**CITATION:** Bennett v. Lenovo (Canada) Inc., 2017 ONSC 5853
**COURT FILE NO.:** CV-15-523714-CP
**DATE:** 20171003

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**

| | | |
|---|---|---|
| **BETWEEN:** | | |
| DANIEL BENNETT | Plaintiff | *Adrienne Boudreau* and *Sabrina Callaway* for the Plaintiff |
| **– and –** | | |
| LENOVO (CANADA) INC. and SUPERFISH INC. | Defendants | *Jeff Galway* and *Kiran Patel* for the Defendant Lenovo (Canada) Inc. |
| | | **HEARD**: September 26, 2017 |

**PERELL, J.**

**REASONS FOR DECISION**

## A. Introduction

[1] The Plaintiff Daniel Bennett brings a proposed national class action under the *Class Proceedings Act*,[1] against Lenovo (Canada) Inc., a computer manufacturer, and against Superfish Inc., a software developer in Palo Alto, California that developed a computer program known as Visual Discovery.

[2] Mr. Bennett moves for certification of his action. Lenovo (Canada) resists the motion. The focus of its challenge to certification is on the identifiable class and the common issues criterion.

[3] Superfish Inc. did not appear at the certification motion and I shall make no order with respect to it.

[4] Mr. Bennett brings his proposed class action on behalf of persons who purchased computers directly from Lenovo (Canada), and, in a disputed point, also on behalf of indirect purchasers; *i.e.* purchasers who bought from computer retailers, such as Best Buy or Canada Computer, who sell Lenovo (Canada)'s computers.

---

[1] 1992, S.O. 1992, c. 6.

[5] The theory of Mr. Bennett's case alleges two wrongdoings arising from the fact that Lenovo (Canada) installed two versions of Visual Discovery on certain of its laptop computers that were sold in Canada. (During the course of the hearing, Mr. Bennett's counsel clarified that his case does not concern whether Visual Discovery affected the performance standards of the Lenovo computers by, for instance, slowing its operating system.)

[6] The first wrongdoing is that in the originally installed version of Visual Discovery, there was a security defect that would permit a hacker to obtain the user's private information. Mr. Bennett submits that the installation of the original version (version 1.0.0.1) of Visual Discovery was: (a) for consumer purchasers, a breach of the implied warranties of the *Sale of Goods Act*;[2] (b) for all purchasers, an infliction of the tort of intrusion upon seclusion; and (c) for purchasers in British Columbia, Saskatchewan, Manitoba, and Newfoundland and Labrador, respectively, a contravention of privacy statutes.[3]

[7] The second wrongdoing is that as a part of the operation of all installed versions of Visual Discovery (the original and an updated version 1.0.0.5), private information was sent to Superfish's computers, and Mr. Bennett alleges that this operative feature of Visual Discovery was: (a) for consumer purchasers, a breach of the implied warranties of the *Sale of Goods Act*; (b) for all purchasers, an infliction of the tort of intrusion on seclusion; and (c) for purchasers in British Columbia, Saskatchewan, Manitoba, and Newfoundland and Labrador, respectively, a contravention of privacy statutes.

[8] Before the certification motion, in *Bennett v. Lenovo,* 2017 ONSC 1082, on a Rule 21 motion, Justice Belobaba concluded that Mr. Bennett's action satisfied the cause of action criterion for certification. The motion now before the court is to determine whether, and to what extent, the other criteria for certification as a class action have been satisfied.

[9] For the reasons that follow, I conclude that Mr. Bennett's action should be certified as a class action, as described below.

## B. Factual Background

[10] Lenovo (Canada) is a subsidiary of Lenovo Group Limited, a corporation based in Beijing, China. Lenovo is the largest computer manufacturer in the world.

[11] Lenovo (Canada) supplies computers directly to consumers for personal and business uses through its consumer website and through a network of retail outlets (such as Best Buy), which in turn resell them to Canadian retail customers. The laptop computers sold by Lenovo (Canada) are not manufactured by it, but are manufactured by other Lenovo entities.

[12] Lenovo (Canada)'s computers come preloaded with an operating system and a variety of software. Seventeen (17) models of Lenovo (Canada)'s laptop computers were sold with Visual Discovery software preloaded. Visual Discovery operates to find products based on an image-to-image search technology that enables users to search for items based on the appearance of the item, rather than a text-based description.

---

[2] R.S.O. 1990, c. S.1.

[3] *Privacy Act*, R.S.B.C. 1996, c. 373; *Privacy Act*, R.S.S. 1978, c. P-24; *Privacy Act,* C.C.S.M. c. P125; and *Privacy Act*, R.S.N.L. 1990, c. P-22.

[13] Upon first use and subsequently by use of the computer's add/remove software commands, the purchaser may remove Visual Discovery. If not removed and if made operational, Visual Discovery operates to intercept the user's internet connections and scans the user's web traffic to inject advertisements into the user's web browser.

[14] Mr. Bennett is a lawyer who lives in St. John's, Newfoundland and Labrador. In September 2014, he purchased a Flex 2 laptop computer from Lenovo (Canada) on-line for personal and for business use. His computer was preloaded with Visual Discovery.

[15] Mr. Bennett purchased his computer pursuant to a written agreement with Lenovo (Canada). Pursuant to the the Lenovo Licence Agreement, the laws of Ontario apply to govern, interpret, and enforce all rights, duties, and obligations arising from, or relating in any manner to, the warranties for the models sold in Canada, without regard to conflict of law principles.

