Date: 20220405
Docket: CI 17-01-07668
(Winnipeg Centre)
Indexed as: Dennis v. Canada (AG) et al. (No. 2)
Cited as: 2022 MBQB 72

# COURT OF QUEEN'S BENCH OF MANITOBA

| **BETWEEN:** | **APPEARANCES:** |
|---|---|
| EDWARD ANDREW DENNIS,<br>plaintiff,<br><br>- and -<br><br>THE ATTORNEY GENERAL OF CANADA,<br>G3 GLOBAL GRAIN GROUP AND<br>G3 CANADA LIMITED,<br>defendants. | Jordan Goldblatt,<br>Louis Century and<br>Anders Bruun<br>for the plaintiff<br><br>David Culleton and<br>Darren Grunau<br>for the Attorney General<br>of Canada<br><br>Lawrence Thacker<br>Brendan Morrison and<br>Jim Lepore<br>for G3 Global Grain Group and<br>G3 Canada Limited<br><br>Judgment Delivered:<br>April 5, 2022 |

Proceedings under ***The Class Proceedings Act***, C.C.S.M. c. C130

## MARTIN J.

## INTRODUCTION

[1] Mr. Edward Dennis filed a class action on behalf of a proposed class of grain producers who sold grain through "pool accounts" of the Canadian Wheat Board ("CWB") during the two crop years from August 1, 2010 – July 31, 2012. At that time, the CWB was a statutorily mandated marketing scheme, which was done away with by Parliament through the CWB's privatization on August 1, 2012, becoming G3 Canada Limited.

[2] At its core, Mr. Dennis is suing the Government of Canada, through the Attorney General of Canada ("Canada"), for Regulations it passed late in 2011 increasing the CWB contingency fund cap, or limit, from $60 million to $200 million. He asserts those actions constituted misfeasance of office in that Canada's actions were contrary to legislation governing the CWB and done knowing that would likely wrongly deprive the proposed class of approximately $145 million, which he says would otherwise have been paid to it. He also claims $5.9 million of privatization transition costs, which he says were wrongly diverted from a pool account(s), plus $10 million punitive damages.

[3] G3 Canada Limited ("G3") is the successor at law of the CWB. Against them, Mr. Dennis claims the same amounts but in breach of contract. The action against G3 Global Grain Group has been discontinued.

[4] Before filing its defence, Canada took a motion to strike out Mr. Dennis' Statement of Claim. I granted the motion and dismissed the claim as failing to show a reasonable cause of action (***Dennis v. Canada (Attorney General)***, [2019] MJ No 301,

2019 MBQB 153). That decision was overturned on appeal (***Dennis v. Canada (Attorney General)***, [2020] MJ No 277, 2020 MBCA 118).

[5] The matter thus returned for a certification hearing. That is the subject of this decision. No other procedural motions have been taken. Canada and G3 have filed their Statements of Defence.

[6] Except as necessary, I will say no more about the detailed facts or the legislation, as that is set out in my earlier decision and somewhat in the Court of Appeal's decision. Contrary to Canada's express view of this claim, Mr. Dennis overtly takes no issue with Canada's right or ability to privatize the CWB. Rather, he says in his certification brief:

> [29] Mr. Dennis pleads in his claim that in order to fund the transformation of the Wheat Board [CWB] to a privately held entity, Canada, through the Minister, and the CWB engaged in the course of conduct intended to reduce payments to farmers who had sold and delivered grain to the CWB during the Class Period, and to increase the money in the contingency fund. The Minister and the CWB knew that the money placed in the contingency fund on the eve of privatization would not be paid to farmers and instead would be an asset of the CWB on sale.
>
> [sic]

This is the essence of the claim.

[7] For the most part, while providing over 30 case precedents, the parties agree on the applicable law for certification. As expected, they do not agree on the application of the law to this situation, in other words, whether Mr. Dennis' case hits the appropriate mark for certification. The liability claims against Canada and G3 lay, distinctly, in misfeasance and contract respectively, while the nature and quantum of the damage claims are the same against both. Each has a distinct position and certification for one defendant does not automatically equate to certification for the other. Extensive

affidavits, cross-examinations on those affidavits and other materials were filed by all parties. Commensurate with the legal tests for certification, an appropriate level of scrutiny is required by a court on certification. While the scrutiny is not "symbolic", the threshold for certification is low and the analysis is not aimed at assessing the merits of the case.

