NOVA SCOTIA COURT OF APPEAL

Citation: *Crooks v. CIBC World Markets Inc.*, 2019 NSCA 46

Date: 20190531
Docket: CA 462245
Registry: Halifax

Between:

Gayle Crooks, Archie Gillis and
Karen McGrath

Appellants

v.

CIBC World Markets Inc./Marches
Mondiaux CIBC Inc. carrying on business as
CIBC Wood Gundy

Respondent

Judge: The Honourable Justice David P.S. Farrar

Appeal Heard: February 14, 2019, in Halifax, Nova Scotia

Subject: **Decertification of a Class Action. Sections 7 and 13 of the *Class Proceedings Act*,** S.N.S. 2007, c. 28.

Summary: The appellants were representative plaintiffs in a class action which was certified by Order dated July 13, 2011. Subsequent to the certification, the respondent made admissions with respect to a number of the common issues. The respondent applied to delete some of the other common issues and to decertify the class action on the basis that it was no longer the preferable proceeding.

Justice Patrick J. Duncan heard the motion and by decision dated May 27, 2016 (reported as 2016 NSSC 145), he decertified the action. He issued an order deleting a number of the common issues. The Order also provided that the admissions made by the respondents would "enure to the

benefit" of any class member who commenced an individual action in the future.

The representative plaintiffs appealed.

Issues: Did the motions judge err in determining a class action was no longer the preferable procedure?

Result: Appeal allowed. The motions judge mistakenly assumed that he could make an order which would benefit the class members who subsequently commenced individual actions. This was an error. Once the action was decertified there was no longer a class. The admissions could not enure to the benefit of a class which no longer existed and was not defined. Further, he relied on the fact that there had been admissions as a factor in determining that a class action was no longer the preferable proceeding. Again, this was an error. The admissions did not eliminate the common issues; they resolved them. The Order, to the extent it decertified the class action, was set aside.

NOVA SCOTIA COURT OF APPEAL

Citation: *Crooks v. CIBC World Markets Inc.*, 2019 NSCA 46

Date: 20190531
Docket: CA 462245
Registry: Halifax

Between:

Gayle Crooks, Archie Gillis and
Karen McGrath

Appellants

v.

CIBC World Markets Inc./Marches
Mondiaux CIBC Inc. carrying on business as
CIBC Wood Gundy

Respondent

Judges:	Farrar, Van den Eynden and Derrick, JJ.A.
Appeal Heard:	February 14, 2019, in Halifax, Nova Scotia
Held:	Appeal allowed with costs to the appellants in the amount of $5,000 per reasons for judgment of Farrar, J.A.: Van den Eynden and Derrick, JJ.A. concurring.
Counsel:	Peter M. Rogers, Q.C. and Jane O'Neill, Q.C., for the appellants John A. Keith, for the respondent

Reasons for judgment:

[1] On January 8, 2010, the appellants, by Notice of Action brought under the *Class Proceedings Act*, S.N.S. 2007, c. 28 (the "*Act*"), commenced action against CIBC World Markets Inc. carrying on business as CIBC Wood Gundy.

[2] The appellants are among a hundred or so clients of CIBC Wood Gundy who were involved in trading options on the advice of Fredrick Saturley, an investment advisor employed by CIBC Wood Gundy.

[3] The clients of Mr. Saturley suffered losses because of a calculation error on their accounts for which CIBC Wood Gundy acknowledged it was responsible. CIBC Wood Gundy made attempts to compensate the clients by paying them, individually, what it considered were their losses.

[4] The manner in which CIBC Wood Gundy determined the losses for the individual investors is not relevant to this appeal. It is sufficient to say that some clients were dissatisfied with CIBC Wood Gundy's approach. They were of the view that it provided less compensation than what they were legally entitled. The result was the issuance of the Notice of Action.

[5] The appellants applied to the Nova Scotia Supreme Court to certify the proceeding under s. 7 of the *Act*. Justice Gerald R.P. Moir, in a decision dated May 11, 2011 (reported 2011 NSSC 181) and Order dated July 13, 2011, certified the action as a class proceeding and identified the common issues. The Certification Order identified the claims that would be asserted by the class as follows:

> 3. The nature of the claims to be asserted by and on behalf of the class are:
>
> a. Negligence;
>
> b. Negligent misrepresentation;
>
> c. Breach of contract;
>
> d. Breach of fiduciary duty.

