DATE OF RELEASE: June 14, 1996

No. 95 2895
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	
JIM CAMPBELL and MICHELLE ANN-MARIE ISHERWOOD PLAINTIFFS	
AND:	
FLEXWATT CORPORATION WINTERTHERM CORPORATION CANADIAN STANDARDS ASSOCIATION HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA THERMAFLEX LIMITED AZTECH INTERNATIONAL LTD. FLEXEL INTERNATIONAL LTD. ADAIR INDUSTRIES LTD. CITY OF VANCOUVER MUNICIPALITY OF WEST VANCOUVER CITY OF VICTORIA CITY OF NORTH VANCOUVER DISTRICT OF NORTH VANCOUVER CITY OF BURNABY CORPORATION OF THE CITY OF NEW WESTMINSTER DISTRICT OF MAPLE RIDGE and CITY OF SURREY CORPORATION OF DELTA DEFENDANTS	REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE HUTCHISON
AND:	
CITY OF ABBOTSFORD ET AL Third Parties	

Malcolm Macaulay, Q.C.
Deborah A. Acheson, Q.C.
Patrick Guy, Esq. K. Whitley, Esq. — Counsel for the Plaintiffs

William M. Holburn, Q.C.
J. Dale Stewart, Esq. — Counsel for the Defendant Canadian Standards Association

Thomas H. MacLachlan, Esq.
Timothy Leadem, Esq. — Counsel for the Defendant Her Majesty the Queen in the Right of the Province of British Columbia

John R. Singleton, Esq.

Jeffrey A. Hand, Esq.	Counsel for the Defendants City of West Vancouver, City of North Vancouver, District of North Vancouver, Municipality of Burnaby, Municipality of New Westminster, Municipality of Maple Ridge
Derek Creighton, Esq.	Counsel for the Defendant City of Vancouver
R.C. Macquisten, Esq.	Counsel for the Defendant City of Victoria
R.G. Hildebrand Esq.	Counsel for the City of Surrey
Michael C. Woodward Corporation	Counsel for the of Delta
W.S. Berardino, Q.C. & W.T. Morley, Esq.	Counsel for the third party City of Kelowna
Date and Place of Hearing	April 22-26, 1996 Victoria, B.C.

1 This Motion is brought by the two named plaintiffs for an Order pursuant to S.2(2) of the ***Class Proceedings Act***, 1995 S.B.C., c.21 (the "***Act***") requesting the actions be certified as a class proceeding and that Jim Campbell ("Campbell") and Michelle Ann-Marie Isherwood ("Isherwood") be appointed as representative plaintiffs for the class. Campbell and Isherwood are each members of a group in excess of 2,000 consumers living in British Columbia who had installed in their homes radiant ceiling heating panels (**RCHPs)** which were subsequently ordered disconnected by the Chief Electrical Inspector for the Province.

2 The plaintiffs ask the court to define the class as follows:

> Those residents of British Columbia who own radiant ceiling heating panels with the brand names Aztech-Flexel, Thermaflex or Flexwatt.

3 The plaintiffs seek to have the proceedings certified against four distinct classes of defendants as follows:

Designer/Manufacturer

- Flexwatt Corporation
- Thermaflex Limited
- Aztech International Ltd.

Distributors

- Wintertherm Corporation
- Flexel International Ltd.
- Adair Industries Ltd.

(It should be noted none of these companies took part in the certification hearing and the manufacturers are said to be out of business.)

Standards/Certification Organizations

- **Canadian Standards Association** (**CSA**)

Public (Regulatory) Authorities

- Province of British Columbia (the Province)
- City of Victoria
- Municipality of West Vancouver
- City of Vancouver
- District of North Vancouver
- Municipality of Burnaby
- Municipality of New Westminster
- Municipality of Maple Ridge
- Municipality of Surrey

4 By practice directive of the Chief Justice has ordered when any suit is brought under the ***Act*** a judge shall be designated to

hear all further motions. Pursuant to the ***Act*** a designated judge takes over case management and, if the action is certified, remains with the case to trial or decertification. However, the ***Act*** wisely provides for a substitute in case of retirement, death or other valid reason. In the result the present application for certification is the culmination of a number of pre certification motions that I have heard since becoming the designated judge in the **RCHPs** litigation. The argument on certification itself occupied five hearing days.

