CITATION: Graham v. Impark, 2010 ONSC4982
COURT FILE NO.: 09-CV-00379652CP
DATE: September 16, 2010

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Stephanie Graham and Angela Miceli

Plaintiffs

- and -

Imperial Parking Canada Corporation carrying on business as Impark

Defendant

Proceeding under *the Class Proceedings Act, 1992*

COUNSEL:

Paul Bates, David Thompson, Matthew G. Moloci, and Bernadette Chung for the Plaintiffs

Paul J. Martin and Laura F. Cooper for the Defendant

HEARING DATES: September 1 and 2, 2010

REASONS FOR DECISION

PERELL, J.

I. Introduction and Overview

[1] Under an agreement with the Defendant Imperial Parking Canada Corporation ("Impark"), a motorist who parks a vehicle at a parking lot operated by Impark may be charged a "violation fee" of $69.55 (or a similar sum). The violation fee is payable: (a) if the motorist does not make any payment in advance; (b) if the motorist pays in advance and receives a ticket under a "pay and display" ticket system but overstays the time allotted for parking; or (c) if the motorist pays in advance and receives a ticket but fails to display the ticket on the vehicle's dashboard.

[2] In this proposed class action, the proposed Representative Plaintiffs Stephanie and Angela Miceli allege that the parking agreements between Impark and motorists contravene the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, sch. A. They also allege that the violation fee is unenforceable as a contract of adhesion or is an unenforceable penalty or forfeiture or is unconscionable by reason of improvidence and the inequality of bargaining power between the parties.

[3] Among a long list of claims, including claims for rescission, relief from forfeiture, declarations, injunctions, constructive trusts, and an accounting, the Plaintiffs claim damages of $50 million and punitive and exemplary damages of $5 million. They also seek remedies for unjust enrichment.

[4] Ms. Graham and Ms. Miceli now move for certification of their action as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. c.6. They bring their proposed class proceeding on behalf of the following class:

> All persons who parked a vehicle or whose vehicle was parked at a parking lot in Ontario owned and/or operated by Impark and who were charged and paid violation fees to Impark.

[5] It should be noted that the proposed class definition has no temporal limitation and would include as class members, persons whose claims are statute-barred under the *Limitations Act, 2002*, S.O. 2002, c.24, Sch. B or who failed to give notice as required for claims under the *Consumer Protection Act, 2002*.

[6] It also should be noted that the class definition makes no distinction between motorists who qualify as consumers under the *Consumer Protection Act, 2002* and other motorists who park at Impark parking lots but who would not qualify as consumers under the Act. Further, it should be noted that the class includes persons who are the registered owner of a vehicle parked by another class member but who themselves did not park the vehicle at the Impark parking lot. Further still, it should be noted that the proposed class includes persons who were charged but did not pay the violation fee.

[7] Impark resists the motion for certification, and it submits that all the criteria for certification under s. 5(1) of the *Class Proceedings Act, 1992* are not satisfied.

[8] In particular, Impark contends that only the matter of the adequacy of the Impark signage to form an enforceable contract (the adhesion contract issue) shows a cause of action, but it argues that there are no common issues associated with that cause of action. It submits that there are no other viable causes of action. It argues that the class definition is over-inclusive and there are no common issues that would advance the litigation and that would justify a class proceeding. It challenges the qualifications of both Ms. Graham and Ms. Miceli as representative plaintiffs and the adequacy of their litigation plan. Further, Impark submits that the proposed class action does not satisfy the preferable procedure criterion and that certification would not advance the legislative objectives of access to justice and behaviour modification.

[9] Impark also submits that based on a holistic approach to certification, the court ought to exercise its gatekeeper function and refuse to certify the proposed class action.

[10] Impark submits that it has doing nothing wrong and that certifying a class action would reward motorists who obtain parking services without paying. Impark argues that certification would punish the majority of Impark motorists who honestly abide by the pay-and-display system used by Impark and other commercial sector suppliers of parking. Further still, Impark submits that if Ms. Graham's and Ms. Miceli's interpretation of the *Consumer Protection Act, 2002* were correct that would be the end of the pay-and-display system for the parking lot industry with the result of substantially higher prices for public parking services and an overall decrease in the availability of those services to the detriment of the public. Impark challenges the social utility of the Plaintiffs' proposed class action and argues that the court as a gatekeeper under the *Class Proceedings Act, 1992* ought not to let the Plaintiffs' action pass through the gate of certification.

[11] For the reasons that follow, I conditionally certify a class action, although with much narrower parameters than the class action proposed by the Plaintiffs.

[12] As will be seen, most of the purported causes of action are untenable or unsuitable for certification as a class action and the Plaintiffs' proposed class action has problems satisfying the various criteria for certification including a problem of an overbroad class definition and a problem about the qualifications of the Plaintiffs to be representative plaintiffs.

[13] Nevertheless, without applying any holistic approach to certification, for the reasons that follow and: (a) with the removal of the purported causes of action that do not satisfy the cause of action criterion for certification; (b) with changes to the class definition; (c) with changes to the common issues; (d) with a new representative plaintiff; and (e) with the preparation of a new litigation plan, there is an action that satisfies all the criteria for certification as a class action.

2. General Legal and Factual Background

(a) Introduction

[14] I will describe the general factual and legal background in a schedule and in two sections of this part of my Reasons for Decision.

[15] In Schedule "A," I will set out the relevant provisions of the *Consumer Protection Act, 2002.*

[16] In the first section of this part, I will describe the factual background about how Impark operates its parking lots in Ontario and the particulars of the circumstances of Ms. Graham's claim and Ms. Miceli's claim.

[17] This factual background is taken from: the statement of claim; the affidavits of Ms. Graham, Ms. Miceli, Mr. Jason Zhang who is a law clerk for the Plaintiffs' lawyers,

and Mr. Gordon Craig, who is a Senior Vice President of Impark; the cross-examinations of Ms. Graham, Ms. Miceli, and Mr. Craig, and the documentary record for the certification motion.

[18] In the second section of this part, I will describe *Imperial Parking Ltd. v. Canada* [2000] F.C.J. No. 1011 (F.C.A.), a case that is part of the factual narrative because the Plaintiffs submit that Impark misrepresented the legal significance of this case to class members.

(i) General Factual Background

[19] Impark, which is incorporated in Nova Scotia with a head office in British Columbia, operates and manages approximately 2,000 parking facilities and 450,000 parking spaces across Canada. In Ontario, Impark leases or manages 240 parking lots. The majority of its lots are private property, but Impark also manages lots for hospitals, universities, airports, and government offices. It has approximately 55,000 parking stalls in Ontario. It charges parking fees by hourly rates for parking in its stalls.

[20] The arrangement that Impark has with its motorists is contractual. The law of trespass is also relevant to the legal relationship that Impark has with the motorists that use its parking facilities.

[21] It would also appear, but nothing turns on it in the case at bar, that Impark designs its contractual relationships so as to avoid the law of bailment and the consequences that would follow if it was held to have possession of the vehicles parked on its lots.

[22] The contract is evidenced by signs posted on the parking lots. The signs are designed to conform to municipal by-law requirements about the size of text. (With some immaterial variations of text at different parking lots), the signs state:

Instructions

1. Park Vehicle
2. Purchase Ticket
3. Display Ticket on Dashboard with time visible

Parking Rates Taxes included

First hour or less $...

Each additional ½ hour $...

Daily Maximum 7am – 6pm $...

Evening Maximum 3:30pm – 7 am $...

Sat./Sun./Holidays 7am-7am $...

We [Impark] accept no responsibility for loss, theft or damage to vehicles or contents. We do not take custody of vehicle, but rent space only.

Please read carefully ..... This is private property.

By this sign, we [Impark] offer space for public parking. You accept this offer by parking on this lot. We waive all requirements of notice of acceptance. If you park, but do not display a valid ticket or pass or park over the posted time limit or are parked improperly or contrary to the posted rules, the violation fee is $69.55 per day or portion thereof. If you park here in violation of these conditions, you agree to pay the violation fee. Do not park on this lot if you do not agree to these terms.

By parking on this lot, you grant permission to the Ministry of Transportation of Ontario to provide registered owner information, including name and address, for the vehicle you are driving, to Imperial Parking and its agents, for the purpose of collecting unpaid violation fees.

GST #887315638RT002

Violation Inquires: 1-877-903-9933

[Impark Logo] Managed by Imperial Parking Lot # xxx

Enforced 24 hours a day.

[23] Impark posts secondary signs that give notice of the violation fee. These signs are displayed on 18" x 24" aluminum stocks at a frequency of two for the first 50 parking stalls on the lot and one for each additional 50 stalls.

[24] Some Impark parking lots have attendants and others are unstaffed.

[25] At staffed parking lots, motorists purchase a parking ticket or parking pass from a parking lot attendant. The motorists are required to display the ticket on the dashboard of the vehicle.

[26] At unstaffed parking lots, motorists may enter into parking agreements by purchasing a parking ticket or pass from a mechanical dispenser. The motorists are required to display the ticket on the dashboard of the vehicle.

[27] Impark also offers parking services on a monthly basis. Monthly parkers are permitted to park during certain hours. They must display a parking pass on the dashboard of the vehicle.

[28] The ticket for parking contains the following information: (a) the amount paid; (b) the time when the ticket expires; and (c) instructions to display the ticket on the dashboard of the parked vehicle. As discussed further below, if Impark's agreement with the motorist qualifies as a "future performance agreement" under the *Consumer*

Protection Act, 2002, then this ticket or pass provided by the pay and display system does not satisfy s. 24 of O. Reg 17/05. The regulation requires that a future performance agreement be in writing and that the agreement disclose prescribed information to the consumer. In the case at bar, it is conceded that the information provided by the ticket or pass does not satisfy s.24 of the regulations.

[29] Although the pay and display system is enforced by random patrols to determine whether the motorists have parked properly, the system has aspects of an honour system where motorists are expected to pay the fee for hourly parking without supervision. Apparently, a small number of motorists do park without paying. Most are honourable and pay for the parking.

[30] If a motorist overstays the time purchased or does not display a ticket, he or she is subject to demands for payment of a violation fee as described below. Monthly parkers are also subject to the violation fee described below, if they park their vehicles outside their permitted hours.

[31] When Impark staff patrol and find a vehicle that does not display a valid ticket or does not display any ticket on the dashboard, the response is for the staff person to issue a notice and place it on the windshield of the motorist's vehicle. The notice, among other things, demands payment of $39.96 within 7 days or $69.55 - the violation fee - after 7 days. When a payment notice is issued, the Impark patroller takes a photograph of the dashboard of the vehicle to show that no valid parking ticket was displayed and a photograph of the vehicle's licence plate.

[32] Impark says that the violation fee reflects: patrol and enforcement costs, dispute and call centre expenses, cost of licence plate search ($14), postage and statement costs, collection agency expense, compensation for foregone revenue, and applicable sales taxes. Impark submits that the violation fee is not a penalty and reflects its actual administrative costs. It submits that as a by-product, the charge has a deterrent effect discouraging motorists from not paying for the parking services they receive.

[33] The amount of Impark's violation fee is quite similar to the violation fees charged by Impark's private sector competitors providing commercial parking services.

[34] The text of the notice placed on the windshield of the vehicle states:

> We, Imperial Parking Canada Corporation, hereby notify you that you have parked on private property without displaying a valid pass or sufficient valid dispenser ticket(s), or have otherwise improperly parked, as detailed below.
>
> To make payment or dispute this notice, see reverse.
>
> Please remit payment as follows:
>
> Within 7 days: $37.35 + $2.61 GST = $39.96
>
> After 7 days: $65.00 + $4.55 GST = $69.55

> The Legal Authority to claim the above amount and/or have your improperly parked vehicle towed arises under the law of contract and the law of trespass.
>
> The above amount is a debt owing to Imperial Parking Canada Corporation and is claimed as an alternative to (or in certain circumstances, in addition to) having your vehicle towed and held for any applicable towing and storage charges.
>
> If this amount remains unpaid for more than thirty (30) days, it will be forwarded to a debt collection agency for collection. We may also tow your vehicle from property managed by us and/or take legal action. Should this charge proceed to a debt collection agency, costs and interests will be added.
>
> This notice must accompany payment.

