P**CITATION:** Dziedziejko v. Canopy Growth, 2025 ONSC 6766
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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CRAIG DZIEDZIEJKO, Plaintiff

– and –

CANOPY GROWTH CORPORATION, DAVID KLEIN, JUDY HONG and KPMG LLP., Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *Eli Karp, Hadi Davarinia, and Taek Soo Shin,* for the Plaintiff

Laura Fric, Robert Carson, Elie Farkas, and Madeleine Worndl, for the Defendants, Canopy Growth Corporation, David Klein, and Judy Hong

Akiva Stern, for the Defendant, KPMG LLP.

HEARD: December 3-5, 2025

MOTION FOR LEAVE AND CERTIFICATION

I. The motions

[1] This is a proposed securities class action on behalf of investors who acquired shares in Canopy Growth Corporation ("Canopy") between June 1, 2021 and June 22, 2023. The Plaintiff moves under section 138.8 of the Ontario *Securities Act*, RSO 1990, c. S.5 ("*OSA*") for leave to proceed on a claim of secondary market misrepresentations, and for certification of the misrepresentation claim and an oppression remedy claim as a class action under section 5(1) of the *Class Proceedings Act, 1992*, SO 1992, c. 5 ("*CPA*").

[2] The Statement of Claim alleges that Canopy made a number of material misrepresentations. These include quantitative misrepresentations regarding its financials and those of its subsidiary, BioSteel Sports Nutrition Inc. ("BioSteel"). They also include qualitative misrepresentations regarding the conduct of Canopy's executives and employees – e.g. adherence of Canopy's management personnel to Canopy's Code of Conduct, the effectiveness of Canopy's Disclosure

Controls and Procedure and its Internal Control over Financial Reporting, the efficacy of Canopy's corporate governance procedures, and, by omission, the intentional inflation of revenues for personal gain by BioSteel's management.

[3] The fact that Canopy made both quantitative and qualitative misstatements is not controversial. Canopy later admitted that it had released misstatements in its Financial Statements, which the Plaintiff alleges were Corrective Disclosures. These disclosures corrected both categories of misrepresentations.

[4] Counsel for Canopy and its two executives, CEO David Klein ("Klein") and CFO Judy Hong ("Hong"), submit that the alleged misrepresentations centre on the inflated revenues of Biosteel that were the subject of the correction, and that this represents such a small percentage of Canopy's overall revenue as to be immaterial. They also submit that there is no evidence that any investor specifically relied on management's statements about corporate governance or Canopy's Code of Conduct.

[5] Counsel for the Plaintiff disagrees with Canopy's assessment. They point out that the assurances of good governance are objectively important to all investors. They also observe that the announced corrections resulted in a substantial market decline in Canopy's share price on both the Toronto Stock Exchange ("TSX") and the NASDAQ Exchange ('NASDAQ"), thereby causing damage to the Plaintiff and proposed class members.

[6] The other Defendant, KPMG LLP ("KPMG"), was Canopy's independent auditor of their annual financial statements from before and throughout the proposed class period. KPMG resigned as Canopy's auditor on the date of the corrective disclosures, June 22, 2023. As a tentative settlement has been reached with KPMG, counsel for KPMG attended at the hearing of the motion but did not make submissions in respect of the allegations against it and KPMG's role has not been addressed herein.

II. The alleged misrepresentations

[7] In October 2019, Canopy acquired roughly 76.7% of sports nutrition company, BioSteel. Canopy promoted its acquisition to investors as an entry into a product line with predictable revenue growth, unlike Canopy's primary business in cannabis products. The acquisition of this new business was therefore an important move for investors and for analysts covering Canopy's market performance.

[8] Under Canopy's share purchase agreement with the selling shareholders of BioSteel, the shares were subject to a price adjustment based on a multiplier of BioSteel's 2019 net revenue. BioSteel's selling shareholders, some of whom were officers and directors of BioSteel, had financial incentive to state the 2019 revenue as high as possible. Canopy publicly disclosed that BioSteel's 2019 net revenue was $14.54 million and that no substantial purchase price adjustment was necessary.

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[9] Canopy omitted to disclose that BioSteel's minority shareholders asserted that its 2019 net revenue was actually $22.74 million, and that this additional revenue would have entitled the selling shareholders to a purchase price adjustment of roughly $24.1 million. KPMG's audit of BioSteel's 2019 net revenue also indicated that the disputed revenue should be rejected.

[10] In April 2020, BioSteel's minority shareholders commenced an action against Canopy and KPMG, claiming that BioSteel's net revenue was 56% higher than what Canopy and KPMG had concluded. In their action, the minority shareholders sought $24.1 million in damages (the amount by which they claimed that Canopy's purchase price for the BioSteel shares should have been adjusted).