[6] The Certification Order then set out nineteen common issues:

> 4. The within action is certified on the basis of the following common issues:

a) Did CIBC Wood Gundy owe the class members a duty of care to provide them with a correct margin calculation in their margin accounts?

b) Did CIBC Wood Gundy breach the standard of care by failing to provide class members with a correct margin calculation in their margin accounts?

c) Did CIBC Wood Gundy breach the *Securities Act* and or IIROC rules by not maintaining correct margin calculations?

d) Was it an implied term of the class members' investment contracts with CIBC Wood Gundy that they would be provided with correctly calculated margin account information?

e) Did CIBC Wood Gundy breach the class members' investment contracts by failing to maintain proper margin account information?

f) Did CIBC Wood Gundy negligently misrepresent that the class members' margin account calculation was correct?

g) When CIBC Wood Gundy discovered the margin error, did a fiduciary duty arise to class members in determining how to deal with the error?

h) If so, did CIBC Wood Gundy breach the fiduciary duty owed to the class members in the manner in which it chose to deal with the error by putting its own interests ahead of those of the class members?

i) Did CIBC Wood Gundy breach industry and its own codes of conduct in the manner in which it chose to deal with the error?

j) Did CIBC Wood Gundy wilfully mislead class members by withholding material information about the margin calculation error?

k) Did CIBC Wood Gundy breach the *Securities Act* and/or IIROC Rules by providing investment advice and/or by conducting unauthorized and/or discretionary trading in options without having the necessary regulatory approval to do so?

l) Did CIBC Wood Gundy attempt to rectify the calculation error by seeking authorizations from members for cancellation of all positions open on July 24, 2008 or opened after, or did it impose cancellation unilaterally?

m) Did CIBC Wood Gundy fail to credit the class members for gains that had accrued to them when it cancelled all EEM option contracts that were opened as of or after July 24, 2008?

n) Did CIBC Wood Gundy provide investment advice, or conduct unauthorized trading in options, without having the necessary regulatory authority to do so?

o) Did CIBC fail to adjust the EEM options open as of July 24, 2008 to July 24, 2008, the date the error occurred?

p) What is the proper compensation formula to be applied in assessing the damages suffered by the class members as a result of the conduct of CIBC Wood Gundy?

q) Does CIBC Wood Gundy's conduct warrant an award of punitive damages?

r) Are the class members entitled to compound pre-judgment interest and if so, at what rate?

s) Are the class members entitled to have their damages calculated in US dollars, converted and paid in Canadian dollars using the applicable exchange rate and if so, what is the applicable exchange rate?

[7] During the course of the proceeding, CIBC Wood Gundy admitted:

1. it owed the class members a duty to provide them with a correct margin calculation in their margin accounts (Common Issue (a));
2. it breached the standard of care by failing to provide class members with a correct margin calculation in their margin accounts during the period July 14, 2008 – October 8, 2008 (the "Error Period") (Common Issue (b));
3. it was an implied term of the class members' investment contracts with CIBC Wood Gundy that they would be provided with correctly calculated margin account information (Common Issue (d));
4. during the Error Period it breached the class members' investment contracts by failing to maintain proper margin account information (Common Issue (e));
5. it negligently misrepresented that the class members' margin account calculation was correct (Common Issue (f)).

[8] On January 8, 2014 CIBC Wood Gundy filed a motion to decertify a number of the common issues often referred to as "decertifying common issues". However, that is a bit of a misnomer. Common issues are not certified; it is the action which is certified. The correct reference should be to either deleting or

removing common issues from the certified action. The original motion did not seek decertification of the class proceeding.

[9] The motion was heard before Justice Patrick J. Duncan on January 23, 2014 and September 14, 2015 but the decision on it was deferred pending a decision of this Court on an appeal of *Matheson v. CIBC Wood Gundy*, 2014 NSSC 18. In that case, the Mathesons opted out of the class proceeding and commenced their own action which proceeded to trial.

[10] In the *Matheson* decision, Justice Arthur W.D. Pickup awarded approximately $280,000 damages to the Mathesons in addition to what had already been paid to them by CIBC Wood Gundy. CIBC Wood Gundy appealed and the Mathesons filed a cross-appeal.