[35] The portion of this notice that is alleged to be a misrepresentation is the portion that states:

> The legal authority to claim the above amount and/or have your improperly parked vehicle towed arises under the law of contract and the law of trespass.

[36] For motorists who respond to notices or demands for payment, Impark has its own dispute resolution system. It employs customer service representatives ("CSRs") who are provided with a set of guidelines to deal with motorists who call in to dispute the notice. CSRs are expected to exercise discretion in dealing with motorists in accordance with guidelines provided by Impark in its document "Parking Dispute Resolution Minimums/Dispute Resolution Guide."

[37] In some instances, after considering the information provided by the motorist, Impark will cancel the notice and confirm this decision in writing by letter to the motorist. In other instances, Impark will reduce the amount owing if payment is made in seven business days, and in yet other instances, Impark will refuse to cancel or reduce the amount owing, the violation fee. In these latter two situations, the motorist will receive a letter advising him or her about Impark's decision. The demand letter contains the following statement:

> Imperial Parking manages facilities which are private property. When a vehicle parks on one of these lots, the customer enters into a contract with Imperial Parking. Signage is located at each lot setting out the terms and conditions of the contract, including the condition of paying a notice if the terms of the contract are not met. This contract has been upheld in a ruling made by the Federal Court of Appeal.

[38] As may be noted the letter demanding payment in part or in whole refers to a decision of the Federal Court of Appeal. I will have reason to discuss that decision several times below.

[39] After placing the notice on the vehicle, if Impark does not receive payment within five weeks, Impark mails out a statement to the registered owner of the vehicle, who, it may be observed, is not necessarily the person who parked the vehicle. This statement, a demand letter, includes the following message, which is alleged to be a misrepresentation:

> The legal authority to claim the amount due and/or have improperly parked vehicle towed arises under the law of contract. Our right to claim this amount from owners of vehicles improperly parked on facilities managed by us has been confirmed by a Canadian Federal Court of Appeal decision.

[40] Impark waits five more weeks before taking its next step. Then, Impark directs a collection agency that it owns to seek payment and another demand letter is mailed to the registered owner.

[41] If Impark's in-house collection agency does not recover the violation fee and if there are three or more notices for the customer, then Impark hires a third party collection agency to pursue payment. If the collection agency's efforts are not successful, Impark closes its file after six months.

[42] To summarize, Impark's collection process is as follows: (a) day one, ticket the vehicle; (b) week five, mail a demand letter; (c) week ten, refer collection to in-house collection agency; (d) week fifteen, refer collection to third party collection agency; and (e) month six, close the file.

[43] Notably, Impark does not bring actions in Small Claims Court to enforce payment from consumers because it is not economical to do so. However, Impark retains a record of registered vehicle owners with multiple unpaid payment notices; it keeps records of the licence plates of those motorists who have not paid the violation fees.

[44] It is also worth noting that the registered owner, who may not be the person who actually parked the vehicle on the Impark lot, is warned that his or her vehicle may be towed if the vehicle returns to any facilities managed by Impark. In an example offered during argument, Ms. Miceli said that because she had not paid Impark after her son had been issued a notice for improperly parking her vehicle, she ran the risk of having her vehicle towed away should she park at a hospital parking lot managed by Impark.

[45] As noted above, Impark CSRs have the discretion to negotiate settlements with Impark motorists. However, CSRs do not have any discretion to reduce the amount of the violation fee if the motorist calls after the matter has been sent to the collection agency.

[46] In Ontario, Impark issues approximately 12,000 payment notices per month, i.e., approximately 120,000 to 140,000 notices annually. Approximately 20-25% of Impark's notices issued in Ontario are forgiven as a result of CSRs' exercise of discretion. Another approximately 25-30% are not paid. (As will be seen, Ms. Miceli is an example of someone who did not pay.) Thus, each year approximately, 70,000 notices result in a payment of the violation fee in whole or in part.

[47] In 2009, the average payment for all notices issued was $20.34. In 2009, the average payment for the notices that were paid in whole or in part was $44.92. In the result, Impark collects approximately $3 million per year in Ontario from fees from improper parking from the approximately $10 million per year collectible if each notice yielded the highest violation fee.

[48] At the hearing of the motion, I asked how many notices are issued for vehicles that are being driven by someone other than the registered owner; however, this is not known. I also asked how many of the payment notices that were paid (approximately 70,000) yielded a payment of the highest violation fee, but nobody knew the answer to that question. Also not known, is how many vehicles are driven or owned by persons who would not qualify as consumers under the *Consumer Protection Act, 2002*.

[49] Moving from the general to the particulars of the case at bar, on March 11, 2009, Joey Miceli parked at an Impark lot at 21 Four Seasons Place, in Toronto. The maximum daily rate for parking at this lot was $5.00. He paid $2.00 and received a mechanically dispensed ticket. The ticket indicated that he parked at 10:27 and had paid to park until 11:57. He overstayed, returning to the lot approximately 43 minutes late. He found a notice on the vehicle. The notice stated that a fee of $68.90 could be charged by Impark.

[50] As the registered owner of the vehicle driven by Joey, the Plaintiff Angela Miceli (his mother) received a statement notice dated April 21, 2009 from Impark demanding payment of the fee. Ms. Miceli did not pay.

[51] On June 24, 2009, Joey Miceli again parked at the Four Seasons Place Impark lot. The mechanical dispenser malfunctioned and displayed an incorrect amount for the amount paid. Upon returning to the lot, he found a notice. Subsequently, Angela Miceli received a collection notice from Tacit Collections, the wholly-owned subsidiary of Impark.

[52] Again Ms. Miceli did not pay, and in this action, she seeks a declaration that Impark's violation fee is unenforceable.

[53] On April 6, 2009, the Plaintiff Stephanie Graham parked at an Impark parking lot at 20 York Street, Toronto. She paid $7.25 for a mechanical dispensed ticket. The ticket indicated that she parked at the lot at 09:51 and had paid to park until 11:18. She overstayed. Upon her return to the lot, she found a notice placed underneath her windshield wiper.

[54] Ms. Graham subsequently received a payment notice from Impark by mail.

[55] The statement of claim in this action was issued on May 28, 2009, and on May 29, 2009, Ms. Graham paid Impark $68.90 under protest, and in this action, she seeks reimbursement of funds paid and damages, including punitive damages.

(ii) Imperial Parking Ltd. v. Canada,

[56] As already noted above, and as I will discuss further below, the Plaintiffs submit that Impark misrepresented the legal significance of *Imperial Parking Ltd. v. Canada* [2000] F.C.J. No. 1011 (F.C.A.) in its correspondence to class members. Thus, as a part of the factual and legal background, it is necessary to describe this case.

[57] In the *Imperial Parking Ltd.* case, a revenue case, the issue before the Federal Court of Appeal was whether Impark was obliged to remit goods and services tax (GST) on a taxable supply. More precisely, the issue was whether Impark's charges for improper parking attracted GST.

[58] In the *Imperial Parking Ltd.* case, Impark conceded that it had a contractual relationship with motorists who purchased a parking ticket and who did not overstay the purchased time. Impark conceded that it was obliged to remit GST on these motorists' charge for parking. However, Impark, argued: (1) that any contractual relationship ended when the motorist overstayed; and (2) that there was no contractual relationship with motorists who parked without purchasing a parking ticket. For both of these categories of motorist, Impark argued that its violation fee was damages for trespass and not a taxable supply that would attract GST. Impark's argument is described in para. 7 of Justice Robertson's judgment as follows:

> 7. The question which arises on these appeals is whether the amounts collected and remitted to the appellant by the collection agency pursuant to violation notices constitute consideration for a "taxable supply" that are subject to payment of GST. The appellant submits that there is no contractual relationship between it and those who park their vehicles without purchasing a ticket or who overstay the time purchased. There being no contractual relationship, the appellant maintains that monies paid in response to a violation notice constitute damages for trespass which are not a taxable supply under the Act. Accordingly, the appellant argues that GST is not payable with respect to the amounts in question. At the same time, it concedes that monies received as damages for breach of contract are subject to GST pursuant to section 182 of the Act.

[59] The Federal Court of Appeal rejected Impark's arguments. The court concluded that there was a contractual relationship with all motorists who parked at the Impark lots, including: (a) those who paid in advance and overstayed; and (b) those who did not pay in advance and did not display a ticket.

[60] In the context of deciding Impark's liability to remit GST, the Federal Court concluded that when Impark levied its charges for overstaying it was enforcing its contract with the motorist by a claim for damages for breach of contract. In the opinion of the Federal Court of Appeal, overstaying the paid-for-time did not mean the parking contract was at an end or that it never came into existence for those who did not purchase a ticket and pay in advance.

[61] At para. 12 of his judgment, Justice Robertson explained that the obligation to pay damages for breach of contract existed throughout as did the right to seek enforcement of any contractual provisions governing breaches of the parking contract. At para. 19 of his judgment, Justice Robertson discussed the contract formation analysis that made Impark's charges for improper parking contractual and not damages for trespass. He stated:

> The final ground for rejecting the appellant's submission is that proof of contractual intention is an objective one and, thus, even if one person believes that he or she is not bound, the law will recognize the formation of a contract unless the other contracting party knew otherwise. Under the objective theory of contract formation, the law seeks to determine whether there has been unequivocal acceptance of an offer. In the case of the automated parking lot, acceptance must be by conduct, for that is the only way in which intention can be ascertained objectively in the circumstances of this case. In my view, the unequivocal conduct which constitutes acceptance of the appellant's offer to provide a parking space occurs when the driver leaves the lot after parking his or her vehicle. This interpretation is reinforced by the text of the large sign posed at the entrance to the appellant's lot. That is the point in time in which an owner can be deemed to have accepted the appellant's offer. Any time before that moment, a driver can demonstrate his rejection of the appellant's offer by driving away. Those who purchase a ticket must be deemed to have accepted the appellant's contractual terms upon leaving their parked vehicle in the appellant's lot. As for those who park their vehicles but fail to pay, the act of non-payment is more consistent with the intention to breach a contract than a refusal to enter into one.

[62] Below, I will discuss whether or not Impark misrepresented the legal significance of the Federal Court of Appeal's decision in *Imperial Parking Ltd. v. Canada,* but it is convenient to note here that Justice Robertson's analysis concerns motorists or owners of vehicles whose conduct of parking a vehicle on the lot manifests acceptance of an offer by Impark. In his judgment, Justice Robertson says nothing about how as a matter of contract formation a contract would come into existence with a person, like Ms. Miceli, whose vehicle was parked by somebody else while she was somewhere else.

3. Criteria for Certification

[63] With the above factual and legal background, I turn now to the matter of whether the Plaintiffs action should be certified as a class proceeding.

[64] Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) 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.

[65] 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: *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.).

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

[67] 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; promoting the efficient use of judicial resources; and sanctioning wrongdoers to encourage behavior modification: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at paras. 26-29; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at paras. 15 and 16;

[68] 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: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at paras. 28-29.

[69] Motions for certification are procedural in nature and are not intended to provide the occasion for an exhaustive inquiry into factual questions that would be determined at a trial when the merits of the claims of class members are in issue: *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 (S.C.J.) at para. 82.

4. Cause of Action

(a.) Introduction – The First Criterion for Certification

[70] To satisfy the first criterion for certification, Ms. Graham's and Ms. Miceli's statement of claim must disclose a cause of action.

[71] The "plain and obvious" test for disclosing a cause of action from *Hunt v. Carey Canada,* [1990] 2 S.C.R. 959 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*. Thus, a claim will be satisfactory, unless it has a radical defect or it is plain and obvious that it could not succeed: *Anderson v. Wilson* (1999), 44 O.R. (3rd) 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.).

[72] 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: *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.). The pleading is read generously and a pleading will be struck out only if it is plain, obvious, and beyond a reasonable doubt that the plaintiff cannot succeed: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 25; *Cloud v. Canada (Attorney General) v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 41, 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.); *Abdool v. Anaheim Management Ltd.*, (1995), 21 O.R. (3d) 453 (Div. Ct.) at p. 469.