[8] At this stage, two statutes are primarily at play: the now repealed ***Canadian Wheat Board Act***, R.S.C. 1985, c. C-24 ("***CWB Act***"), which the parties sometime refer to as the "*CWBA*", and ***The Class Proceedings Act***, C.C.S.M. c. C130.

## ISSUES

[9] Pursuant to s. 4 of ***The Class Proceedings Act***, a proceeding must be certified as a class proceeding if certain preconditions are established:

a) the pleadings disclose a cause of action;
b) there is an identifiable class of two or more persons;
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 common issues; and
e) there is a person who is prepared to act as the representative plaintiff 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, on the common issues, an interest that conflicts with the interests of other class members.

Whether Mr. Dennis has met the test for these criteria is the issue(s).

[10] A relatively recent leading authority respecting certification is ***Pro-Sys Consultants Ltd. v. Microsoft Corporation***, 2013 SCC 57. It reiterates the standard of proof for s. 4(a), that the pleadings disclose a cause of action, is the same "plain and obvious" test used to strike a pleading. As the Court succinctly explained in the case headnote:

> The first requirement for certification ... requires that the pleadings disclose a cause of action. A plaintiff satisfies this requirement unless, assuming all facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed.

[11] The remaining four preconditions in s. 4(b) – (d) attract a different standard of proof in that the class representative must show "some basis in fact" to establish each of the individual certification preconditions. Again, from the ***Pro-Sys Consultants*** headnote, the Court explained:

> The starting point in determining the standard of proof to be applied to the remaining certification requirements is the standard articulated in this Court's decision in *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158: **the class representative must show some basis in fact for each of the certification requirements set out in the provincial class action legislation**, other than the requirement that the pleadings disclose a cause of action. The certification stage is not meant to be a test of the merits of the action, rather, this stage is concerned with form and with whether the action can properly proceed as a class action. **The standard of proof asks not whether there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements**. Although evidence has a role to play in the certification process, the standard of proof does not require evidence on a balance of probabilities. **The certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action**, rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding. Each case must be decided on its own facts. **There must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed**

> on a class basis without foundering at the merits stage by reason of the requirements not having been met.
>
> (emphasis added)

[12] I will proceed by dealing with the s. 4 criteria sequentially.

## ANALYSIS

[13] As will be seen, the core issue for all parties is the right or entitlement of the proposed identifiable class, by the ***CWB Act*** or contract, or the confluence of both, to excess funds generated through certain marketing activities of the CWB during the two crop years at issue. Those funds were placed in the CWB contingency fund, through operation of Orders in Council with which the CWB was obligated to comply. The proper interpretation of the statutory scheme is at the heart of the claims, which in turn threads directly or indirectly through all the criteria in s. 4(b) – (e) of ***The Class Proceedings Act***. The $5.9 million claim is secondary, and distinct from the main claim, although it is rooted in the same cause of action as pled.

### Section 4(a): Does the Pleading Disclose a Cause of Action?

[14] The standard of proof for this criteria is the same at the certification stage as it was when Canada took its motion to dismiss the claim as showing no reasonable cause of action. As Canada apparently backed away from that position in the Court of Appeal, they also conceded in oral argument on the certification hearing that this criteria has been met for the misfeasance of public office claim.

[15] G3 takes a different position, asserting that Mr. Dennis' claim for breach of contract

against it is not a viable cause of action because:

i. the claim against G3 is one of contract and breach of the duty of good faith in contractual performance; and as such,

ii. Mr. Dennis must plead the facts in the claim upon which he relies; but,

iii. the so-called "contract" between the members of the proposed class and the CWB is not a contract, but rather nothing more than a compendium of requirements "entirely determined by statute [the ***CWB Act***]"; and

iv. Mr. Dennis has pled no facts to support a damages claim against G3 but rather conclusions in law, based on his interpretation of federal statutes.