[11] This Court allowed CIBC Wood Gundy's appeal (reported 2015 NSCA 22) and dismissed the cross-appeal. Bourgeois, J.A. reasoned:

> [78] If the Mathesons wished to establish that the funds received from CIBC in November of 2008 were inadequate, it was up to them to marshal evidence of reliance, causation and the quantification of their damages. If they did so, and their proven losses were greater than the reimbursement received, they would have been entitled to compensation. In my view, the application judge's analysis of the EEM "clawback" losses skipped from reliance directly to damages, without finding the necessary link of causation.
>
> DISPOSITION
>
> [79] I would allow CIBC's appeal. The application judge's award of EEM "clawback" damages should be set aside. As such, all damages paid by CIBC to the Mathesons pursuant to the decision below shall be returned. Costs awarded to the Mathesons should be reversed in favour of CIBC.
>
> [Emphasis added]

[12] Justice Bourgeois' comments on reliance, causation and the quantification of damages appear to have been the springboard for CIBC Wood Gundy filing an amended motion. On June 5, 2015, it filed an Amended Notice of Motion seeking to completely decertify the class action under s. 13 of the *Act* or alternatively, to remove some of the common issues. Its position, essentially, was that since this Court ruled the Mathesons had to provide specific proof of reliance, causation and the quantification of damages, the same approach would be required for each of the members of the class, thereby making the action no longer suitable as a class proceeding.

[13] Further submissions on the Amended Notice of Motion were heard by Justice Duncan on September 14, 2015. The motions judge issued a decision on May 27, 2016 (reported 2016 NSSC 145), an Erratum to that decision and an Addendum dated March 20, 2017 (also reported as 2016 NSSC 145) and Supplementary Reasons dated March 20, 2017 (reported 2017 NSSC 75).

[14] In his decision released on May 27, 2016, the motions judge found that a class proceeding was no longer the preferable procedure for addressing the plaintiff's claims and decertified the action as a class proceeding. He also deleted common issues (c), (g), (h), (j), (k), (n) and (p). After the deletion of the common issues coupled with the admissions which had been made by CIBC Wood Gundy, the only remaining common issues to be determined were:

> i) Did CIBC Wood Gundy breach industry and its own codes of conduct in the manner in which it chose to deal with the error?
>
> l) Did CIBC Wood Gundy attempt to rectify the calculation error by seeking authorizations from members for cancellation of all positions open on July 24, 2008 or opened after, or did it impose cancellation unilaterally?
>
> m) Did CIBC Wood Gundy fail to credit the class members for gains that had accrued to them when it cancelled all EEM option contracts that were opened as of or after July 24, 2008?
>
> o) Did CIBC fail to adjust the EEM options open as of July 24, 2008 to July 24, 2008, the date the error occurred?
>
> q) Does CIBC Wood Gundy's conduct warrant an award of punitive damages?
>
> r) Are the class members entitled to compound pre-judgment interest and if so, at what rate?
>
> s) Are the class members entitled to have their damages calculated in US dollars, converted and paid in Canadian dollars using the applicable exchange rate and if so, what is the applicable exchange rate?

[15] The Addendum to the original decision was primarily to clarify that, notwithstanding the admissions made by CIBC Wood Gundy, it had made no acknowledgement of liability. In other words, although it had conceded breaches, it was not acknowledging that the class members suffered any damages as a result of those breaches.

[16] In his Supplemental Decision the motions judge explained that additional reasons were necessary as the parties could not agree on the degree to which the

proceeding continued to be subject to the statutory regime set out in the *Act*. They also could not agree on the disposition of costs on the decertification motion.

[17] The appellants' position, following the decertification motion, was that the *Act* continued to apply and the Court should now move to the determination of the individual actions.

[18] CIBC Wood Gundy disagreed and proposed that an order would be issued setting out its admissions which would enure to the benefit of any class member who subsequently brought an action against it.