[16] Section 9(2) of Ontario's *Consumer Protection Act, 2002*,[4] provides that the implied conditions and warranties of s. 15 of the *Sale of Goods Act*, apply with necessary modifications to goods that are leased or traded or otherwise supplied under a consumer agreement and these terms cannot be varied or waived. Section 1 of the *Consumer Protection Act, 2002* defines consumer to mean "an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes."

[17] The *Sale of Goods Act* contains the following implied condition as to quality or fitness:

> *Implied conditions as to quality or fitness*
>
> 15. Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:
>
> > 1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply (whether the seller is the manufacturer or not), there is an implied condition that the goods will be reasonably fit for such purpose, but in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.
> >
> > 2. Where goods are bought by description from a seller who deals in goods of that description (whether the seller is the manufacturer or not), there is an implied condition that the goods will be of merchantable quality, but if the buyer has examined the goods, there is no implied condition as regards defects that such examination ought to have revealed.
> >
> > 3. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.
> >
> > 4. An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

[18] In the Lenovo (Canada) Sales Agreement, Articles 5.1 and 5.2 provide a limited warranty for the hardware and a disclaimer of any and all warranties for the installed software. The latter disclaimer acknowledges, however, that under provincial or state consumer protection laws, the disclaimer may not apply. Articles 5.1 and 5.2 state:

---

[4] S.O. 2002, c. 30, Sched. A.

> 5.1 Lenovo hardware Products are warranted in accordance with the Lenovo Limited Warranty accompanying each Lenovo hardware Product ...
>
> 5.2 LENOVO MAKES NO WARRANTIES FOR SOFTWARE, SERVICE, SUPPORT OR THIRD PARTY PRODUCTS. SUCH SOFTWARE, SERVICE, SUPPORT AND PRODUCTS ARE PROVIDED "AS IS", WITHOUT WARRANTIES OR CONDITIONS OF ANY KIND. SOME PROVINCES OR JURISDICTIONS DO NOT ALLOW LIMITATIONS OF WARRANTIES, SO THESE LIMITATIONS MAY NOT APPLY TO CUSTOMER ...

[19] In versions of the software installed on Lenovo (Canada)'s computers from September 1, 2014 until December 1, 2014, when an updated version of the software was installed, there was a security defect in the software (a self-signed root certificate with a non-unique password). The presence of the security defect meant that in certain circumstances, when the user was using his or her laptop on an unsecure computer network, a third-party could gain access to the computer owner's confidential and private information. The defect did not affect users on a secure network such as typically provided by a home internet service, but the user's computer was exposed if used on an unsecure network such as in an airport or coffee shop where a hacker who knew the non-unique password and how to redirect the user's traffic to a malicious website, could obtain data from the user's computer.

[20] In all versions of Visual Discovery installed on Lenovo (Canada)'s computers between September 1, 2014 and January 16, 2015, when Lenovo (Canada) stopped loading the software, it was part of the operation of the software to send information from the user's computer to Superfish's servers in order to perform the search for items. The information included the URL of the website being visited, the main or first product image on the page, text associated with that product image, the name of the merchant's website, the user's IP address and country, a unique identifier created by the software, and session information.

[21] All information sent to Superfish's servers was received on an anonymous basis. The information did not contain the name, user name, password, physical address, email address, telephone number or other personally identifiable information of the user or computer owner. Visual Discovery did not log users' keystrokes and the information that Visual Discovery sent to Superfish could not be tracked back to any particular person. The information was not retained and each search was treated as a discrete search.

[22] After January 16, 2015, Visual Discovery was not preloaded on Lenovo computers.

[23] On February 19, 2015, from media reports, Lenovo (Canada) learned that the original version of Visual Discovery had a security defect. On that day, the Superfish servers were shut down, and Visual Discovery became inoperable on all Lenovo computer units on which it had been installed. Lenovo (Canada) issued an online statement explaining that the server connection had been shut down and providing online resources to help users remove the software.

[24] On February 20, 2015, Lenovo (Canada) issued another online statement containing a link to an automated tool to help users remove Visual Discovery and advising that Lenovo (Canada) was working with third parties to have the Superfish software quarantined or removed. Simultaneously, the antivirus software was updated to automatically disable and remove Visual Discovery.

[25] On February 23, 2015, Lenovo (Canada) posted an open letter from its Chief Technology Officer on its website, providing an update regarding Lenovo (Canada)'s efforts to eliminate the security defect associated with the Superfish software.

[26] On March 21, 2015, Lenovo (Canada) issued an "Important Security Message" to users directly via the Lenovo Messenger Advisory tool. The message went out to users whose computers still contained any version of Visual Discovery. The message advised the user of the security defect, recommended that the user uninstall the software, and provided a link to manually or automatically remove Visual Discovery.

[27] According to its sales records, between September 1, 2014 and January 19, 2015, Lenovo (Canada) directly sold 10,933 computers that had been loaded with Visual Discovery. Lenovo (Canada) does not know the extent to which the computers were purchased for business purposes or for personal, family or household purposes.

[28] There have been no reports or evidence in Canada or elsewhere that the security defect was exploited to access the private information of any user of the computers sold by Lenovo (Canada).

## C. Procedural Background

[29] On March 11, 2015, Mr. Bennett commenced his proposed class action.

