CITATION: Durling v. Sunrise Propane Energy Group Inc., 2012 ONSC 4196
COURT FILE NO.: CV-08-363271-00CP
DATE: 20120723

ONTARIO

SUPERIOR COURT OF JUSTICE

PROCEEDING UNDER the *Class Action Proceedings Act, 1992*, S.O. 1992, C. 6

BETWEEN:	
JAMES DURLING, JAN ANTHONY THOMAS, JOHN SANTORO, GIUSEPPINA SANTORO, ANNA MANCO, FRANCESCO MANCO AND CESARE MANCO Plaintiffs	*Harvin D. Pitch, Theodore P. Charney, Ryan Lake* and *Sharon Strosberg* for the plaintiffs
– and –	
SUNRISE PROPANE ENERGY GROUP INC., 1367229 ONTARIO INC., 1186728 ONTARIO LIMITED, 1369630 ONTARIO INC., 1452049 ONTARIO INC., VALERY BELAHOV, SHAY (SEAN) BEN-MOSHE, LEONID BELAHOV, ARIE BELAHOV, 2094528 ONTARIO INC., HGT HOLDINGS LTD., TESKEY CONSTRUCTION CO. LTD. and TESKEY CONCRETE CO. LTD., THE TECHNICAL STANDARDS AND SAFETY AUTHORITY, FELIPE DE LEON, ONTARIO HOSE SPECIALTIES LIMITED, PERAFLEX HOSE INC., PERAFLEX HOSE INDUSTRIES INC., BLACKMER OPERATING AS A DIVISION OF DOVER ENERGY INC., WELDEX COMPANY LIMITED, KEDDCO MFG. LTD., ROBERT PARSONS EQUIPMENT TRADING INC. and PRO-PAR (1978) INC. Defendants	*Robert J. Potts* and *Mirilyn R. Sharp*, for the defendants Sunrise Propane Energy Group Inc., 1367229 Ontario Inc., 1186728 Ontario Limited, Valery Belahov, Shay (Sean) Ben-Moshe, Leonid Belahov, and Arie Belahov *Ward Branch*, for the defendant 1452049 Ontario Inc. *John* A. *Campion* and *Antonio Di Domenico*, for the Defendants, 2094528 Ontario Inc., HGT Holdings Ltd., Teskey Construction Co. Ltd., and Teskey Concrete Co. Ltd. *Lisa La Horey* and *Rory Barnable*, for the defendant Technical Standards and Safety Authority *Paul Belanger*, for the defendants Felipe De Leon and 1369630 Ontario Inc. *Daniel I. Reisler* and *John Lea*, for the defendant Ontario Hose Specialties Limited

)	
)	*Stuart Ghan*, for the defendants Peraflex Hose
)	Inc., Peraflex Hose Industries Inc.,
)	
)	*Linda Phillips-Smith* and *Kathleen Urdahl*,
)	for the defendant Blackmer operating as a
)	division of Dover Energy Inc.
)	
)	*Barry L. Yellin*, for the defendant Weldex
)	Company Limited
)	
)	*Dana Eichler*, for defendant Keddco Mfg.
)	Ltd.
)	
)	*Anne Thompson*, for the defendants,
)	Robert Parsons Equipment Trading Inc., and
)	Pro-Par (1978) Inc.
)	
)	*David S. Young* and *Kevin Bridel*, for the
)	third party, 856187 Ontario o/a Westside
)	
)	
)	
)	
)	
)	**HEARD:** May 14, 15, 16, 17 and 18, 2012

C. HORKINS J.

INTRODUCTION

[1] This is a motion for certification of a proposed class action pursuant to s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*Class Proceedings Act*").

[2] The proceeding arises out of a series of explosions that occurred on August 10, 2008 at a propane facility ("Sunrise propane facility") located in Toronto. The explosions caused several massive fireballs to be released into the air and over the surrounding neighbourhood. The Toronto Police ordered a non-compulsory evacuation order of everyone within 1.6 km of the Sunrise propane facility. It is alleged that as a result of the explosions, the plaintiffs and proposed class suffered property damage and/or personal injury.

[3] The plaintiffs seek to certify this proceeding as a class action on behalf of a class defined as follows:

> All persons who were present or owned or leased or rented or occupied properties located within the area in the City of Toronto bounded by Keele Street, Highway 401, Sheppard Avenue and Dufferin Street when a series of explosions occurred on August 10, 2008 at the propane facility located at 48/54/62 Murray Road in the City of Toronto, excluding the defendants and third parties and excluding the defendants' and third parties' officers, directors, servants, employees or agents.

[4] There are two groups of defendants that contest certification. The defendants 2094528 Ontario Inc., Teskey Construction Co. Ltd., Teskey Concrete Co. Ltd. and HGT Holdings ("Teskey defendants") say that the plaintiffs have not satisfied the s. 5(1)(a) criterion as it relates to them. They take no position on the rest of the s. 5 criteria except for the wording of some common issues. The defendant, Blackmer operating as a division of Dover Energy Inc. ("Blackmer"), says that the plaintiffs have not satisfied s. 5(1)(c) criterion as it relates to it. The title of proceeding was amended at the outset of the certification motion on consent to remove Dover Corporation and Dover Corporation (Canada) Limited Societe Dover (Canada) Limitee and replace it with Blackmer operating as a division of Dover Energy Inc.

[5] All of the other defendants consent to certification of this proceeding as a class action. For the reasons that follow, I conclude that the plaintiffs have not satisfied the s. 5(1)(a) criterion against the Teskey defendants. The plaintiffs have satisfied the s. 5(1)(c) criterion against Blackmer.

OVERVIEW OF THE STATEMENT OF CLAIM

1. The Defendants

[6] The Amended Fresh as Amended Statement of Claim ("statement of claim") divides the defendants into four groups:

(1) The Sunrise defendants

(2) The Teskey defendants

(3) The Technical Standards and Safety Authority ("TSSA")

(4) The defendants that allegedly designed, manufactured and/or distributed various parts involved in the tank to tank transfer of propane that led to the explosions or were involved in the actual transfer of propane: Felipe De Leon, Ontario Hose Specialties Limited, Peraflex Hose Inc., Peraflex Hose Industries Inc., Blackmer operating as a division of Dover Energy Inc., Weldex Company Limited, Keddco Mfg.Ltd., Robert Parsons Equipment Trading Inc. and Pro-Par (1978) Inc.

[7] The following provides a summary of the defendants as described in the statement of claim.

The Sunrise Defendants

[8] The defendant Sunrise Propane Energy Group Inc. supplied propane and industrial gases at the Sunrise propane facility located at 54 and 48 Murray Road, Toronto, Ontario. It operated under the names Sunrise Propane Industrial Gases and Sunrise Propane Industrial Cylinders.

[9] The class definition describes the location of the Sunrise propane facility as 48/54/62 Murray Road. This location consists of two relevant parcels of land: 48 Murray Road and 54/62 Murray Road (54 and 62 refer to the same piece of land and will be referred to in these reasons as "54 Murray Road"). The north side of 48 Murray Road is adjacent to the south side of 54 Murray Road. The Sunrise propane facility was located primarily on 54 Murray Road. A small part of the Sunrise propane facility occupied the north east corner of 48 Murray Road.

[10] The defendant 1367229 Ontario Inc. carried on business as Sunrise Propane. It is authorized to operate a propane filling plant pursuant to O. Reg. 211/01, made under the *Technical Standards and Safety Act, 2000*, S.O. 2000 c.16 ("*TSSA Act*"). This defendant is named as the tenant on the lease of 54 and 48 Murray Road.

[11] The defendant 1186728 Ontario Limited also carried on business as Sunrise Propane, and is authorized to operate a propane filling plant pursuant to O. Reg. 211/01, made under the *TSSA Act*.

[12] The defendant 1369630 Ontario Inc. carried on business as Sunrise Propane. It is the owner and operator of a fleet of trucks/tank trailers used to transport propane and other industrial gases to and from the Sunrise propane facility.

[13] The defendant 1452049 Ontario Inc. (operating as "Discount Propane") is the owner and operator of a fleet of trucks/tank trailers used for the purpose of transporting propane and other industrial gases to and from the Sunrise propane facility.

[14] There are two trucks/tanks in issue: Cargo Liner Unit 861 ("Unit 861") and Cargo Liner Unit 1 ("Unit 1"). They were owned and/or operated by 1369630 Ontario Inc. and 1452049 Ontario Inc.

[15] Together it is alleged that Sunrise Propane, 1367229 Ontario Inc., 1186728 Ontario Limited, 1369630 Ontario Inc., and 1452049 Ontario Inc. ("the Sunrise defendants") operated the Sunrise propane facility located at 54 and 48 Murray Road, supplying propane and industrial gases. They operated under the names Sunrise Propane, Sunrise Propane Industrial Gases and Sunrise Propane Industrial Cylinders.

[16] The defendants Valery (Valeri) Belahov, Shay (Sean) Ben Moshe, Leonid Belahov and Arie Belahov are directors of 1367229 Ontario Inc. and/or 1186728 Ontario Ltd. The defendant Valery (Valeri) Belahov was also an officer and director of 1369630 Ontario Inc.

The Teskey Defendants

[17] There are four defendants in this group: 2094528 Ontario Inc. ("Teskey 209"), HGT Holdings Ltd. ("HGT"), Teskey Construction Co. Ltd. ("Teskey Construction") and Teskey Concrete Co. Ltd. ("Teskey Concrete"). Reference in this judgment to the Teskey defendants means these four defendants.

[18] The statement of claim alleges in paragraphs 17-18 that at all material times Teskey 209 owned 54 Murray Road and a neighbouring property at 20 Murray Road and HGT owned 48 Murray Road. They each owned part of the property where the Sunrise propane facility was located (the property means 54 and 48 Murray Road).

[19] In paragraph 20 it is alleged that Teskey Construction and Teskey Concrete leased the property from Teskey 209 and HGT. Further, it is alleged that at all material times Teskey Construction, Teskey Concrete, HGT and Teskey 209 were operated as one economic unit or one economic enterprise. Alternatively, the plaintiffs allege that Teskey 209 and HGT were operated as the alter egos of Teskey Construction and Teskey Concrete.

[20] Finally, in paragraph 21, the plaintiffs allege that all material times, Teskey Construction, Teskey Concrete, HGT and Teskey 209 were each agent for the other and vicariously liable for the acts and omissions of the others.

[21] I note that the plaintiffs do not define in the statement of claim what they mean by the phrase "at all material times." This phrase is commonly used in pleadings without any regard for what it means in the specific case. However, to plead in this manner can be vague. In this case, it is particularly vague and problematic because there are three leases allegedly dealing with 54 and 48 Murray Road, each Teskey defendant owned one of the Murray Road properties at some point and the alleged unsafe transfers of propane at the Sunrise propane facility continued over an extended period of time.

The TSSA

[22] The TSSA is a not-for-profit corporation incorporated under the laws of Ontario which is governed by its thirteen member board of directors. Pursuant to ss. 3.1, 3.2(1), 3.7(2) of the *TSSA Act*, the TSSA is charged with providing fuel-related safety services associated with the safe transportation, storage, handling and use of fuels such as propane.

[23] On October 27, 2006, the director of the TSSA made an order that prohibited truck-to-truck transfers of propane in Ontario. On November 9, 2006, a TSSA inspector conducted a fuel safety inspection at the Sunrise propane facility and determined that the Sunrise propane facility had been carrying out truck-to-truck propane transfers. The inspector issued a cease and desist order pursuant to s. 21 of the *TSSA Act* that required compliance by November 30, 2006.

[24] The TSSA was aware that unlawful truck-to-truck transfers of propane were ongoing at the Sunrise propane facility in spite of the orders to the contrary and failed to take further action.

The Other Defendants

[25] Felipe de Leon ("De Leon") was employed by the Sunrise defendants. He was the operator of Unit 1 and was engaged in an unauthorized tank-to-tank transfer of propane from Unit 861 to Unit 1 when the explosions occurred.

[26] It is alleged that Weldex Company Limited ("Weldex") was the manufacturer of Unit 861. Robert Parsons Equipment Trading Inc. and Pro-Par (1978) Inc. sold Unit 861 to the Sunrise defendants.

[27] Ontario Hose Specialties Limited ("Ontario Hose") allegedly manufactured certain hoses that were used to transfer the propane from Unit 861 to Unit 1. Alternatively it is alleged that Peraflex Hose Inc. ("Peraflex") or Peraflex Hose Industries Inc. ("Peraflex Industries"), operating as one economic enterprise, manufactured certain hoses including the hose or parts of certain hoses used at the Sunrise propane facility which they supplied to Ontario Hose.

[28] Keddco Mfg.Ltd. ("Keddco") allegedly designed, manufactured and/or distributed the hose crimp fittings that were affixed to the hose at the time of explosions.

[29] It is alleged that Blackmer, operating as a division of Dover Energy Inc. ("Blackmer") manufactured the hydraulically driven pump and pump by-pass components that were used to carry out the tank-to-tank transfer of propane from Unit 861 to Unit 1 when the explosions occurred.