[19] The motions judge agreed with CIBC Wood Gundy and a final order was issued on March 24, 2017 which incorporated all of his decisions and provided:

> 1. The following admissions made by CIBCWM in respect of the common issues contained in the Order (the "Admissions") shall enure to the benefit of all members of the class:
>
>   a. Common issue (a): CIBCWM admits that it owed the class members a duty of care to provide them with a correct margin calculation in their margin accounts;
>
>   b. Common issue (b): CIBCWM admits that it breached the standard of care by failing to provide class member with a correct margin calculation in their margin accounts during the period July 14, 2008 – October 8, 2008 (the "**Error Period**");
>
>   c. Common issue (d): CIBCWM admits that it was an implied term of the class members' investment contracts with CIBCWM that they would be provided with correctly calculated margin account information;
>
>   d. Common issue (e): CIBCWM admits that during the Error Period, it breached the class members' investment contracts by failing to maintain proper margin account information; and
>
>   e. Common issue (f): CIBCWM admits that during the Error Period, CIBC negligently misrepresented that the class members' margin account calculation was correct.
>
> 2. Common issues (c), (g), (h),(j), (k), (n) and (p) (the "**Deleted Common Issues**") are deleted from the Order.
>
> 3. A class proceeding is no longer the preferred procedure for addressing these claims and the requirements of Section 7 of the Nova Scotia *Class Proceedings Act*, S.N.S. 2007, c. 28, as amended (the "*Act*"), are no longer satisfied. This action is hereby decertified as a class proceeding.

[underlining mine]

[20] Section 39(3)(b) of the *Class Proceeding Act* directs that a party may only appeal a decision on decertification with leave of a judge of this Court. The appellants sought leave to appeal the Decertification Order. By Consent Order dated December 22, 2017, Justice Anne Derrick granted leave to appeal on the following two grounds:

> 1. The Learned Justice erred in law by failing to follow the procedures set out in sections 23-31 which apply once there has been a determination of common issues in favor of the class;
> 2. The Learned Justice erred in law by finding that, even though common issues had been determined in favour of the class, the *Class Proceedings Act* no longer applies.

[21] The appellants do not take issue with the decision of the motions judge to delete some of the common issues.

[22] For the reasons that follow, I would set aside the decertification order with costs to the appellants in the amount of $5,000.00 inclusive of disbursements.

Issues

[23] In my view, the grounds of appeal may be restated as one issue:

> Did the motions judge err in determining a class action was no longer the preferable procedure?

Standard of Review

[24] In *AIC Limited v. Fischer*, 2013 SCC 69, the Court explained the standard of review as follows:

> [65] I recognize that a decision by a certification judge is entitled to substantial deference: see e.g. *Pearson*, at para. 43; *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 33. Specifically, "[t]he decision as to preferable procedure is . . . entitled to special deference because it involves weighing and balancing a number of factors": *Pearson*, at para. 43. However, I conclude that deference does not protect the decision against review for errors in principle which are directly relevant to the conclusion reached such as, in my view, occurred here: see e.g. *Cassano v. Toronto-Dominion Bank*, 2007 ONCA

781, 87 O.R. (3d) 401, at para. 23, leave to appeal refused, [2008] 1 S.C.R. xiv; *Markson*, at para. 33; *Cloud*, at para. 39.

[Emphasis added]

[25] Although *AIC Limited* was addressing a decision on a certification motion, it is equally applicable on a motion to decertify. In both instances the court is determining whether the class action is the preferable procedure under s. 7 of the *Act* (See s. 7 and s. 13, *infra*). Therefore, the motions judge's decision on whether it is a preferable procedure is entitled to deference. However, deference will not prevent this Court from interfering if the motions judge reached his conclusion based on an error in principle.

Analysis

Did the motions judge err in determining a class action was no longer the preferable procedure?

[26] Section 7 of the *CPA* provides as follows:

> **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.

> (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.
>
> [Emphasis added]

[27] Where a certification order has been made under section 7, section 13 allows for decertification if the conditions for certification are no longer satisfied. It provides:

> **Where conditions for certification not satisfied after certification**
>
> 13(1) Without limiting subsection 11(4), where at any time after a certification order is made under this Part it appears to the court that the conditions referred to in Section 7 or subsection 9(1) are not satisfied, the court may amend the certification order, decertify the proceeding as a class proceeding or make any other order it considers appropriate.
>
> (2) Where the court makes a decertification order under subsection (1), the court may permit the proceeding to continue as one or more proceedings between different parties and may make any order referred to in Section 12 in relation to each of those proceedings.

[28] While section 13(1) allows a court to decertify where the conditions for certification are no longer met, that provision must not be interpreted to defeat the purpose of the class action proceeding.

[29] With respect, the motions judge erred in his determination that the proceeding should be decertified by:

1. assuming that he could grant an order that would enure to the benefit of the members of the class even after the class proceeding was decertified; and
2. using admissions made by CIBC Wood Gundy as a consideration in his determination that a class action was no longer the preferred proceeding.