I. BACKGROUND

5 **RCHPs** have been used in North America for approximately 10 to 15 years. The panels consist of thin carbon-ink based heating elements encased in transparent plastic film. Electricity is supplied to the elements through narrow metal buss bars (or electrical connectors) which run parallel to each side of the panel.

6 Panels made by Aztech-Flexel, also known as Thermaflex, were manufactured in Scotland and distributed in British Columbia by two distributors: Aztech International, of New Mexico, and Adair Industries Ltd. of Vancouver.

7 Panels made by Flexwatt Corporation of Massachusetts were distributed by various companies in B.C. including Wintertherm Corporation.

8 Between 1991 and 1995 several incidents involving overheating **RCHPs** occurred in B.C. On November 2, 1993 the Chief Electrical Inspector for B.C. issued a disconnect order for specific models of Aztech-Flexel **RCHPs** rated at 22 watts/sq. ft. installed after November 3, 1989. On February 25, 1994 the Chief Electrical Inspector issued a second disconnect order for all Aztec-Flexel **RCHPs** rated at 22 watts/sq. ft. installed after November 3, 1989.

9 On September 26, 1994 the Chief Electrical Inspector issued a disconnect order for certain Flexwatt **RCHPs** rated at 20 watts/sq. ft. and 30 watts/sq. ft. On November 18, 1994 the Chief Electrical Inspector issued a disconnect order for all Flexwatt **RCHPs**.

10 More than 2,000 homeowners were affected by the disconnect orders. These homeowners then had to acquire alternative heating sources or remain in the cold.

11 The homeowners affected by the disconnect orders formed consumer groups to pressure the parties involved in an attempt to get compensation for their losses. Dean David Cohen of the University of Victoria Law School was appointed by the Province of

B.C. to conduct an inquiry. Dean Cohen recommended a mediated resolution to the problem.

12 Following Dean Cohen's report Mr. Gordon Sloan, a lawyer practising on Salt Spring Island, site of some of the first failures of the **RCHPs**, was retained by some of the defendants to act as mediator for the defendants. The homeowners were not invited to participate in this "mediation". In September 1995 Mr. Sloan was relieved of his duties.

13 Attempts were made by some defendants and the plaintiffs to hold mediation discussions involving all parties but their efforts were unsuccessful.

14 On August 1, 1995 the ***Act***, became law and these actions were commenced and filed as a class proceeding.

II. RCHPs AND ELECTRICAL STANDARDS

15 **RCHPs** are electrical devices and as such fall under the ***Electrical Safety Act and Regulations***, R.S. 1979, C. 104. Section 3 of Regulation 450/90 states that electrical equipment cannot be used in B.C. unless it meets a standard adopted under the **B.C. Electrical Code** (***B.C.E.C.***) Regulations. Regulation 237/95 adopts the **Canadian Electrical Code** (***C.E.C.***) Part 1 as the ***B.C.E.C.***.

16 The Defendant **CSA** is one of five organizations authorized by the **Standards Council of Canada** to develop electrical standards. These electrical standards may then be adopted by the ***C.E.C.***

III. THE HISTORY OF CSA

17 The Defendant **CSA** is one of nine organizations authorized by the **Standards Council of Canada** to certify electrical equipment. The Defendant **CSA** certifies electrical equipment to the standards of the ***C.E.C.*** Part 2. It should be noted however, the ***B.C.E.C.*** adopts Part 1, but not Part 2 of the ***C.E.C.***. Therefore **CSA** certification does not mean, the plaintiffs argue, that an electrical device complies with the ***Electrical Safety Act***. An electrical device must meet the standards of Part 1 of the ***C.E.C.*** in order to satisfy the requirements of the ***Electrical Safety Act***.