[73] A motions judge, however, is entitled to consider any documents specifically referred to and relied on in the pleading: *Web Offset Publications Ltd. v. Vickery* (1999), 43 O.R. (3d) 802 (C.A.); *Corktown Films Inc. v. Ontario* (1996), 34 B.L.R. (2d) 168 (Ont. Gen. Div.); *Montreal Trust Co. of Canada v. Toronto-Dominion Bank* (1992), 40 C.P.C. (3d) 389 (Ont. Gen. Div.).

(b) The Proposed Causes of Action

[74] While terse, it appears to me that Ms. Graham's and Ms. Miceli's statement of claim proposes seven causes of action; namely; (i) breach of the future performance agreement provisions of the *Consumer Protection Act, 2002*; (ii) breach of the unfair practice provisions of the *Consumer Protection Act, 2002*; (iii) unjust enrichment based on a breach of the *Consumer Protection Act, 2002*; (iv) unjust enrichment based on unconscionability; (v) unjust enrichment based on relief from a penalty (vi) unjust enrichment based on relief from forfeiture under s. 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43; and (vii) unjust enrichment based on the parking agreements being a contract of adhesion and the violation fee being unenforceable.

[75] Before analyzing each of these proposed causes of action, it is helpful at the outset to note that several of the proposed causes of action overlap or have the same unjust enrichment theme.

[76] The three elements of an unjust enrichment claim are well known: (1) the defendant being enriched; (2) a corresponding deprivation of the plaintiff; and (3) no juristic reason for the defendant's enrichment at the expense of the plaintiff. (See: *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 at para 30; *Pettkus v. Becker*, [1980] 2 S.C.R. 834 at p. 848; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 at p. 784.) In the case at bar, payment of the violation fee satisfies the first two elements and the contested element is whether that violation fee is legally enforceable. In other words, the theme of the Plaintiffs' unjust enrichment causes of action is that Impark's violation fee is unlawful and, therefore, there is no juristic reason for Impark to keep the violation fee. Each of the Plaintiffs' unjust enrichment causes of action offer a different basis for the illegality of the violation fee. The cause of action based on a violation of the unfair practice provisions of the *Consumer Protection Act, 2002* is to similar effect and has a similar theme.

[77] My analysis of these several causes of action based on unjust enrichment will, therefore, focus on the legal viability of the allegations that provide the underlying basis for the unjust enrichment claims, which is that Impark is not justified in keeping the violation fee payments. Ultimately, all of the proposed causes of action turn on whether Impark has lawfully imposed or extracted the violation fee, in which case, there will be a juristic reason for Impark's enrichment. If the violation fee, however, cannot be legally justified or is unenforceable, then Impark should repay it because Impark has been unjustly enriched.

[78] In this last regard, it should be noted that the statement of claim inaptly speaks of the remedy of rescission as the basis for the restitution of the violation fee. Rescission, however, is not available because the class members have had the benefit of the parking contracts, and apart from possibly punitive damages, there is no reason why anything other than the violation fee should be refunded to them. I, therefore, have not listed rescission (in the sense of setting aside the parking agreement) to the list of causes of action or remedies that I will now analyze.

(c) Analysis of the Proposed Causes of Action

(i) Breach of Future Performance Provisions of the Consumer Protection Act, 2002

[79] The Plaintiffs advance a cause of action predicated on the contract between the proposed class members and Impark being a "future performance agreement" under the *Consumer Protection Act, 2002*. In my opinion, however, it is plain and obvious from the statement of claim that the agreement is not a future performance agreement under the *Consumer Protection Act, 2002*.

[80] As set out above, under the *Consumer Protection Act, 2002*, a "future performance agreement" means a consumer agreement in respect of which delivery, performance or payment in full is not made when the parties enter the agreement." Under the former *Consumer Protection Act* what are now future performance agreements were described as "executory contracts."

[81] It would appear that Impark does not dispute that its parking agreements are consumer agreements - if they are made with a consumer - and Impark concedes that their parking contracts with consumers satisfy the literal meaning of the definition of a "future performance agreement" under the *Consumer Protection Act, 1992*. However, Impark argues, and I agree with this argument, that it does not follow that their parking contracts are future performance agreements simply because they are consumer agreements and "delivery, performance or payment in full is not made when the parties enter the agreement." In other words, Impark argues that the literal wording of the Act does not govern all cases of consumer contracts including its parking agreements. Then, it argues that its parking agreements are not future performance agreements. I agree.

[82] This argument is supported by *Re Livent Inc.*, (1999), 46 O.R. (3d) 458 (C.A.). In that case, the Ontario Court of Appeal ruled that the executory contract provisions of the former Act, which are identical to the future performance agreement provisions of the

current Act, cannot be applied literally, but rather the application of the future performance agreement provisions require context and an appreciation of the purposes and practical operation of the Act.

[83] The definition of executory contract is identical to what is now called a future performance agreement, and in *Re Livent Inc.*, purchasers of theatre tickets argued that their contracts with the theatre owner were "executory contracts" under the *Consumer Protection Act*. The Court of Appeal disagreed, and in a judgment written by Justice Catzman, the Court indicated that this was not a reasonable interpretation of the intention of the Legislature and would produce unrealistic results. Justice Catzman stated at para. 11 of the judgment, with my emphasis added:

> While those words [*i.e.*, the definition of "executory contract"], read literally, might admit of such an interpretation, I have no doubt that the type of transaction in the present case is one which the legislature could not reasonably have intended to fall within the contemplation of "executory contract". This is evident from a brief reference to s. 19 of the Act, which sets out the statutorily prescribed form of an executory contract. Section 19(1)(a) requires every executory contract to contain "the name and address of the seller and the buyer"; s. 19(1)(c), "the itemized price of the goods or services and a detailed statement of the terms of payment"; s. 19(1)(f), "any warranty or guarantee applying to the goods or services and, where there is no warranty or guarantee, a statement to this effect". In the same vein, s.19(2) provides that an executory contract is not binding on the buyer unless the contract is made in accordance with Part II of the Act and regulations and is signed by the parties and a duplicate original copy is in the possession of each of the parties. These are provisions that cannot realistically apply to the purchase, typically by telephone, of a ticket for a theatrical performance or to the form of ticket generated by such a purchase.

[84] See also the lower court judgment *Re Livent Inc.* (1998), 42 O.R. (3d) 501 (Gen. Div.) at para. 13.

[85] It would appear that the policy rationale for the future performance agreement provisions of the *Consumer Protection Act, 2002* and of the executory contract provisions of the former Act is that consumers should be provided with prescribed information before entering into certain types of agreement and consumers should have an opportunity to accept or decline the agreement and to correct errors immediately before entering into these types of agreement. The most obvious targets of the statute are contracts involving high pressure sales techniques. Justice Catzman for the Court of Appeal in *Re Livent Inc.* recognized, however, that it could not have been the intention of the Legislature to impose the formalities and stipulations of the *Consumer Protection Act* to all consumer contracts that satisfied the statutory definition for an executory contract, now a future performance agreement.

[86] The Act itself in s. 21(1) limits the application of the future performance agreement provisions by excluding contracts below a prescribed limit ($50) from the disclosure requirements of the Act, but in *Re Livent Inc.*, the Court of Appeal recognized

a further limitation on the application of the Act based on whether the provisions of the Act could sensibly or realistically apply to the particular type of consumer contract. In *Re Livent Inc.*, the Court recognized that the $50 monetary threshold was insufficient to restrain the literal operation of the language of the Act to inappropriate situations where the application of the Act would go too far.

[87] Thus, in *Re Livent Inc.*, theatre tickets with a value beyond the Act's threshold purchased in advance of the performance were found not to be future performance agreements. Other examples come to mind where it makes little sense to impose the requirements of the Act on what is literally a future performance agreement. A $70 call-in-order for Chinese Food to be delivered to a home is another example. "Feeding the parking meter" at curb side and purchasing parking tickets at a parking lot are agreements that most persons understand from childhood and, in my opinion, it could not have been the intention of the Legislature to require elaborate contract formalities for such contracting.

[88] The regulation for a future performance agreement enumerates 15 items of prescribed information. A review of those 15 items reveals that a motorist about to purchase the right to park his or her vehicle has no need or use for most of the information that the Act requires be disclosed. For instance, a motorist parking his or her vehicle does not needs a written contract setting out a fair and accurate description of the services to be supplied including the technical requirements related to the use of the service. A motorist parking his or her vehicle does not need information about the place where the services are to be performed, the person for whom they are to be performed, and the supplier's method of performing the services. It does not make sense to provide a motorist about to park his or her car with an opportunity to correct errors immediately before entering into the parking contract. The real point of *Re Livent Inc.* is the Court of Appeal's holding that the Legislature cannot be taken to have intended to impose the elaborate disclosure provisions of the Act for future performance agreements in circumstances where they cannot realistically apply or where they are unnecessary.

[89] The Plaintiffs submit that the *Consumer Protection Act, 2002* is remedial legislation that was intended to update legislation in light of new technologies and new realities in the marketplace that make Impark's business practices possible. They submit that *Re Livent Inc.* was decided under the former Act, is distinguishable because it did not involve a penalty or future payment from the consumer, and the case is not determinative of whether the Impark contract is a future performance agreement under the current Act. I disagree with these submissions. There is no material difference between the meaning of the definition of an executory contract under the old Act and the definition of a future performance agreement under the current Act. Other provisions of the Act are available to address unfair trade practices, including the imposition of penalties as unconscionable. In the case at bar, the use of technology has nothing to do with the determination of whether the Impark contract is a future performance agreement, and the legal problem would be the same if Impark used pre-printed tickets and its employees used a quill to fill in the ticket and hand-delivered it to the motorist.

[90] I am bound to follow the principles of *Re Livent Inc.* and determine whether the future performance agreement provisions of the Act can realistically apply. While this approach may introduce some uncertainty to the application of the statute in particular cases, it does not mean that the Act is not given a generous interpretation. It just means that the application of the Act is not without boundaries.

[91] Therefore, in the case at bar, in my opinion, applying the law from *Re Livent Inc.*, it is plain and obvious from the statement of claim that there is no cause of action for non-compliance with the future performance agreement provisions of the *Consumer Protection Act, 2002*.

(ii) Breach of the Unfair Practice Provisions of the Consumer Protection Act, 2002

[92] The Plaintiffs propose a cause of action predicated on Impark's representations with respect to the parking agreements being false, deceptive, or unconscionable representations under the *Consumer Protection Act, 2002*. The theory of this claim is that the alleged misrepresentations would constitute breaches of the unfair practice provisions of the Act giving rise to remedies to compensate the class members.

[93] In paragraph 78 of their factum, the Plaintiffs state that Impark's representations are false, misleading or deceptive or constitute unconscionable representations because: (a) Impark misrepresents that its ability to impose and enforce payment of violation fees pursuant to its contract has been approved by the Federal Court of Appeal when there is no such authority; (b) Impark misrepresents in its payment notices that unpaid amounts may be enforced through legal action, when, in reality, they do not pursue claims in Small Claims Court.

[94] In paragraph 36 of the statement of claim, the Plaintiffs provide the particulars of their misrepresentation claim. Paragraph 36 states:

> 36. Impark representations with respect to parking agreements are false, misleading or deceptive and/or constitute unconscionable representations, particulars of which are as follows:
>
> (a) Impark fails to provide class members with an opportunity to consider whether they wish to risk imposition of a violation fee as a consequence of over-staying at a lot or through failure to display a parking voucher;
>
> (b) Impark misrepresents its legal authority to charge violation fees, deceives class members with reference to "law of trespass" on violation notices and reference to a Canadian Federal Court of Appeal decision on statement notices, said to authorize the imposition of violation fees;
>
> (c) Impark represents in violation notices, statement notices and collection notices that Impark will take legal action when the violation fees charged are not enforceable in law;

> (d) Impark issues violation notices in a form intended to communicate to class members that there is an underlying municipal or governmental authority which has legitimized the violation fees.

[95] Addressing the alleged misrepresentations from the statement of claim, beginning with misrepresentation (a) found in paragraph 36 of the statement of claim, it concerns what might be described as failure to warn about the consequences of not displaying the parking ticket on the dashboard of the parked vehicles. The problem with this allegation, however, is that the statement of claim indicates that the motorist is warned.