[30] The Statement of Claim was amended twice: on January 6, 2016 and on May 9, 2016 to add the defendant, Superfish Inc.

[31] Mr. Bennett's proposed class action initially advanced five causes of action: (1) breach of contract; (2) the implied condition of merchantability; (3) the tort of intrusion upon seclusion; (4) breach of provincial privacy laws; and (5) negligence.

[32] Mr. Bennett withdrew the negligence claim, and on February 17, 2017, on a Rule 21 motion, Justice Belobaba held that it was plain and obvious that the breach of contract claim would fail. Justice Belobaba concluded that it was not plain and obvious that the claims for: (1) the implied condition of merchantability; (2) the tort of intrusion upon seclusion; and (3) breach of provincial privacy laws, would fail.

[33] As noted in the introduction above, based on two alleged wrongdoings, Mr. Bennett alleges that for consumer purchasers, there has been a breach of the implied warranties of the *Sale of Goods Act.*

[34] As noted above, Mr. Bennett alleges for all purchasers, based on the two alleged wrongdoings, there has been a contravention of the tort of intrusion on seclusion. In *Jones v. Tsigel*,[5] the Court of Appeal recognized three elements of this privacy tort: (1) the defendant's conduct must be intentional or reckless; (2) the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and (3) a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. The third element is generally presumed once the other elements have been established. Proof of actual loss is not an element of this cause of action.

---

[5] 2012 ONCA 32.

[35] As noted above, Mr. Bennett alleges a contravention of privacy statutes for purchasers in British Columbia, Saskatchewan, Manitoba, and Newfoundland and Labrador. Each of the four provincial statutes declares, in essence, that the unlawful violation of another's privacy is an actionable tort, without proof of loss.

[36] On March 10, 2017, Lenovo (Canada) delivered a Statement of Defence and a Crossclaim against Superfish.

[37] In the Statement of Claim, the proposed class was defined as:

> All persons in Canada who purchased one or more of the following laptops (the "Affected Models") **from Lenovo** from September 1, 2014 to March 11, 2015: [my emphasis added]
>
> - G Series: G410, G510, G710, G40-70, G50-70, G40-30, G50-30, G40-45, G50-45, G50-50, G40-80, G50-80, G50-80Touch
> - U Series: U330P, U430P, U330Touch, U430Touch, U530Touch
> - Y Series: Y430P, Y40-70, Y50-70, Y40-80, Y70-70
> - Z Series: Z40-75, Z50-75, Z40-70, Z50-70, Z70-80
> - S Series: S310, S410, S40-70, S415, S415Touch, S435, S20-30, S20-30Touch
> - Flex Series: Flex2 14D, Flex2 15D, Flex2 14, Flex 2 14(BTM), Flex2 15, Flex2 15(BTM), Flex2 Pro, Flex 10
> - MIIX Series: MIIX2-8, MIIX2-10, MIIX2-11, MIIX 3 1030
> - YOGA Series: YOGA2Pro-13, YOGA2-13, YOGA2-11, YOGA2-11BTM, YOGA2-11HSW, YOGA3 Pro
> - E Series: E20-30
> - Edge Series: Lenovo Edge 15 (collectively, the "**Affected Models**");

[38] On February 27, 2017, Mr. Bennett served his notice of motion for certification. In a point that I will return to below, and of which Lenovo (Canada) places considerable emphasis and objection, is that the proposed class definition in the notice of motion expands from the definition set out in the Statement of Claim, which focuses on direct purchasers from Lenovo (Canada).

[39] The notice of motion for certification, in effect, includes indirect purchasers as Class Members. The definition in the notice of motion is:

> All persons in Canada who purchased one or more of the following Lenovo laptops from September 1, 2014 to March 11, 2015 ....

[40] The proposed common issues are:

> *Consumer Protection Act, 2002*
>
> (i) Did the defendants, or either of them, breach s. 9 (2) of the *Consumer Protection Act, 2002*?
>
> (ii) Are the contracts for the sale of computers to the class members "consumer agreements" within the meaning of the *Consumer Protection Act, 2002*?
>
> (iii)If the answer to (0) is "yes", does the implied condition under section 15 of the *Sale of Goods Act*, that goods be of merchantable quality, apply to the consumer agreement?
>
> (iv) Were the Affected Models of merchantable quality?

*Intrusion Upon Seclusion*

(v) Did the defendants, or either of them, invade, without lawful justification, the class members' private affairs or concerns by installing VisualDiscovery on the Affected Models?

(vi) Was the defendants' conduct intentional or reckless?

(vii) Would a reasonable person regard the invasion as highly offensive causing distress, humiliation or anguish?

*Breach of Provincial Privacy Acts*

(viii) Did the defendants, or either of them, violate the privacy of the class members contrary to the following provincial privacy acts:

Section 1 of the *Privacy Act*, R.S.B.C. 1996, c. 373?

Section 2 of *The Privacy Act*, C.C.S.M. c. P125?

Section 2 of the *Privacy Act*, R.S.S. 1978, c. P-24?

Section 3 of the *Privacy Act*, R.S.N.L. 1990, c. P-22?

*Damages or Compensation*

(ix) Can damages or compensation, or some portion thereof, be determined on an aggregate basis?

*Punitive Damages*

(x) Are the defendants, or either of them, liable to pay punitive or exemplary damages to the class members having regard to the nature of their conduct and, if so, what amount?