[16] G3 states at paras 42, 43 and 47 of its brief:

> 42. The distinction between factual and legal allegations is crucial to this motion. The powers and responsibilities of the CWB, pursuant to the *CWBA*, are questions of law that are established by Acts of Parliament and regulations. Accordingly, the Plaintiff's pleadings in relation to the powers and authority of the CWB are not taken as either true or correct. The Plaintiff must prove those allegations of law to be correct, because they are central elements of the single cause of action upon which every proposed common issues is based.
>
> 43. All of the Plaintiff's claims depend on the interpretation of Acts of Parliament, and the legislative intentions of parliamentarians. These are not questions of fact but rather questions of law. Accordingly, the Court cannot presume the pleadings to be correct on these points. Given the true nature of the statutory scheme, these claims are unsustainable and certain to fail.
>
> ...
>
> 47. All of the pleaded terms of the purported contract are provisions of the *CWBA* or the regulations enacted thereunder. Removing the terms of the *CWBA* and associated regulations, the Plaintiff's Proposed Claim is a bare allegation that the "written agreements" (referred to as certificates in the *CWBA*) are "each a, Contract". This is a conclusion of law, which is not taken as true for the purposes of determining whether there is a reasonable cause of action.
>
> [sic]

G3 asserts that the facts establish G3's predecessor in-law, the CWB, did exactly as it was required to do by the ***CWB Act*** through its Minister and Governor in Council. The CWB, hence G3, did not act independently respecting any of the matters underlying the claim.

[17] All in, G3 asserts that the "Plaintiff's damages claim boils down to a purported breach of the terms of the [***CWB Act***], not any contractual terms" (G3 brief, para 51). G3 particularly cites ***Canada v. John Doe***, 2016 FCA 191, as supporting authority.

[18] Mr. Dennis counters that the pleading is sufficient, and that, while irrelevant in any event, there is evidence of producers entering contracts as pled. Moreover, by the ***CWB Act***, the money at issue had to be placed either in the contingency fund (beyond the reach of the proposed class), or in a pool account(s) (which may have benefited the proposed class). The claim is that the CWB wrongly put the money at issue in the contingency fund because the Orders in Council compelled that, but in so doing, it ignored limitations in the ***CWB Act*** and the CWB failed to take steps to protect the contractual rights of producers. Mr. Dennis says the time to argue about the interpretation of the legislation is after certification, at trial.

[19] While I agree with the legal principles set out in ***John Doe***, the nature of that alleged contract is markedly different and remote, compared to Mr. Dennis' claim, so as not to be of help to G3. John Doe relied exclusively on a legislative scheme for home based marihuana production that he claimed amounted to a contract. He claimed the "agreement" included express and implied confidentiality obligations which Health Canada breached. The Federal Court of Appeal disagreed; as the statute and regulations amounted to an all-encompassing pre-existing statutory duty and there was no

consideration or bargaining. The scheme was a statutory licensing regime for reasons of public policy and as a matter of public law (paras 46 – 48). This situation is distinct; the ***CWB Act*** establishes a commercial scheme, with elements of bargaining, albeit featuring both a marketing monopoly over certain grain grown in Western Canada and a specific pricing mechanism.

[20] I have empathy for G3's position. However, to cut to the quick, for this criteria, their points are roughly akin to the reasoning the Court of Appeal overturned, although respecting Canada. Given that ruling, the test in ***Pro-Sys Consultants*** as set out above, and the tests in ***R. v. Imperial Tobacco Canada Ltd.***, 2011 SCC 42, [2011] 3 S.C.R. 45, and ***Grant v. Winnipeg Regional Health Authority et al.***, 2015 MBCA 44, 319 Man. R. (2d) 67, for striking a claim, I am bound by the Court of Appeal's decision which *prima facie* appears broad enough to capture and dispatch G3's arguments, including the damages aspect. Further, as noted by Mr. Dennis, the Court of Appeal expounded that the proper interpretation of the statutory provisions should be left to trial where a proper factual basis can be laid. I cannot adequately distinguish their decision for G3's situation.