[96] Paragraphs 13 and 14 of the statement of claim state, with my emphasis added:

> 13. Signage posted at Impark parking lots provides that space for public parking is available on the terms set out on the signs. At each lot, a rate is posted on a sign requiring persons to pay in advance the posted amount, based on an hourly flat rate. Other **signage indicates that if persons do not display a valid parking voucher or park over the time limit, a violation fee of either $68.90 or $69.55** will be charged.
>
> 14. **Parking vouchers** provided at the time parking agreements are entered into contain very little information, **identifying** only the amount paid, time allotted and **that the parking voucher must be displayed on the dashboard of the vehicle**. Parking vouchers do not indicate the amount which may be charged by Impark if a person over-stays at the lot or does not display a voucher.

[97] Paragraph 13 of the statement of claim refers to the "signage posted at Impark parking lots." The language of those signs is thus incorporated by reference into the statement of claim, and, as noted above, the language of the signs by which a contract is formed expressly states:

> If you park, but do not display a valid ticket or pass or park over the posted time limit or are parked improperly or contrary to the posted rules, the violation fee is $69.55 per day or portion thereof. If you park here in violation of these conditions, you agree to pay the violation fee. Do not park on this lot if you do not agree to these terms.

[98] In my opinion, it is plain and obvious that that there is no misrepresentation here, and thus it is plain and obvious that there is no cause of action based on the first of the four alleged misrepresentations.

[99] Alleged misrepresentation (c) found in the paragraph 36 of the statement of claim concerns Impark representing that it may take legal action when to date it has not followed up on this threat.

[100] It is plain and obvious that there is no misrepresentation here. Saying that one "may" do something while not having yet done it is not a false statement. A threat is not

made false by having no history of being carried through. Thus, it is plain and obvious that there is no cause of action based on the third of the four alleged misrepresentations.

[101] The remaining two alleged misrepresentations, which are described in paragraphs (b) and (d) of paragraph 36 of the statement of claim, may conveniently be dealt with together. The alleged misrepresentations are based on two statements. The first statement is made in the notice that is placed on the windshield of the improperly parked vehicle and the second statement is found in the letters sent to the motorist or the registered owner of the vehicle that was improperly parked. The two statements are:

> The legal authority to claim the above amount and/or have your improperly parked vehicle towed arises under the law of contract and the law of trespass.
>
> The legal authority to claim the amount due and/or have improperly parked vehicle towed arises under the law of contract. Our right to claim this amount from owners of vehicles improperly parked on facilities managed by us has been confirmed by a Canadian Federal Court of Appeal decision.

[102] In my opinion, the first statement, which does not refer to the decision of the Federal Court of Appeal, is true, and it is plain and obvious that there is no cause of action based on it. It is well known to most persons (even those that have not had the pleasure of taking first year property law at law school) that parking-lot law involves the law of bailment, the law of contract, and the law of trespass.

[103] In my opinion, however, it is not plain and obvious that the second statement is true. In my opinion, it is arguable that the Federal Court of Appeal did not on a revenue case involving GST "confirm" Impark's right to claim an amount "from owners of vehicles improperly parked on facilities managed by Impark." It should be noted that the proposed class members for this cause of action would only be the registered owners whose vehicles were parked by others on an Impark parking lot. As I noted above, there is nothing in the Federal Court of Appeal's judgment that explains how a registered owner who was not at the parking lot when his or her vehicle was parked enters into a contract.

[104] To be clear about my opinion, although, I regard it as unseemly to dress up a demand letter with a testimonial or product endorsement from the Federal Court of Appeal in the way that Impark did (and ironic given Impark's actual submissions to the Federal Court), I do not see an actionable misrepresentation beyond the statement that owners including owners who did not park the vehicle are liable in contract.

[105] The Federal Court of Appeal's reasons are based on an analysis of contract formation. The Federal Court of Appeal posits or acknowledges a contractual obligation to pay the violation fee by a person parking the vehicle. It is a small semantic leap from acknowledging the formation of a contract to confirming the enforcement of a claim in contract against the person whose conduct in parking the vehicle was an act of acceptance

of Impark's offer. In my opinion, the possible misrepresentation in the case at bar concerns only registered owners who did not park the vehicle.

[106] I wish to be clear that I am not deciding the point. Impark may be able to show that the second statement about the liability of the registered owner of the vehicle was true, but for present purposes, all I need say is that it is not plain and obvious that the Plaintiffs have not shown a reasonable cause of action based on the second statement being false and deceptive and unfair because it would make a person without privity of contract think that he or she was contractually liable to pay Impark.

[107] Impark argues that there is no misrepresentation because, with my emphasis added, s. 18 of the *Consumer Protection Act, 2002* states: "Any agreement ... entered into by a consumer **after or while** a person has engaged in an unfair practice may be rescinded by the consumer and the consumer is entitled to any remedy that is available in law, including damages." Impark argues that s. 18 does not apply to the representations made after the contract is entered into. I simply say that this is an argument to be made later by way of defence. Impark's possible defences do not negate that the Plaintiffs have shown a tenable cause of action based on an alleged misrepresentation contained in the correspondence to registered owners of vehicles that were improperly parked.

[108] I conclude that the Plaintiffs have shown a reasonable cause of action based on the false misrepresentation, unconscionable representation, and unfair practice provisions of the *Consumer Protection Act, 2002.* This claim would ground a claim for repayment of the violation fee that was paid.

(iii) Unjust Enrichment based on a Breach of the Consumer Protection Act, 2002

[109] In paragraph 59 of their statement of claim, the Plaintiffs plead an unjust enrichment claim based on a breach of the *Consumer Protection Act, 2002*, as follows:

> 59. The plaintiffs and class members state that Impark has been unjustly enriched via funds received through violation fees charged in contravention of the *OCPA*. Class members have suffered a corresponding deprivation through payment of such violation fees, with there being no juristic reason for violation fees to be paid to and retained by Impark.

[110] This proposed cause of action is essentially the same as the cause of action just discussed but framed by a claim for unjust enrichment. Relying on my analysis above concerning the unfair practice provisions of the Act, in my opinion, this is a tenable cause of action that satisfies the requirements of s. 5 (1)(a) of the *Class Proceedings Act, 1992,* provided that it is made clear that the absence of a juristic reason is a contravention of the *Consumer Protection Act, 2002* based on the alleged misrepresentation contained in the letters sent to the registered owner of the vehicle that was improperly parked on the Impark parking lot. Once again, the proposed class members with this claim would be registered owners who did not park the vehicle.

[111] The thesis of this unjust enrichment cause of action is that Impark did not have the right to extract the payment of the violation fee based on the demand made in its

demand letter. Thus, there is a wrongful transfer of monies from class members to Impark. It is worth noting that this unjust enrichment claim is not a negligent misrepresentation claim where the class member might have to prove reliance on the misrepresentation. The claim is closer to a claim for monies had and received where a payment is mistakenly made without any legal obligation to make the payment.

[112] I will return to this next point about this cause of action based on unjust enrichment, when I discuss the class definition, but this particular cause of action is potentially available to registered owners of vehicles who would not qualify as consumers under the *Consumer Protection Act, 2002.* Although this cause of action is currently pleaded as connected to the Act, the wrongdoing is not necessarily tied to the Act, because non-consumers, including corporations, might be deceived by the demand letter which suggests that there is privity of contract when there may not be any.

[113] In any event, I conclude that this claim for unjust enrichment based on a breach of the *Consumer Protection Act, 2002* satisfies the requirements of s. 5 (1) of the *Class Proceedings Act, 1992.*

(iv) Unjust Enrichment based on Unconscionability

[114] The Plaintiffs plead that the Impark parking contracts are unconscionable, a penalty, and as a forfeiture. These allegations, which purport to advance common law or equitable causes of action, including the unjust enrichment claim, are tersely made in paragraphs 52 to 55 of the Statement of Claim, which state:

> 52. Parking agreements are unconscionable in that persons entering into them have no bargaining power. The terms of parking agreements, and in particular, the violation fees, are substantially unfair.
>
> 53. Violation fees are penalties at common law. Amounts charged as violation fees do not constitute a genuine pre-estimate of damage suffered by Impark.
>
> 54. Parking agreements are contracts of adhesion. Class members have no bargaining power to negotiate or alter the terms of parking agreements.
>
> 55. The plaintiffs and class members furthermore rely upon s. 98 *Courts of Justice Act*, R.S.O. 1990, c.C-43 as amended, in particular section 98, which provides for relief from forfeiture on such terms as to compensation or otherwise as are considered just.

[115] Have the Plaintiffs in these brief paragraphs pleaded a tenable cause of action based on unconscionability?

[116] A transaction may be unfair because of a disparity in the bargaining strength of the parties. The law's concern for this problem is within the province of the equitable doctrine of unconscionable bargains. The central themes of unconscionability are a pronounced inequality of bargaining power and a substantially improvident or unfair

bargain; both factors must be present: *Titus v. William F. Cooke Enterprises Ltd.* (2007), 284 D.L.R. (4th) 734 (Ont. C.A.); *Birch v. Union of Taxation Employees, Local 70030* (2008), 93 O.R. (3d) 1 (C.A.); *Mundinger v. Mundinger*, [1969] 1 O.R. 606 (C.A.); affd. [1970] S.C.R. vi; *Black v. Wilcox* (1976), 12 O.R. (2d) 759 (C.A.); *Waters v. Donnelly* (1884), 9 O.R. 391 (Ch. Div.); *Vanzant v. Coates* (1917), 40 O.L.R. 566 (C.A.).

[117] Equity will not intervene merely because a party, acting foolishly or immoderately, has made a very bad bargain: *Brock v. Gronbach*, [1953] 1 S.C.R. 207; *Syed v. McArthur* (1984), 46 O.R. (2d) 593 (H.C.); *Laderoute v. Laderoute* (1978), 17 O.R. (2d) 700 (H.C.). There must be a stronger party who takes an unfair advantage of the circumstances that hamper the weaker party. Those circumstances may be age, impaired mental health or ability, recklessness, a weak or submissive personality, intimidation, lack of representation, ignorance, illiteracy, poverty, need, or distress.

[118] A contracting party relying on unconscionability to found his or her claim to recover what he or she paid faces a high hurdle and the party must show a grossly unfair and improvident transaction and that he or she was unfairly exploited: *Titus v. William F. Cooke Enterprises Ltd.* (2007), 284 D.L.R. (4th) 734 (Ont. C.A.); *Black v. Wilcox* (1976), 12 O.R. (2d) 759 at p. 762 (C.A.).

[119] If the circumstances of inequality exist, the court will set the transaction aside unless the stronger party seeking to uphold the transaction demonstrates that it was a fair and not an improvident transaction: *Mundinger v. Mundinger*, [1969] 1 O.R. 606 (C.A.); affd. [1970] S.C.R. vi; *Black v. Wilcox* (1976), 12 O.R. (2d) 759 (C.A.); *Vanzant v. Coates* (1917), 40 O.L.R. 566 (C.A.); *Waters v. Donnelly* (1884), 9 O.R. 391 (Ch. D.).

[120] The Ontario Court of Appeal considered the doctrine of unconscionability in *Birch v. Union of Taxation Employees, Local 70030* (2008), 93 O.R. (3d) 1 (C.A.), leave to appeal to S.C.C. ref'd [2009] S.C.C.A. 29 where by a split decision (Armstrong and Rouleau JJ.A. for the majority, Jurianz. J. dissenting), the Court upheld Justice R. Smith's decision that a provision in a union constitution (the contract between a union and its members) that authorized the union to fine two members who had crossed a picket line during a legal strike was unenforceable as unconscionable.

[121] For reasons that will become apparent in the next section of these Reasons for Decision, it is important to note that in *Birch,* the Court did not decide whether there should be some change to the law about penalty provisions and forfeiture provisions. The majority simply agreed with Justice R. Smith that the provision allowing the union to impose fines was unconscionable.