[30] To explain these errors some further context is necessary.

[31] In his review of Justice Moir's decision to certify, the motions judge identified that there were "new facts or circumstances before the court now" as compared to those before Justice Moir:

> [133] There are "new facts and circumstances" before the court now as compared to those considered by Justice Moir. I disagree with the plaintiffs' characterization of the *Matheson* decision's effect on the position of the investors in proving their claims against the defendant.
>
> [134] The impact of the post certification developments on what Justice Moir saw as the advantages and disadvantages of a class proceeding must be weighed to determine whether it remains preferable to continue with a class proceeding.

[32] The motions judge went on to discuss the impact the admissions had on the matter proceeding as a class action:

> [141] Liability has now been admitted to three of the four causes of action. In these matters the members of the class can go directly to the proof of causation and assessment of their individual damages if warranted. The *Matheson* decision has made it clear that these two latter issues must be adjudicated on a case by case basis.
>
> [Emphasis added]

[33] He then summarized his conclusions on the issues and found that, in light of the admissions and the common issues that had been eliminated, the foundation for which Justice Moir's decision was made was no longer present:

> [145] In summary, the foundation upon which Justice Moir's decision was built included an expectation that liability in relation to four pleaded causes of action could be resolved or substantially resolved on a class wide basis. That is no longer the situation.
>
> …

> [147] In summary, there have been changes in the circumstances from those which Justice Moir relied upon to reach his conclusions. Those changes have resolved or eliminated as common issues much of what was intended to be accomplished in the common issues trial.
>
> [148] The issue then is, having regard to the present circumstances, whether the remaining common issues can be decided on a class basis, and, if so, whether a common issue trial of these issues is preferable within the meaning of section 7 of the **Class Proceedings Act**.
>
> [Emphasis added]

[34] It is clear from this passage of the motions judge's decision that he is re-applying the test under section 7 of the *Act* taking into account only the remaining common issues. As I will explain, this is not the proper approach to a decertification motion.

[35] He then concluded:

> [174] The defendant has satisfied its burden, on the basis of newly discovered evidence, post certification developments in the course of the litigation and post certification changes to the law, to establish that the requirements of section 7 of the **Class Proceedings Act** are no longer satisfied. Having examined the common and individual issues and taking into account that which each class member must prove to demonstrate liability and damages, I conclude that a class action is no longer the preferable procedure for proceeding with these claims.
>
> [175] I will sign an order to give effect to the admissions of liability by the defendant, and to decertify the proceeding.
>
> [Emphasis added]

[36] The motions judge's reasons, and the Order suggesting that the admissions could enure to the benefit of the class members (cited in ¶19 above) are inconsistent with his decision to decertify the action. The admissions can be of no benefit to a member of a class which no longer exists and is no longer defined.

[37] This issue was addressed in *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 (leave to appeal to SCC denied, [2012] S.C.C.A. No. 326), where the Court found that admissions made in the absence of a certification order could not bind the defendant:

> [87] … in the absence of a certification order, any admission fails to bind the defendant vis-à-vis the proposed class in any meaningful way. As stated *in*

> *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.)), at para. 14:
>
> > Without a certification order from this court no public statement by the defendant, and no admission in its defence to the nominal plaintiff, binds the defendant in respect of the members of the proposed class. A class proceeding by its very nature requires a certification order for the proposed class members to become parties to the proceeding. If the proposed class members are not parties to the proceedings, the admission of liability, as it relates to them, is no more than a bare promise.
>
> [88] … the admission of what would otherwise be a proper common issue should not be allowed to defeat a finding of commonality. This is because, in the absence of a certification order, the admission has no binding effect as between the defendant and the members of the class. As the motion judge in this case observed, at para. 139: "A defendant cannot finesse a motion for certification by admitting what would otherwise be a proper common issue." Likewise, Scotiabank cannot ask this court to overturn a certification order on the basis that it has admitted a proper common issue.
>
> [Emphasis added]

[38] As in *Fulawka*, CIBC Wood Gundy seeks to have a certification order overturned on the basis it has admitted a proper common issue. Admission of a common issue does not change the determination by Justice Moir that a class action was the preferred procedure. The admissions do not eliminate the common issues; they resolve them.