18 **CSA** is a not-for-profit association founded in 1919, independent of government and business. It is comprised of approximately 8,000 volunteer members from Canada and 20 other countries. The 8,000 association members represent business, all levels of government, service industries, manufacturers, consumers, regulatory authorities and special interest groups. **CSA** is governed by a voluntary board of directors: 16 of its 25 directors are elected by the 8000 association members and 8 are appointed by

those who are elected. The president, who directs staff operations, is also a director and is appointed by the board.

19 **CSA** has two primary roles. First, it facilitates the development of consensus standards. Second, it provides conformity assessment services, including testing products for certification to various national and international standards.

IV. THE SETTING OF NATIONAL STANDARDS

20 **CSA**'s process for the development of standards is a part of Canada's National Standards System. It is carried out under the mandate and coordination of the **Standards Council of Canada** ("**SCC**"). **SCC** is a separate corporate entity of Industry Canada. **CSA** is one of five organizations in Canada that are accredited by **SCC** as standards development organizations.

21 A national standard of Canada is a standard which has been approved by **SCC**, and one which reflects an agreement among the views of a number of capable individuals whose collective interests provide, to the greatest practicable extent, a balance of representation of business, government (including federal and provincial regulatory authorities), labour, consumers and associations.

22 Approval of a standard as a National Standard of Canada indicates that a standard conforms to the criteria and procedures established by **SCC**.

23 **CSA**'s role is to facilitate the development of standards, many of which become **National Standards of Canada**. It does this by providing an open forum for business, governments (including federal and provincial regulatory authorities), labour, consumers and associations to voluntarily reach agreement through the consensus process on the criteria that best meets the community interest for materials, products, structures and services in a wide variety of fields.

24 Standards are developed by committees. These committees are composed of a balanced matrix of volunteer members from across Canada representing business, government (including federal and provincial regulatory authorities), labour, consumers and associations. The volunteers develop and set the standards.

25 **CSA** staff do not write standards and do not have a vote on any committee. **CSA**'s management system provides the secretariat for these volunteers to accomplish their objectives. **CSA** provides the tools, facilitator and meeting rooms for the development of standards by the members.

26 Standards are developed using a consensus approach which balances the competing views and ideas of all affected sectors. The procedure for developing consensus standards is based on the principle that any group having an interest in establishing a standard has the right and responsibility to contribute technical knowledge, ideas, experience and financial support to the development of that standard. The standard reflects a national consensus of business, government (including federal and provincial regulatory authorities), labour, consumers and associations.

27 Meetings are conducted where draft standards are developed following the consensus principle with the involvement of all members of a technical committee.

28 "Consensus" is defined in **SCC**'s **Criteria and Procedures for the Preparation and Approval of National Standards of Canada** as:

> 2.1.4 **Consensus:** substantial agreement reached by concerned interests involved in the preparation of a standard. Consensus includes an attempt to resolve all objections and implies much more than the concept of a simple majority, but not necessarily unanimity.

29 When substantial agreement has been reached within the technical committee, **CSA** processes the draft standard for formal approval by the technical committee and the standards steering committee.

30 Once the standard has reached the final draft stage, it is sent out for comment to other members and made available to the general public for comment.

31 All comments are noted and considered by the voting committees when the standard is finalized. If the standard is adopted by **SCC** it becomes a National Standard of Canada.