[11] In Canopy's Statement of Defence, it stated that BioSteel had "artificially inflated" revenue, and that the allegedly overlooked sales were unsupported by written contracts and had no likelihood of collection. Canopy additionally pleaded that, "[t]here was lack of strong evidence that control [of the product] was transferred", and that BioSteel's overstatement of revenue was made in circumstances where BioSteel's selling shareholders (and executives) had a financial incentive to inflate its revenue.

[12] On May 10, 2023, Canopy released a Material Change Report and corresponding press release, as well as a Current Report, which together comprised a set of Corrective Disclosures. The salient portions of the disclosure contained within these documents has been summarized by Plaintiff's counsel, as follows:

> (a) Canopy had released 'material misstatements' in its Financial Statements during fiscal year 2022 and the first three quarters of fiscal 2023 year (i.e, the Restatement Period), related to sales in the BioSteel business unit;
>
> (b) the Financial Statements released during the Restatement Period 'should no longer be relied upon' because of the material misstatements' nor should the audit report of KPMG released in Canopy's 2022 Annual Report;
>
> (c) Canopy had determined that it was appropriate to correct the misstatements by restating the Financial Statements for the Restatement Period;
>
> (d) the correction of the misstatements was expected to reduce certain revenues previously recognized and adjust related balance sheet items; and
>
> (e) as a result of its preliminary findings, Canopy was continuing to assess its DC&P [Disclosure Controls and Procedure] and ICFR [Internal Control over Financial Reporting] and expected to report one or more material weaknesses in ICFR.

[13] This initial set of Corrective Disclosures did not disclose the magnitude of the false financial figures. It likewise did not provide any specific reason for the errors in revenue recognition. Nevertheless, the impact was dramatic. The very next day, Canopy's shares traded at

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an unusually high volume, and the share price dropped by 14% on the TSX and 15% on the NASDAQ.

[14] The following month, on June 22, 2023, Canopy released its Annual Report for the 2023 fiscal year, together with a news release. The Annual Report disclosed that Canopy had concluded that revenue was recognized by BioSteel where the product ordered by a customer had not actually been shipped, or where it was shipped without a legally enforceable contract and payment terms for the customer, or where the product was shipped but not accepted by the customer because it had too short a remaining shelf life. These are the very same reasons that Canopy had initially found BioSteel's 2019 revenues to be invalidly inflated.

[15] A final set of Corrective Disclosures reiterated incorrect financial figures released during the Restatement Period, and showed that BioSteel's revenue and growth had been drastically overstated. It also disclosed that, as of March 31, 2023, Canopy had ineffective DC&P and ICFR, which had allowed the statements of false information to occur.

[16] Counsel for the Plaintiff summarizes some of the more far-reaching disclosures in this last set of corrections, as follows:

> (a) a majority of the misstatements in the Company's Impugned Documents related to BioSteel's international sales and the company was exiting BioSteel's international market, despite repeatedly touting BioSteel's 'strong international sales growth' and 'higher international sales' as a significant driver of BioSteel's growth;
>
> (b) the Company had overpaid the minority shareholders of BioSteel for Canopy's option to purchase some of their shares as the payments were based on a multiple of BioSteel's revenues (which were materially overstated);
>
> (c) the Company had terminated several members of the BioSteel leadership team and was considering all legal remedies, including litigation, to recover the damages and costs associated with the BioSteel review and the overpayment for BioSteel's shares;
>
> (d) the entirety of the $57.4M of goodwill assigned to BioSteel should have been impaired as of September 30, 2022 (representing 42% of Canopy's total goodwill at that time);
>
> (e) Canopy had 'evaluated the materiality of these misstatements both 'qualitatively and quantitatively' and determined that they were material; and
>
> (f) Canopy was the subject of a formal investigation by the SEC and an ongoing inquiry by the OSC regarding its false Class Period statements.

[17] Taken together, the Corrective Disclosures identified and addressed misrepresentations made by Canopy during the proposed class period. These include the quantitative misstatements

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contained in Canopy's financial statements for the relevant periods, as well as Canopy's misrepresentations regarding the effectiveness of its DC&P and ICFR. Furthermore, Plaintiff's counsel submit that the Corrective Disclosures countered Canopy's assertions that it had adhered to an effective Code of Conduct and good governance practices.