**Section 4(b): Is There an Identifiable Class of Two or More Persons?**

[21] In its seminal case of ***Western Canadian Shopping Centres Inc. v. Dutton***, [2001] 2 S.C.R. 534, 2001 SCC 46, the Court explained the importance and components of this criteria at para 38:

> 38. ... First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend

> on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria: ...
>
> (citations omitted)

[22] Mr. Dennis proposes the identifiable class be comprised of:

> Producers, as defined by s. 2 of the *Canadian Wheat Board Act*, R.S.C. 1985, or their Estates, who sold grain to the Canadian Wheat Board on or after August 1, 2010, and before July 31, 2012, and were entitled to an equitable share of the distribution of the surplus, if any, arising from the operation of the Canadian Wheat Board in respect of the grain.

Mr. Dennis asserts the scope of the proposed identifiable class is clear, objective and bounded. The definition of a producer, which would include, "as well as an actual producer, any person entitled, as landlord, vendor or mortgagee, to the grain grown by an actual producer or to any share therein". He estimates there are 70,000 eligible producers:

a) who sold grain to the CWB;

b) in a defined period of August 1, 2010 – July 31, 2012; and

c) who were statutorily/contractually entitled to share in any surplus; which has been described in the claim and briefs as comprising the contingency fund of $145.2 million, plus funds wrongfully diverted from pool accounts of $5.9 million in transition costs.

[23] Canada's submission on this point is focused on whether producers were entitled to share in a surplus, which they say is part of s. 4(c) common issues, but spills over to ss. 4(b), (d) and (e) as a threshold point. In other words, if there is no established common issue, there can be no identifiable class, and so on. Recognizing the "some evidence test", they say there is no evidence of producers' entitlement to the contingency

fund, in fact the evidence clearly shows there never has been. Given the argument is directly aimed at the common issues criteria, and thus only incidental to the identification of a class criteria, I will defer consideration of this argument to the common issues analysis.

[24] G3's submission is similar but more explicit. They say the claim is founded on an assumption that producers in the two crop years at issue have an ownership, or other interest, in the contingency fund different than producers in other years. They say this cannot be so, as factually the contingency fund is a result of cumulative operation in all years since its inception in about 1998. Indeed, the parties agree in their materials that the opening balance in the contingency fund, at the start of the proposed class period of August 1, 2010, was over $21.98 million; an amount that was not generated in the class period, yet which nonetheless appears to be covered by the claim.

[25] G3 also says the definition is not clear as to whether the proposed identifiable class relates only to producers who participated in pool accounts, or also those who dealt through the producer payment option or cash transaction programs -- and from that, they say there are materially diverse, or no, common terms of the alleged contract and damages complaint.

[26] These two points raise legitimate issues, but more so for clarification and amendment of the proposed identifiable class.

[27] Respecting the starting or opening balance on August 1, 2010, the action, as framed by the Amended Statement of Claim, deals with increases in the contingency fund cap through two Orders in Council late in 2011. On its face, the claim does not deal with

the opening balance. However, the evidence also demonstrates an accounting restatement of the $21.98 million opening balance, which amended or adjusted the balance to zero for subsequent annual financial statements. The meaning and effect of the restatement is a matter best left for trial rather than this certification hearing.

[28] As to the specific definition of a producer, it was not the subject of much commentary during the hearing. After, I wrote to counsel for further submissions, as I was concerned the definition appeared quite wide and subject to confusion for producers participating in pool accounts, or producer payment option or cash programs, or some combination of these schemes. To the extent possible, precision and clarity are necessary hallmarks of an identifiable class, not only for the certification test but for any subsequent notice to potential class members.

[29] While some disagreement and debate remained among counsel, two modifications to the proposed definition would be beneficial. First, all parties agree that the class members are only those who in fact sold grain to the CWB through a "pool account". While this term is not defined in the ***CWB Act***, it arises from various statutory provisions and is also consistent with the pleadings. Moreover, it is commonly used and explained in CWB annual reports. The phrase "pool account" was common parlance in the industry. Second, adding reference to s. 32(1)(d) of the ***CWB Act*** also further demarcates the class. All in, the proposed identifiable class definition, with these modifications, is supportable on the some evidence test and is suitable. Rather than allowing certification on condition that the identifiable class definition be amended, I have revised it as attached to this decision as part of Appendix A. Doing so is efficient and appropriate, for as noted

in Michael A. Eizenga et al, *Class Actions Law and Practice,* 2nd ed (Toronto: Lexis Nexis, 2009)(loose-leaf updated 2018, release 53), §3.56, "In many cases, the class definition is amended by the Court on its own motion or by the plaintiff."