2. Events Leading to the Explosions

[30] The statement of claim pleads that the Sunrise defendants operated the Sunrise propane facility that supplied propane and industrial gases. The Sunrise propane facility was located at 48 and 54 Murray Road. The Sunrise defendants did not own this property. It was leased.

[31] When the explosions occurred on August 10, 2008, De Leon was in the process of a truck to truck transfer of propane from Unit 861 to Unit 1. The TSSA prohibited such transfers in an order dated October 27, 2006. On November 9, 2006, an inspector from the TSSA conducted a spot inspection of the Sunrise propane facility and determined that the Sunrise defendants had been carrying out truck-to-truck propane transfers. The inspector issued a cease and desist order pursuant to s. 21 of the *TSSA Act* that was served on Shay (Sean) Ben-Moshe. The cease and desist order required compliance by November 30, 2006. The Sunrise defendants continued to routinely allow the unsafe practice of truck-to-truck propane transfers and this caused an immediate threat to public safety.

[32] Employees of the TSSA, including inspectors, investigators, deputy directors and directors were aware that the Sunrise defendants were contravening a safety order. Pursuant to ss. 15 and 16 of the *TSSA Act*, the TSSA had the authority to enforce the safety order by suspending the facility's authorization to operate a propane plant or by obtaining an order directing compliance from a judge of the Ontario Superior Court of Justice.

[33] In order to comply with the TSSA order issued on November 9, 2006, it was necessary for the Sunrise defendants to install a 30,000 USGW stationary propane tank for the storage of gas. The installation was approved by the TSSA, but not completed before the explosions. At a meeting held at the Sunrise propane facility in November 2006, Don Hayworth, a TSSA inspector, informed the Sunrise defendants that the 30,000 USGW stationary propane tank would be required to replace truck to truck transfers.

[34] From November 2006 until the time of the explosions, a TSSA inspector inspected operations at the Sunrise propane facility approximately every two to three months. During these inspections, the inspector observed illegal truck to truck transfers and that the Sunrise defendants were making use of two stationary 2,000 USGW tanks for the storage and transfer of gas. At no time did the inspector issue a further cease and desist order or initiate any steps to enforce the November 9, 2006 cease and desist order. At no time did the inspector require the Sunrise defendants to implement additional precautions to safeguard against the dangers presented by truck to truck propane transfers.

[35] By letter dated July 9, 2007, a TSSA inspector and a fuel safety engineer with the TSSA were informed of the Sunrise defendants' intention to install a 30,000 USWG propane tank on a skid frame to replace two existing 2,000 USWG tanks currently in operation. This was in response to the TSSA Director's public safety order. The letter informed the TSSA that truck to truck transfers would continue until the 30,000 USWG propane tank could be installed and placed into operation. The TSSA took no steps to enforce the safety order despite being placed on notice of the Sunrise defendants' intention to breach the order.

[36] It is alleged that a further unsafe practice routinely occurred at the Sunrise propane facility: the lighting and smoking of cigarettes in close proximity to propane and other inflammable substances by employees of the Sunrise defendants and other people accessing the Sunrise propane facility with their permission. The Sunrise defendants and their officers and directors failed to take reasonable precautions to prevent lighting and smoking of cigarettes in close proximity to inflammable substances at the Sunrise propane facility. Further, it is alleged that 1452049 Ontario Inc. failed to ensure that the drivers of the trucks which they owned did not smoke while on the property.

[37] A regulation to the *TSSA Act* requires that the operator of a propane filling facility apply for and receive permission from the Director before expanding or making changes to the operation of the facility. The Sunrise propane facility fell within the definition of "propane filling facility." The officers and directors of the Sunrise defendants directed changes to the Sunrise propane facility without applying for or receiving permission from the Director. Specifically, two existing 2,000 USGW tanks were moved to make room for the 30,000 USWG tank installation. The two 2,000 gallon tanks were moved and then placed back into service without obtaining a permit from the TSSA. The reinstallation required reinstalling pipes, electrical wiring, recalibrating pressure valves, as well as draining the tanks of propane before the move. The 2,000 gallon tanks exploded on August 10, 2008, as did a tanker which was being used to transfer propane to a truck at the site.

THE LEGAL FRAMEWORK

[38] Subsection 5(1) of the *Class Proceedings Act* sets out the criteria for the certification of a class proceeding. The language is mandatory. The court is required to certify the action as a class proceeding where the following five-part test for certification is met:

> (a) the pleadings or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[39] These requirements are linked: '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 at para. 14 (S.C.J.) ("*Sauer*"))

[40] Winkler J. pointed out in *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 at para. 25 (S.C.J.) ("*Frohlinger*") that the core of a class proceeding is "the element of commonality." It is not enough for there to be a common defendant. Nor is it enough that class members assert a common type of harm. Commonality is measured qualitatively rather than quantitatively. There must be commonality in the actual wrong that is alleged against the defendant and some evidence to support this.

[41] The decision to certify is not merits-based. The test must 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 and encouraging them to modify their behaviour: see *Western Canadian Shopping Centres Inc. v. Dutton,* [2001] 2 S.C.R. 534 at paras. 26-29 ("*Western Canadian Shopping Centres")*; *Hollick v Toronto (City),* [2001] 3 S.C.R. 158 at para. 15. (*"Hollick")*

[42] In *Hollick* at para. 25, the "some basis in fact" test was introduced when the court stated that "the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action."

[43] Since it is not the role of the court on a certification motion to "find facts", I conclude that *Hollick* directs the court to confirm that there is some evidence to support the s. 5(b) – (e) requirements. This interpretation of the test is consistent with the low burden that rests on the plaintiff as explained in *Hollick* at para. 16 and consistent with how the numerous courts have applied the "some basis in fact" test: see, for example, *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 at para. 61 (S.C.J.) ("*Fresco*").

[44] In this case, the issue of whether the plaintiffs have satisfied s. 5 is limited to the Teskey defendants and the defendant Blackmer. There are three questions to be answered:

(1) Have the plaintiffs satisfied the s. 5(1)(a) criterion against the Teskey defendants?

(2) Have the plaintiffs satisfied the s.5(1)(c) criterion against the defendant Blackmer?

(3) What is the appropriate wording for common issues 1, 2, 3, 13 and 14?

5(1)(a) - CAUSE OF ACTION

[45] The first criterion for certification is the disclosure of a cause of action. In *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) ("*Cloud*"), the Ontario Court of Appeal affirmed that the "plain and obvious" test from *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 ("*Hunt*") that is used for Rule 21 motions is also used to determine whether the proposed class proceeding discloses a cause of action.

[46] Unless the claim has a radical defect or it is plain and obvious that it could not succeed, the requirement in s. 5(1)(a) will be satisfied. This determination is to be made without evidence and claims that are unsettled in the jurisprudence should be allowed to proceed.

[47] The pleading must be read generously to allow for inadequacies due to drafting frailties and the plaintiffs' lack of access to key documents and discovery information: see *Hunt* at 980; *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 at 679 (C.A.).

[48] All of the defendants, except the Teskey defendants, agree that the s. 5(1)(a) criterion has been satisfied. As a result, the following consideration of s. 5(1)(a) is limited to the causes of action against the Teskey defendants.

THE PLEADING AGAINST THE TESKEY DEFENDANTS

Overview

[49] The statement of claim advances three causes of action against the Teskey defendants:

- Strict liability – under the rule in *Rylands v. Fletcher* (1866), L.R. 1 Ex. 265, aff'd (1868), L.R. 3 H.L. 330
- Nuisance
- Trespass
- Negligence

[50] The pleading against the Teskey defendants is not straightforward. In part, this is because of three leases that deal with 54 and/or 48 Murray Road and the questions that these leases raise about the role of the Teskey defendants. It is also because the pleading is seriously flawed. The pleading against the Teskey defendants relies on bald allegations without material facts and contains inconsistencies that cannot be explained simply as alternative pleadings.

[51] The statement of claim alleges facts that describe the Teskey defendants in various capacities: owners, landlords and/or tenants of 54 and 48 Murray Road. The pleading pulls the four Teskey defendants together as a group, asserts the above causes of action against the Teskey group of companies and alleges that they are liable as a group for the damages caused by the explosions. To support this "group" approach, the plaintiffs plead that the Teskey defendants were agents of each other, that they were operated as a single group enterprise and that Teskey 209 and HGT were the alter egos of Teskey Construction and Teskey Concrete respectively. I will examine each of these legal theories and explain why the pleading does not satisfy the s. 5(1)(a) criterion.

[52] To support the strict liability, nuisance and trespass causes of action, the plaintiffs plead that the Teskey defendants "owned" and "leased" 54 and 48 Murray Road (paras. 102, 107 and 112). For the negligence cause of action, the plaintiffs plead that the Teskey defendants were "owners and tenants" of 54 and 48 Murray Road and owed a duty of care to the plaintiffs (para. 153). The pleading is unclear as to why, for the purpose of strict liability, nuisance and trespass, the Teskey defendants are framed as landlords and yet they are framed as tenants for the purpose of negligence.

[53] The Teskey defendants argue that there is only one lease that is relevant and that is the lease between Teskey Construction and the Sunrise defendant, 1367229 Ontario Inc. They say it is plain and obvious that the causes of action against Teskey Construction will fail.

[54] The Teskey defendants say that regardless of the legal theory that the plaintiffs rely on, they have not pleaded the requisite facts to draw in Teskey Concrete, HGT and Teskey 209. As a

result, the Teskey defendants say it is plain and obvious that the claims against Teskey Concrete, HGT and Teskey 209 will also fail.

[55] The facts regarding the ownership of 54 and 48 Murray Road and the relationship between the Teskey defendants are set out in paragraphs 64-73 of the statement of claim and are reviewed below. In addition, since the three leases dealing with 54 and 48 Murray Road are referred to in the pleading, the parties agree that they are incorporated by reference. This approach is consistent with well established case law: see *Montreal Trust Co. of Canada v. Toronto-Dominion Bank* (1992), 40 C.P.C. (3d) 389 at 395-396 (Ont. Ct. (Gen. Div.)); *Lubarevich v. Nurgitz*, [1996] O.J. No. 1457 (Ont. Ct. (Gen. Div.)); *Vaughan v. Ontario (Minister of Health)* (1996), 49 C.P.C. (3d) 119 at 123 (Ont. Ct. (Gen. Div.)) and *Web Offset Publications Ltd. v. Vickery,* [1999] O.J. No. 2760 (C.A.).

The Ownership and Lease of 54 and 48 Murray Road

1. 54 Murray Road

[56] Paragraphs 17, 19, 20, and 64-66 of the statement of claim deal with the ownership and lease of 54 Murray Road. The following facts are pleaded.

[57] Teskey 209 was the owner of 54 Murray Road "at all material times" (para. 17). The material times are not defined. Teskey 209 owned part of the property where the Sunrise propane facility was located (para. 19).

[58] Teskey Construction purchased 54 Murray Road on March 1, 1996 (para. 65). Teskey Construction leased 54 Murray Road "to one or more of the Sunrise Companies" (para. 65). The lease that is incorporated by reference is dated September 1, 2004. It is between Teskey Construction as landlord and one of the Sunrise defendants (1367229 Ontario Inc.) ("2004 Sunrise lease"). The 2004 Sunrise lease is the only lease between a Teskey defendant and a Sunrise defendant. The term of the 2004 Sunrise lease runs from September 1, 2004 to December 31, 2014.

[59] When the TSSA orders were made in 2006, Teskey Construction still owned 54 Murray Road. The plaintiffs plead that after the 2006 TSSA orders, Sunrise continued to allow unsafe practices, namely truck to truck transfers of propane, which caused an immediate threat to public safety (paras. 51, 52).

[60] Teskey Construction continued to own 54 Murray Road until December 2007. On December 28, 2007, Teskey Construction sold 54 Murray Road to Teskey 209. Teskey 209 was the owner of 54 Murray Road on the day of the explosions.

[61] Teskey Construction established standards and procedures regarding its supervision and control of 54 Murray Road which remained in place when 54 Murray Road was sold to Teskey 209 and remained in place at the time of the explosions (para. 65).

[62] On the day that Teskey Construction sold 54 Murray Road to Teskey 209, Teskey 209 leased 54 Murray Road "back to Teskey Construction or Teskey Concrete or both of them who was the leasee [of 54 Murray Road] at the time of the explosions" (para. 65). This lease is incorporated by reference and is between Teskey 209 as landlord and Teskey Construction as tenant (the "December 2007 lease").

[63] The plaintiffs plead that the sale of 54 Murray Road to Teskey 209 did not change who controlled 54 Murray Road because Teskey 209 was the alter ego of Teskey Construction or was completely dominated by Teskey Construction. Therefore, the plaintiffs allege that 54 Murray Road remained under the control of Teskey Construction (para. 66).

[64] In summary, when the explosions occurred there were two leases in existence dealing with 54 Murray Road: the 2004 Sunrise lease and the December 2007 lease. Both leases introduce complications and questions about the leasing of 54 and 48 Murray Road that I will now review.

The 2004 Sunrise Lease - the Agency Pleading

[65] The 2004 Sunrise lease covers the lease of 54 and 48 Murray Road. This is clear from the content of the lease that defines "buildings" as 54 and 48 Murray Road. Leased Premises is defined as a portion of the lands at Schedule A and B. These schedules cover 54 and 48 Murray Road.