32 In the case of standards under the ***C.E.C.*** once finalized it becomes a standard under Part II of the ***C.E.C.***

V. THE ATTACK ON STANDARDS FOR RCHPs

33 The plaintiffs argue that **CSA** Standard CAN/CSA-C22.2 No. 217-M89 is the standard for **RCHPs** and has been adopted by the ***C.E.C.***, Part 2. That standard states that **RCHPs** installed next to gypsum board, may reach temperatures of 85°C. **CSA** Standard CAN/CSA No. A82.31-M91 is the standard for gypsum board and is adopted by the **B.C. Building Code**, S.9.29.5.1(2). Section 4.4 states that gypsum board shall not be exposed to continuous temperatures in excess of 52°C. These standards, the plaintiffs say, contradict each other. Thus, they say, **CSA** was negligent in setting standards that were contradictory. They submit that the Defendant **CSA** in certifying **RCHPs**, negligently certified an unsafe product which could not operate in compliance with its own standards.

34 The plaintiffs point out s.62-210 of the ***C.E.C.***, Part 1, states that heating panels must not have a watt density that will produce an exposed ceiling surface temperature in excess of the limiting temperature of the ceiling finish materials used. Therefore, they say, **RCHPs** violate the ***C.E.C.***, Part 1, because they produce an exposed ceiling surface temperature of up to 85°C which exceeds, they suggest, the limiting temperature of gyproc which is 52°C. Thus the plaintiffs submit the defendant Province of British Columbia and the Municipal defendants failed in their statutory duty to inspect according to the standards of Part 1 of the ***C.E.C.*** as adopted by the ***B.C.E.C.*** and as adopted by the **B.C. Building Code** because they did not inspect to prevent this alleged conflict of standards. No one suggests, of course, that all plaintiffs have gyproc ceilings but it is common ground that some do and with drywall being a popular building material it is probably safe to say a majority do.

35 The cross-examination on the Affidavit of John Broderick, the Chief Electrical Inspector for the Province, does show that there was no policy in place, regarding **RCHPs**, that required electrical inspectors to inspect for compliance with the manufacturer ′s installation procedures or compatibility with building materials even though such matters are governed by Part 1 of the ***C.E.C.***. The Province and **CSA** argue that the two Code requirements are not in conflict and that there is no necessity to have **RCHPs** meet the

temperature requirements of s.62-210 of Part 1 of the ***C.E.C.***. In any event, they say, the whole argument raises nothing but a red herring since no experiments have shown that any of the fires which have occurred have been caused by this seeming conflict.

36 The cross-examinations of the Affidavits filed by the City of Victoria, the Municipality of West Vancouver, City of Surrey, and the Corporation of the City of New Westminster show that there was no policy in place, regarding **RCHPs**, that required electrical inspectors to inspect for compliance with the manufacturer ′s installation procedures or compatibility with building materials even though such matters are governed by Part 1 of the ***C.E.C.***.

37 Since **CSA** and the Province approved the use and installation of **RCHPs** in B.C. and there after the Province ordered them disconnected, the order the plaintiffs say, was not founded upon methods of installation but for one or more of three other causes: defects in the manufacturing process, the incompatibility of **RCHPs** with building materials or **CSA**′s decertification of **RCHPs**.

38 Finally the plaintiffs submit the Defendant Manufacturers designed, manufactured, and marketed **RCHPs** that were defective. The Defendant **CSA** certified **RCHPs** that were defective. The Defendant Province and the Defendant Municipalities, they say, failed to prevent or stop the use of the defective **RCHPs** and while

CSA and the Province initially approved the defective product, in the end, **CSA** decertified the **RCHPs** and the Province ordered them disconnected.

39 In their Statement of Claim, the plaintiffs assert a variety of different causes of action against these various groups of defendants.

40 Section 4 of the ***Act***, makes certification mandatory once the Court finds that:

a) the pleadings disclose a cause of action;
b) there is an identifiable class of 2 or more persons;
c) the claims of the members raise common issues;
d) the class proceeding is the preferable procedure; and
e) there is a representative plaintiff.

VI. COMMON ISSUES

41 In their brief the plaintiffs assert their claims raise common issues and put them to the court in the following way:

I. NEGLIGENCE

A. As to all Defendants:

1. Are the subject **RCHPs** dangerous, unsafe, or otherwise unfit for installation and use in B.C.?

2. Did the class plaintiffs suffer damages as a result of the disconnect order issued by the Province forbidding the use of the subject **RCHPs** whereby the defendants are liable to the class plaintiffs?