[122] For present purposes, it is not necessary to explore Justice R. Smith's reasons for concluding that there were unconscionable provisions in the agreement between the union and its members. What is important is that at paras. 44-45 of the majority judgment, the Court of Appeal emphatically made it clear that inequality of bargaining power alone does not render a contract unconscionable or unenforceable. The majority quoted Justice Robins in in *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.* (1997), 34 O.R. (3d) 1, [1997] O.J. No. 2359 (C.A.) at, pp. 11-12 that: "The question

is not whether there was an inequality of bargaining power. Rather, the question is whether there was an abuse of the bargaining power." At para. 45, Justice Armstrong stated:

> However one articulates the test for unconscionability, I am satisfied that it involves more than a finding of inequality of bargaining power between the parties to a contract. ... [A] determination of unconscionability involves a two-part analysis -- a finding of inequality of bargaining power and a finding that the terms of an agreement have a high degree of unfairness. I see little, if any, difference between a description of terms of a contract as "very unfair" or "substantially unfair". I am also of the view that "abuse of the bargaining power" identified by Robins J.A. in *Fraser Jewellers* is another way of describing substantial unfairness.

[123] In my opinion, it is plain and obvious that the facts pleaded in the statement of claim do not and could not establish a grossly improvident or unfair transaction and there is nothing pleaded to suggest that Impark took unfair advantage of its customers.

[124] The plaintiffs simply plead that the parking agreements are contracts of adhesion and class members have no bargaining power, which factors by themselves, however, are insufficient to establish unconscionability. In my opinion, it is plain and obvious that there is no high degree of unfairness and that there has been no abuse of bargaining. It is inconceivable that a court could find the Impark parking agreement an unconscionable contract simply because paying almost $70 to park a car hurts the purse. I, therefore, conclude that this proposed cause of action does not satisfy s. 5 (1) of the *Class Proceedings Act, 1992.*

(v) and (vi) Unjust Enrichment based on Relief from a Penalty or based on Relief from Forfeiture

[125] Because of the Court of Appeal's decision in *Peachtree II Associates -- Dallas L.P. v. 857486 Ontario Ltd.* (2005), 76 O.R. (3d) 362 (C.A.), leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 420, it is convenient to analyze together the Plaintiffs' unjust enrichment claim based on relief from a penalty and their unjust enrichment claim based on relief from forfeiture.

[126] In the *Peachtree II* case, in a judgment written by Justice Sharpe, the Court of Appeal held that a contract provision alleged to be a penalty under the common law or to be forfeiture provision subject to relief in equity was enforceable. In the course of deciding the case, Justice Sharpe explained the common law about penalties and the equitable law about relief from forfeiture.

[127] In the *Peachtree II* case, there was an agreement between a developer and a group of investors to acquire multi-unit residential properties. The developer, Serviceco, was the active party arranging the acquisition, and the investors' role was to provide promissory notes. The agreement between Serviceco and the investors provided that should Serviceco breach the agreement, then the investors had the remedy of treating

their promissory notes as having been paid. The investors alleged that Servicceo had failed to perform and they exercised their right to treat their promissory notes as having been paid. Serviceco disagreed, and pursuant to an arbitration agreement, the investors sought a declaration that their promissory notes had been paid. In the result, the arbitrator enforced the contract provision relied on by the investors. The arbitrator's award was affirmed on appeal to the Superior Court, and Serviceco appealed to the Court of Appeal. The only issue on the appeal was whether the judge in motions court erred by affirming the arbitrator's decision that the contract provision should be enforced.

[128] Justice Sharpe dismissed the appeal and affirmed the arbitrator's decision on the basis that the contract provision was a forfeiture clause subject to equity's jurisdiction but that in the circumstances of the case equity would not relieve against the forfeiture.

[129] For present purposes several aspects of Justice Sharpe's judgment are important. In his judgment, Justice Sharpe defines penalty clauses and forfeitures, and he describes the common law's treatment of penalty clauses and equity's treatment of forfeiture clauses. In para. 22 of his judgment, he states:

> 22. The courts of common law and equity adopted similar but distinctive rules with respect to stipulated remedy clauses that had penal consequences. The courts of common law dealt with attempts to enforce the payment of penalties while the courts of equity dealt with pleas for relief from penal forfeitures. In the oft-quoted words of Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage & Motor Co. Ltd.*, [1915] A.C. 79, 23 C.L.T. 106 (H.L.), at pp. 86-87 A.C., "The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party ..." On the other hand, a forfeiture is the loss, by reason of some specified conduct, of a right, property, or money, often held as security or part payment of the obligation being enforced under the threat of forfeiture. Like promises to pay a penalty, forfeitures often have penal consequences as the right or property forfeited by the defaulting party may bear no relation to the loss suffered by the innocent party.

[130] Justice Sharpe explains that equity's approach to forfeiture clauses is based on finding unconscionability at the time of enforcement of the forfeiture clause and that the common law's approach to penalty clauses is based on finding that at the time of contracting the penalty clause was not a genuine pre-estimate of the innocent party's anticipated damages from a breach of contract. In paras. 23-25 of his judgment, he states:

> 23. There is a venerable common law rule to the effect that the courts will not require a party to pay a genuine or true penalty on grounds of public policy. The parallel, but distinctive, equitable rule is to the effect that penal forfeitures will be relieved against where their enforcement would be inequitable and unconscionable.
>
> 24. While both doctrines have the effect of relieving the breaching party of the penal consequences of stipulated remedy clauses, in their traditional

> formulations they bear significant differences. The common law penalty rule involves an assessment of the stipulated remedy clause only at the time the contract is formed. If the stipulated remedy represents a genuine attempt to estimate the damages the innocent party would suffer in the event of a breach, it will be enforced. On the other hand, again to quote Lord Dunedin from *Dunlop, supra*, "[i]t will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could be conceivably be proved to have followed from the breach". Laskin C.J.C. adopted a virtually identical formulation (taken from *Snell's Principles of Equity*, 27th ed. (London: Sweet & Maxwell, 1973) at p. 535) in *H.F. Clarke Ltd. v. Thermidore Corp. Ltd.*, [1976] 1 S.C.R. 319, 54 D.L.R. (3d) 385, at p. 338 S.C.R. Although the common law defined penalties in terms of unconscionability, that assessment is to be made at the time the contract was formed. The common law doctrine did not include any discretion to be exercised in the light of circumstances that may exist at the time of breach.
>
> 25. Equity, on the other hand, considers the enforceability of forfeitures at the time of breach rather than at the time the contract was entered. Equity also looks beyond the question of whether or not the stipulated remedy has penal consequences to consider whether it is unconscionable for the innocent party to retain the right, property, or money forfeited. As explained by Denning L.J. in *Stockloser v. Johnson*, [1954] 1 All E.R. 630, [1954] 1 Q.B. 476 (C.A.), at p. 638 All E.R.: "Two things are necessary: first, the forfeiture clause must be of a penal nature, in the sense that the sum forfeited must be out of all proportion to the damage; and, secondly, it must be unconscionable for the seller to retain the money."

[131] Justice Sharpe provided this elaborate analysis because Serviceco argued that the arbitrator had erred because having found that the contract provision releasing or discharging the promissory notes was penal in nature, he ought to have ruled the contract provision unenforceable as not being a genuine pre-estimate of damages. Justice Sharpe's response to the argument was to characterize the contract provision as a forfeiture clause that was not unconscionable. Justice Sharpe's *obiter dicta*, however, indicates that had he concluded that the contract provision was a penalty, it would have been enforceable because the penalty clause was not unconscionable even if it was not a genuine pre-estimate of the innocent party's damages from a breach of contract.

[132] In very strong *obiter dicta*, Justice Sharpe states that equity's approach is to be preferred for both forfeiture clauses and for penalty clauses and that relief should be granted in both cases based on principles of unconscionability. Thus, he states in paragraphs 31 -34:

> 31. First, it seems to me more apt to describe deeming the notes paid as being a forfeiture rather than the payment of a penalty. .... Admittedly, in the case at bar, we are to some extent looking at two sides of the same coin, but as I shall explain, there is good authority to the effect that courts should,

if at all possible, avoid classifying contractual clauses as penalties and, when faced with a choice between considering stipulated remedies as penalties or forfeitures, favour the latter.

32. Second, I agree with Professor Waddams' observation in *The Law of Damages*, looseleaf (Aurora: Canada Law Book Inc., 1991) at para. 8.310 that as there is often little to distinguish between the two types of clauses and that there is much to be said for assimilating both under unconscionability. The effect of assimilation would be "to provide a more rational framework for the decisions of both forfeitures and penalties". Unconscionability is also the direction suggested by the dictum of Dickson J. in *Elsley v. J.G. Collins Insurance Agencies Ltd.*, [1978] 2 S.C.R. 916, 83 D.L.R. (3d) 1, at p. 937 S.C.R.: "It is now evident that the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum." As pointed out by the appeal judge, this would also appear to be the direction of s. 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C .43: "A court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise, as are considered just." All of this suggests to me that courts should, whenever possible, favour analysis on the basis of equitable principles and unconscionability over the strict common law rule pertaining to penalty clauses.

33. Third, there is good authority for the proposition that the strict rule of the common law refusing to enforce penalty clauses should not be extended. The English Court of Appeal has stated in *Else, supra*, at para. 30 (per Evans L.J.) that "in modern conditions the courts should not seek to extend the common law rule" and at para. 58 (per Hoffman L.J.) "the penalty doctrine, being an inroad upon freedom of contract which is inflexible compared with the equitable rules of relief against forfeiture, ought not to be extended". A similar view was expressed by Diplock L.J. in *Robophone Facilities Ltd. v. Blank*, [1966] 1 W.L.R. 1428, [1966] All E.R. 128 (C.A.), at p. 1447 W.L.R., stating that courts should not be "astute to descry 'a penalty clause' in every provision of a contract which stipulates a sum to be payable by one party to the other in the event of a breach by the former".

34. This is closely related to the fourth factor, namely, the policy of upholding freedom of contract. Judicial enthusiasm for the refusal to enforce penalty clauses has waned in the face of a rising recognition of the advantages of allowing parties to define for themselves the consequences of breach. As I have already noted, in *Elsley, supra*, Dickson J. labelled the penalty clause doctrine as "a blatant interference with freedom of contract", a sentiment echoed by the English Court of Appeal in *Else*. The arguments favouring the enforcement of stipulated remedy clauses on this score are recognized by Fridman, *The Law of Contract in Canada*, 4th ed. (Toronto:

Carswell, 1999) at p. 817 and are especially well put by Waddams, *supra*, at para. 8.330:

> It is useful to remember that the jurisdiction to strike down penalty clauses represents an exception to a general principle of freedom of contract. The force of the general principle should not be underestimated. There are strong arguments for enabling parties to set their own value on performance. The power to do so gives flexibility to the contracting process; it enables the promisor to offer an assurance of performance while limiting liability for consequential damages and thereby making the cost of breach predictable. It enables the promisee to avoid the cost of securing compensation by litigation and the risks of undercompensation that may be caused by the legal restrictions on damages, such as remoteness, certainty of proof, mitigation, and failure to recognize intangible losses; it reduces the cost to the parties and to the state of settling a dispute after breach; it enables the promisee to purchase insurance against default from the party in the best position to provide it at the lowest cost. A further point is that the striking down of the clause may represent an injustice to the promisee for the price of performance will have been agreed in the light of all the promisor's obligations, including the promise to pay an agreed sum on breach; if that promise is struck down, the promisee does not receive what has been paid for. (Footnote omitted)

[133] Moreover, in paras. 26-29 of his judgment, Justice Sharpe rejected the proposition that a penal provision is necessarily unenforceable. Relying on the Supreme Court of Canada's judgment in *Dimensional Investments Ltd. v. Canada*, [1968] S.C.R. 93 at p. 100 and the English Court of Appeal's decision in *Else (1982) Ltd. v. Parkland Holdings Ltd.*, [1993] E.W.J. No. 4674 (C.A.), he stated that even if a contract provision imposes a penalty rather than a genuine pre-estimate of damage, it does not automatically follow that the clause would not be enforced. As already noted above, he came back to this theme in paragraph 32 of his judgment, where he quoted the dictum of Dickson J. in *Elsley v. J.G. Collins Insurance Agencies Ltd.*, [1978] 2 S.C.R. 916, 83 D.L.R. (3d) 1, at p. 937 S.C.R.: "It is now evident that the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum."

[134] In *Birch v. Union of Taxation Employees, Local 70030*, *supra*, the majority of the panel struck down a penalty provision as being unconscionable. The majority noted without disapproval Justice Sharpe's *obiter dicta* in *Peachtree II Associates* that the common law rule about penalty clauses should be subsumed by equity's approach to unconscionability, but the majority concluded that it was not necessary to decide the point because in any event the doctrine of unconscionability was available to strike down penalty clauses.