## D. Certification - General Principles

[41] The court is required to certify the action as a class proceeding where the following five-part test in s. 5 of the *Class Proceedings Act, 1992* is met: (1) the pleadings disclose a cause of action; (2) there is an identifiable class of two or more persons that would be represented by the representative plaintiff; (3) the claims of the Class Members raise common issues; (4) a class proceeding would be the preferable procedure for the resolution of the common issues; and (5) there is a representative plaintiff who: (a) would fairly and adequately represent the interests of the class; (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and (c) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[42] For an action to be certified as a class proceeding, there must be a cause of action shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers.[6]

[43] On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding.[7] The test for certification is to be applied in a purposive and generous manner, to give effect to the important goals of class actions -- providing access to justice for litigants;

---

[6] *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 (S.C.J.) at para. 14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Div. Ct.).

[7] *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 16.

promoting the efficient use of judicial resources; and sanctioning wrongdoers to encourage behaviour modification.[8]

[44] The representative plaintiff must come forward with sufficient evidence to support certification, and the opposing party may respond with evidence of its own to challenge certification.[9]

[45] The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim; there is to be no preliminary review of the merits of the claim.[10] However, the plaintiff must show "some-basis-in-fact" for each of the certification criteria other than the requirement that the pleadings disclose a cause of action.[11] Certification will be denied if there is an insufficient evidentiary basis for the facts on which the claims of the class members depend.[12]

[46] In particular, there must be a basis in the evidence before the court to establish the existence of common issues.[13] In order to establish commonality, evidence that the alleged misconduct actually occurred is not required; rather, the necessary evidence goes only to establishing whether the questions are common to all the class members.[14]

[47] On a certification motion, evidence directed at the merits may be admissible if it also bears on the requirements for certification but, in such cases, the issues are not decided on the basis of a balance of probabilities but rather on that of the much less stringent test of "some-basis-in-fact".[15] The evidence on a motion for certification must meet the usual standards for admissibility.[16] While evidence on a certification motion must meet the usual standards for admissibility, the weighing and testing of the evidence is not meant to be extensive and if the expert evidence is admissible the scrutiny of it is modest.[17] In a class proceeding, the close scrutiny of the evidence of experts should be reserved for the trial judge.[18]

---

[8] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 26 to 29; *Hollick v. Toronto (City), supra* at paras. 15 and 16.
[9] *Hollick v. Toronto (City), supra* at para. 22.
[10] *Hollick v. Toronto (City), supra* at paras. 28 and 29.
[11] *Hollick v. Toronto (City), supra* at paras. 16-26.
[12] *Williams v. Canon Canada Inc.*, 2011 ONSC 6571, aff'd 2012 ONSC 3992 (Div. Ct.); *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106; *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 (C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545; *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Gen. Div.), aff'd (1999), 42 O.R. (3d) 576 (Div. Ct.).
[13] *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (S.C.J.) at para. 25; *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (S.C.J.) at para. 21; *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 at para. 140.
[14] *Pro-Sys Consultants v. Microsoft*, 2013 SCC 57 at para. 110.
[15] *Hollick v. Toronto (City)*, *supra* at paras. 16-26; *Cloud v. Canada*, 2004), 73 O.R. (3d) 401 (C.A.) at para. 50, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.).
[16] *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744; *Williams v. Canon Canada Inc., supra; Ernewein v. General Motors of Canada Ltd., supra*; *Schick v. Boehringer Ingelheim (Canada) Ltd.*, 2011 ONSC 63 at para.13.
[17] *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (S.C.J.) at para. 76.
[18] *Stanway v. Wyeth Canada Inc.*, 2011 BCSC 1057, aff'd 2012 BCCA 260.

[48] The "some-basis-in-fact" test sets a low evidentiary standard for plaintiffs, and a court should not resolve conflicting facts and evidence at the certification stage or opine on the strengths of the plaintiff's case; the focus at certification is whether the action can appropriately go forward as a class proceeding: *Pro-Sys Consultants v. Microsoft, supra*; *McCracken v. CNR Co.*[19]

## E. Cause of Action Criterion

[49] The first criterion for certification is that the plaintiff's pleading discloses a cause of action. The "plain and obvious" test for disclosing a cause of action from *Hunt v. Carey Canada*[20] is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5(1)(a) of the *Class Proceedings Act, 1992*.

[50] Thus, to satisfy the first criterion for certification, a claim will be satisfactory, unless it has a radical defect or it is plain and obvious that it could not succeed.[21]

[51] In a proposed class proceeding, in determining whether the pleading discloses a cause of action, no evidence is admissible, and the material facts pleaded are accepted as true, unless patently ridiculous or incapable of proof. The pleading is read generously and it will be unsatisfactory only if it is plain, obvious, and beyond a reasonable doubt that the plaintiff cannot succeed.[22]

[52] Because of Justice Belobaba's decision, it has already been determined that the cause of action criterion is satisfied for three causes of action.