3. Were the Defendant, or any of them, negligent as hereinafter set out?

B. As to the Defendant manufacturers and distributors:

1. Did the manufacturers and distributors owe a duty of care to the purchasers and users of **RCHPs** in B.C.?

2. Were the subject **RCHPs** defective in design and/or manufacture?

3. Were the **RCHPs** defective in that they were not appropriate for use with building materials commonly used in Canada?

4. Were the manufacturers and distributors negligent and did they fail to fulfil their duty owed to the class plaintiffs?

C. As to the Province:

1. Did the Province owe a duty of care to the class plaintiffs:

   a. with regard to the certification, use, display, sale or offering for sale of the subject **RCHPs** in British Columbia?

   b. to examine the subject **RCHPs** being used, displayed, sold or being offered for sale to determine if they were defective in design and/or manufacture and met prescribed requirements of the laws of British Columbia?

   c. to determine whether the subject **RCHPs** were dangerous to persons or property?

2. Did the Province, through its inspectors under the ***Electrical Safety Act***, owe a duty of care to the class plaintiffs to reject RCHP installations where such installations were in immediate proximity to gypsum board ceilings?

3. Was the Province negligent in fulfilling the duties noted in paragraphs 1 and 2 above and is the Province thereby liable to the class plaintiffs for damages?

4. If the Province is liable to the class plaintiffs, is such liability limited by either statute or common law?

5. Does the Province, through its Electrical Safety Branch, owe a duty to the class plaintiffs under the principle of public authority liability such that it is not necessary for the class plaintiffs to demonstrate actual reliance on the Province?

D. As to CSA:

1. Did **CSA** owe a duty to the class plaintiffs:

a. to properly set appropriate standards for **RCHPs**?

b. to properly test and certify the subject **RCHPs**?

c. to ensure that the instruction manual for the subject **RCHPs** did not allow incompatible use with gypsum board?

2. Did **CSA** fail to fulfil its duty to the class plaintiffs by negligently setting standards for **RCHPs**, negligently certifying the subject **RCHPs** for use in Canada and negligently failing to ensure the installation instructions were adequate?

3. Did **CSA** know that its certification of **RCHPs** would allow for the use, display, sale and offering for sale of **RCHPs** in the Province of British Columbia?

4. Was **CSA** negligent in fulfilling its duties noted in paragraphs 1 - 4 and is **CSA** thereby liable to the class plaintiffs for damages?

E. As to the Defendant Municipalities:

1. Are they liable to the class plaintiffs resident in their jurisdiction for damages arising from the negligence of their employees acting as inspectors under the ***Electrical Safety Act***, as set out in I.C.2?

II. MISREPRESENTATION

A. As to CSA:

1. Is the certification by **CSA** and permission thereafter granted by it to manufacturers to market and sell the subject RCHP products bearing the **CSA** certification label amount to a representation that the said **RCHPs** are:

   a. fit for the purpose for which they are intended? or

   b. safe?

   c. permitted to be sold in British Columbia?

2. If such representation is a misrepresentation arising from the negligence of **CSA** and the said subject **RCHPs** are not fit for the purpose to which they are intended and are not safe, or do not comply with the prescribed requirements of the laws of British Columbia permitting sale of same in the Province, does such misrepresentation give rise to **CSA**'s liability to the class plaintiffs for damages?

3. Given the statutory approval for use, display, sale and offering for sale of **RCHPs** in B.C. bearing a **CSA** label, is it necessary in the circumstances for each individual class Plaintiff to demonstrate actual reliance upon the representations of **CSA** noted above for **CSA** to be liable to the class plaintiffs?