[135] I, however, would apply the reasoning of *Peachtree II Associates -- Dallas L.P. v. 857486 Ontario Ltd.*, *supra*, and of Justice Dickson in *Elsley v. J.G. Collins Insurance*

Agencies Ltd. to the circumstances of this case and allow unconscionability to govern the enforceability of penalty clauses. In my opinion, it is plain and obvious from the statement of claim that the violation fee - be it a penalty cause or be it a forfeiture clause - is not unconscionable. It is enforceable and provides a juristic reason for Impark's enrichment. As explained in the previous section of these Reasons for Decision, the violation fee is not grossly improvident or unfair and there is nothing pleaded to suggest that Impark took advantage of its customers.

[136] In arriving at the above opinion, it is not necessary to determine whether the violation fee is a genuine pre-estimate of Impark's damages. It is also not necessary to classify the violation charge as a penalty clause or as a forfeiture provision because the approach of determining the clauses' enforceability based on principles of unconscionability would apply to both types of clause.

[137] I also note that this approach to penalty clauses and forfeiture clauses is consistent with the contemporary approach of the law to exculpatory provisions, which, like penalties and forfeiture clauses, may be regarded as a harsh or tough contract provision. The recent cases reveal that courts rarely declare contract provisions unenforceable and do not generally interfere with freedom of contract. See *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] 1 S.C.R. 69.

[138] In arriving at the above opinion, it is also not necessary to comment about another argument by Impark that was advanced to counter the Plaintiffs' claims based on relief from penalty clauses or from forfeiture clauses. Relying on the British Columbia Court of Appeal decision in *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp.-Canada*, [2007] B.C.J. No. 265 (C.A), Impark argued that the violation fee was a price term of the contract and neither a penalty or a forfeiture. My opinion, however, accepts that the violation fee is either a penalty or a forfeiture clause but concludes that it is not unconscionable and therefore it is enforceable.

[139] I conclude that the proposed causes of actions based on the violation fee being a penalty clause or a forfeiture do not satisfy s. 5 (1) of the *Class Proceedings Act, 1992.*

(vii) Unjust Enrichment based on the Parking Agreements Being a Contract of Adhesion

[140] The Plaintiffs' last purported cause of action is built upon the principles set out in the Ontario Court of Appeal's decision in *Tilden Rent-A-Car Co. v. Clendenning* (1978) 18 O.R. (2d) 601 (C.A.) and the terse material facts that parking agreements are contracts of adhesion and class members have no bargaining power to negotiate or alter the terms of parking agreements.

[141] In this well-known case, Mr. Clendenning rented a car from Tilden Rent-A-Car Co. and purchased a collision damage waiver, under which he would not be liable for damage to the vehicle during its rental. He signed the rental contract without reading it and without knowing that on the back of the standard form, in fine and faint print, the collision damage waiver was conditional on the vehicle not being operated by any person

who had consumed intoxicating liquor, whatever be the quantity. The rented car was damaged while being driven by Mr. Clendenning, who had consumed some alcohol. In an action by Tilden Rent-A-Car to recover property damages from Mr. Clendenning, a majority of the Ontario Court of Appeal held that as a matter of contract formation, the exclusion to the collision damage waiver was not enforceable and, therefore, the trial judge had been correct in dismissing Tilden Rent-A-Car's action.

[142] The principle to be taken from the *Tilden Rent-A-Car Co. v. Clendenning* decision is found in the following passage from the judgment of Justice Dubin:

> In modern commercial practice, many standard form printed documents are signed without being read or understood. In many cases the parties seeking to rely on the terms of the contract know or ought to know that the signature of a party to the contract does not represent the true intention of the signer, and that the party signing is unaware of the stringent and onerous provisions which the standard form contains. Under such circumstances, I am of the opinion that the party seeking to rely on such terms should not be able to do so in the absence of first having taken reasonable measures to draw such terms to the attention of the other party, and, in the absence of such reasonable measures, it is not necessary for the party denying knowledge of such terms to prove either fraud, misrepresentation or *non est factum*.

[143] Purporting to apply the authority of *Tilden Rent-A-Car Co. v. Clendenning* to the circumstances of the case at bar, it seems that the theory of the Plaintiffs' cause of action is that the parking contract is a contract of adhesion and since Impark did not take reasonable steps to draw the violation fee to the attention of motorists using its parking lots, therefore, Impark cannot enforce the violation fee.

[144] Impark conceded that individual motorists might challenge that the Impark signs were insufficient to draw the violation fee to their individual attention but there would be no common issue for this cause of action. In my opinion, however, it is plain and obvious that this cause of action is untenable in any event and does not satisfy the requirements of s. 5 (1) of the *Class Proceedings Act, 1992*. There are two fatal flaws.

[145] First, although some terms of the Impark agreement, for example, the term negating or exculpating responsibility for lost, theft, or damage to the vehicle, might arguably need to be pointed out, the violation fee is not a provision that needs to be pointed out as something that might be contrary to the reasonable expectations of the parties. In *Tilden Rent-A-Car Co. v. Clendenning*, Mr. Clendenning thought he was purchasing a collision damage waiver, and while he might have reasonably anticipated that he would be liable if he drove while impaired, it was onerous and stringent to exclude the waiver based on a zero tolerance to liquor. To impose this exclusion that was inconsistent with what he intended to purchase, it had to be pointed out to Mr. Clenndenning. In contrast, it can hardly come to a surprise to a motorist that a high price will have to be paid if he or she parks a vehicle at a commercial parking lot and does not pay properly. While the cost may be higher than a municipal parking ticket, it will come

as no surprise to the motorist that the cost will be considerably higher than had the cost of parking been properly paid.

[146] In *Imperial Parking Ltd. v. Canada, supra*, Justice Robertson addressed the reasonableness of Impark's violation fee and stated at para. 17:

> The second ground for rejecting the appellant's submission is that it is premised on the belief that no reasonable person would agree to the contractual terms set out in the appellant's signage. The inference being drawn by the appellant is that the terms of the contract are somehow unreasonable. The fact of the matter is that overstaying a parking meter in the City of Ottawa costs $25 and the possibility of one's vehicle being towed remains open. In the present case, the reality is that motorists who overstay in one of the appellant's lots pay a minimum of $25 and a maximum of $50 and the same holds true for those who abuse the honour system by failing to purchase a ticket at the outset. Those who remain undeterred and decide to gamble cannot complain if issued with a violation notice or if their vehicle is ultimately towed. Having regard to the legitimate business interests of the appellant when operating a totally automated parking lot, and the inherent difficulty in conducting business on the honour system, it is not obvious to me that the terms set out at the entrance to the appellant's lots are either unconscionable or unreasonable. Arguably, they are intended to serve the legitimate business purpose of encouraging drivers to pay at the outset.

[147] Second, the Plaintiffs plead in their statement of claim that Impark's signage indicates that if persons do not display a valid parking voucher or park over the time limit, a violation fee of either $68.90 or $69.55 will be charged. Thus, the plaintiffs actually plead that the violation fee is pointed out, and there is no allegation that the signs are not a reasonable measures to draw the violation fee to the attention of motorists using the parking lot. Thus, the pleading does not leave room for the operation of the principles from *Tilden Rent-A-Car Co. v. Clendenning.*

[148] I, therefore, conclude that there is no viable unjust enrichment claim based on the parking agreements being a contract of adhesion and this proposed cause of action does not satisfy s. 5 (1) of the *Class Proceedings Act, 2002.*

[149] Because of the argument made by Impark in its factum, I should point out that had I determined that there was a cause of action based on the parking agreements being a contract of adhesion, I would have agreed with Impark's argument that this cause of action wanted for a common issue because a determination of the cause of action would depend upon the idiosyncratic circumstances of each class member at each parking lot operated by Impark and whether the class members were alert or alerted to the violation fee by the signage or by past experience. This absence of a common issue would mean that this cause of action would fail the criterion for a common issue and the criterion of a preferable procedure.

5. Identifiable Class

[150] I have determined that the Plaintiffs have shown a reasonable cause of action based on a breach of the unfair practice provisions of the *Consumer Protection Act, 2002* or based on the same breach grounding an unjust enrichment claim. I turn now to the second criteria of an identifiable class.

[151] 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; (3) it describes who is entitled to notice: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).

[152] 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: *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.).

[153] Class membership identification is not commensurate with the elements of the cause of action; there simply must be a rational connection between the class member and the common issue(s): *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 (S.C.J.) at para. 32, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Div. Ct.).

[154] As already noted above, the proposed class definition is as follows:

> All persons who parked a vehicle or whose vehicle was parked at a parking lot in Ontario owned and/or operated by Impark and who were charged and paid violation fees to Impark.

[155] In my opinion, for the reasons that follow, the above class definition is not acceptable. However, the class definition can be revised to satisfy the second criteria for certification. The class definition that satisfies the requirements of the Act is as follows:

> The class is comprised of a registered owner of a vehicle:
>
> (a) whose vehicle was parked at an Impark parking lot in Ontario between May 29, 2007 and September 1, 2010 (the date of the certification motion);
>
> (b) who was not the driver or a passenger in the vehicle that was parked on the Impark parking lot;
>
> (c) who received from Impark a written demand for payment of a violation fee that stated: "Our right to claim this amount from owners of vehicles improperly parked on facilities managed by us has been confirmed by a Canadian Federal Court of Appeal decision;" and

(d) who paid the violation fee in whole or in part.

[156] The amended definition of the class is rationally connected to the cause of action and the common issues discussed below, and, in my opinion, the definition satisfies the requirements of a class definition and is not over or under-inclusive.

[157] I have added the qualifier that excludes registered owners who were passengers because their conduct in not directing their driver to not park at the Impark lot is conduct that indicates that they personally were prepared to accept Impark's offer to form a contract to park their vehicle.

[158] The amended definition responds to Impark's criticism that the proposed definition wants for a temporal qualifier and would include statute-barred claims. I agree with Impark's criticism of the Plaintiffs' original definition, but the amended definition excludes statute-barred claims.

[159] The *Limitations Act, 2002*, S.O. 2002 c. 24, Sch. B, ss. 4-5 precludes the commencement of claims after the second anniversary of the date on which a claim was discovered, which in the case at bar would arise on the day that payment was made to Impark. Since the statement of claim was issued on May 28, 2009, all claims by Ontario residents who made such payment on or before May 29, 2007 would be statute-barred.

[160] The discoverability principle governs the commencement of a limitation period and stipulates that a limitation period begins to run only after the plaintiff has the knowledge, or the means of acquiring the knowledge, of the existence of the facts that would support a claim for relief: *Kamloops v. Nielson* (1984), 10 DLR (4th) 641 (S.C.C.); *Central Trust Co. v. Rafuse* (1986), 31 DLR (4th) 481 (S.C.C.); *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549. Thus, a limitation period commences when the plaintiff discovers the underlying material facts or, alternatively, when the plaintiff ought to have discovered those facts by the exercise of reasonable diligence. The circumstance that a potential claimant may not appreciate the legal significance of the facts does not postpone the commencement of the limitation period if he or she knows or ought to know the existence of the material facts, which is to say the constitute elements of his or her cause of action. Error or ignorance of the law or legal consequences of the facts does not postpone the running of the limitation period: *Coutanche v. Napoleon Delicatessen* (2004), 72 O.R. (3d) 122 (C.A.); *Calgar v. Moore*, [2005] O.J. No. 4606 (S.C.J.); *Milbury v. Nova Scotia (Attorney General)* (2007), 283 D.L.R. (4th) 449 (N.S.C.A.); *Hill v. South Alberta Land Registration District* (1993), 100 D.L.R. (4th) 331 (Alta. C.A.).

[161] A class member would have discovered all the facts that would support his or her a claim for relief as of the date that he or she received the demand that asserted that "[Impark's] right to claim [the violation fee] from owners of vehicles improperly parked on facilities managed by us has been confirmed by a Canadian Federal Court of Appeal decision."

[162] Impark submits that the temporal definition of the class should be further shortened to begin the class period on May 29, 2008, which recognizes that for claims

under the *Consumer Protection Act, 2002* there is a one-year notice period prescribed by s. 18 of the Act. I do not agree, however, with this submission for two reasons.