[66] The Sunrise lease provides in section 13.06 that any notices that Sunrise is required to give to the landlord, Teskey Construction, are sufficient if delivered to Teskey Concrete.

[67] Teskey Construction owned 54 Murray Road when it executed the 2004 Sunrise lease, but it did not own 48 Murray Road. When the 2004 Sunrise lease was signed, Teskey Concrete owned 48 Murray Road Road (para. 68). Teskey Concrete is not a party to the 2004 Sunrise lease.

[68] How can Teskey Construction lease a property it does not own? Class counsel says that Teskey Construction was acting as the agent for Teskey Concrete for the purpose of leasing 48 Murray Road. However, the pleading is much broader since it alleges that each Teskey defendant is the agent of the other.

[69] While it was clear during the certification motion that class counsel rely on agency law to explain how Teskey Construction could lease property that it does not own, the essential elements of an agency pleading are not in the statement of claim. The statement of claim does not describe the problem or the underlying facts that support the agency argument that counsel made during the hearing: that Teskey Construction leased 48 Murray Road which it did not own. The facts that the plaintiffs rely on are in paragraphs 64-73 and there is no mention of these underlying facts. Paragraph 68 simply states that "Teskey Concrete leased [48 Murray Road] to one or more of the Sunrise companies." Only after the 2004 Sunrise lease is reviewed and the pieces of the alleged facts are drawn together does it become apparent that the problem exists.

[70] Further, there is absolutely nothing in the pleading to explain the alleged agency relationship between the Teskey defendants as a group. The statement of claim alleges that they were "each agent for the other." The material facts that rule 25.06(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 requires are missing.

[71] The alleged material facts that support the agency claim must be clearly set out in the pleading and they are not. The reference to an agency relationship between the Teskey defendants is limited to the following three paragraphs in the statement of claim.

[72] In paragraph 21 it is alleged that the four Teskey defendants were "each agent for the other and vicariously liable for the acts and omissions of the others as particularized below."

[73] In paragraph 70(b) the plaintiffs repeat that "each of the four companies is the agent of the other." I note that paragraph 70 deals with the single group enterprise allegation and paragraph 70(b) is presented as a fact in support of this alleged theory. This pleading fails to recognize that single group enterprise and agency law are distinct legal theories as explained below. An agency relationship has the effect of circumventing, as opposed to piercing the corporate veil.

[74] Lastly, there is a general allegation in paragraph 24 "that all defendants can only act through their employees, directors, officers and agents and are vicariously liable for their acts and omissions as hereinafter pleaded. The acts and omissions particularized and alleged in this claim to have been done by the defendants were authorized, ordered or done by each of the defendants' employees, directors, officers and agents while engaging in the management, direction, control and transaction of business of the defendants and are therefore acts and omissions for which the defendants are vicariously liable." [Emphasis added.]

[75] These references in the statement of claim to agents are bald conclusions of law without the requisite material facts. Such a pleading offends rule 25.06(2) which states: "A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded." (See *Gardner v. The Queen* (1984), 7 D.L.R. (4th) 464, [1984] O.J. No. 3162 (Ont. H.C.), referring to *Paradis v. Vaillancourt*, [1943] O.W.N. 359; *Forensic Support Services Inc. v. Out of the Cold Resource Centre Inc*., [2005] O.J. No. 2758 (S.C.J.); *Carten v. Canada*, 2009 FC 1233, 358 F.T.R. 118 at paras. 38-40; *Tompkins v. Alberta Wheat Pool*, [1997] A.J. No. 300; *Williams v. Canon Canada Inc*. [2011] O.J. No. 5049 at para. 218 and *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744 at para. 126.)

[76] Corporations can be agents of individuals or of other corporations: Bruce Welling, *Corporate Law in Canada: The Governing Principles*, 3rd ed. (London, Ont.: Scribblers Publishing, 2006) at 135-137). An agency relationship would have the effect of "circumventing" as opposed to "piercing" the corporate veil: Welling, at 136; Peter Watts & F.M.B. Reynolds, *Bowstead & Reynolds on Agency* (London, England: Thomson Reuters, 2010) at para. 1-024.

[77] In *Dumbrell v. Regional Group of Companies Inc*., 2007 ONCA 59, (2007) 85 O.R. (3d) 616 at para. 80, the court explains the distinction between piercing the corporate veil and holding that a corporation acts as an agent:

> 80 The concepts of piercing the corporate veil and holding that a corporation acts as an agent for the individual who controls that corporation achieve the same result in that they both impose personal liability for what appear to be corporate actions. They achieve that result, however, in different ways. The agency relationship assumes that the corporation and the controlling mind are distinct, but that on the relevant facts the former acted as agent for the latter. Piercing the corporate veil ignores the legal persona of the corporation: Bruce L. Welling, *Corporate Law in Canada: The Governing Principles*, 2d ed. (Markham, Ont.: Butterworths, 1991) at 122-36.

[78] An agency relationship can be created through an agency agreement or it can be implied. Neither is alleged in the statement of claim. An agency relationship requires a principal and an agent. While class counsel argues that Teskey Construction was agent for Teskey Concrete in the lease of 48 Murray Road, this basic pleading of fact is not in the statement of claim. The pleading simply lumps the four Teskey defendants together and alleges that they were agents of the other without providing any facts about how the four Teskey defendants were agents of each other. Basic material facts are missing: were there one or more agency agreements, when was the agreement made, was the agreement express or implied, who was the principal, who was the agent, what was the purpose of the agency agreement and how are the four Teskey defendants each agent for the other? There are simply no material facts of the alleged agency in this pleading.

[79] When considering the adequacy of a pleading, I must read it generously and favourably to the pleader. I have done so and conclude that the "agency" pleading is fatally flawed and must be struck. It is plain and obvious that this agency pleading will fail.

Teskey 209 buys 54 Murray Road

[80] During the hearing, class counsel argued that by operation of ss. 7 and 8 of the *Commercial Tenancies Act*, R.S.O. 1990 c. L-7, Teskey 209 assumed the role of landlord under the 2004 Sunrise lease, when it purchased 54 Murray Road from Teskey Construction.

[81] In essence, these sections of the *Commercial Tenancies Act* provide that a purchaser who buys with notice of a tenancy is charged with all obligations to the tenant, binding the land, by which the vendor was bound. Arguably this is one way to plead that Teskey 209 was a landlord after it bought the land and remained a landlord when the explosions occurred.

[82] However, the pleading does not reflect this argument. Paragraph 17 of the pleading describes Teskey 209 as an owner of 54 Murray Road, not a landlord. Furthermore, paragraph 66 states that transfer of 54 Murray Road to Teskey 209 did not change control of the property because Teskey 209 was the alter ego of Teskey Construction or was completely dominated by

Teskey Construction. Therefore, 54 Murray Road remained under the control of Teskey Construction.

[83] The statement of claim pleads the *Commercial Tenancies Act* on five occasions, but without any reference to the relevant sections of this Act, as is required. Furthermore, the paragraphs that plead the *Commercial Tenancies Act* treat the Teskey defendants as a group. This group approach relies on the plaintiffs' attempt to plead that the corporate veil is pierced. For example, in paragraph 102, it is alleged that the Teskey defendants are strictly liable as owners and leasees as follows:

> 102. The Teskey Companies are also strictly liable for damage caused by the escape of propane and other gases because they owned the Property and leased the Property to Teskey Construction and Teskey Concrete, who in turn subleased the Property to one or more of the Sunrise Companies. As landlords, the Teskey Companies exercised control over the Property, through the terms of the sublease and the operation of the Commercial Tenancies Act, R.S.O. 1990 c.L-7. …
>
> [Emphasis added.]

[84] The same pleading is made for the nuisance (para. 107), trespass (para.112) and negligence (paras. 154(c) and 159).

The December 2007 Lease

[85] As noted above, the pleading alleges in paragraph 65 that on the day Teskey Construction sold 54 Murray Road to Teskey 209, Teskey 209 leased 54 Murray Road "back to Teskey Construction or Teskey Concrete or both of them." The lease was made on December 28, 2007 and is between Teskey 209 as landlord and Teskey Construction as tenant (the December 2007 lease). Despite the pleading in paragraph 65, Teskey Concrete is not a party to this lease.

[86] The plaintiffs plead that the sale of 54 Murray Road to Teskey 209 did not change who controlled 54 Murray Road because Teskey 209 was the alter ego of Teskey Construction or was completely dominated by Teskey Construction. Therefore 54 Murray Road remained under the control of Teskey Construction (para. 66).

[87] The lease gives the tenant (Teskey Construction) possession of the leased premises from December 28, 2008 until December 31, 2016. I note that possession starts a year after the lease was signed and months after the explosions. However, in paragraph 65 of the statement of claim, the plaintiffs plead that Teskey Construction was the lessee of 54 Murray Road at the time of the explosions. According to this lease, Teskey Construction did not take possession until after the explosions.

[88] Under this lease, Teskey 209 covenants that Teskey Construction as the tenant will have quiet enjoyment of 54 Murray Road without any interruption from the landlord or any other persons (section 3 of lease). This lease states that 54 Murray Road shall not be used for any purpose "other than the concrete and construction business operations of the tenant and any other

use authorized by applicable laws." The December 2007 lease is silent about the existing 2004 Sunrise lease.

[89] During the hearing, class counsel argued that the December 2007 lease is not a *bona fide* lease because the landlord, Teskey 209, cannot provide the tenant, Teskey Construction, with quiet enjoyment of the leased land because Sunrise has possession of this land and operates a propane facility on the land under the Sunrise lease. Counsel also argued that the December 2007 lease is not a *bona fide* lease because the rent is set at $1.00 a year, the term of this lease is entirely different than the term under the Sunrise lease and there is absolutely no mention of Sunrise in this lease.

[90] This argument is not reflected in the pleading. There is no allegation that the December 2007 lease was not a *bona fide* lease or any material facts to support such an allegation. While I appreciate that this lease is incorporated by reference into the pleading, this does not relieve the plaintiffs from clearly stating their case against the Teskey defendants. This is particularly important given that *bona fide* means "made in good faith; without fraud or deceit" (*Black's Law Dictionary*, 7th ed., *sub verbo* "bona fide")

2. 48 Murray Road

[91] Paragraphs 18, 20, and 67-69 of the statement of claim deal with the ownership and lease of 48 Murray Road. The following facts are pleaded.

[92] The pleading first alleges that HGT was "at all material times" the owner of 48 Murray Road (para.18). The "material times" are not defined. Teskey Concrete purchased 48 Murray Road on March 1, 1996 (para. 68).

[93] The 2004 Sunrise lease between Teskey Construction and the Sunrise company describes the leased premises as 54 Murray Road and part of 48 Murray Road, even though Teskey Construction did not own 48 Murray Road when the 2004 Sunrise lease was executed. Teskey Concrete was the owner of 48 Murray Road when this lease was signed. It is not a party to the September 2004 lease.

[94] When the TSSA stop orders were made in 2006, Teskey Concrete still owned 48 Murray Road. The plaintiffs plead that after the TSSA orders, Sunrise continued to allow unsafe practices, namely truck to truck transfers, which caused an immediate threat to public safety. (paras. 51, 52). Teskey Concrete continued to own 48 Murray until it was sold in July 2007. On July 30, 2007, Teskey Concrete sold 48 Murray Road to HGT.

[95] The plaintiffs plead that the transfer of 48 Murray Road to HGT did not change who controlled this property because HGT was the alter ego of Teskey Concrete or completely dominated by Teskey Concrete and the property was leased back to "Teskey Concrete or Teskey Construction or both of them." The property, 48 Murray Road, remained under the control of Teskey Concrete (para. 69).

The January 2007 lease

[96] The plaintiffs plead that HGT leased 48 Murray Road property back to "Teskey Concrete or Teskey Construction or both of them." (para. 67-68)

[97] In a lease dated January 1 2007, HGT as landlord leased 48 Murray Road to Teskey Concrete as tenant (the "January 2007 lease"). The date of this lease is several months before 48 Murray Road was transferred to HGT. The January 2007 lease is between HGT (described as landlord) and Teskey Concrete (described as tenant) and not Teskey Construction as pleaded in paragraph 68.

[98] The January 2007 lease not does mention Sunrise's lease of 48 Murray Road. It grants the tenant quiet enjoyment of the leased land at 48 Murray Road (already leased to Sunrise), states that the tenant will use the premises to run the concrete business and charges nominal rent of $1 a year.

[99] During the hearing class counsel made the same argument about the January 2007 lease that was made for the December 2007 lease: it is not a *bona fide* lease. I have the same concerns about this argument as expressed with the December 2007 lease: it is not in the pleading.

The Single Group Enterprise and Alter Ego Pleading

[100] The pleading approaches 54 and 48 Murray Road as one, calling it the "Property" and alleges each cause of action against the "Teskey Companies" as a group.