VII. ANALYSIS

42 Up to the date of the hearing only one case had been decided under the ***Act***: ***Harrington v. Dow Corning Corporation et al*** Vancouver Registry, C954330, a decision of Mackenzie J. handed down April 11, 1996, in which he certified a class of plaintiffs who have had silicone gel breast implants. Since the hearing one other

certification case has been decided: ***Tiemstra v Insurance Corporation of British Columbia*** April 30, 1996 Vancouver Registry No. C954327 a decision of Chief Justice Esson's in which he refused to certify a class action sought against I.C.B.C.

43 Mr. Justice Mackenzie's views on certification under our ***Act*** are best set forth at p. 24, paragraph 41 of his reasons as follows:

> I am satisfied that the question: Are silicone gel breast implants reasonably fit for their intended purpose? - raises a threshold issue which is common to all intended members of the class who have been implanted with silicone gel breast implants and to the several manufacturers of such implants. If the plaintiff succeeds on this issue, then it moves the class a long way to a finding of liability. Quantum of damages would still have to be individually assessed but s. 7(a) of the ***Act*** makes clear that individual assessment of damages is not a barrier to certification.

44 In the case at bar those findings are apt but would be of more assistance to the claimants if the manufacturers of the offending **RCHPs** were before the court and not apparently out of business. Thus there is some merit to Mr. Holburn's submission that the plaintiffs are simply looking for "deep pockets" to solve their dilemma. While that may be so is it just and convenient to have over 2,000 plaintiffs start individual actions, as argued by **CSA** when the issue between all the plaintiffs and **CSA** is in every

respect similar, at least in the initial stages? I conclude that it is "just and convenient" to certify these actions under the ***Act***.

45 The issue for the court falls to be determined under s. 4 of the ***Act*** which reads thus:

> **Class certification**
>
> **4**. (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if
>
> (a) the pleadings disclose a cause of action,
>
> (b) there is an identifiable class of 2 or more persons,
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members,
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, and
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interest 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, an interest that is in conflict

with the interests of the other class members.

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including

(a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members,

(b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions,

(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings,

(d) whether other means of resolving the claims are less practical or less efficient, and

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

46 In his analysis of the ***Act*** Chief Justice Esson put it this way at p. 10 to 12, at Paragraphs 12 to 15 in the ***I.C.B.C.*** case:

> The question of "predominance" looms very large in the American jurisprudence by reason of Rule 23(3) which requires the court to find, before finding that an action may be maintained as a class action, "... that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members . . .". The

Ontario Act has no provision similar to that language. In that respect, the ***Ontario Act*** has been held to be less restrictive than the Federal rule: See ***Bendall v. McGhan Medical Corp.*** (1993), 16 C.P.C. (3d) 156 at 164.

Our ***Act*** deals quite differently with the question of predominancy. Section 4(1)(c) requires the court to decide whether the claims of class members raise common issues without considering whether those common issues predominate over individual issues. If the matter had been left there, our ***Act*** would be substantially the same as the ***Ontario Act*** on the point. But our ***Act*** has a further provision for which there is no equivalent in Ontario. Section 4(2)(a) provides that, in determining whether a class proceeding would be the preferable procedure, the court must consider all relevant matters including:

> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members,

That section, not being mandatory in its terms, is less restrictive than the American Rule 23(3). But by requiring predominancy and four other matters to be considered in relation to the important question of "preferable procedure", it is more restrictive than the ***Ontario Act***. Although the other four sub-sections of s. 4(2) may be less significant in this regard, they all tend in some degree to restrict the circumstances in which certification should be granted.

Section 4(1) requires certification if the conditions of the five subsections are met. No serious issue has been raised with respect to the existence of the first three conditions (cause of action, identifiable class, existence of common issues). The principal issue arises under sub-section (d), i.e. whether a class proceeding would be the preferable procedure and under the second and third subsections of (e). The defendant

> submits that the plaintiff has not produced a workable method for notifying class members and that the plaintiff has an interest in conflict with the interests of at least some of the other class members. The latter point overlaps with the issue raised under sub-section (d).