**Section 4(c): Do the Claims of the Proposed Class Raise Common Issues?**

[30] The detailed list of common issues was attached as part of Mr. Dennis' certification motion. Abbreviated, Mr. Dennis structures the common issues as:

- against Canada, the misfeasance in public office claim;
- against G3, the contract claim:
    - was there a contract, what were the express or implied common terms, and did G3 breach the terms and cause a loss by (i) wrongfully crediting the contingency fund, and (ii) debiting pool accounts; and
    - was there a duty of good faith and, if so, did G3 breach it and thus cause a loss;
- as to damages, determine the amount and how that should be allocated amongst the proposed class, consistent with Division 2 of ***The Class Proceedings Act***.

[31] Canada and G3 focused their objections respectively on whether there was some evidence of the elements of the two causes of action, particularly respecting the proposed class' right or entitlement to the funds comprising of transfers to the contingency fund by the Orders in Council. This is the seminal issue threading throughout every criteria in this case, albeit approached differently by each defendant.

[32] On this point, concisely, Canada asserts that the proposed identifiable class had, by law and past practice, no right or entitlement to the funds comprising the contingency fund transfers before or after the two Orders in Council at issue were passed. They say the evidence and interpretation of the ***CWB Act*** bears this out.

[33] As to G3, it says the evidence on affidavit and cross-examination demonstrates there was no contract between producers identified by the class and the CWB for delivery of grain. Rather, producers and the CWB were governed by a detailed legislative monopoly scheme, which in law does not amount to or equate to a contract. Thus they say, Mr. Dennis has failed to meet the test of showing some evidence essential to a key pillar of his claim, being the existence of a contract.

[34] Further, G3 also presses that there was no entitlement or right to the contingency fund monies. They say this is clear from past practice, the legislation, CWB annual reports (which were approved by at least one former CWB director, who was put forward by Mr. Dennis as a deponent to an affidavit and prospective member of the proposed class) and the contingency fund process between Canada and the CWB. Moreover, they say this issue has already been determined by other courts, based on iterations of similar types of claims that numerous courts have struck.

[35] I reiterate, this case boils down to the interpretation of the ***CWB Act***, in the context of past and then current practice, of the CWB and Canada in operating the CWB and the effect of that to producers who delivered grain to pool accounts established by the CWB.

[36] As to Canada, it is agreed that the misfeasance claim encompasses the second type of misfeasance (Category B) identified by the Supreme Court of Canada in ***Odhavji Estate v. Woodhouse***, 2003 SCC 69, [2003] 3 S.C.R. 263 (QL), where the constituent elements are set out at paras 22 and 23. The court further explained the common elements of both categories of the tort at para 23:

> [23] In my view, there are two such elements. First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff. What distinguishes one form of misfeasance in a public office from the other is the manner in which the plaintiff proves each ingredient of the tort. In Category B, the plaintiff must prove the two ingredients of the tort independently of one another. ...

The plaintiff must also prove "... that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law" (at para 32).

[37] Most recently, the SCC revisited this tort in ***Ontario (Attorney General) v. Clark***, [2021] SCJ No 18, 2021 SCC 18, where at paras 22 and 23 the Court reiterated the essential elements:

> [22] ... A successful misfeasance claim requires the plaintiff to establish that the public official engaged in deliberate and unlawful conduct in his or her capacity as a public official, and that the official was aware that the conduct was unlawful and likely to harm the plaintiff (*Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, at para. 23, per Iacobucci J.).
>
> [23] The unlawful conduct anchoring a misfeasance claim typically falls into one of three categories, namely an act in excess of the public official's powers, an exercise of a power for an improper purpose, or a breach of a statutory duty (*Odhavji*, at para. 24). The minimum requirement of
>
> subjective awareness has been described as "subjective recklessness" or "conscious disregard" for the lawfulness of the conduct and the consequences to the plaintiff ...
>
> (citations omitted)

[38] Clarity and conciseness are also indispensable goals in delineating common issues, which in many ways, frame the proceedings as they flow from the pleadings. As framed by Mr. Dennis, Canada says he has inserted a breach of a duty of good faith as part of the misfeasance tort, or perhaps created an independent cause of action. I agree there is no independent element of good faith that requires a separate determination as a common issue. I also agree with Canada that misfeasance is directed toward a public official, as opposed to a group, such as Cabinet. Given the law and elements of misfeasance, and bearing in mind the additional submissions I requested, I frame the common issues for Canada as set out in Appendix A.