[101] To support the allegation that the Teskey defendants are liable as a group, the plaintiffs plead that they were operated as one economic unit or a single group enterprise ("single group enterprise"). Alternatively, they allege that Teskey 209 and HGT were the alter egos of Teskey Construction and Teskey Concrete. The single group enterprise and alter ego allegations are set out as follows in the statement of claim.

[102] In paragraphs 70 -71, the plaintiffs plead that the four Teskey defendants "were operated as one economic unit or a single group enterprise" and that each is therefore vicariously liable for the others' acts and omissions. The particulars that the plaintiffs rely on to support this allegation are set out in paragraph 70:

> 70. The Teskey Companies were operated as one economic unit or a single group enterprise as follows:
>
> (a) Each of the four companies is a parent or subsidiary of the others or is an affiliate of the others;
>
> (b) Each of the four companies is the agent of the others;
>
> (c) All four companies have the same officers and directors;

(d) All four companies have common offices and employees;

(e) All four companies operate under the same name;

(f) The Teskey Companies hold themselves out to the public as a single company;

(g) The residents in the area surrounding the Teskey Companies considered the Teskey Companies to own the properties located at 48 Murray Road, 54 and 62 Murray Road and 20 Murray Road and to be in control of all properties;

(h) The Teskey Companies prepare their financial statements on a consolidated basis;

(i) The acts and omissions set out in the claim were done by the Teskey Companies in pursuit of their common enterprise;

(j) The Teskey Companies carry on business jointly and are operated as one economic unit or one economic enterprise.

[103] While 54 and 48 Murray Road were owned by Teskey 209 and HGT, respectively, at the time of the explosions, the plaintiffs allege that "all of the Teskey Companies are collectively liable to the plaintiffs because of their operation as one economic unit or a single group enterprise." (para. 71)

[104] The alter ego pleading starts in paragraph 66 and continues in paragraph 69 as follows:

66. The transfer of the property to the Teskey Numbered Company did not change who controlled the property at 54 and 62 Murray Road, as the Teskey Numbered Company was, in effect, the alter ego of Teskey Construction or completely dominated by Teskey Construction and as the property was leased back to Teskey Construction or Teskey Concrete or both of them. That property remained under the control of Teskey Construction and its officers and directors, or subsidiaries, as described below.

…

69. The transfer of the property to HGT did not change who controlled the property at 48 Murray Road, as the HGT was, in effect, the alter ego of Teskey Concrete or completely dominated by Teskey Concrete and as the property was leased back to Teskey Concrete or Teskey Construction or

> both of them. That property remained under the control of Teskey Concrete and its officers and directors, or subsidiaries, as described below.
>
> [Emphasis added]

[105] The plaintiffs then plead at paragraph 72 that Teskey Construction and Teskey Concrete are the "controlling shareholders" of Teskey 209 and HGT and should be held liable for the acts and omissions of Teskey 209 and HGT because:

> (a) They exercised complete control over the Teskey Numbered Company and HGT;
>
> (b) The Teskey Numbered Company and HGT had no independent decision making power and all decisions were made by Teskey Construction and Teskey Concrete;
>
> (c) They treated the Teskey Numbered Company and HGT like alter egos of Teskey Construction and Teskey Concrete.
>
> (d) They operated the Teskey Numbered Company and HGT in a manner that condoned illegal activity at the Property, specifically, the unlawful activities pleaded at paragraphs [50-53];
>
> (e) They failed to take steps to prevent or correct the illegal activity at the Property or have the Teskey Numbered Company or HGT take appropriate steps, when they knew of the illegal activity and had the power to take steps to prevent or correct the illegal activity.

[106] Finally, in paragraph 73, the plaintiffs allege that all of the Teskey defendants were in control of the "Property" and the "Facility." It would appear that this paragraph relates to the single group enterprise pleading even though it follows the alter ego pleading. The paragraph states as follows:

> 73. The Teskey Companies were at all material times in control of the Property and acted as landlords to the Property where the Sunrise Propane Facility was located and leased the Property to one or more of the Sunrise Companies. The Teskey Companies have their head office located at 20 Murray Road, in close proximity to the Facility. As a result of their role as landlords and as a further result of their close geographic proximity to the Facility, the Teskey Companies exercised control over the Property and the Facility.

[107] There are four causes of action against the Teskey defendants: strict liability, nuisance trespass and negligence. Each is alleged against the defendants as a group and is premised on the agency, single group enterprise and/or alter ego allegations. I have already dealt with the agency

pleading and have decided that it must be struck. I will now consider the applicable law and explain why the single group enterprise and alter ego pleadings fail.

THE LEGAL FRAMEWORK – PIERCING THE CORPORATE VEIL

[108] The concept of a single group enterprise and an alter ego are simply labels that courts use to pierce the corporate veil and ignore the distinct legal identity of a corporation. Regardless of the label or theory that the plaintiffs plead, it comes down to piercing the corporate veil and when this is justified.

[109] As Spence J. stated in *801962 Ontario Inc. v. MacKenzie Trust Co.*, [1994] O.J. No. 2105 (Ont. Ct. (Gen. Div.)) at para 37, "the test in Salomon v. Salomon has not been superseded by a new 'business entity' or 'single business entity' test. They merely illustrate the principle that, in particular fact situations; where the nature of the legal issue in dispute makes it appropriate to have regard to the larger business entity, the court is not precluded by Salomon from doing so." This is consistent with *Hughes v. Sunbeam Corp. (Canada)*, [2000] O.J. No. 4595 (S.C.J.) at para. 44 and *Fairview Donut Inc. v. The TDL Group Corp*. 2012 ONSC 1252, where Strathy J. stated at para. 657 that the "group enterprise theory" has not been accepted by Canadian courts as a separate theory.

[110] The fundamental principle of corporate law established in *Salomon* many years ago is that each corporation has a separate legal personality that will only be disregarded in exceptional circumstances. These exceptional circumstances were described in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Ont. Ct. (Gen. Div.)), aff'd [1997] O.J. No. 3754 at p. 434 (C.A.), ("*Transamerica Life*"):

> … the courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct.

[111] Other courts have described exceptional circumstances in different terms, such as when it would be "flagrantly unjust" or "flagrantly opposed to justice" not to pierce the corporate veil: see *642947 Ontario Ltd. v. Fleischer*, [2001] O.J. No. 4771 at para. 67 (C.A.) ("*Fleisher*") and *Clarkson Co. v. Zhelka*, [1967] 2 O.R. 565-579 at p. 578 (H.C.).

[112] In *Fleischer*, at paragraph 68, the court explained that "[t]ypically, the corporate veil is pierced when the company is incorporated for an illegal, fraudulent or improper purpose. But it can also be pierced if when incorporated 'those in control expressly direct a wrongful thing to be done.'" *Fleischer* is an example of directing a wrongful thing to be done.

[113] *Fleischer* was an "alter ego" case that involved property leased to a company called Sweet Dreams. Sweet Dreams was controlled by a sophisticated developer, George Halasi and his partner Larry Kraus (a lawyer). A brief review of the extensive web of facts from this case is sufficient. Sweet Dreams had a right of first refusal over the property that it leased. A dispute arose regarding the pending sale of this property and Sweet Dreams' right of first refusal. Sweet

Dreams successfully moved for an injunction to enjoin the others from completing the sale of the property that was imminent. Sweet Dreams (through Halasi and Kraus) gave the court an undertaking to abide by any order concerning damages that the court may make if it ultimately appeared that the granting of the injunction had caused damage to the responding party.

[114] Sweet Dreams was found to be "merely the alter ego" of Halasi and Kraus. It was a company that was "completely dominated and controlled by Halasi and Kraus." When they gave the undertaking to the court, Halasi and Kraus knew that Sweet Dreams had no assets and was worthless.

[115] The trial judge described the undertaking as "fraudulent and it was misconduct on the part of Krauss and Halasi as officers of Sweet Dreams to offer it to the Court." If Halasi and Kraus could hide behind the corporate shell this "would be a mockery of injunction proceedings" and "would effectively mean that worthless hollow undertakings could be given to the Court, leaving the Court powerless to grant effective sanctions by way of damages which, in the final analysis, could never be collected by the injured party." Halasi and Kraus were using Sweet Dreams "as a shield for ... improper conduct."

[116] *Manley Inc. v. Fallis*, [1977] O.J. No. 1080 (C.A.) ("*Manley*") is a case that the plaintiffs rely upon. The Ontario Court of Appeal utilized what they called the "group enterprise concept" to ensure that a former employee who was competing with his former employer would not escape the consequences of his breach of a fiduciary trust. While the court did not use the words "flagrantly opposed to justice" or "flagrantly unjust", the facts of this case presented such a situation.

[117] The employee was dismissed because he set up a business that competed with his employer. The employer was a Canadian company called Manley Popcorn Canada Limited, a wholly owned subsidiary of Manley Incorporated. Both Manley companies sued the employee for breach of his fiduciary duty to his employer, the Canadian company, and they succeeded at trial. The judge did not distinguish between the two Manley companies. On appeal, the employee argued that his fiduciary duty was owed to his employer, the Canadian company, and not its parent, Manley Incorporated. The employee's actions had caused damage to the parent company and not to Manley Popcorn Canada Limited. The appellate court used what they called the one business enterprise to conclude that it was appropriate to treat the two Manley companies as one. At para. 5, the court stated:

> We are satisfied that in a case of this kind, it is open to the court to regard the Manley companies as constituting one business enterprise. In our view, it would undermine the requirement of fidelity to allow an employee to successfully argue that, while his activities may have injured the parent company of his employer, it did not in fact injure his employer.
>
> [Emphasis added]

[118] In my view, it is clear from the above passage that the court in *Manley* intended their use of a one business enterprise theory to be limited to the nature of that case that involved an employer/employee fiduciary relationship. The court stated that the group enterprise concept had to be "carefully limited."

[119] The plaintiffs and the Teskey defendants both rely on *Spring Garden Holdings Ltd. v. Ryan Duffy's Restaurants Ltd.*, 2010 NSSC 71, 297 N.S.R. (2d) 201 ("*Spring Garden*"). It is a good example of the limited circumstances that will justify piercing the corporate veil. This was a successful motion by the defendants for summary judgment.

[120] The case involved two restaurants. One defendant company ("Restaurants") leased the property where the restaurants were located and the other defendant company ("Management") managed the restaurants. Neither had any ownership interest in the other company and neither was the parent or subsidiary of the other. The two defendant companies were related and shared a majority shareholder and the same corporate address.

[121] Restaurants had no assets other than the lease. It had no employees, did not operate a bank account or have any credit facilities and there were no financial accounting or income tax returns filed on behalf of Restaurants. Its sole function was to hold the lease.

[122] Management ran the operations of the two restaurants. Management hired the staff for the operation and the employees who worked at the restaurants were Management's employees. Any revenues that came into the restaurants were deposited into Management's bank account. Service providers or equipment providers invoiced Management and they were paid out of Management's bank account. The rent payments for the lease were paid out of Management's bank account and Management listed the rent as an expense on its financial statements, even though the lease was in Restaurants' name. All of the equipment at the restaurants was either owned by or leased to Management. Finally, there was no written management or service agreements between Restaurants and Management.

[123] The landlord distrained the leased premises and locked the doors of the restaurants. An action was commenced against Restaurants and Management. The landlord argued that Management was the alter ego of Restaurants and therefore liable to the landlord under the lease and that the two companies were a "single economic unit."

[124] It is worth noting that there are many similarities in the type of relationship between Restaurants and Management and the alleged relationship between the Teskey defendants in this action. As explained below, this type of relationship was not enough to pierce the corporate veil in *Spring Gardens*.

[125] At paragraphs 50-51 the court identified the three situations that justify lifting the corporate veil:

> 50 In White v. E.B.F. Manufacturing Ltd., *supra*, Saunders J.A. quoted with approval from Le Car GmbH v. Dusty Roads Holdings Ltd. et al., *supra*, where

> Murphy J. identified three situations where the courts have lifted the corporate veil:
>
> (a) where failure to do so would be unfair and lead to a result "flagrantly opposed to justice";
>
> (b) where representations are made or activities undertaken for a fraudulent or other objectionable, illegal or improper purpose to facilitate doing something that would be illegal or improper for an individual shareholder to do personally; or
>
> (c) where the corporation is merely acting as the controlling shareholder's agent.
>
> 51 Courts have also referred to the corporate veil being lifted if a company is a "sham", the "alter ego" of another or a "facade" although these situations could clearly be covered in the three circumstances listed by Murphy J. above.

[126] I note that in this passage the court lists agency as the third situation for piercing the corporate veil. As I have already explained this legal principle allows one to circumvent rather than lift or pierce the corporate veil. While both achieve the same result, it is incorrect to characterize agency as a tool to pierce the corporate veil.

[127] Dealing with the allegation that the two companies were acting as a "single economic unit", the court in *Spring Gardens* explained that the facts of the case did not support piercing the corporate veil. At paragraphs 56-57, the court stated:

> 56 There is little doubt that Restaurants and Management are closely intertwined. They are controlled by the same majority shareholder, they share the same corporate address and they are both involved in the same business (Restaurants held the lease for the restaurant -- Management managed the business.) Could the fact that these two companies are controlled by the same majority shareholder and are intimately involved in the same enterprise be enough to lift the corporate veil on the facts of this case?
>
> 57 There is nothing wrong *per se* with two companies being controlled by the same majority shareholder or being involved in the same business enterprise. Many closely held corporations function in this manner and the law deems them to be separate legal entities.