[163] First, as the above discussion reveals, the claim based on a violation of the unfair practice provisions of the *Consumer Protection Act, 2002* has the alternative of a claim based on unjust enrichment that would not depend upon the class member being a consumer under the Act. As already observed, assuming without holding that the demand letters are misrepresentations, then registered owners, as such, would be the victims of the misrepresentation. Thus, upon analysis, the notice period under the Act is meaningless because the class members would have a claim independent of the *Consumer Protection Act* but subject to the limitation period under the *Limitations Act, 2002.*

[164] Second, under s. 18 (15) of the *Consumer Protection Act, 2002*, "if a consumer is required to give notice under this Part in order to obtain a remedy, a court may disregard the requirement to give the notice or any requirement relating to the notice if it is in the interest of justice to do so." In the circumstances of this case, I would exercise the discretion to disregard the requirement to give notice in the interests of justice. In my view, there is enough on the record for the court to have grounds to exercise its discretion globally.

[165] For their part, the Plaintiffs relying on the recent Court of Appeal decision in *Everding v. Skrijel* (2010), 100 O.R. (3d) 641 (C.A.) submit that the application of any limitation period should be raised by a defence pleading and left to individual issues trials because it is an individual issue whether the Class Members claims have been discovered as that term is defined in s. 5 of the *Limitations Act.*

[166] I disagree, *Everding* was a case about the operation of the discoverability principle under the no-fault automobile insurance scheme where the plaintiff's cause of action for a soft-tissue injury from a motor vehicle accident had a prescribed monetary threshold that would make it problematic for a plaintiff to know whether he or she had a claim worth pursuing. In the case at bar, the Class Members would or ought to have discovered the facts of their unjust enrichment claim at the moment that they received what may or may not turn out to be an unlawful demand for payment of the violation fee. As of that date in accordance with the language of paragraph 5 (1)(iv) of the *Limitations Act, 2002*, they knew or ought to have known that a "proceeding would be an appropriate means to seek a remedy."

[167] The amended definition with the temporal qualifier satisfies the purposes of a class definition, and it appears that it may be relatively easy to determine from Impark's records who are the class members, given that Impark should have records of the class members who were the Impark postal correspondents who paid the violation fee in whole or in part.

[168] Impark argues, however, that the class definition should also exclude those class members who compromised or agreed to pay a reduced violation fee. I disagree. Assuming that a registered owner paid the violation fee in whole or in part but it is

determined at the common issues that he or she had no contractual relationship with Impark, then the unjust enrichment claim would be sound because the settlement or accord and satisfaction would be tainted by the factor that one or both parties were mistaken that there was an outstanding debt to be compromised. Thus, the registered owners who paid less than the highest violation fee should not be excluded from class membership.

6. Common Issues

[169] Section 1 of the *Class Proceedings Act, 1992* defines "common issues" as: (a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[170] 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: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 18.

[171] For an issue to be common, it cannot be dependent on individual findings of fact that have to be made with respect to each individual claimant: *Williams v. Mutual Life Assurance Co. of Canada*, [2000] O.J. No. 3821 (Sup. Ct.) at para. 39 (S.C.J.), aff'd [2001] O.J. No. 4952 (Div. Ct.), aff'd [2003] O.J. No. 1160 and 1161 (C.A.).

[172] The focus of the analysis of whether there is a common issue is not on how many individual issues there might be but whether there are issues the resolution of which would be necessary to resolve each class member's claim and which could be said to be a substantial ingredient of those claims: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 55, 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.).

[173] The fundamental aspect of a common issue is that the resolution of the common issue will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 39.

[174] For an issue to be common, it is not essential that the class members be identically situated vis-à-vis the opposing party or benefit from the successful prosecution of the action to the same extent: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at paras. 39-40.

[175] The comparative extent of individual issues is not a consideration in the commonality inquiry, although it is a factor in the preferability assessment: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 65, 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.); *Rumley v. British Columbia* (sub. nom. *L.R. v. British Columbia*), [2001] 3 S.C.R. 184 at para. 33.

[176] The core of a class proceeding is the element of commonality; there must be commonality in the actual wrong that is alleged against the defendant and some evidence to support this: *Frohlinger v. Nortel Networks Group*, [2007] O.J. No. 148 at para. 25;

Fresco v. Canadian Imperial Bank of Commerce, [2009] O.J. No. 2531 (S.C.J.) at para. 21.

[177] Ms. Graham and Ms. Micelli proposed the following common issues:

(a) Are parking agreements "consumer agreements" as defined in s.1 of the *Consumer Protection Act, 2002*?

(b) Do parking agreements constitute "future performance agreements" as defined in s. 1 of the *Consumer Protection Act, 2002*?

(c) If so, does the potential payment under parking agreements exceed $50.00?

(d) Do parking agreements contravene the requirements of s. 5 of the *Consumer Protection Act, 2002*?

(e) Do parking agreements contravene the requirements of s. 22 of the *Consumer Protection Act, 2002*?

(f) Do parking agreements contravene the requirements of s. 24 and 25 of Ont. Reg. 17/05 made pursuant to *Consumer Protection Act, 2002*?

(g) Has Impark engaged in unfair practices in contravention of ss. 14, 15, and 17 of the *Consumer Protection Act, 2002*?

(h) Are parking agreements rescinded pursuant to s. 18 of the *Consumer Protection Act, 2002*, or alternatively, are parking agreements not binding pursuant to s. 93 of the *Consumer Protection Act, 2002*?

(i) Are class members entitled to relief from forfeiture in connection with parking agreements, pursuant to s. 98 of the *Courts of Justice Act*, R.S.O 1990, c. 43?

(j) Do violation fees constitute illegal charges and/or payments pursuant to s. 98 of the *Consumer Protection Act, 2002*?

(k) Are violation fees penalties at common law?

(l) Has Impark been unjustly enriched via funds received as violation fees?

(m) If so, have class members suffered a corresponding deprivation through such payment of violation fees?

(n) If so, is there a juristic reason for violation fees paid to be retained by Impark?

(o) Are violation fees received by Impark held in trust for the benefit of Class Members?

(p) If parking agreements contravene the *Consumer Protection Act, 2002* and/or its regulations, is Impark liable to Class Members for Damages?

(q) If so, in what amount?

(r) If violation fees contravene the *Consumer Protection Act, 2002*? and/or are penalties, or if Impark has been unjustly enriched through receipt of violation fees, is it liable to class members for damages?

(s) If so, in what amount?

(t) Does the conduct of Impark warrant imposition of punitive damages?

(u) If so, in what amount?

(v) If violation fees contravene the *Consumer Protection Act, 2002* and/or are penalties, or if Impark has been unjustly enriched through receipt of violation fees must Impark provide an accounting of all proceeds received through collection of violation fees?

(w) If violation fees contravene the *Consumer Protection Act, 2002* and/or are penalties, or if Impark has been unjustly enriched through receipt of violation fees should this Court impose a permanent injunction restraining Impark from collecting further violation fees?

[178] My findings above about what causes of action are certifiable entails that questions (a), (b), (c), (d), (e), (f), (h), (i), (j), (k), (p), (q), (r), (s), (v), and (w) are not certifiable as common issues under the *Class Proceedings Act, 1992*.

[179] With respect to questions (t) and (u), for the reasons that I expressed in *Robertson v. Medtronic*, [2009] O.J. No. 4366 (S.C.J), affd. [2010] O.J. No. 1479 (Div. Ct.), I do not think that the case at bar is an appropriate case for making the entitlement to punitive damages or the quantification of punitive damages common issues.

[180] My findings about what causes of action are certifiable and about the appropriate class definition means that questions (g), (l), (m), (n) and (o) can be restated as two common issues as set out below.

[181] Recognizing that the class definition has an effect on commonality, I conclude that for the above class definition, the following three common questions satisfy the third criteria for certification:

(1) Has Impark by its correspondence to Class Members engaged in unfair practices in contravention of ss. 14, 15, and 17 of the Consumer Protection Act, 2002?

(2) Is Impark liable to Class Members for unjust enrichment based on its receipt of violation fees from Class Members in whole or in part?

(3) Are violation fees received by Impark held in trust for the benefit of Class Members?

[182] I have certified the question about whether the violation fees are held in trust as a common issue because a constructive trust may be a remedy for unjust enrichment.

[183] Before the 26 proposed common issues were reduced to these three, Impark strenuously argued that the individual issues associated with contract formation and the elements of unconscionability and penalties would overwhelm the proposed common issues and that the proposed questions would not achieve sufficient economies to satisfy the prerequisites of the common issue criterion. This argument, which really is better placed as an aspect of the preferable procedure analysis, fails when applied to the above three questions, and it fails as an aspect of the preferable procedure analysis. Determining the above three questions will substantially advance the litigation and the individual issues, if any, will not overwhelm the common issues.

[184] Impark has not pleaded its defence, but there would not be any individual issues to be tried if Impark succeeds in showing at the common issues trial that there was no false statement in its demand letter and that a contract was formed with registered owners who had no part in parking a vehicle at Impark's parking lots.

[185] If Impark fails at the common issues trial, apart from proving that a class member was not the driver or a passenger and determining precisely what amount was paid for the violation fee, there would be no individual issues to be tried.

7. Preferable Procedure

[186] 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: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at paras. 73-75, leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 50.

[187] Preferability captures the ideas of whether a class proceeding would be an appropriate method of advancing the claim and whether it would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) at para. 69, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158.

[188] The determination of preferable procedure involves two major tests. The first test is whether a class proceeding would be a fair, efficient, and manageable procedure. The second test is whether a class proceeding is preferable to any alternative method of resolving the class member's claims. See *Fischer v. IG Investment Management Ltd.*, [2010] O.J. No. 112 (S.C.J.).

[189] 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): *Chadha v. Bayer Inc.* (2001), 54 O.R. (3d) 520 (Div. Ct.) at para. 16, aff'd (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. ref'd, [2003] S.C.C.A. No. 106.

[190] 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: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) at para. 69, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158.

[191] In my opinion, the class proceeding that emerges from the crucible of the first three criteria also satisfies the preferable procedure criterion.

[192] Impark's arguments that a class action would not be the preferable procedure because the individual issues would overwhelm the common issues (which arguments would have had had some traction had it been necessary to consider the individual and idiosyncratic elements of unconscionability, relief from forfeiture, and contract formation), slip away. As noted above, depending on Impark's defence, which has not yet been pleaded, the only individual issues would be whether the registered owner was the driver or passenger of the vehicle parked at the Impark lot and proof that the violation fee was paid in whole or part.

[193] The individual claims in this case are small and would be uneconomic to litigate and a class action provides access to justice, judicial economy, and behaviour modification, if that is necessary.

[194] The dispute resolution system offered by Impark is not an alternative for many reasons, but most especially because the system assumes that Impark has done no wrong, which is precisely the issue that needs to be determined by a class action.

[195] The fourth criterion for certification has been satisfied.

8. Representative Plaintiff

[196] 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: *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.).

[197] 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: *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. 1397 (S.C.J.) at para. 55.

[198] 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: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 41.

[199] Unfortunately, in the case at bar, it is my opinion, that neither Ms. Miceli nor Ms. Graham are qualified to be a representative plaintiff.

[200] Ms. Miceli is disqualified because she would not be a class member. She did not pay any violation fee. She has no cause of action upon which to base her claims for ancillary relief including injunctions and declarations. Ms. Graham is also not a class member. Although she is a registered owner that received a demand letter from Impark, she herself had parked the vehicle at the Impark parking lot and her conduct can be taken as acceptance of Impark's offer to provide parking. As I have already explained she does not have a cause of action based on unconscionability, want of contract formation, violation of the *Consumer Protection Act, 2002*, or relief from penalties or forfeitures.

[201] There is, however, undoubtedly Class Members with claims and, therefore, I will certify the class action conditional on the substitution of a new representative plaintiff to be added by motion on notice to Impark or on consent of the parties.

[202] The new representative plaintiff will have to prepare a new litigation plan, and it makes sense that the new plan be prepared after Impark has delivered its statement of defence. I have no doubt that a litigation plan can be formulated for this class proceeding and if the parties cannot agree, I will settle the plan by motion on notice to Impark.