[39] In any class action, once the common issues have been decided the re-application of s. 7 to the remaining issues is bound to result in an assessment that those issues are best decided individually and not as common issues. It would invariably lead to decertification and the benefits of the *Act* will have been lost.

[40] The Ontario Superior Court of Justice in *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 reached a similar conclusion as *Fulawka*. It held the defendants could not avoid a common issues trial by admitting common issues as a separate and independent proposition:

> [63] The defendants assert that individual proceedings are preferable to a class proceeding in the present factual matrix. I am not persuaded that such is the case. The time, and doubtless many lawyer hours, spent on simply getting this action before the court on a certification motion, let alone an examination of the positions taken in the expert evidence filed by the defendants, is indicative that an individual attempting to pursue litigation would likely find his or her resources

taxed beyond sustainable limits.

[64] In like fashion, I am unable to accede to the defendants' submission that an "admission" such as that set out in their factum at para. 107 would render individual proceedings preferable. Paragraph 107 reads:

> The defendants acknowledge that there are significant health risks associated with smoking. Accordingly, there is no issue on this motion as to whether tobacco products are capable of causing or contributing to disease. The only causation issue will be whether or not a potential class member can establish whether his or her individual disease was caused or contributed to by the use of tobacco products.

[65] In my view, the supposed "admission" is of little use to any plaintiff in an individual proceeding. *It would not advance any particular proceeding to a significant degree and in any event, an admission made on this motion in the absence of a certification order does not bind the defendant to the class members*. (*Bywater* at paras. 13-14; See also *Griffith v. Winter*, [2003] B.C.J. No. 1551 (B.C. C.A.) at para. 20; *Dalhuisen (Guardian ad litem of) v. Maxim's Bakery Ltd.*, [2002] B.C.J. No. 729 (B.C. S.C. [In Chambers]) at para. 8) As stated in *Bywater*:

> [para13] Here, the defendant admits liability for the cause of the fire. This admission, it contends, eliminates the common issue of liability. Since this, it asserts, is the only common issue, the certification motion must fail.
>
> [para14] I cannot accede to this submission. This is not to in any way detract from the commendable and timely admission of fault by the defendant. *However, an admission of liability in the air does not advance the litigation* or *bind the defendant in respect of the members of the proposed class*.

[Emphasis added]

[41] Ward Branch in his text *Class Actions in Canada*, vol. 1 (loose-leaf) (2018 Thomson Reuters Canada Limited: Toronto) also comments on the effect of an admission of fault outside the certified proceeding as follows:

> **4.510** The fact that the defendant has already admitted fault does not prevent the court from certifying fault as a common issue, given that a bare admission will not bind the defendant as against all class members, unless embodied in a court order within a certified class proceeding. Similarly, the fact that a duty of care has been found to exist in analogous circumstances in other proceedings does not

> preclude certification of a duty of care issue, particularly if the issue is not conceded, and the other proceedings are under appeal.
>
> [Emphasis added]

[42] Authors George S. Holmested and Garry D. Watson, et al., in their publication *Holmested and Watson, Ontario Civil Procedure*, 7th ed. (Toronto: Carswell, 1984) at R. 12§20 (electronic service) are very critical of the motions judge's approach to decertification in this case:

> *Crooks v. CIBC World Markets Inc./Marches Mondiaux CIBC Inc.*, 2016 CarswellNS 456, 2016 NSSC 145, 85 C.P.C. (7th) 277, is a rare and perhaps unique example of where the court has granted a defendant's motion to decertify a class action, however, the reasons for decision make clear that in substance the resulting decertification order was intended to obviate the need for a common issues trial on issues that the defendant had already admitted liability, and to permit the litigation to move expeditiously to resolution of the remaining individual issues. The action was brought on behalf of the defendant's investment clients for losses sustained as a result of the defendant's alleged miscalculations in class members' margin accounts. The defendant admitted liability in breach of contract, negligence and negligent misstatement, but contested liability for breach of fiduciary duty. Various post-certification developments in the case law made it clear that the elements of the plaintiff's breach of fiduciary claim could not be commonly litigated. In light of the defendant's admissions and post-certification case law developments, the only disputed issues that remained would need to be litigated individually.
>
> The defendant moved for decertification on the basis that there were no longer any live common issues to be resolved. The plaintiff resisted decertification, arguing in relevant part that the defendant's admissions did not eliminate the common issues to which they related, but merely answered them. [*Authors note:* the plaintiff's position accords with the law in Ontario to the effect that a defendant cannot avoid certification and a common issues trial by admitting the common issues - - - see for example, *Bywater v. Toronto Transit Commission*, 1998 CarswellOnt 4645, 27 C.P.C. (4th) 172 (Gen. Div.), additional reasons (1999), 30 C.P.C. (4th) 131 (Gen. Div.)] The court granted decertification, but made an order inuring the benefit of the defendants admissions to all class members, and directed the parties to address how the resolution of the remaining individual issues were to be resolved.
>
> In the authors' respectful view, the decision of the Nova Scotia Supreme Court is misguided and potentially dangerous. A better solution, we suggest, would have been to decertify the common issues that could no longer be litigated commonly and to render judgment on the significant common issues to which the defendant admitted. The latter approach keeps the proceeding within the class action regime, thereby both (a) keeping available the special procedural tools made