[128] With the benefit of this legal framework I will review the statement of claim in this case. The issue is whether or not it is plain and obvious based on the pleading that the single group enterprise and/or alter ego pleading will fail?

THE SINGLE GROUP ENTERPRISE PLEADING FAILS

[129] I start with the single group enterprise pleading (paras. 70-71 of the statement of claim).

[130] Paragraph 70 alleges that the Teskey defendants were operated as a single group enterprise and then offers a list of facts in support of this contention. In paragraph 71, the plaintiffs then plead that while Teskey 209 and HGT held title to 54 and 48 Murray Road when the explosions occurred, the four Teskey defendants are collectively liable to the plaintiffs because they operated as one group enterprise. In essence, the plaintiffs are seeking to label all four Teskey defendants as owners of the Murray Road property. To do so, the separate legal status of each Teskey company must be ignored. In other words, their corporate veils must be pierced.

[131] Simply put, it is plain and obvious that this single group enterprise pleading will fail. It is obvious from a careful review of each fact pleaded in paragraph 70 that the plaintiffs are either pleading conclusions of law or facts that do not support the limited circumstances in which the corporate veil will be pierced.

[132] Paragraphs 70 (b) and (j) are bare conclusions of law:

> (b) Each of the four companies is the agent of the others;
>
> ….
>
> (j) The Teskey Companies carry on business jointly and are operated as one economic unit or one economic enterprise.

[133] Paragraph 70(b) is a bare pleading of agency (a legal theory that is distinct from piercing the corporate veil). I have already struck this agency pleading.

[134] The rest of the alleged facts in paragraph 70 (a), (c) to (i) (set out below) are either very similar to or the same as the facts pleaded in *Spring Garden* that did not support a single group enterprise argument.

> (a) Each of the four companies is a parent or subsidiary of the others or is an affiliate of the others;
>
> ….
>
> (c) All four companies have the same officers and directors;
>
> (d) All four companies have common offices and employees;
>
> (e) All four companies operate under the same name;

(f) The Teskey Companies hold themselves out to the public as a single company;

(g) The residents in the area surrounding the Teskey Companies considered the Teskey Companies to own the properties located at 48 Murray Road, 54 and 62 Murray Road and 20 Murray Road and to be in control of all properties;

(h) The Teskey Companies prepare their financial statements on a consolidated basis;

(i) The acts and omissions set out in the claim were done by the Teskey Companies in pursuit of their common enterprise;

[135] It is important to note that the plaintiffs allege that the four Teskey defendants "operated as one economic unit or a single group enterprise." As explained, these are labels for piercing the corporate veil and do not relieve the plaintiffs from pleading facts that support the veils being pierced. In effect, this pleading asks the court to disregard the separate legal personality of each Teskey defendant. As stated in *Transamerica Life*, this requires complete domination and control of one company by the other and using the company as a shield for fraudulent or improper conduct.

[136] Typically, as in *Transamerica Life*, there are only two companies and a party alleges that one controlled the other and used it for illegal purposes. Here the four Teskey companies allegedly acted as one. Based on this pleading, who was controlling who, when and how? There are no facts pleaded that articulate the complete control and domination among these four defendants.

[137] I turn to the second requirement: that one company uses the other as a shield for fraudulent or improper conduct. The pleading is silent. Such conduct is not alleged. Further, there is no allegation that they expressly directed a wrongful thing to be done as in *Fleischer* and no facts alleged in support. There is no alleged conduct that might capture conduct that is "flagrantly opposed to justice" or "flagrantly unjust" nor any alleged facts in support. Once again, I emphasize that this pleading lumps all four Teskey defendants together. Therefore, any allegation of fraud or improper conduct would require material facts so it is clear how the essential elements of piercing the corporate veil are satisfied, given that the four defendants are grouped together.

[138] I recognize that the alter ego pleading in paragraph 72 alleges "illegal activity" and "control." However, it is not an answer to say that the single group enterprise pleading can be saved by looking to the alter ego pleading. As I will now explain, the alter ego pleading is also certain to fail.

THE ALTER EGO PLEADING FAILS

[139] Paragraph 66 of the statement of claim alleges that the sale of 54 Murray Road to Teskey 209 did not change who controlled this property because Teskey 209 was in effect the alter ego of Teskey Construction or Teskey Construction "completely dominated" Teskey 209.

[140] Paragraph 69 makes the same allegation about 48 Murray Road. The transfer of this property to HGT did not change who controlled this property because HGT was in effect the alter ego of Teskey Concrete or Teskey Concrete "completely dominated" HGT.

[141] These paragraphs alone are just bald statements. The facts that the plaintiffs allege in support are set out in paragraph 72(a) through (e). Paragraphs 72(a) and (c) are simply conclusions:

> (a) They exercised complete control over the Teskey Numbered Company and HGT;
>
> ….
>
> (c) They treated the Teskey Numbered Company and HGT like alter egos of Teskey Construction and Teskey Concrete.

[142] This leaves paragraph 72(b) as the only allegation of control (paras. (d) and (e) deal with "illegal activity"). In paragraph 72(b), the plaintiffs allege that Teskey 209 and HGT had "no independent decision making power" and all decisions were made by Teskey Construction and Teskey Concrete. In my view, this single particular may deal with control but it is not enough to satisfy a pleading of complete domination and control. There is no elucidation of this allegation in paragraph 72(b). Given the strict limits imposed on when the corporate veil will be pierced, the law demands more of a pleading.

[143] Several decisions emphasize the complete degree of control that is required. For example, in *Gregario v. Intrans-Corp*. (1994), 18 O.R. (3d) 527 at p. 536 (C.A.), the court stated as follows:

> Generally, a subsidiary, even a wholly owned subsidiary, will not be found to be the alter ego of its parent unless the subsidiary is under the complete control of the parent and is nothing more than a conduit used by the parent to avoid liability. The alter ego principle is applied to prevent conduct akin to fraud that would otherwise unjustly deprive claimants of their rights.
>
> [Emphasis added.]

[144] In *Transamerica Life*, at paragraph 22, the court explained that complete domination means that the company does not function independently:

> 22 As just indicated, the courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct. The first element, "complete control", requires more than ownership. It must be shown that there is complete domination and that the subsidiary company does not, in fact, function independently: Aluminum Co. of Canada Ltd. v. Toronto (City), [1944] S.C.R. 267 at p. 271, [1944] 3 D.L.R. 609; Bank of Montreal v. Canadian Westgrowth Ltd. (1990), 72 Alta. R. (2d) 319 (Q.B.). The evidence before me indicates that the relationship between Canada Life and C.L.M.S. was that of a typical parent and subsidiary. While C.L.M.S. is wholly owned by Canada Life and its board of directors is comprised of Canada Life executives, I have found that it does have an independent management and conducts a business separate and distinct from that of its parent.
>
> [Emphasis added.]

[145] A single particular that Teskey 209 and HGT had "no independent decision making power" and all decisions were made by Teskey Construction and Teskey Concrete, is simply one facet of control and does not particularize the "complete" control that the alter ego pleading requires.

[146] Turning to the allegation of illegal activity, paragraphs 72 (d) and (e) state that Teskey Construction and Teskey Concrete did the following:

> (d) They operated the Teskey Numbered Company and HGT in a manner that condoned illegal activity at the Property, specifically, the unlawful activities pleaded at paragraphs [50-53];
>
> (e) They failed to take steps to prevent or correct the illegal activity at the Property or have the Teskey Numbered Company or HGT take appropriate steps, when they knew of the illegal activity and had the power to take steps to prevent or correct the illegal activity.

[147] The illegal activity that is referred to in paragraphs 50-53 of the pleading is the alleged illegal activity of the Sunrise defendants (the Sunrise truck to truck transfers of propane). This is not the type of illegal activity that is required to pierce the corporate veil. The company whose separate identity is to be ignored must be an instrument of fraud or a mechanism to shield the other company from its liability for illegal activity.

[148] There is no allegation that Teskey Concrete and Teskey Construction incorporated Teskey 209 and HGT for an illegal fraudulent or improper purpose. There is no allegation that Teskey Concrete and Teskey Construction carried out any illegal activity and used Teskey 209 and HGT as instruments of fraud or as mechanisms to shield Teskey Concrete and Teskey Construction from their illegal activity.

[149] Lifting the corporate veil will only occur in exceptional circumstances. A pleading that seeks to achieve this result must clearly articulate the essential elements of this legal principle and provide the material facts that rule 25.06(1) requires. For the reasons set out above, the pleading in this case is fatally deficient. Regardless of whether the plaintiffs label it as a single group enterprise or alter ego, it is plain and obvious that the pleading will fail.

CAUSES OF ACTION AGAINST TESKEY DEFENDANTS

[150] The four causes of action that the plaintiffs plead against the Teskey defendants are premised on these defendants being treated as a group. I have now concluded that the pleading of agency, single group enterprise and alter ego are certain to fail and must be struck. As a result, it is not possible to proceed and consider if the plaintiffs have properly pleaded each cause of action against the Teskey defendants.

[151] During the hearing, class counsel argued that they have made out a case in the pleading to show that each of the Teskey defendants alone acted as owner, landlord and/or tenant at some point. Counsel seemed to suggest that if the agency, single group enterprise and alter ego pleadings were struck, the court could allow part of the pleading to survive. I disagree. It is clear from the sections of the statement of claim that deal with each cause of action, that the plaintiffs allege these causes of action against the "Teskey Companies." There is no pleading that advances these causes of action against the Teskey defendants individually and if so in what capacity. The court cannot be left to guess how this might be structured and then proceed to analyze a hypothetical pleading under s. 5(1)(a).

[152] In summary, the very foundation of the causes of action against the Teskey defendants is certain to fail. I strike all references to agency, one economic group enterprise, alter ego and treatment of the Teskey defendants as one. In these circumstances, it follows that the causes of action as pleaded against the Teskey defendants will also fail and must be struck. The plaintiffs have not satisfied the s. 5(1)(a) criterion as it relates to these defendants.

[153] At the conclusion of the certification hearing, class counsel requested leave to amend the pleading should the pleading against the Teskey defendants be struck. Pursuant to s. 5(4) of the *Class Proceedings Act* and following the direction of the Divisional Court in *Brown v. Canada (Attorney General)*, 2011 ONSC 7712 at para.9, the certification motion, as it relates to the Teskey defendants, is adjourned and the pleading against the Teskey defendants is struck with leave to amend. If the plaintiffs wish to amend they must serve their motion record within 30 days from the release of this decision and a case conference must be set up immediately to schedule the motion.

5(1)(b) - IDENTIFIABLE CLASS

[154] The plaintiff proposes the following class definition:

> All persons who were present or owned or leased or occupied properties located within the area in the City of Toronto bounded by Keele Street, Highway 401,

> Sheppard Avenue and Dufferin Street when a series of explosions occurred on August 10, 2008 at the propane facility located at 48/54/62 Murray Road in the City of Toronto, excluding the defendants and third parties and excluding the defendants' and third parties' officers, directors, servants, employees or agents.

[155] Subsection 5(1)(b) requires that there be "an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant". The purpose of a class definition is: (a) to identify persons with a potential claim; (b) define who will be bound by the result; and (c) describe who is entitled to notice: see *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913, at para. 10 (Ont. Ct. (Gen. Div.)). To serve the mutual benefit of the parties, the class definition should not be unduly narrow or unduly broad.

[156] Class membership identification is not commensurate with the elements of the causes of action advanced on behalf of the class. There simply must be a rational connection between the class member and the common issues: *Sauer* at para. 32

[157] In *Hollick*, the Supreme Court of Canada confirmed the test for determining if there is an "identifiable class." The plaintiff must define the class by reference to objective criteria so that a given person can be determined to be a member of the class without reference to the merits of the action.

[158] There must also be a rational relationship between the class and the causes of action. The class must not be unnecessarily broad or over-inclusive. Class members are not required to have identical claims and it need not be shown that each class member would be successful in establishing a claim for one or more remedies.

[159] There is evidence that 6,386 people lived in the area described in the class definition and this consisted of 2,576 households. To date, 1,675 people have registered their claims on class counsel's website and of this group 1,072 report physical or emotional injury.

[160] The class definition satisfies all of the above requirements and objectives. The defendants agree that the s. 5(1)(b) criterion is satisfied.

[161] I conclude that the s. 5(1)(b) criterion is satisfied.

5(1)(c) - COMMON ISSUES

Legal Framework

[162] Subsection 5(1) of the *Class Proceedings Act* requires that "the claims or defences of the class members raise common issues". Section 1 of the *Class Proceedings Act* 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;

[163] For an issue to be common, 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: see *Hollick* at para. 18.

[164] An issue will not be common if its resolution is dependent upon individual findings of fact that have to be made with respect to each individual claimant: see *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110 (S.C.J.), aff'd, [2003] O.J. No. 3918 (Div. Ct.).