[203] It is unfortunate that Ms. Miceli and Ms. Graham are disqualified as representative plaintiffs, but the Ontario Act requires that the representative plaintiffs be a member of the class.

[204] Notwithstanding Impark's arguments, I have no doubt about the Plaintiffs' sincere believes that Impark's actions are illegal (which remains to be determined), and I have no doubt that they would have well served the class members as representative plaintiffs and that to date they have well served the class members that have claims that will go forward to a common issues trial.

9. Gatekeeping and the Holistic Approach to Certification

[205] Having regard to the outcome of this motion, this is not the case to discuss the gatekeeping role played by the five certification criteria and whether those criteria should be augmented by a holistic approach that would measure whether it was a "good" class action that should be certified or a "bad" class action that would not serve the purposes of the class proceedings legislation and should not be certified.

[206] I simply say that I have not applied a holistic approach. Rather, I have attempted to measure the proposed class action against the various statutorily mandated criteria and I have come to a conclusion that there is an action worthy of certification as a class proceeding albeit a narrower action than proposed by the Plaintiffs.

10. Conclusion

[207] For the above reasons, the motion for certification is granted.

[208] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Plaintiffs within 20 days of the release of these Reasons for Decision followed by the Impark's submissions within a further 20 days.

Perell, J.

Released: September 16, 2010

Schedule "A"

Excerpts from the Consumer Protection Act, 2002

In advancing their claims, Ms. Graham and Ms. Miceli rely on ss. 1, 5, 14, 15, 17, 21 and 22 of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, schedule A. Sections 18, 23, 93, 100, and 101 of the Act are also relevant. Thus, for present purposes, the relevant sections of the Act are as follows:

1. In this Act,

"consumer" means an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes;

"consumer agreement" means an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment;

"future performance agreement" means a consumer agreement in respect of which delivery, performance or payment in full is not made when the parties enter the agreement;

Disclosure of information

5.(1) If a supplier is required to disclose information under this Act, the disclosure must be clear, comprehensible and prominent.

Delivery of information

(2) If a supplier is required to deliver information to a consumer under this Act, the information must, in addition to satisfying the requirements in subsection (1), be delivered in a form in which it can be retained by the consumer.

False, misleading or deceptive representation

14. (1) It is an unfair practice for a person to make a false, misleading or deceptive representation.

Examples of false, misleading or deceptive representations

(2) Without limiting the generality of what constitutes a false, misleading or deceptive representation, the following are included as false, misleading or deceptive representations: ....

6. A representation that the goods or services are available for a reason that does not exist. ....

8. A representation that the goods or services or any part of them are available or can be delivered or performed when the person making the representation knows or ought to know they are not available or cannot be delivered or performed.

9. A representation that the goods or services or any part of them will be available or can be delivered or performed by a specified time when the person making the representation knows or ought to know they will not be available or cannot be delivered or performed by the specified time. ....

11. A representation that a specific price advantage exists, if it does not. ....

13. A representation that the transaction involves or does not involve rights, remedies or obligations if the representation is false, misleading or deceptive.

14. A representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive.

15. A representation that misrepresents the purpose or intent of any solicitation of or any communication with a consumer.

16. A representation that misrepresents the purpose of any charge or proposed charge. ....

Unconscionable representation

15. (1) It is an unfair practice to make an unconscionable representation.

Same

(2) Without limiting the generality of what may be taken into account in determining whether a representation is unconscionable, there may be taken into account that the person making the representation or the person's employer or principal knows or ought to know, ...

(b) that the price grossly exceeds the price at which similar goods or services are readily available to like consumers; ...

(f) that the terms of the consumer transaction are so adverse to the consumer as to be inequitable; ...

(g) that a statement of opinion is misleading and the consumer is likely to rely on it to his or her detriment; or ....

Unfair practices prohibited

17. (1) No person shall engage in an unfair practice.

One act deemed practice

(2) A person who performs one act referred to in section 14, 15 or 16 shall be deemed to be engaging in an unfair practice.

Rescinding agreement

18. (1) Any agreement, whether written, oral or implied, entered into by a consumer after or while a person has engaged in an unfair practice may be rescinded by the consumer and the consumer is entitled to any remedy that is available in law, including damages.

Remedy if rescission not possible

(2) A consumer is entitled to recover the amount by which the consumer's payment under the agreement exceeds the value that the goods or services have to the consumer or to recover damages, or both, if rescission of the agreement under subsection (1) is not possible,

(a) because the return or restitution of the goods or services is no longer possible; or

(b) because rescission would deprive a third party of a right in the subject-matter of the agreement that the third party has acquired in good faith and for value.

Notice

(3) A consumer must give notice within one year after entering into the agreement if,

(a) the consumer seeks to rescind an agreement under subsection (1); or

(b) the consumer seeks recovery under subsection (2), if rescission is not possible.

Form of notice

(4) The consumer may express notice in any way as long as it indicates the intention of the consumer to rescind the agreement or to seek recovery where rescission is not possible and the reasons for so doing and the notice meets any requirements that may be prescribed.

Delivery of notice

(5) Notice may be delivered by any means.

When notice given

(6) If notice is delivered other than by personal service, the notice shall be deemed to have been given when sent.

Address

(7) The consumer may send or deliver the notice to the person with whom the consumer contracted at the address set out in the agreement or, if the consumer did not receive a written copy of the agreement or the address of the person was not set out in the agreement, the consumer may send or deliver the notice,

(a) to any address of the person on record with the Government of Ontario or the Government of Canada; or

(b) to an address of the person known by the consumer.

Commencement of an action

(8) If a consumer has delivered notice and has not received a satisfactory response within the prescribed period, the consumer may commence an action.

Same

(9) If a consumer has a right to commence an action under this section, the consumer may commence the action in the Superior Court of Justice.

Evidence

(10) In the trial of an issue under this section, oral evidence respecting an unfair practice is admissible despite the existence of a written agreement and despite the fact that the evidence pertains to a representation in respect of a term, condition or undertaking that is or is not provided for in the agreement.

Exemplary damages

(11) A court may award exemplary or punitive damages in addition to any other remedy in an action commenced under this section.

Liability

(12) Each person who engaged in an unfair practice is liable jointly and severally with the person who entered into the agreement with the consumer for any amount to which the consumer is entitled under this section.

Effect of rescission

(14) When a consumer rescinds an agreement under subsection (1), such rescission operates to cancel, as if they never existed,

(a) the agreement;

(b) all related agreements;

(c) all guarantees given in respect of money payable under the agreement;

(d) all security given by the consumer or a guarantor in respect of money payable under the agreement; and

(e) all credit agreements, as defined in Part VII, and other payment instruments, including promissory notes,

(i) extended, arranged or facilitated by the person with whom the consumer reached the agreement, or

(ii) otherwise related to the agreement.

Waiver of notice

(15) If a consumer is required to give notice under this Part in order to obtain a remedy, a court may disregard the requirement to give the notice or any requirement relating to the notice if it is in the interest of justice to do so.

Application of sections

21. (1) Sections 22 to 26 apply to future performance agreements if the consumer's total potential payment obligation under the agreement, excluding the cost of borrowing, exceeds a prescribed amount.

Exceptions

(2) Sections 22 to 26 do not apply to agreements that are future performance agreements solely because of an open credit arrangement.

Transition

(3) Sections 22 to 26 apply to future performance agreements entered into on or after the day this section is proclaimed in force.

Same

(4) The *Consumer Protection Act*, as it existed immediately before its repeal under the *Consumer Protection Statute Law Amendment Act, 2002*, continues to apply to executory contracts entered into before its repeal.

Requirements for future performance agreements

22. Every future performance agreement shall be in writing, shall be delivered to the consumer and shall be made in accordance with the prescribed requirements.

Cancelling future performance agreements

23. A consumer may cancel a future performance agreement within one year after the date of entering into the agreement if the consumer does not receive a copy of the agreement that meets the requirements required by section 22.

Consumer agreements not binding

93. (1) A consumer agreement is not binding on the consumer unless the agreement is made in accordance with this Act and the regulations.

Court may order consumer bound

(2) Despite subsection (1), a court may order that a consumer is bound by all or a portion or portions of a consumer agreement, even if the agreement has not been made in accordance with this Act or the regulations, if the court determines that it would be inequitable in the circumstances for the consumer not to be bound.

Action in Superior Court of Justice

100. (1) If a consumer has a right to commence an action under this Act, the consumer may commence the action in the Superior Court of Justice.

Judgment

(2) If a consumer is successful in an action, unless in the circumstances it would be inequitable to do so, the court shall order that the consumer recover,

(a) the full payment to which he or she is entitled under this Act; and

(b) all goods delivered under a trade-in arrangement or an amount equal to the trade-in allowance.

Same

(3) In addition to an order under subsection (2), the court may order exemplary or punitive damages or such other relief as the court considers proper.

Waiver of notice

101. If a consumer is required to give notice under this Act in order to obtain a remedy, a court may disregard the requirement to give the notice or any requirement relating to the notice if it is in the interest of justice to do so.

Ont. Reg. 17/05

Ms. Graham and Ms. Miceli also rely on ss. 23.1, 24, and 25 of O. Reg. 17/05 to provide the prescribed requirements for future performance agreements and to provide an opportunity for a consumer to decline the future performance agreement. These sections state:

Prescribed amount

23.1 The prescribed amount for the purpose of subsection 21 (1) of the Act is $50 if the future performance agreement mentioned in that subsection is not a gift card agreement to which sections 25.2 to 25.5 apply.

Requirements for future performance agreements

24. For the purpose of section 22 of the Act, a future performance agreement that is not a gift card agreement to which sections 25.2 to 25.5 apply shall set out the following information:

1. The name of the consumer.

2. The name of the supplier and, if different, the name under which the supplier carries on business.

3. The telephone number of the supplier, the address of the premises from which the supplier conducts business, and information respecting other ways, if any, in which the supplier can be contacted by the consumer, such as the fax number and e-mail address of the supplier.

4. A fair and accurate description of the goods and services to be supplied to the consumer, including the technical requirements, if any, related to the use of the goods or services.

5. An itemized list of the prices at which the goods and services are to be supplied to the consumer, including taxes and shipping charges.

6. A description of each additional charge that applies or may apply, such as customs duties or brokerage fees, and the amount of the charge if the supplier can reasonably determine it.

7. The total amount that the supplier knows is payable by the consumer under the agreement, including amounts that are required to be disclosed under paragraph 6, or, if the goods and services are to be supplied during an indefinite period, the amount and frequency of periodic payments.

8. The terms and methods of payment.

9. As applicable, the date or dates on which delivery, commencement of performance, ongoing performance and completion of performance are to occur.

10. For goods and services that are to be delivered,

i. the place to which they are to be delivered, and

ii. if the supplier holds out a specific manner of delivery and will charge the consumer for delivery, the manner in which the goods and services are to be delivered, including the name of the carrier, if any, and including the method of transportation to be used.

11. For services that are to be performed, the place where they are to be performed, the person for whom they are to be performed, the supplier's method of performing them and, if the supplier holds out that a specific person other than the supplier will perform any of the services on the supplier's behalf, the name of that person.

12. The rights, if any, that the supplier agrees the consumer will have in addition to the rights under the Act and the obligations, if any, by which the supplier agrees to be bound in addition to the obligations under the Act, in relation to cancellations, returns, exchanges and refunds.

13. If the agreement includes a trade-in arrangement, a description of the trade-in arrangement and the amount of the trade-in allowance.

14. The currency in which amounts are expressed, if it is not Canadian currency.

15. Any other restrictions, limitations and conditions that are imposed by the supplier.

16. The date on which the agreement is entered into.

Express opportunity to accept or decline agreement

25. In the case of a future performance agreement to which sections 22 to 26 of the Act apply, the supplier shall provide the consumer with an express

opportunity to accept or decline the agreement and to correct errors immediately before entering into it.

CITATION: Graham v. Impark, 2010 ONSC4982
COURT FILE NO.: 09-CV-00379652CP
DATE: September 16, 2010

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Stephanie Graham and Angela Miceli

Plaintiffs

- and -

Imperial Parking Canada Corporation carrying on business as Impark

Defendant

REASONS FOR DECISION

Perell, J.

Released: September 16, 2010