[39] I also note Canada takes issue with the $5.9 million claim, saying in its last submission that the $5.9 million claim does not fit into the misfeasance claim as pled, and "that there are no facts pled to support this claim for damages". At paragraph 48 of Mr. Dennis' brief, he asserts it constituted another "unlawful act" for the purpose of the tort of misfeasance. A few points. First, as against Canada, this specific claim reads as an afterthought in Mr. Dennis' pleading. Second, Canada is correct; it is not based on pled facts, except possibly by inference. Third and critically, the $5.9 million claim is part of the Court of Appeal's ruling that Mr. Dennis' Statement of Claim met the plain and obvious threshold. For these reasons, I find it is a common issue under the misfeasance claim, which has been addressed by some evidence.

[40] Finally, to loop back, as Mr. Dennis' claim against Canada meets some evidence test for the common issues, I disagree with Canada's position that there is no identifiable class.

[41] For G3, all in, there is some evidence of a contract in that producers and the CWB appeared to historically treat their relationship as contractual, even using that term on documents and assuming each had enforceable rights and obligations: producers committed to deliver quantities of grain at certain times, into various pools, in exchange for agreed pricing or pricing programs. Obligations and liabilities were created. That CWB operations were a statutory monopoly, with a relatively detailed statutory scheme, does not necessarily mean that a legal element(s) needed to establish a contract was nonexistent in some respect, such as the absence of a real negotiation, or free-will, in an offer and acceptance, as asserted by G3. The evidence of manner of dealings between producers and the CWB historically, and in the timeframe, is enough for the certification test.

[42] The claim to damages is arguably more problematic. Both Mr. Dennis and the defendants point to various interpretations and evidence which they say establishes the minimum evidentiary base for certification, or not. Indeed, a detailed review of the ***CWB Act*** was an integral part of all parties' submissions, each attempting to bolster cogency by emphasizing certain sections and certain evidence. There is little to be gained by an overly exacting analysis, along with the requisite weighing of pieces of evidence or facts, as overarching the evidence is the critical issue of the correct interpretation and application of the ***CWB Act***. However, on a certification motion, the evidence need not be exhaustive and a court must refrain from assessing the sufficiency of facts or resolving evidentiary conflicts.

[43] This situation is distinct from ***Mackinnon v. Volkswagen***, 2021 ONSC 5941, as relied on by G3. Mr. Mackinnon specifically failed to prove an economic loss, as he did not provide fact evidence, rather just an assumption of a starting point to isolate the value of the clean diesel feature of diesel Volkswagens bought or leased and disposed of before a diesel emission-device fraud scandal became public. Moreover, generally, there was no need to assess the impact or interpretation of an overarching legislative scheme to assess the claimants' rights. Here, the interpretation of the ***CWB Act*** is a material consideration in determining whether there was a loss. If the case goes Mr. Dennis' way, the loss appears quantifiable on a class-wide measurement. The same goes for the secondary $5.9 million claim.

[44] Finally, I am satisfied with the damages common issues as drafted. There were no objections to that wording.

**Section 4(d): Is a Class Proceeding the Preferable Procedure?**

There is no real issue that a class action is the preferable procedure for such a proposed suit. It is preferable to other procedures and it would be a fair, efficient and manageable method of advancing the claim (***Anderson et al. v. Manitoba et al.***, 2017 MBCA 14, at para 56).

**Section 4(e): Is Mr. Dennis an Appropriate Representative Plaintiff?**

[45] Neither Canada nor G3 raised any substantive issue respecting this criteria. Mr. Dennis' affidavit is sufficient to meet the some evidence test. I need not elaborate further. I will accept editing comments before finalizing the order.