[165] The underlying question is whether the resolution of a proposed common issue will avoid duplication of fact-finding or legal analysis: see *Western Canadian Shopping Centres* at para. 39.

[166] 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: see *Frohlinger* at para. 25; *Fresco* at para. 21.

[167] An issue can be common even if it makes up a very limited aspect of the liability question and although many individual issues remain to be decided after its resolution: see *Cloud* at para. 53. It is not necessary that the answers to the common issues resolve the action or even that the common issues predominate. It is sufficient if their resolution will significantly advance the litigation so as to justify the certification of the action as a class proceeding.

[168] The common issues criterion is not a high legal hurdle, but a plaintiff must adduce some basis in the evidence to show that issues are common: see *Hollick* at para. 25. As Lax J. stated in *Fresco* at para. 61 "[w]hile only a minimum evidentiary basis is required, there must be some evidence to show that this issue exists and that the common issues trial judge is capable of assessing it in common. Otherwise, the task for the common issues trial judge would not be to determine a common issue, but rather to identify one." [Emphasis added.]

[169] Finally, a plaintiff is not required to produce evidence on each element of a cause of action pleaded. As Lax J. stated in *Glover v. Toronto (City),* [2009] O.J. No. 1523 at para. 56: "One cannot give meaning to the concept that the criterion in section 5(1)(a) is to be satisfied without evidence, but then require the plaintiffs to produce evidence for each of the material facts alleged."

Proposed Common Issues

[170] I was provided with two versions of the common issues. With the exception of Blackmer and the Teskey defendants, all parties agree with the second version. They agree that there is some evidence to support the common issues and some evidence that they can be managed on a common basis.

[171] Dealing with version 2, common issues 17 and 18 address the liability of Blackmer ("Blackmer common issues"). Blackmer says that there is no evidence to support these common issues. The Teskey defendants dispute the wording of common issues 1, 2, 3, 13 and 14. Version 2 of all proposed common issues is as follows:

1. Is the storage and distribution of large quantities of propane and other combustible and flammable gases considered a non-natural use of the land on which the Facility was located, under the common law of Ontario? If yes, was there an escape of a substance likely to do mischief? If yes, are any or all of Sunrise Propane Energy Group, 1367229 Ontario Inc., 1186728 Ontario Limited, 1369630 Ontario Inc., 1452049 Ontario Inc., 2094528 Ontario Inc., HGT Holdings Ltd., Teskey Construction Co. Ltd., and Teskey Concrete Co. Ltd., strictly liable to the Class for the damage caused by the escape of propane and other flammable gases from the land on which the Facility was located on August 10, 2008?

2. Did the explosions, fire and ensuing discharge of smoke and contaminants from the land on which the Facility was located on August 10, 2008 constitute a nuisance? If yes, are any or all of Sunrise Propane Energy Group, 1367229 Ontario Inc., 1186728 Ontario Limited, 1369630 Ontario Inc., 1452049 Ontario Inc., 2094528 Ontario Inc., HGT Holdings Ltd., Teskey Construction Co. Ltd., and Teskey Concrete Co. Ltd., liable in nuisance for the resulting damages suffered by the Class?

3. Did the explosions, fire and ensuing discharge of smoke and contaminants from the land on which the Facility was located on August 10, 2008 constitute a trespass? If yes, are any or all of Sunrise Propane Energy Group, 1367229 Ontario Inc., 1186728 Ontario Limited, 1369630 Ontario Inc., 1452049 Ontario Inc., 2094528 Ontario Inc., HGT Holdings Ltd., Teskey Construction Co. Ltd., and Teskey Concrete Co. Ltd., liable in trespass for the resulting damages suffered by the Class?

4. Did any or all of Sunrise Propane Energy Group, 1367229 Ontario Inc., 1186728 Ontario Limited, 1369630 Ontario Inc. and 1452049 Ontario Inc. owe a duty of care to the Class in relation to the design, operation, monitoring, maintenance, supervision and control of the Facility?

5. Did any or all of Sunrise Propane Energy Group, 1367229 Ontario Inc., 1186728 Ontario Limited, 1369630 Ontario Inc. and 1452049 Ontario Inc. breach the standard of care expected of them in relation to the design, operation, monitoring, maintenance, supervision and control of the Facility? If yes, when and how?

6. Did the Sunrise Directors owe a duty of care to the Class to ensure that the Facility was operated in a safe and prudent manner?

7. Did the Sunrise Directors breach the standard of care expected of them in relation to the safe and prudent operation of the Facility? If yes, when and how?

8. Did Felipe De Leon owe a duty of care to the Class in relation to the storage, handling, transportation and/or transfer of propane at the Facility?

9. Did Felipe De Leon breach the standard of care expected of him in relation to the storage handling, transportation and/or transfer of propane at the Facility? If yes, when and how?

10. Are any or all of Sunrise Propane Energy Group, 1367229 Ontario Inc., 1186728 Ontario Limited, 1369630 Ontario Inc. and 1452049 Ontario Inc. liable vicariously for the acts or omissions of any individual(s) who caused or contributed to the explosions at the Facility on August 10, 2008, including the Sunrise Directors, Felipe De Leon, and others?

11. Did the TSSA owe a duty of care to the Class in relation to its regulation and oversight of the Facility, including regulation of the transportation, storage, handling and use of propane at the Facility?

12. Did the TSSA breach the standard of care expected of it in relation to its regulation and oversight of the Facility? If yes, when and how?

13. Did any or all of 2094528 Ontario Inc., HGT Holdings Ltd., Teskey Construction Co. Ltd., and Teskey Concrete Co. Ltd. owe a duty of care to the Class in relation to the design, operation, monitoring, maintenance, supervision and control of the Facility regarding the operation of the Facility?

14. Did any or all of 2094528 Ontario Inc., HGT Holdings Ltd., Teskey Construction Co. Ltd., and Teskey Concrete Co. Ltd breach the standard of care in relation to the design, operation, monitoring, maintenance, supervision and control of the Facility regarding the operation of the Facility? If yes, when and how?

15. Did Ontario Hose and/or Peraflex US and/or Peraflex Canada owe a duty of care to the Class in relation to the manufacture, design, test, market build, install, construct, distribute and/or supply of the Hose, portions of the Hose, and/or the Hose Crimp Fittings?

16. Did Ontario Hose and/or Peraflex US and/or Peraflex Canada breach the standard of care expected of them in relation to the manufacture, design, test, market build, install, construct, distribute and/or supply of the Hose, portions of the Hose, and/or the Hose Crimp Fittings? If yes, when and how?

17. Did Blackmer, operating as a division of Dover Energy Inc., owe a duty of care to the Class in relation to the manufacture, design, testing, marketing, assembly, installation, construction and distribution of a By-Pass Valve, being one of the possible components forming the "Pump By-Pass Components" referenced in the Fire Marshall's Report as being possibly on board Tanker #861?

18. Did Blackmer, operating as a division of Dover Energy Inc., breach the standard of care expected of it in relation to the manufacture, design, testing, marketing, assembly, installation, construction and distribution of a By-Pass Valve, being one of the possible components forming the "Pump By-Pass Components" referenced in the Fire Marshall's Report as being possibly on board Tanker #861? If yes, when and how?

19. Did Weldex owe a duty of care to the Class in relation to the manufacture, design, testing, marketing, assembly, installation, construction and distribution of Cargo Liner 861, including the input connections for the vapour hose which was attached to Cargo Liner 861?

20. Did Weldex breach the standard of care expected of it in relation to the manufacture, design, testing, marketing, assembly, installation, construction and distribution of Cargo Liner 861, including the input connections for the vapour hose which was attached to Cargo Liner 861? If yes, when and how?

21. Did RPET and/or Pro-Par owe a duty of care to the Class in relation to the inspection of Cargo Liner 861, and with respect to the reporting about that inspection of Cargo Liner 861 and with proceeding with a sale (if any) of Cargo Liner 861 to any or all of Sunrise Propane Energy Group, 1367229 Ontario Inc., 1186728 Ontario Limited, 1369630 Ontario Inc. and 1452049 Ontario Inc.

22. Did REPT and/or Pro-Par breach the standard of care expected of them under the circumstances? If yes, when and how?

23. Did Keddco owe a duty of care to the Class in relation to the manufacture, design, testing, marketing, assembly, installation, construction, distribution and supply of the Hose Crimp Fittings, including but not limited to ensuring that the Hose Crimp Fitting were fit for their intended purpose and complied with all provincial standards relevant to the production of materials used for the storage and distribution of propane?

24. Did Keddco breach the standard of care expected of it under the circumstances? If yes, when and how?

25. If the answers to any of the common issues 4 through 24 are "yes", did the breach or breaches cause or contribute to the explosion?

26. If the answer to any of questions 1 through 25 is "yes", what degree of fault should be assigned to each defendant or third party under the Negligence Act R.S.O. 1990, c. N.1 (the "Negligence Act") or under any other statute or at law?

27. If the answer to any of questions 1 through 25 is "yes", do any of the defendants or third parties (who have pled into the main action) have independent claims or third party claims-over under the Negligence Act, or at all, against any other defendants or third parties? If so, to what degree?

28. Can the damages of the Class (with respect to punitive damages and damages for lost enjoyment and use of their homes) be determined, in part or in whole, on an aggregate basis? If yes, what amount should the defendants pay, to whom and why?

29. Are the Class Members' claims, or any of them, statute-barred under the Limitations Act, 2002 against 2094528 Ontario Inc., HGT Holdings Ltd., Teskey Construction Co. Ltd., and Teskey Concrete Co. Ltd?

30. Should the defendants pay punitive damages to the Class, and if yes, who, why and in what amount?

31. Should the defendants pay prejudgment and post judgment interest, and if yes, at what annual interest rate?

32. Should the defendants pay the costs of administering and distributing any monetary judgment and/or the costs of determining eligibility and/or the individual issues? If so, who should pay what costs, why, in what amount and to what extent?

Dispute re Common issues 1, 2, 3, 13 and 14

[172] This is a dispute between the Teskey defendants and the rest of the parties about the wording of these common issues in version 2 set out above. Common issues 1, 2, and 3 involve the Sunrise defendants and the Teskey defendants. Common issues 13 and 14 deal only with the Teskey defendants.

[173] Although I have struck the pleading against the Teskey defendants, their dispute with the wording of these common issues is still valid, since the court must approve the common issues.

[174] Common issues 1, 2 and 3 can be dealt with together. Version 1 focused on the "non-natural use of the Facility" and the parties being strictly liable for the escape of propane from the "Facility". Version 1 of common issues 1, 2 and 3 is set out below:

> 1. Is the storage and distribution of large quantities of propane and other combustible and flammable gases considered a non-natural use of the Facility under the common law of Ontario? If yes, was there an escape of a substance likely to do mischief? If yes, are any or all of Sunrise Propane Energy Group, 1367229 Ontario Inc., 1186728 Ontario Limited, 1369630 Ontario Inc., 1452049 Ontario Inc., 2094528 Ontario Inc., HGT Holdings Ltd., Teskey Construction Co. Ltd., and Teskey Concrete Co. Ltd., strictly liable to the Class for the damage caused by the escape of propane and other flammable gases from the Facility on August 10, 2008?
>
> 2. Did the explosions, fire and ensuing discharge of smoke and contaminants from the Facility on August 10, 2008 constitute a nuisance? If yes, are any or all of Sunrise Propane Energy Group, 1367229 Ontario Inc., 1186728 Ontario Limited, 1369630 Ontario Inc., 1452049 Ontario Inc., 2094528 Ontario Inc., HGT Holdings Ltd., Teskey Construction Co. Ltd., and Teskey Concrete Co. Ltd., strictly liable for the resulting damages suffered by the Class?
>
> 3. Did the explosions, fire and ensuing discharge of smoke and contaminants from the Facility on August 10, 2008 constitute a trespass? If yes, are any or all of Sunrise Propane Energy Group, 1367229 Ontario Inc., 1186728 Ontario Limited, 1369630 Ontario Inc., 1452049 Ontario Inc., 2094528 Ontario Inc., HGT Holdings Ltd., Teskey Construction Co. Ltd., and Teskey Concrete Co. Ltd., strictly liable for the resulting damages suffered by the Class?
>
> [Emphasis added]

[175] In version 2, common issue 1 asks if the storage of the propane was a "non-natural use of the land on which the Facility was located." It also asks if the defendants are strictly liable for the escape of the propane and other gases "from the land on which the Facility was located." Common issue 2 asks if the "explosions, fire and ensuing discharge of smoke and contaminants from the land on which the Facility was located on August 10, 2008 constitute a nuisance?" The same is asked about trespass in common issue 3. As you can see the focus of these common issues has shifted from the "facility" to the "land on which the facility is located."

[176] The Teskey defendants say that they did not consent to the revision of these common issues and in any event the common issues as revised are not connected to the pleading. I will deal with the second point only.

[177] A common issue must be connected to the statement of claim, specifically the causes of action pleaded or the damages claimed: see *Toronto Community Housing Corp. v. Thyssenkrupp*

Elevator (Canada) Ltd., 2011 ONSC 4914 at para.188, leave to appeal to the Div. Court dismissed, 2012 ONSC 225.