[18] The financial quantifications at issue can be precisely calculated from the sequence of Corrective Disclosures issued by Canopy. The following is a chart of disclosures that Plaintiff's counsel has compiled from evidence in the record that sets out the representations, corrected representations, and amount of change reflected by the Corrective Disclosure.

Net Revenue	**Original**	**Corrective Disclosure**	**Change**	**Change %**
Q1 2023 report				
BioSteel Q4 2022	$13.479M	$3.475M	-$10M	-74%
BioSteel FY 2022	$44.6M	$34.6M	-$10M	-22%
Canopy Q4 2022	$111.8M	$101.8M28	-$10M	-9%
Canopy receivables	$96.4M	$86.6M	-$9.9M	-10%
Q2 2023 report				
BioSteel Q1 2023	$17.9M	$13.7M	-$4.2M	-23%
BioSteel Q1 2023 (growth)	169%	106%	-63%	-37%
Canopy receivables	$96.6M	$82.8M	-$13.8M	-14%
Q3 2023 report				
BioSteel Q2 2023	$29.9M	$17.5M43	-$12.4M	-42%
BioSteel Q2 2023 (growth)	298%	133%	-166%	-56%
Canopy Q2 2023	$117.9M	$105.4M	-$12.4M	-11%
Canopy Q2 2023 (growth)	-10%61	-20%	-9%	92%
Canopy Q2 2023 net loss	-$231.9M	-$305.8M	-$73.9M	32%
Q4 2023 report				
BioSteel Q1-3 2023	$64.2M	$50.4M	-$13.8M	-22%
BioSteel Q1-3 2023 (growth)	106%	62%	-44%	-42%
Canopy receivables	$104.6M	$81.7M	-$23.0M	-22%

[19] Canopy's formal restatement of Financial Statements went from May 27, 2022 to February 9, 2023 (i.e. FY 2022 and Q1-3 2023). In addition, however, the Plaintiff alleges that there were materially false statements in Canopy's disclosure documents released prior to that time, going back at least to June 1, 2021.

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[20] The claim does not allege any specific quantification misstatements made during this pre-restatement period; rather, it focuses on what are alleged to be untrue statements by Canopy executives and employees about adherence to the corporate Code of Conduct and the implementation of corporate governance norms. It also alleges that during the pre-restatement period there were problematic, but undisclosed issues with Canopy's DC&P and ICFR.

[21] Canopy's Code of Conduct is, essentially, a statement of principles about corporate behaviour. It is a document promulgated by Canopy's board and management that makes assurances that the company, its subsidiaries, and its employees will act "in strict compliance with both the letter and spirit of all applicable laws and in full adherence with the highest standards of business integrity and ethics", and that all of its business activities "must be based on principles of honesty, integrity and the ethical standards outlined in the Code."

[22] The Code also goes on to describe the responsibilities of the board of directors, the audit committee, and the corporate governance committee in terms of overseeing the company's business ethics, with particular emphasis on financial reporting and integrity and effective corporate governance. It goes on to state that "[a] failure to comply with the Code may result in disciplinary actions up to and including termination of employment. … Such actions shall be reasonably designed to deter wrongdoing and to promote accountability for adherence to the Code."

[23] Plaintiff's counsel observe that the Code of Conduct was in place from the start of the class period and remained in place through all of the Corrective Disclosures and financial restatements. In fact, they point out, the Code was in place and disseminated by Canopy at all times after it filed its Statement of Defense in the BioSteel litigation, at which time it had full knowledge of the failure of its subsidiary's management to adhere to the very standards expressed by the Code. Canopy and its management also knew that they had neither terminated the responsible individuals at BioSteel, nor had they implemented new or adequate monitoring to safeguard the financial and ethical integrity of the company overall.

[24] The allegations that the Plaintiff levels with respect to Canopy's DC&P and ICFR have an even sharper edge. Plaintiff's counsel note that the failings of BioSteel's and Canopy's financial safeguard systems are admitted in the Corrective Disclosures. The disclosure of March 31, 2023 specifically stated that Canopy's DC&P was ineffective and that its ICFR had material weaknesses, all of which resulted in its having to restate its financial statements. The restated annual financial report was issued with the following statement:

> An evaluation of the effectiveness of the design and operation of our disclosure controls and procedures as of the end of the period covered by this Annual Report on Form 10-K was made under the supervision and with the participation of our management, including our Chief Executive Officer and Chief Financial Officer.
>
> Based upon this evaluation, our Chief Executive Officer and Chief Financial Officer have concluded that, as of March 31, 2023, our disclosure controls and

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> procedures were not effective as of such date due to material weaknesses in internal control over financial reporting as described below.
>
> …
>
> These material weaknesses resulted in identified material misstatements to the financial statements, and the Prior Financial Statements are restated in this filing.