**The Proposed Class and Common Issues Drafting**

[46] Given my analysis, the areas of concern reduced to the exact definition of the identifiable class and the articulation of some common issues, as put forward by Mr. Dennis in his motion and materials. Clearly all this is important, for it is the basis of the notice to be given, the basis for the questions the trial judge will consider and the basis for distribution of any potential decision. I have commented on the components for certification under my analysis.

[47] I have amended the draft order consistent with valid concerns raised.

## CONCLUSION

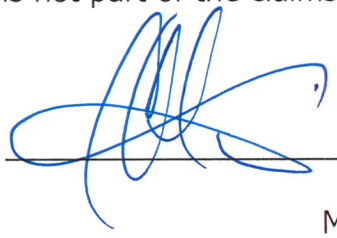
[48] Assuming the pleading to be true, it is not plain and obvious the claims will fail (s. 4(a)) of ***The Class Proceedings Act***.

[49] Further, the low standard of some basis in fact, or "some evidence" on the common issues criteria, and other criteria, has been met (s. 4(b) – (e) of ***The Class Proceedings Act***). Thus, the claim must be certified.

[50] I caution that having met these tests is nowhere near the same as proving the claims; that is a much different matter.

[51] Mr. Dennis' motion for certification is granted, with the identifiable Proposed Class and Common Issues as set out in Appendix A to this decision. Finally, I note Mr. Dennis withdrew the negligence common issue, as it is not part of the claims.

[52] Costs will be in the cause.



Martin J.

# Appendix "A"

## Proposed Class:

Producers, as defined by the s. 2 of the ***CWB Act***, or their Estates, who sold grain through a Canadian Wheat Board pool account, on or after August 1, 2010 and before July 31, 2012, and, pursuant to s. 32(1)(d) of the ***CWB Act***, were entitled to an equitable share of the distribution of the surplus, if any, arising from the operations of the Canadian Wheat Board in respect of that grain ("the Class").

## Common Issues:

### Misfeasance of Public Office:

1. In exercising his authority in respect of the Canadian Wheat Board, pursuant to the ***CWB Act***, did the Minister of Agriculture and Agri-Food for Canada:

    a) recommend to Cabinet, Canadian Wheat Board Direction Order SOR-2011-1181 and PC 2011-1288?

    b) recommend to Cabinet, Canadian Wheat Board Contingency Fund Regulations PC 2011-1181 and PC 2011-1288?

    c) refuse to reimburse the Canadian Wheat Board $5.9 million in privatization transition costs?

2. In any such case:

    a) was such decision or conduct unlawful?

    and

    b) did the Minister of Agriculture and Agri-Food for Canada know or was he recklessly indifferent or willfully blind that such decision and conduct:

        i. was unlawful?

        and,

        ii. would cause harm to the Class members by depriving them of monies to which they were lawfully entitled?

        and if so,

        iii. did such decision or action cause a loss to the Class members?

**Breach of Contract:**

1. Was there a contract between the Canadian Wheat Board and the Class members?

    a) if so, what were the common terms of that contract? Specifically:

        i. what terms of ***CWB Act***, or the ***Marketing Freedom for Grain Farmers Act*** (Bill C-18), were implied or incorporated into the contract as a matter of fact or law?

        ii. did G3 owe the Class members a duty of good faith in contractual performance?

2. Did the Canadian Wheat Board and/or G3 breach its contractual obligations to Class members by:

    a) wrongfully crediting monies to the Contingency Fund by complying with Canadian Wheat Board Direction Order, SOR-2011-227?

    b) wrongfully debiting funds from the pool accounts to pay for $5.9 million of Canadian Wheat Board privatization transitions cost?

    if so,

    c) did the Canadian Wheat Board or G3 thereby cause a loss to the Class members?

**Remedies/Damages:**

1. Is the Class entitled to an accounting of the loss?

2. What are the damages owing to the Class?

3. If monetary damages are owed to the Class, can the damages be determined on an aggregate basis?

    a) if yes, what is the appropriate method to distribute such damages?

    b) if no, what is the appropriate method to determine damages on an individual basis?