[178] It is clear from the pleading in this action that "facility" is the Sunrise propane facility and the land is 54 and 48 Murray Road. The statement of claim alleges that the escape of various substances was from the facility not the land. For example, in paragraph 40 the plaintiffs plead that "massive fireballs were released into the air from the Facility." In paragraph 42, they plead that "[n]oxious fumes, smoke, gas and other chemicals and contaminants, including asbestos were released from the facility as a result of the explosion and fire." In paragraph 100, the plaintiffs plead that "[u]nder the common law of Ontario, the storage and distribution of such large quantities of propane and other combustible and inflammable gases constitutes a non-natural use of the Facility." In paragraph 101, it is alleged that the Sunrise defendants "failed to prevent the escape of a large quantity of propane from the Facility" and "are therefore liable for all damages flowing from the escape of propane from the Facility." Similar language appears in paragraph 105 where the plaintiffs allege nuisance and "an escape of propane and the explosions and fire from the Facility."

[179] It is not clear why the common issues were revised at the last moment. Perhaps the drafters thought the wording was clearer or perhaps they were trying to frame the wording so the focus would be on Teskey defendants and the "land" that the Teskey defendants owned at various times. During the hearing, the Teskey defendants were clear that they characterize the distinction as critical to determining liability. In my view, that remains to be seen. My concern is making sure that the common issues approved are connected to the statement of claim.

[180] Regardless of the motivation for the change, a common issue cannot ask a question that is not connected to the pleading. Common issues frame the documentary and oral discovery and the common issues trial. The common issue when answered must move the class action forward. Version 2 of these common issues poses questions that are different from what is alleged in the pleading. For this reason, I will not approve version 2 of common issues 1, 2, and 3. I will approve version 1 of common issues 1, 2 and 3 as set out above.

Dispute re Common Issues 13 and 14

[181] These common issues deal only with the Teskey defendants. The following draft of common issues 13 and 14 shows the words that were struck from the first version and the underlined words that were added in the second version:

> 13. Did any or all of 2094528 Ontario Inc., HGT Holdings Ltd., Teskey Construction Co. Ltd., and Teskey Concrete Co. Ltd. owe a duty of care to the Class in relation to the design, operation, monitoring, maintenance, supervision and control of the Facility regarding the operation of the Facility ~~regarding the operation of the facility~~?
>
> 14. Did any or all of 2094528 Ontario Inc., HGT Holdings Ltd., Teskey Construction Co. Ltd., and Teskey Concrete Co. Ltd breach the standard

> of care in relation to the design, operation, monitoring, maintenance, supervision and control of the Facility ~~regarding the operation of the Facility~~? If yes, when and how?

[182] Technically, there is no need to consider the dispute about revised common issues 13 and 14 since the causes of action against the Teskey defendants have been struck. In the event the plaintiffs successfully amend the pleading against the Teskey defendants, it is worth noting that there is a problem with these common issues. Once again, the wording of these common issues in version 2 is not connected to what is in the pleading. The phrase design, operation, monitoring, maintenance, supervision and control of the Facility is much broader than what is alleged against the Teskey defendants in the statement of claim.

[183] To be clear, I am not approving common issues 13 and 14 since the causes of action against the Teskey defendants have been struck.

THE BLACKMER COMMON ISSUES

[184] Common issues 17 and 18 deal with Blackmer. It is the position of Blackmer that there is no evidence to support these common issues and therefore no basis to certify this action against it. There is no debate about whether these common issues can be assessed in common. Before I assess these common issues, a review of the relevant evidence is required.

[185] The following is a review of the evidence that is relevant to the Blackmer common issues. The review primarily focuses on the investigation of the Ontario Fire Marshall ("OFM") and the Blackmer affidavits. The issue is whether there is some evidence to support the common issue dealing with Blackmer (common issues 17 and 18).

The Truck to Truck Transfers of Propane

[186] The Sunrise defendants used Unit 1 to transport propane from the Sunrise propane facility to various retail locations. On the night of the explosion De Leon was driving Unit 1. He completed his propane deliveries and arrived back at the Sunrise propane facility at approximately 3:00 a.m. He needed to fill Unit 1 for the next shift and did this through a truck to truck propane transfer. He filled Unit 1 with propane from Unit 861. Sunrise used Unit 861 for transporting propane from Sarnia to the propane facility on Murray Road. It was not used for local deliveries.

[187] The transfer of fuel from one unit to the other required De Leon to pull Unit 1 alongside Unit 861. De Leon connected two hydraulic lines from Unit 1 to the hydraulic pump connection on Unit 861, because the hydraulic pump aboard Unit 861 was not operational. Next, De Leon connected the vapour and liquid transfer lines between each unit and subsequently opened the liquid and vapour valves on each unit. He then engaged the power take off ("PTO") in the cab of Unit 1, which hydraulically energized the propane pump located on Unit 861 to transfer liquid propane from Unit 861 to Unit 1.

[188] After Unit 1 was filled to 85% capacity, De Leon shut off the PTO in the cab of Unit 1, which stopped the pump and the transfer of propane. While disconnecting the hydraulic lines, De Leon noticed some "smoke" which he thought was fog coming from the dock area of the Sunrise propane facility, approximately 20 feet from his location. It sounded like air being released by a jack-hammer compressor. De Leon cleared the area and left the liquid and vapour transfer hoses in place on each truck. He did not close the valves on either truck. Shortly after he noticed the fog, an initial explosion occurred followed by subsequent larger explosions.

The Fire Marshall's Report

[189] The OFM conducted an investigation to determine the origin and cause of the explosions. Several fire investigators and engineers participated in this investigation.

[190] On August 4, 2010, after a two year investigation, the OFM delivered a report that describes the investigation and offers an opinion on the cause of the explosions. The plaintiffs rely on this report to say that there is some evidence to support the Blackmer common issues.

[191] OFM representatives examined the items found at the Sunrise propane facility including equipment, tanks and tankers. They conducted tests on some of these items and prepared computer simulations in an effort to identify the cause of the explosions.

[192] According to the OFM report, the explosions resulted from a liquid propane leak from a hose or by-pass component which occurred at the Sunrise propane facility when a truck-to-truck transfer from Unit 861 to Unit 1 was in progress. The report states as follow:

> Based on our engineering analysis, it is our opinion that the origin of the leak, was a failure on the discharge side of the pump for unit 861, such as the liquid transfer hose or a pump by-pass component. Liquid propane escaped from the hose or by-pass component failure, vaporized and was ignited from an unknown ignition source to initiate the vapour cloud explosion and subsequent fire, that caused BLEVEs of various containers on site.
>
> [Emphasis added]

[193] The Fire Marshall could not identify the source of the ignition that caused the explosions. The report states that a tank-to-tank transfer from Unit 861 to Unit 1 was in process at the time of the explosions and that tank to tank transfers are prohibited unless they occur at a licensed bulk plant facility. The Sunrise propane facility was not a licensed bulk plant facility.

[194] The OFM located portions of the hose that was used to transfer propane from Unit 861 to Unit 1 and identified that the hose manufacturer was likely Ontario Hose. Alternatively, Peraflex or Peraflex Industries manufactured the hose in question, and supplied it to Ontario Hose. The plaintiffs allege Ontario Hose or in the alternative, Peraflex or Peraflex Industries, was negligent in manufacturing, designing and distributing the hose which was recovered at the Sunrise propane facility.

[195] The OFM report also located the hose crimp fitting on the hose ends that were machined from a section of pipe manufactured by Keddco, exclusively for Ontario Hose. The hose crimp fitting was part of the hose that connected Unit 861 to Unit 1 which was identified as the origin of the leak. The plaintiffs allege that Keddco was negligent in manufacturing, designing and distributing the hose crimp fittings which were recovered at the Sunrise propane facility.

[196] Although the OFM report also identifies the pump by-pass component as the origin of the leak, the OFM never recovered this component during the investigation. The statement of claim alleges that Blackmer designed, manufactured, tested, marketed, built, installed, constructed distributed and/or supplied the pump by-pass component. Blackmer says that there is no evidence to support this claim against it and therefore no evidence that common issues 17 and 18 exist.

[197] The OFM report is the source of the evidence that the plaintiffs rely upon. As noted above, the OFM concluded that the "origin of the leak, was a failure on the discharge side of the pump for unit 861, such as the liquid transfer hose or a pump by-pass component." [Emphasis added.]

[198] There is no dispute that Unit 861 was equipped with a Blackmer hydraulically driven pump that was used to transfer liquid propane into Unit 1. The OFM recovered the pump during its investigation and the name Blackmer is visible on the outside surface. The head casting was marked "Blackmer Grand Rapids M N6C1B." The OFM report states that the recovered pump assembly is "similar in construction and appearance to a Blackmer model TLGLF4." The OFM report does not provide the pump's serial number. The OFM examined the Blackmer pump and took various photographs. The OFM did not retain the Blackmer pump. It was returned to the owner and the pump's current location is unknown.

[199] Blackmer accepts that the pump in question is a Blackmer pump but without knowing the serial number on this pump, Blackmer states that it cannot locate or produce design specifications, date of design, or sale particulars of the pump, identity of the purchaser, or any communications relating to the pump.

[200] It is agreed that the OFM report does not identify the Blackmer pump as a possible cause for the explosions. Rather, the origin of the propane leak was a failure on the discharge side of Unit 861, "such as the liquid transfer hose or a pump by pass component."

[201] The OFM report details where Unit 861 was located after the explosion and states that the area was searched for components that formed part of Unit 861. The components that were found were photographed and are discussed in the OFM report. While a by-pass valve for Unit 861 was never located, the OFM report states that the pump had such a valve. Page 207 of the OFM report states that Unit 861 "was equipped with a pump internal liquid relief valve and a by-pass valve rated to divert propane before the vapour relief valve set pressure was reached." [Emphasis added.]

[202] The OFM report includes a drawing from a 2008 Blackmer product manual. The drawing is titled: "Typical cargo liner pump installation." This drawing clearly shows the location of the by-pass valve and its connection to a Blackmer pump. Referring to this Blackmer product manual and what the OFM found at the site of the explosion, the OFM report states at page 208:

> The pump is equipped with an internal relief valve usually set to 125 psi … and is usually set 25 psi higher than the by-pass valve. …
>
> ….
>
> The by-pass valve for Unit 861 was not recovered. A tank fitting was found immediately forward of the pump flange for the by-pass valve tank return. It is possible a flexible style connector was used to connect the bypass valve to the tank return fitting.

[203] Blackmer admits that it manufactures propane pumps and by-pass valves and has done so since 1954. By-pass valves and pumps are sold and installed separately because they are separate components. Several manufacturers in the world, including Blackmer, manufacture by-pass valves.

[204] Blackmer vigorously asserts that there is no evidence that Unit 861and the Blackmer pump in question had a by-pass valve or if there was a by-pass valve, that it was a Blackmer by-pass valve. In essence, Blackmer says that the OFM report is simply speculation and therefore it does not satisfy the "some evidence" test. Blackmer filed several affidavits that are considered below.

The Kennedy Affidavit

[205] William Kennedy is a former Vice President of Blackmer and currently serves as a consultant to the company. In his affidavit, he responds to the OFM's use of the phrase "by-pass component" as follows: "The term 'pump bypass component' is not used in the industry and to my knowledge, there are no 'pump bypass components'." However a by-pass valve is a known component.

[206] By-pass valves are not part of a propane pump. By-pass valves and pumps are separate components of a propane delivery system. By-pass valves are not required to operate a pump. Where a designer determines there is a need for a by-pass valve, the valve is connected to a delivery hose or pipe downstream of the pump.

[207] Mr Kennedy states that "[t]he OFM Report speculates at page 208, that a bypass valve was connected to steel piping which, in turn, was connected to the discharge end of the pump on #861. However, the OFM did not recover a bypass valve for #861 and I did not observe a bypass valve or pump bypass components for #861 during the Inspections."

[208] At page 208 (Figure 252) of the OFM report, the OFM references an image taken from page 25 (Figure 30) of Blackmer's Liquefied Gas Handbook, dated December 2008.

Mr. Kennedy states at paragraph 18 of his affidavit that "[a]lthough this image depicts a hypothetical propane delivery system, which includes a bypass valve, such bypass valves are not required. While Blackmer generally recommends that tankers be equipped with a bypass valve …", it is Mr. Kennedy's experience that "for tankers similar to #861, bypass valves are not common." For example, he notes that Unit 90, also on site at the time of the explosion, is similar in model and size to Unit 861 and Unit 90 did not have a bypass valve.

[209] In summary, Mr. Kennedy could not see any evidence of a by-pass valve being associated with Unit 861, or if one did exist, any evidence that it was manufactured by Blackmer or that it malfunctioned.

[210] Although Mr. Kennedy states that by-pass valves are not common, I note that Blackmer Bulletin 501-007, effective March 2008, states as follows:

> Blackmer differential valves are designed to protect pumps and system components from excessive pressure damage and no [liquid propane] gas pump installation is complete without one. Blackmer offers five different models that provide full-flow pressure control.