[25] The March 31, 2023 restated financial statement did not specify when the ineffective controls began. But it did go on to indicate that the source of the problem was with its subsidiary, BioSteel, and with Canopy's oversight of that subsidiary, and that the lax financial controls had resulted in misstatements pertaining to BioSteel's revenue, receivables, and other financial matters:

> Management has determined that it did not maintain effective internal control over financial reporting due to the existence of the following material weaknesses:
>
> > * An ineffective control environment … The control environment material weakness contributed to the following material weaknesses:
> >
> > * The accounting for sales recorded by the BioSteel segment, which resulted in material misstatements relating to revenue and trade receivables, particularly with respect to the timing and amount of revenue recognition. Specifically, we did not design and maintain effective controls to sufficiently assess the timing, amount, and appropriateness of revenue recognition. …This also contributed to the failure to impair goodwill related to the BioSteel reporting unit on a timely basis … and the failure to accurately record the redeemable noncontrolling interest.

[26] Plaintiff's counsel point out that the acknowledgment that material weaknesses in ICFR resulted in the material misstatements made in the restatement period and the necessity to restate the annual financial statements released during that period was, effectively, an admission that material weakness in ICFR existed at least throughout the restatement period. They also highlight the fact that Canopy represented in every annual and quarterly report since June 1, 2021, that there had been "no changes" in Canopy's ICFR during the period.

[27] Finally, subsequent to the restatement period (and after the end of the proposed class period), on September 14, 2023, Canopy issued a press release entitled "Canopy Growth to Cease Funding BioSteel Business Unit Furthering Business Transformation and Focus on North American Cannabis Leadership". In that press release, the company stated expressly that "the company anticipates the removal of the previously identified material weakness related to the BioSteel business segment upon disposition."

[28] Plaintiff's counsel submit that this acknowledgment is on its face an admission that there is, and has been, material weakness in BioSteel's financial controls. It is also the Plaintiff's position that the announcement of BioSteel financial irregularities, and the consequent misstatements in

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Canopy's own financials, amounts to a tacit admission that the financial control problems have existed since the inception of Canopy's acquisition of BioSteel in the second half of 2019.

[29] As described above, there was an observable market impact immediately upon release of the corrective disclosures – a drop of 14% on the TSX and roughly 15% on the NASDAQ on the next trading day, May 11, 2023. The trading volume in Canopy's shares was roughly double that of the previous day on both exchanges. Some 6 weeks later, June 23, 2023 – i.e. the first trading day after the final Corrective Disclosure was released – Canopy's stock price dropped another 12% on the TSX and 14% on the NASDAQ, all on high trading volumes.

[30] In sum, the volume weighted average price of Canopy's shares in the 10 trading days following the final Corrective Disclosures was 62% lower on the TSX and 60% lower on the NASDAQ than it was on May 10, 2023 – i.e. the last day before the initial Corrective Disclosures were released.

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III. Leave to proceed

[31] Section 138.8 of the *OSA* provides that to obtain leave to proceed with a secondary market misrepresentation claim, the Plaintiff must satisfy the court that the action has been brought in good faith. The section also requires that there be a reasonable possibility that the Plaintiff will win at trial.

[32] Accordingly, to pass the statutory hurdle and be granted leave, the Plaintiff must present a plausible analysis of the applicable legislation. He also must produce a record with some credible evidence to support the claim. The test, and its equivalent under the parallel Quebec legislation, has been described by the Supreme Court of Canada as a screening test:

> [T]he authorization stage under s. 225.4 [of the Quebec *Securities Act*] should not be treated as a mini-trial. A full analysis of the evidence is unnecessary. If the goal of the screening mechanism is to prevent costly strike suits and litigation with little chance of success, it follows that the evidentiary requirements should not be so onerous as to essentially replicate the demands of a trial. To impose such a requirement would undermine the objective of the screening mechanism, which is to protect reporting issuers from unsubstantiated strike suits and costly unmeritorious litigation. What *is* required is sufficient evidence to persuade the court that there is a reasonable possibility that the action will be resolved in the claimant's favour.
>
> *Theratechnologies Inc. v. 121851 Canada Inc*., [2015] 2 SCR 106, at para. 39.

[33] The Plaintiff does not, therefore, have to 'win' on the merits of its claim at this stage. However, "[w]hat is required is sufficient evidence to persuade the court that there is a reasonable possibility that the action will be resolved in the claimant's favour. The reasonable possibility test is therefore a relatively low hurdle that is, nevertheless, not *de minimis*": *Badesha v. Cronos*

Group, 2021 ONSC 4346, at paras. 47-48, rev'd on other grounds 2022 ONCA 663 ("*Cronos Group CA*").