47 Not surprisingly the defendants strenuously oppose certification under the ***Act***. As in the ***I.C.B.C.*** case the only issue that arises between these parties is whether a class proceeding would be the preferable procedure. The arguments put forward are to a large extent *ad terrorem*. There can be little doubt that embarking on a suit on behalf of over 2,000 potential claimants must perforce create difficulties. The test however is whether the ***Act*** provides a preferable procedure for the "fair and efficient" disposal of the issues. Using the same language and test put by the Chief Justice in the ***I.C.B.C.*** case at p. 16 (***supra***) I would make the following observations:

(a) questions affecting individual members do not predominate heavily over questions common to the members of the class;

(b) a significant number of class members do not have a valid interest in individually controlling the prosecution of separate actions;

(c) the class proceeding may involve claims that are or have been the subject of other proceedings but the ***Act*** enables those persons, principally owners of strata title condominiums, the opportunity to opt out of the class proceedings should they choose;

(d) other means of resolving the claims are not more practical and efficient;

(e) the administration of the class proceeding would not, in my opinion, create greater difficulties than those likely to be experienced were relief to be sought by other means.

48 Having come to these general conclusions then I must deal with which of the common issues and what question or questions should be posed first, whether the action should or should not be certified as against some defendants and not others, and if certified, whether they should be stayed until some of the common issues are tried and disposed of.

VIII. WHAT ARE THE COMMON ISSUES TO BE TRIED.

49 Section 1 of the ***Act*** defines common issues as follows:

"common issues" means

> (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.

50 It seems self evident that the first hurdle for these plaintiffs is to prove that the **RCHPs** were defective and not fit or unsafe for the purpose of their manufacture. If unfitness can be shown it follows the next issue to be determined is whether **CSA** can be held responsible to the plaintiffs for negligent certification or alternatively for negligent misrepresentation. If such liability can be found is **CSA** liable to all members of the class simply because the Chief Electrical Inspector of the Province decided to have all the **RCHPs** of the impugned manufacturers disconnected.

51 I am satisfied that the arguments raised by **CSA,** that it can not be held responsible for pure economic loss, nor liable to members of the class unless they prove reliance on **CSA**, are no more than that, arguments, not so compelling that certification should be denied. At this stage what must be determined are triable issues. It would be folly for the court to get into a careful analysis of the case law and its applicability to the issues at this preliminary point in the case at bar. I need cite no more than the following cases put forward in reply by Mr. Macaulay to the

submissions of **CSA**: On economic loss: ***Winnipeg Condominium Corporation No 36 v. Bird Construction Co.***, [1995] 1 S.C.R. 85, ***C.N.R. v. Norsk Pacific Steamship Co.*** [1992] 1 S.C.R. 1021. On misrepresentation: ***Yorkshire Trust Company v. Empire Acceptance Corporation Limited et al.,*** (1986), 69 B.C.L.R. 357 (B.C.S.C.) and ***McGauley et al. v. The Queen in Right of British Columbia et al.,*** (1990), 44 B.C.L.R. (2nd) 217 (B.C.S.C.). These cases make it clear the plaintiffs arguments are viable and triable issues.

52 The Province and the Municipalities should be brought into this case after the initial argument over fitness as a subsidiary issue. The court can then determine whether the Province through its Chief Electrical Inspector became liable to those members of the class who have **RCHPs** installed in gypsum board ceilings, when the Inspector knew, or ought to have known, that the two products were not compatible and would be unsafe in such application. If that begets liability to the Province can the same be said of the municipalities who relied on the Inspector and not on their own inspectors? Assuming that **CSA** or the Province are liable to members of the class on the aforementioned basis are the class entitled to damages because the Chief Electrical Inspector ordered in a quasi judicial decision that all **RCHPs** of the impugned manufactures be disconnected? Those in summary are the common issues I find should first be determined, but the issue of fitness

first and prior to the subsidiary issue of incompatible building materials.