The Lewis Affidavit

[211] Kevin Lewis is a principal and senior metallurgical engineer from CASE Forensics Corporation. He agrees that the "rubber transfer hose could be a likely source of escaping [propane] liquid since it was being used at the time." However, he does not agree with the OFM "that by-pass components caused the escape of liquid propane that initiated" the explosion. Like Mr. Kennedy, he describes this as speculation.

[212] Mr. Lewis explains his opinion as follows (at para. 14 of his affidavit):

> We have found no direct evidence to support the hypothesis that tanker #861 was equipped with a by-pass system at the time of the explosion. By including by-pass components as a potential source of the leak, the OFM Report has listed a possible cause without any direct evidence to support its existence. To date, no evidence from the OFM of a by-pass component has been located or photographed.

[213] Further, Mr. Lewis states at paragraph 15 that the "OFM Report incorrectly assumes that all transport trucks are equipped with a by-pass valve. It is common for transport trucks, like the ones involved in this incident, to be designed without a by-pass valve because it is not required."

[214] Mr. Lewis reviews the various valves that are typically used for controlling the flow of propane on tankers: the internal combination valve ("ICV"), the pump's internal relief valve and a by-pass valve. Unit 861 was equipped with an ICV and an internal relief valve. The OFM located evidence of both valves. Each was examined and the OFM ruled out any failure of these two valves.

[215] Mr. Lewis notes that Unit 1 had a by-pass valve. The OFM located evidence of the by-pass valve and the piping hoses on Unit 1. Mr. Lewis states that in contrast (at para. 41) "[n]o evidence or photographs were found to suggest that any by-pass components were part of the propane delivery system on tanker #861. The by-pass valves were required to be made of steel or cast iron in 2005. Both steel and cast iron have high melting temperatures and will generally survive a fire. None of the by-pass components were found by the OFM supports that by-pass components were not installed on tanker #861."

[216] Mr. Lewis explains his opinion that if there had been a by-pass valve, it would have survived the explosions. He states:

> 44. Blackmer manufactures a 2-inch by-pass valve which is made of ductile iron. Ductile iron has a melting point of over 1,150°C (2,050°F), and would have easily survived the ensuing fire and explosion, just as all the other steel and cast iron piping. As can be seen in Figures A (photos taken by the OFM), the liquid propane pump and associated piping, including an intact bypass valve, which were located on truck #1 both survived the BLEVE [Boiling Liquid Expanding Explosion].
>
> 45. Although there is no evidence to support the OFM's by-pass component theory, if a by-pass valve was installed on #861, I am of the opinion it would have survived the BLEVE.
>
> 46. The assumption made by the OFM that initial leak may have been caused by a breach in a "by-pass component" is an unsubstantiated hypothesis. Unlike the flexible hoses that are known to have existed, to date, no evidence whatsoever has been uncovered to support the existence of a by-pass system aboard tanker #861. As not all transport tankers employ a by-pass system, it is incorrect to assume that #861 had a by-pass system.

[217] Lastly, Mr. Lewis states that if a by-pass valve was installed on Unit 861, there is no evidence of who manufactured such a by-pass valve.

ANALYSIS – BLACKMER COMMON ISSUES

[218] For ease of reference, common issues 17 and 18 are set out below:

> 17. Did Blackmer, operating as a division of Dover Energy Inc., owe a duty of care to the Class in relation to the manufacture, design, testing, marketing, assembly, installation, construction and distribution of a By-Pass Valve, being one of the possible components forming the "Pump By-Pass Components" referenced in the Fire Marshall's Report as being possibly on board Tanker #861?
>
> 18. Did Blackmer, operating as a division of Dover Energy Inc., breach the standard of care expected of it in relation to the manufacture, design,

> testing, marketing, assembly, installation, construction and distribution of a By-Pass Valve, being one of the possible components forming the "Pump By-Pass Components" referenced in the Fire Marshall's Report as being possibly on board Tanker #861? If yes, when and how?

[219] I start with the fact that Unit 861 had a Blackmer pump. This is not in dispute.

[220] There is some evidence that Unit 861 had a by-pass valve. Specifically, the OFM report states at page 207 that Unit 861 had a by-pass valve. At page 208 of this report, the OFM states that the "by-pass valve for Unit 861 was not recovered. A tank fitting was found immediately forward of the pump flange for the by-pass valve tank return. It is possible a flexible style connector was used to connect the bypass valve to the tank return fitting."

[221] I acknowledge that the Blackmer witnesses characterize these excerpts in the OFM report as speculation. They point to the fact that the by-pass valve should have survived the explosion and yet it was never found. They also conclude that none of the recovered evidence supports the OFM's conclusion that there was a by-pass valve. The Blackmer witnesses draw some compelling conclusions about the OFM report. However, it is not the role of this court on a certification motion to assess and weigh the evidence and determine whether the OFM's statement, that Unit 861 had a by-pass valve, is mere speculation.

[222] This is not the end of the debate. Blackmer argues that, if there is some evidence that Unit 861 had a by-pass valve, there is no evidence that it was a Blackmer valve.

[223] I start with the undisputed piece of evidence that Blackmer manufactured and sold by-pass valves. As stated in the Blackmer Bulletin, "no liquid propane gas pump is complete without one." There is evidence that by-pass valves were also manufactured by other companies.

[224] The only other evidence that the plaintiffs rely on is found at page 208 of the OFM report. After stating that Unit 861 had a by-pass valve, the OFM report then refers to a drawing from the Blackmer Bulletin depicting the location of the by-pass valve and excerpts from the Bulletin that explain how the Blackmer by-pass valve works. The OFM does not explain why it referenced the Blackmer manual, rather than manuals from other companies that manufacture by-pass valves. However, after concluding that Unit 861 had a by-pass valve, the OFM relies on the Blackmer manual to explain its location and operation.

[225] The some evidence requirement is a low burden. In my view, the plaintiffs have satisfied the some evidence test. There is evidence that the Blackmer pump had a by-pass valve, that Blackmer manufactures and sells by-pass valves and that it tells customers that no liquid propane gas pump installation is complete without a Blackmer differential by-pass valve.

[226] The plaintiffs are not required to produce some evidence to support each element of a cause of action against a defendant. Obviously, the plaintiffs will eventually have to prove on a balance of probabilities that Unit 861 had a by-pass valve and that it was a Blackmer valve.

[227] To require such proof at this early stage in the proceeding would impose a higher burden on the plaintiffs than what the law requires. The parties have not exchanged documents or conducted examinations for discovery. The parties have not yet gathered further evidence from the OFM about its report as it relates to the by-pass valve. There are other sources of evidence to be considered as the action progresses that may offer proof of the by-pass valve and its manufacturer. For example, at pages 87-88 of the OFM report, there is reference to Unit 861 being inspected by the TSSA and Pro-Par in 2008 before the explosion. These parties may have records that may offer relevant evidence about the by-pass valve issue.

[228] In summary, there is some evidence to support common issues 17 and 18. I therefore accept them as common issues.

5(1)(d) - PREFERABLE PROCEDURE

[229] Subsection 5(1)(d) of the *Class Proceedings Act* requires that a class proceeding be the preferable procedure for the resolution of the common issues. The preferability requirement has two concepts at its core: first, whether the class action would be a fair, efficient and manageable method of advancing the claim; and second, whether the class action would be preferable to other reasonably available means of resolving the claims of class members.

[230] The preferability inquiry is conducted through the lens of the three goals of class actions: access to justice, judicial economy and behaviour modification and by taking into account the importance of the common issues to the claims as a whole, including the individual issues: see *Cloud* at para. 73 and *Hollick* at paras. 27-28.

[231] In determining whether a class proceeding is the preferable procedure for resolving the common issues, the court must consider not just the common issues, but rather, the claims of the class in their entirety: see *Hollick* at para. 29.

[232] The preferable procedure requirement can be met even when there are substantial individual issues. However, a class proceeding will not satisfy the preferable procedure requirement when the common issues are overwhelmed or subsumed by the individual issues, such that the resolution of the common issues will not be the end of the liability inquiry but only the beginning.

[233] The defendants do not dispute that a class action is the preferable procedure. I am satisfied that it is. This class proceeding will provide thousand of class members with access to justice. It will avoid numerous individual actions that would otherwise be required to advance the claims in question. Lastly, a class proceeding will achieve the goal of behaviour modification. If found liable, the defendants will be required to account for the harm they caused and this will promote behaviour in relation to the safe operation of a propane facility.

[234] The goal of judicial economy will be achieved by certifying this action as a class proceeding. The resolution of the common issues will be determinative of the liability of the

defendants. The issues that are common to all class members should be decided in one action. No purpose would be served by requiring a multiplicity of individual proceedings.

[235] In summary, a class proceeding is the preferable procedure for the resolution of the common issues in this case. It is a fair, efficient and manageable method of advancing the claims. The plaintiffs have satisfied the s. 5(1)(d) criterion.

5(1)(e) – A REPRESENTATIVE PLAINTIFF / WORKABLE LITIGATION PLAN

[236] The final requirement for certification is that there be a representative plaintiff who will fairly and adequately represent the interests of the class, who has produced a suitable litigation plan and who does not have a conflict of interest on the common issues with other class members. The capability of the proposed representative plaintiff to provide fair and adequate representation is an important consideration. The standard is not perfection, but the court must be satisfied that "the proposed representative will vigorously and capably prosecute the interest of the class ...." (*Western Canadian Shopping Centres* at para. 41).

[237] The representative plaintiffs are individuals who lived within the area described in the class definition. They are capable of fairly and adequately representing the class and have provided instructions to class counsel since this action began. They have a common interest with the other class members and there is no conflict of interest.

[238] It is recognized that litigation plans are a work in progress and may have to be amended during the course of the proceeding: see *Cloud* at para. 95. The plaintiffs have prepared a detailed and comprehensive litigation plan that provides for communication with class members, a litigation schedule, notification of certification and the right to opt out, post-certification status reports, and production and management of documents. The plan is workable and sufficient for the purpose of managing this class proceeding. As required, the plan can be amended during the life of this action.

[239] The defendants do not dispute the s. 5(1)(e) criterion. I conclude that the plaintiffs have satisfied this criterion.

CONCLUSION

[240] In summary I make the following orders:

(1) The pleading against the Teskey defendants is struck with leave to amend. If the plaintiffs seek to amend the statement of claim, they must serve their motion record within 30 days of the date of this decision and immediately schedule a case conference to set a date for the motion.

(2) I adjourn the certification motion as it relates to the Teskey defendants. If the plaintiffs do not seek to amend their statement of claim, this adjournment is no longer in effect.

(3) This action is certified as a class proceeding, against all other defendants, pursuant to the *Class Proceedings Act* on the basis of the common issues approved in these reasons.

(4) The class is defined as follows:

> All persons who were present or owned or leased or occupied properties located within the area in the City of Toronto bounded by Keele Street, Highway 401, Sheppard Avenue and Dufferin Street when a series of explosions occurred on August 10, 2008 at the propane facility located at 48/54/62 Murray Road in the City of Toronto, excluding the defendants and third parties and excluding the defendants' and third parties' officers, directors, servants, employees or agents.

(5) James Durling, Jan Anthony, Thomas John Santoro, Guiseppina Santoro, Anna Manco and Francesco Manco are appointed as the representative plaintiffs for the class.

(6) Notice of certification will be given to the class in a manner approved by the court. Costs of the notice will be determined by the court if the parties have not agreed to same.

[241] Counsel shall prepare an order that incorporates my conclusions and complies with s. 8 of the *Class Proceedings Act*.

[242] If the parties cannot agree on costs, they must deliver written submissions to the court by August 30, 2012 in accordance with a schedule to be agreed upon by counsel. This schedule must allow for a brief reply from the plaintiffs.

_____

C. Horkins J.

Released: July 23, 2012

CITATION: Durling v. Sunrise Propane Energy Group Inc., 2012 ONSC 4196
COURT FILE NO.: CV-08-363271-00CP
DATE: 20120723

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JAMES DURLING, JAN ANTHONY THOMAS, JOHN SANTORO, GIUSEPPINA SANTORO, ANNA MANCO, FRANCESCO MANCO AND CESARE MANCO

Plaintiffs

– and –

SUNRISE PROPANE ENERGY GROUP INC., 1367229 ONTARIO INC., 1186728 ONTARIO LIMITED, 1369630 ONTARIO INC., 1452049 ONTARIO INC., VALERY BELAHOV, SHAY (SEAN) BEN-MOSHE, LEONID BELAHOV, ARIE BELAHOV, 2094528 ONTARIO INC., HGT HOLDINGS LTD., TESKEY CONSTRUCTION CO. LTD. and TESKEY CONCRETE CO. LTD., THE TECHNICAL STANDARDS AND SAFETY AUTHORITY, FELIPE DE LEON, ONTARIO HOSE SPECIALTIES LIMITED, PERAFLEX HOSE INC., PERAFLEX HOSE INDUSTRIES INC., BLACKMER OPERATING AS A DIVISION OF DOVER ENERGY INC., WELDEX COMPANY LIMITED, KEDDCO MFG. LTD., ROBERT PARSONS EQUIPMENT TRADING INC. and PRO-PAR (1978) INC.

Defendants

REASONS FOR JUDGMENT

C. Horkins J.

Released: July 23, 2012