## F. Identifiable Class Criterion

[53] The definition of an identifiable class serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (3) it describes who is entitled to notice.[23]

[54] In defining class membership, there must be a rational relationship between the class, the causes of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive.[24]

---

[19] 2012 ONCA 445.
[20] [1990] 2 S.C.R. 959.
[21] *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (C.A.) at p. 679, leave to appeal to S.C.C. ref'd, [1999] S.C.C.A. No. 476; *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.) at para. 19, leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.).
[22] *Hollick v. Toronto (City), supra* at para. 25; *Cloud v. Canada (Attorney General) supra* at para. 41; *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Div. Ct.) at p. 469.
[23] *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).
[24] *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.) at para. 57, rev'g [2004] O.J. No. 317 (Div. Ct.), which had aff'd [2002] O.J. No. 2764 (S.C.J.).

[55] In *Western Canadian Shopping Centres v. Dutton*,[25] the Supreme Court of Canada explained the importance of and rationale for the requirement that there be an identifiable class:

> 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.

[56] Lenovo (Canada) makes a variety of arguments that challenge the class definition in the immediate case. I shall address the easiest objections first and then address the more complicated issue of whether indirect purchasers are or can be included as class members in Mr. Bennett's proposed class action.

[57] The proposed class definition identifies 44 computer models. However, the uncontested evidence is that only 19 models were preloaded with Visual Discovery in Canada. Lenovo (Canada) correctly submits that models that never contained Visual Discovery should be deleted from the class definition.

[58] I agree with this submission. Thus, the following models should be deleted from the class definition: (a) G Series: G410, G710, G40-30, G50-30, G40-45, G50-50, G40-80, G50-80, G50-80Touch; (b) U Series: U330P, U330Touch, U430Touch; (c) Y Series: Y430P, Y40-80, Y70-70; (d) Z Series: Z40-75, Z50-75, Z70-80; (e) S Series: S310, S410, S40-70, S415, S415Touch, S435, S20-30, S20-30Touch; (f) Flex Series: Flex2 14D, Flex2 15D, Flex 2 14(BTM), Flex2 15(BTM), Flex2 Pro, Flex 10; (g) MIIX Series: MIIX2-8, MIIX2-11, MIIX 3 1030; (h) YOGA Series: YOGA2-11, YOGA3 Pro; (i) E Series: E20-30; (j) Edge Series: Lenovo Edge 15.

[59] The uncontested evidence also establishes that the security defect did not exist in laptops containing the updated version of Visual Discovery, *i.e.,* the version contained in Lenovo (Canada) models shipped after December 1, 2014. Lenovo (Canada) submits that this circumstance means that the class definition is over-inclusive or that it is necessary to establish subclasses with another representative plaintiff to act for purchasers of the computers with updated software. Lenovo (Canada) submits that many subclasses would be required because they would have to differentiate the claimants from each of the four provinces that have privacy statutes.

[60] I disagree, I seen no reason why Mr. Bennett cannot represent purchasers of the original or the updated version of the software both of which operated to send information to Superfish's computers. The matter of differentiating the claims of purchasers of the original software with its security defect as opposed to the claims of purchasers of the updated version of the software and the matter of differentiating the purchasers who have statutory claims in British Columbia, Saskatchewan, Manitoba and Newfoundland & Labrador can be addressed by carefully crafting the common issue questions.

---

[25] *Supra*, at para. 38.

[61] Similarly, Lenovo (Canada) submits that the class definition is overbroad by not differentiating between purchasers who are consumers under the *Consumer Protection Act* and purchasers who are not covered by the *Act*. The former but not the latter have *Sale of Goods Act* claims. Alternatively, Lenovo (Canada) submits that it is necessary to establish a subclass with another representative plaintiff to act for consumer purchasers since it is not clear that Mr. Bennett himself was a consumer under the *Consumer Protection Act* because he used his computer for both personal and business uses.

[62] Once again, I see no need to create subclasses, and the differentiation between consumers and non-consumers is a matter that can be dealt with by carefully crafting the common issue questions.

[63] Turning to the more difficult question of whether Mr. Bennett's action was brought or could now be brought on behalf of indirect purchasers of the 17 models of computer that contained Visual Discovery, I agree with Lenovo (Canada)'s argument that up until the 2017 notice of motion for certification, that Mr. Bennett's proposed class action was brought on behalf of only direct purchasers. I agree with this submission for three reasons.

[64] First, the original Statement of Claim defines the class as persons who purchased computers "from Lenovo". Those words, which identify direct purchasers, were deleted from the notice of motion for certification and in my opinion Mr. Bennett cannot, by this deft sleight of hand, add indirect purchasers as Class Members and plead a claim that was not pleaded in the original Statement of Claim. Second, a significant element of Mr. Bennett's Statement of Claim is his *Sale of Goods Act* claim, but this claim is not available to indirect purchasers because they have no privity of contract with Lenovo (Canada). Third, the evidence for the certification motion, and it would appear the argument for the Rule 21 motion, did not relate to or explore Lenovo (Canada)'s distribution of its computers to retailers, and thus, it would not be procedurally fair to extend class membership to persons who have a different and unexplored legal and factual relationship to Lenovo (Canada) and whose claims raise different issues about the common issues criterion, the preferable procedure, and the representative plaintiff criteria.

[65] I, therefore, conclude that, as currently drafted, the Statement of Claim does not include a claim by indirect purchasers, and, thus, the question becomes whether the class definition can be amended at this juncture to include indirect purchasers. I, however, agree with Lenovo (Canada)'s argument that it is not possible to revise the definition at this juncture. In particular, I agree with its argument that it would require a motion to amend the Statement of Claim, which motion has never been brought. Moreover, and more significantly, assuming that the motion was brought, it would inevitably fail because a claim by indirect purchasers is now statute-barred.