> available under the legislation for resolving individual issues; and (b) ensures that plaintiff counsel can avail themselves of the important legislative class action fee provisions that are critical to viability of the class action mechanism.
>
> [Emphasis added]

[43] I agree with Holmested and Watson. The motions judge should have granted judgment on the admitted common issues. This would have maintained the action as a class proceeding preserving the procedural tools available under the legislation for resolving individual issues.

[44] The determination of common issues prior to resolving individual issues is contemplated by the very nature of the *Act*. Section 23(1) of the *Act* sets out the procedure to be followed where common issues are determined in favour of a class or sub-class:

> **Notice of determination of common issues**
>
> 23 (1) Where the court determines common issues in favour of a class or subclass and considers that the participation of individual class or subclass members is required to determine individual issues, the representative party for that class or subclass shall give notice to those members in accordance with this Section.
>
> (2) Subsections 22(3) to (5) apply with the necessary modifications to a notice given under this Section.
>
> (3) A notice under this Section must
>
> (a) state that common issues have been determined;
>
> (b) identify the common issues that have been determined and explain the determinations made;
>
> (c) state that class or subclass members may be entitled to individual relief;
>
> (d) describe the steps that must be taken to establish an individual claim;
>
> (e) state that failure on the part of a class or subclass member to take those steps will result in the member not being entitled to assert an individual claim except with leave of the court;
>
> (f) give an address to which class or subclass members may direct inquiries about the class proceeding; and
>
> (g) give any other information the court considers appropriate.

[45] Section 29 establishes that the determination of a common issue will bind the members of a class but only in the context of the certified proceeding:

> **Judgment on common issues is binding**
>
> 29 (1) A judgment on common issues of a class or subclass binds every class or subclass member, as the case may be, who has not opted out of the class proceeding, but only to the extent that the judgment determines common issues that
>
> (a) are set out in the certification order;
>
> (b) relate to claims described in the certification order;
>
> [Emphasis added]

[46] Finally, s. 30 outlines how a court may proceed after common issues are determined:

> **Determination of issues affecting certain individuals**
>
> 30 (1) Where the court determines common issues in favour of a class or subclass and determines that there are issues, other than those that may be determined under Section 35, that are applicable only to certain individual class or subclass members, the court may
>
> (a) determine those individual issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;
>
> (b) appoint one or more persons, including, without limiting the generality of the foregoing, one or more independent experts, to conduct a reference into those individual issues under the Civil Procedure Rules and report back to the court; or
>
> (c) with the consent of the parties, direct that those individual issues be determined in any other manner.

[47] The motions judge conducted his decertification analysis on the basis that the individual actions brought by former class members could proceed in the "shadow" of the *Act*, bound by findings of fact made in the context of a class action which had been decertified. In essence, he found that the "dead hand" of the *Act* could continue to guide the course of new and future proceedings to which it no longer applied. The motions judge's failure to follow the provisions of the *Act* and to properly consider the impact of the admissions on the manner in which the action should proceed is an error in principle which is fatal to his decision to decertify.

Conclusion

[48] I would allow the appeal and set aside the portion of the March 24, 2017 Order that decertifies the action as a class proceeding with costs to the appellants in the amount of $5,000.00, inclusive of disbursements.

Farrar, J.A.

Concurred in:

Van den Eynden, J.A.

Derrick, J.A.