53 I would not decline to certify the actions against the Province and the municipalities but there would not appear to be any need to proceed on issues involving a sub-class (ie. those with gyproc board ceilings) until the other issues are resolved. In its argument **CSA** urged that the **RCHPs** were not defective and there was no need for disconnect orders if each installation were individually inspected. It submitted that its standards for **RCHPs** were appropriate since many panels of other manufacturers were in use in Canada having met **CSA** standards and having been certified by it as achieving that standard. Nonetheless **CSA** has not third partied the Province but third partied most of the municipalities in British Columbia. I would thus stay the proceeding against the municipalities pursuant to s. 13 of the ***Act*** until the common issues involving the manufacturers and **CSA** have been determined. The Province may wish to take part in the action and **CSA** may yet third party the province so I decline to stay the proceedings as against the Province save to delay the issue of incompatible building materials until after the fitness issue is addressed.

54 It is obvious that until the first major common issues are resolved there is no place in the proceedings for the third party municipalities. It is doubtful if there ever will be. For that

reason the third party notices so far issued against them are stayed pursuant to s. 13.

55 The class propounded by the plaintiffs is appropriate as against the manufacturers but must be divided into a sub-class as against **CSA** to those members of the class whose **RCHPs** were certified by **CSA**. There is some evidence in the affidavits that a few **RCHPs** were installed even though they had not been certified by **CSA** or had been decertified prior to their sale and installation.

IX. ARE ISHERWOOD AND CAMPBELL REPRESENTATIVE OF THE CLASS?

56 I am satisfied, despite the fact that Campbell installed his own **RCHPs**, that he and Isherwood do not have, on the common issues, an interest which is in conflict with other class members. Campbell can represent those members of the class who have Aztech-Flexel, also known as Thermaflex **RCHPs**, installed in their premises and Isherwood can represent those members of the class who have Thermaflex **RCHPs** installed in theirs.

57 Issues involving prospective class members not resident in British Columbia have not been argued and the time within which a person not so resident may opt into the proceeding can be deferred. There is a likelihood that some condominium owners with impugned

manufactured **RCHPs** may be non residents and can be notified through their respective strata councils.

58 I am confident that the members of the class are now largely known and aware of the proceedings. This is due to the wide amount of publicity that surrounded the disconnect orders and the efforts made by Dean Cohen.

59 Because of the difficulties caused to the class by the Province's disconnect orders I find it appropriate to put the expense of the required statutory notification to the Province and I will hear submissions by counsel for the Province on how best to notify members of the class and the content of such notice in light of the certification.

X SUMMARY

60 In summation then I define the following common issues for resolution and certification:

1. Are **RCHPs** manufactured by Flexwatt or Aztech-Flexel fit for their intended purpose or were they defective in design and/or manufacture?

2. Did **CSA** fail in a duty to the class of plaintiffs in negligently setting standards and negligently certifying the subject **RCHPs** as being fit and safe for their intended purpose?

3. Did **CSA** in certifying the subject **RCHPs** make negligent representations as to their fitness

> entitling the class of plaintiffs to damages, irrespective of whether each member of the class relied on such representations?

61 Following the resolution of those common issues, and depending upon their outcome, it can be determined if the Province under the ***Electrical Safety Act***, breached a duty of care to the class of plaintiffs in permitting installations of the subject **RCHPs** in premises in British Columbia when they knew or ought to have known they were defective or knew or ought to have known they would be incompatible with gyproc ceilings. Conversely if the subject **RCHPs** were not defective did the Province in issuing disconnect orders through its Chief Electrical Inspector breach a duty of care to the class plaintiffs causing them damages for which they are entitled to compensation?

62 It follows I am satisfied that a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues referred to and that Campbell and Isherwood would fairly and adequately represent the interests of the class. I am satisfied as well that the other requirements of s. 4(1) of the ***Act*** have been met.

"R.B.McD. Hutchison, J."

June 13, 1996.

Victoria, British Columbia