[66] The indirect purchasers' claim is now statute-barred because under the *Limitations Act, 2002,*[26] their claim would have been discovered between February 19, 2015 and at the latest March 21, 2015. In this regard, it should be recalled that pursuant to s. 5(2) of the *Class Proceedings Act,* there is a presumption that a person with a claim knew about his or her claim on the day the act or omission on which the claim took place, unless the contrary is proved. There is a two-year limitation period and, thus, the indirect purchasers' claim became statute-barred between February 19, 2017 and March 21, 2017.

---

[26] S.O. 2002, c. 24, Sched. B.

[67] Mr. Bennett commenced his action on behalf of the direct purchasers on March 11, 2015, and although s. 28(1) of the *Class Proceedings Act, 1992* suspends the running of a limitation period, it does so only for putative class members whose causes of action are asserted in the Statement of Claim,[27] which has yet to occur for the indirect purchasers, and thus their claims would be statute-barred.

[68] For the above reasons, in the case at bar, the following definition satisfies the identifiable class criterion:

> All persons in Canada who purchased directly from Lenovo (Canada) one or more of the following Lenovo laptops containing Visual Discovery software:
>
> - G Series: G510, G40-70, G50-70, G50-45
> - U Series: U430P, U530Touch
> - Y Series: Y40-70, Y50-70
> - Z Series: Z40-70, Z50-70
> - Flex Series: Flex2 14, Flex2 15,
> - MIIX Series: MIIX2-10
> - YOGA Series: YOGA2Pro-13, YOGA2-13, YOGA2-11BTM, YOGA2-11HSW

[69] It may be noted that the definition that I have approved does not contain a class period. A class period is unnecessary and, worse, it would be confusing to persons who, in order to determine whether they are Class Members, do not need to know when they purchased a computer from Lenovo (Canada).

## G. Common Issues Criterion

[70] The third criterion for certification is the common issues criterion. For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim.[28] With regard to the common issues, success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. The answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class.[29] In *Pro-Sys Consultants v. Microsoft*,[30] the Supreme Court of Canada describes the commonality requirement as the central notion of a class proceeding which is that individuals who have litigation concerns in common ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings.

---

[27] *Coulson v. Citigroup Global Markets Canada Inc.*, 2010 ONSC 1596 at para. 38; *Toronto Community Housing Corp. v. Thyssenkrupp Elevator (Canada) Ltd.*, 2011 ONSC 4914 at para. 83.

[28] *Hollick v. Toronto (City), supra* at para. 18.

[29] *Western Canadian Shopping Centres Inc. v. Dutton, supra* at para. 40; *Ernewein v. General Motors of Canada Ltd., supra* at para. 32; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 at paras. 145-46 and 160, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 512; *McCracken v. Canadian National Railway Co., supra*, at para. 183.

[30] *Supra* at para. 106.

[71] An issue is not a common issue if its resolution is dependent upon individual findings of fact that would have to be made for each class member.[31] Common issues cannot be dependent upon findings which will have to be made at individual trials, nor can they be based on assumptions that circumvent the necessity for individual inquiries.[32]

[72] The common issue criterion presents a low bar.[33] An issue can be a common issue 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.[34] A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class.[35]

[73] In the context of the common issues criterion, the "some-basis-in-fact" standard involves a two-step requirement that: (1) the proposed common issue actually exists; and (2) the proposed issue can be answered in common across the entire class.[36]

[74] Notwithstanding the arguments of Lenovo (Canada), I am satisfied that there is "some-basis-in-fact" for common issues about the three causes of action that satisfy the cause of action criterion.

[75] I do agree with Lenovo (Canada) that there are problems with the current set of questions because they do not focus on the elements of the three causes of action that are common and because they do not differentiate the elements that are not common and that would have to be determined at individual issues trials. As examples, whether or not a Class Member is a consumer protected by the *Consumer Protection Act* is an individual issue as is the question of whether he or she had the original version of Visual Discovery or the undated version of the software on their computer. Whether a Class Member is from British Columbia, Saskatchewan, Manitoba, or Newfoundland & Labrador are not class-wide characteristics.

[76] Recasting the liability common issues from individual issues yields the following set of questions, which satisfy the common issues criterion:

> *Sale of Goods Act*
>
> (i) Did the defendant Lenovo (Canada) breach s. 15 of the *Sale of Goods Act* for class members who are consumers as defined by the *Consumer Protection Act, 2002* who purchased the Affected Models preloaded with the original version of Visual Discovery?

---

[31] *Fehringer v. Sun Media Corp.*, [2003] O.J. No. 3918 (Div. Ct.) at paras. 3, 6.
[32] *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 (S.C.J.) at paras. 50-52; *Collette v. Great Pacific Management Co.*, [2003] B.C.J. No. 529 (B.C.S.C.) at para. 51, varied on other grounds (2004) 42 B.L.R. (3d) 161 (B.C.C.A.); *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 (S.C.J.) at para. 126, leave to appeal granted [2010] O.J. No. 3183 (Div. Ct.), varied 2011 ONSC 3882 (Div. Ct.).
[33] *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (C.A.) at para. 42; *Cloud v. Canada (Attorney General), supra,* at para. 52; *203874 Ontario Ltd. v. Quiznos Canada Restaurant Corp.*, [2009] O.J. No. 1874 (Div. Ct.), aff'd [2010] O.J. No. 2683 (C.A.), leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 348.
[34] *Cloud v. Canada (Attorney General), supra.*
[35] *Harrington v. Dow Corning Corp., supra.*
[36] *Hollick v. Toronto (City), supra; Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443; *McCracken v. Canadian National Railway Company, supra*; *Williams v. Canon Canada Inc., supra; Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744; *Good v. Toronto Police Services Board*, 2014 ONSC 4583 (Div. Ct.); *Dine v. Biomet*, 2015 ONSC 7050, aff'd 2016 ONSC 4039 (Div. Ct.).

