provided by April 20, 2012, a deadline which, if necessary, may be extended by

agreement or upon request. If counsel wish to make supplementary oral representations, I will entertain a request.

[131] To enable the next steps to be taken in this proceeding, the certification order can be issued now. I request that plaintiffs' counsel prepare a draft, and direct that terms be finalized in accordance with *Civil Procedure Rule 78.04(3)*. The order must address the matters enumerated in section 11(1) of the Act; any other terms to which the parties agree, including aspects of the litigation plan not requiring further consideration, may be included. The order should specify that costs of the motion, and any issues arising from certification requiring case management, be reserved for determination by me.

J.