(ii) Did the defendant Lenovo (Canada) breach s. 15 of the *Sale of Goods Act* for class members who are consumers as defined by the *Consumer Protection Act, 2002* who purchased the Affected Models preloaded with the updated version of Visual Discovery?

*Intrusion Upon Seclusion*

(iii) Did Lenovo (Canada) invade, without lawful justification, the class members' private affairs or concerns by installing the original version of Visual Discovery on the Affected Models?

(iv) Did Lenovo (Canada) invade, without lawful justification, the class members' private affairs or concerns by installing the updated version of Visual Discovery on the Affected Models?

(v) If the answer to question (iii) is "yes", was Lenovo (Canada)'s conduct intentional or reckless?

(vi) If the answer to question (iv) is "yes", was Lenovo (Canada)'s conduct intentional or reckless?

(vii) If the answers to questions (iii) and (v) are "yes", would a reasonable person regard the invasion as highly offensive causing distress, humiliation or anguish?

(viii) If the answers to questions (iv) and (vi) are "yes", would a reasonable person regard the invasion as highly offensive causing distress, humiliation or anguish?

*Breach of Provincial Privacy Acts*

(ix) For class members resident in British Columbia, did Lenovo (Canada) contravene the *Privacy Act*, R.S.B.C. 1996, c. 373, s. 1?

(x) For class members resident in Saskatchewan, did Lenovo (Canada) contravene the *Privacy Act*, R.S.S. 1978, c. P-24, s. 2?

(xi) For class members resident in Manitoba, did Lenovo (Canada) contravene *The Privacy Act*, C.C.S.M. c. P125, s. 2?

(xii) For class members resident in Newfoundland and Labrador, did Lenovo (Canada) contravene the *Privacy Act*, R.S.N.L. 1990, c. P-22, s. 3?

[77] Moving on from the liability issues to remedy issues, Mr. Bennett also seeks to have certified as a common issue whether damages can be determined on an aggregate basis pursuant to s. 24(1) of the *Class Proceedings Act, 1992*, which states:

*Aggregate assessment of monetary relief*

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

(a) monetary relief is claimed on behalf of some or all class members;

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[78] For an aggregate assessment of damages to be available "no questions of fact or law other than those relating to the assessment of monetary relief" must "remain to be determined in order to establish the amount of the defendant's monetary liability." If liability cannot be established through the other common issues, then an aggregate damages common issue cannot be certified.[37]

---

[37] *Kalra v. Mercedes Benz*, 2017 ONSC 3795.

[79] In the case at bar, once the liability questions are determined, the action must necessarily move on to the individual issues stage because several questions of fact or law would remain to be determined: visualize: whether the class member was a consumer; what version of the software was on the class member's computer; whether Lenovo (Canada) has individual defences depending on the individual class member's type of use of the computer (he or she may never have activated the software or the software may have been removed or deactivated or the class member may never have used the computer on an unsecure network).

[80] I, therefore, conclude that aggregate damages may not be certified as a common issue.

[81] The remaining proposed common issue is: "Punitive Damages - Are the defendants, or either of them, liable to pay punitive or exemplary damages to the class members having regard to the nature of their conduct and, if so, what amount?"

[82] I shall not certify this common issue because as against Lenovo (Canada), on the current evidentiary record, there is no basis in fact for it. There is not a scintilla of evidence that: Lenovo (Canada) deliberately concealed the defect, refused to address such issues when discovered, or treated the purchasers of its computers in a high-handed or malicious manner. The matter of liability for punitive damages can be revisited by the judge at the common issues trial or by the judges of the individual issues trials.

[83] The result is that Mr. Bennett's action satisfies the common issues criterion in the way described above.

## H. Preferable Procedure Criterion

[84] The fourth criterion is the preferable procedure criterion. Preferability captures the ideas of: (a) whether a class proceeding would be an appropriate method of advancing the claims of the class members; and (b) whether a class proceeding would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute.[38]

[85] Relevant to the preferable procedure analysis are the factors listed in s. 6 of the *Class Proceedings Act, 1992*, which states:

> 6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:
>
> > 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
> >
> > 2. The relief claimed relates to separate contracts involving different Class Members.
> >
> > 3. Different remedies are sought for different Class Members.
> >
> > 4. The number of Class Members or the identity of each Class Member is not known.
> >
> > 5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all Class Members.

---

[38] *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para. 69, leave to appeal to SCC ref'd [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, *supra*.

[86] For a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims.[39] Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues.[40]

[87] In considering the preferable procedure criterion, the court should consider: (a) the nature of the proposed common issue(s); (b) the individual issues which would remain after determination of the common issue(s); (c) the factors listed in the *Act*; (d) the complexity and manageability of the proposed action as a whole; (e) alternative procedures for dealing with the claims asserted; (f) the extent to which certification furthers the objectives underlying the *Act*; and (g) the rights of the plaintiff(s) and defendant(s).[41]

[88] The court must identify alternatives to the proposed class proceeding.[42] The proposed representative plaintiff bears the onus of showing that there is some-basis-in-fact that a class proceeding would be preferable to any other reasonably available means of resolving the class members' claims, but if the defendant relies on a specific non-litigation alternative, the defendant has the evidentiary burden of raising the non-litigation alternative.[43]

[89] In *AIC Limited v. Fischer*,[44] the Supreme Court of Canada reiterated that the preferability analysis must be conducted through the lens of judicial economy, behaviour modification, and access to justice. Justice Cromwell for the Court stated that access to justice has both a procedural and substantive dimension. The procedural aspect focuses on whether the claimants have a fair process to resolve their claims. The substantive aspect focuses on the results to be obtained and is concerned with whether the claimants will receive a just and effective remedy for their claims if established.

[90] In *AIC Limited v. Fischer,* Justice Cromwell pointed out that when considering alternatives to a class action, the question is whether the alternative has potential to provide effective redress for the substance of the plaintiff's claims and to do so in a manner that accords suitable procedural rights. He said that there are five questions to be answered when considering whether alternatives to a class action will achieve access to justice: (1) Are there economic, psychological, social, or procedural barriers to access to justice in the case?; (2) What is the potential of the class proceeding to address those barriers?; (3) What are the alternatives to class proceedings?; (4) To what extent do the alternatives address the relevant barriers?; and (5) How do the two proceedings compare?

[91] And one should now add to the preferable procedure factors the factor of the relationship between access to justice, which is the preeminent concern of class proceedings, and proportionality in civil procedures. The proportionality analysis, which addresses how much procedure a litigant actually needs to obtain access to justice, fits nicely with the part of the

---

[39] *Cloud v. Canada (Attorney General) supra* at paras. 73-75, leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 50.

[40] *Markson v. MBNA Canada Bank, supra* at para. 69, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City), supra.*

[41] *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.).

[42] *AIC Limited v. Fischer*, 2013 SCC 69 at para. 35; *Hollick v. Toronto (City), supra* at para. 28.

[43] *AIC Limited v. Fischer, supra* at paras. 48-49.

[44] *Supra* at paras. 24-38.

preferable procedure analysis that considers whether the claimants will receive a just and effective remedy for their claims.

[92] Lenovo (Canada) did not concede that Mr. Bennett's action satisfied the preferable procedure criterion, but, as noted above, it focussed its attack on the cause of action, identifiable class, and common issues criteria. In my opinion, with these three criteria satisfied and in other respects, Mr. Bennett's action also satisfies the preferable procedure criterion.

## I. Representative Plaintiff Criterion

[93] The fifth and final criterion for certification as a class action is that there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[94] The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all of the class members as against the defendant.[45]

[95] Provided that the representative plaintiff has his or her own cause of action, the representative plaintiff can assert a cause of action against a defendant on behalf of other class members that he or she does not assert personally, provided that the causes of action all share a common issue of law or of fact.[46]

[96] Whether the representative plaintiff can provide adequate representation depends on such factors as: his or her motivation to prosecute the claim; his or her ability to bear the costs of the litigation; and the competence of his or her counsel to prosecute the claim.[47]

[97] While Lenovo (Canada) criticized Mr. Bennett's litigation plan, it did not challenge his qualifications as a representative plaintiff nor did it challenge the competence of putative Class Counsel. The litigation plan, which is always a work in progress, will need to be amended in accordance with these Reasons for Decision, but the plan is adequate for the purposes of satisfying the representative plaintiff criterion.

[98] I conclude that Mr. Bennett's action satisfies the representative plaintiff criterion.

## J. Conclusion

[99] For the above reasons, I certify this action under the *Class Proceedings Act, 1992.*

---

[45] *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 (S.C.J.) at paras. 36-45; *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 (S.C.J.) at para. 40, aff'd [2003] O.J. No. 4708 (C.A.).

[46] *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 (S.C.J.) at para. 22, leave to appeal granted, [2002] O.J. No. 2135 (S.C.J.), varied (2003), 64 O.R. (3d) 208 (Div. Ct.) at paras. 41, 48, varied [2003] O.J. No. 2218 (C.A.); *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (S.C.J.) at paras. 71-77; *Voutour v. Pfizer Canada Inc.*, [2008] O.J. No. 3070 (S.C.J.); *LeFrancois v. Guidant Corp.*, [2008] O.J. No. 1397 (S.C.J.) at para. 55.

[47] *Western Canadian Shopping Centres Inc. v. Dutton, supra* at para. 41.

[100] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Mr. Bennett's submissions within 20 days from the release of these Reasons for Decision followed by Lenovo (Canada)'s submissions within a further 20 days.

Perell, J.

Released: October 3, 2017

**CITATION:** Bennett v. Lenovo (Canada) Inc., 2017 ONSC 5853
**COURT FILE NO.:** CV-15-523714-CP
**DATE:** 20171003

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

DANIEL BENNETT

Plaintiff

**– and –**

LENOVO (CANADA) INC. and SUPERFISH INC.

Defendants

---

**REASONS FOR DECISION**

---

PERELL J.

Released: October 3, 2017