[34] The Court of Appeal has explained that it is the Plaintiff's burden to "show that there was a misrepresentation and that the misrepresentation was material": *Ibid.*, at para. 47, citing *1654776 Ontario Limited v. Stewart*, 2013 ONCA 184, at para. 64. The level of proof at this stage is one that is appropriate to a preliminary screening test; the Plaintiff does not need to prove liability in order to be granted leave.

[35] The legislation therefore reflects "an attempt to strike a balance between preventing unmeritorious litigation and strike suits and, at the same time, ensuring that investors have a meaningful remedy when issuers breach disclosure obligations": *Theratechnologies*, at para. 34. In other words, leave can be granted despite the existence of unresolved contentious issues, so long as the possibility of the Plaintiff ultimately succeeding is a realistic one.

[36] In fact, attempting to resolve all contentious issues at this stage would be an analytic error. As the Court of Appeal has put it, "if a motion judge attempts to resolve realistic and contentious issues arising from conflicting credible evidence they will be lapsing into a mini-trial": *Drywall Acoustic Lathing and Insulation (Pension Fund, Local 675) v. Barrick Gold Corporation*, 2024 ONCA 105, at para. 38.

[37] In their factum, counsel for the Plaintiff have contextualized the relevant questions for the s. 138.8 analysis as follows:

> This issue can generally be expressed as:
>
> (a) Whether the Plaintiff brings this action in good faith; and
>
> (b) Has the Plaintiff shown that there is a reasonable possibility that the Company made misrepresentations of fact:
>
> (i) That were corrected; and
>
> (ii) That the misrepresentations were of material facts.
>
> More specifically:
>
> (a) Did the Plaintiff show a reasonable possibility that a trial judge would decide
>
> (i) That the misstatements corrected by Canopy via its restatements were material;
>
> (ii) That Canopy had deficient ICFR and DC&P during the entire Class Period – and that the same was material and corrected; and

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(iii) That Canopy made the Code of Conduct Misrepresentations and that it was material and corrected.

a) Good faith by the Plaintiff

[38] The good faith element of the leave test is essentially designed to prevent exploitative lawsuits and reflects a "policy concern…for long-term shareholders, who are unfairly affected by the volatility of share prices that results from spurious claims": *Canadian Imperial Bank of Commerce v. Green*, [2015] 3 SCR 801, at para. 68. A supporting affidavit such as the one in the present record sworn by the Plaintiff and attesting to the good faith basis of the claim is generally sufficient to satisfy this requirement, in the absence of specific evidence to the contrary: *Tietz v Cryptobloc Technologies Corp*., 2021 BCSC 2275, at para. 50.

[39] As a consequence, "[v]ery few *OSA* leave motions fail to clear the good faith requirement": *Mask v. Silvercorp Metals Inc*., 2015 ONSC 5348, at para. 33. There is no evidence here suggesting that the action is in the realm of "U.S.-style strike suits" – i.e. "meritless actions launched in order to coerce targeted defendants into unjust settlements": *CIBC v. Green,* at para. 67. With nothing untoward suggested in the record, there is nothing to counter the Plaintiff's assertion that his action is not predatory, but rather has been brought out of a concern to ensure that the shareholders are treated fairly; accordingly the good faith element of the leave test is satisfied: *Gowanlock v. Auxly Cannabis Group Inc*., 2021 ONSC 4205, at para. 33.

b) Untrue statements by Canopy

[40] As reviewed in part II above, Canopy made a number of misstatements during the proposed class period that necessitated the publication of Corrective Disclosure statements. As defined in section 1(1) of the *OSA*, a misstatement or omission will qualify as a "misrepresentation" if it is an untrue statement or omission of a "material fact". Canopy's restatement of its annual financial statements during the class period amounts to an admission that the original versions of those statements contained untrue information or omitted relevant and necessary information.

[41] Accordingly, for the period covered by Canopy's restatements, the only issue under *OSA* section 138.3(1)(b) is whether Canopy's untrue statements and omissions were of material facts, or, as defined in section 1(1) of the *OSA*, facts "that would reasonably be expected to have a significant effect on the market price or value of the securities". The Corrective Disclosures and financial restatements themselves suffice to establish that factually untrue statements were disseminated by Canopy.

[42] Furthermore, during the entire proposed class period, including the portion of the class period that pre-dates the restatement period, Canopy represented in its various reports to the investing public that it had a Code of Conduct that was adhered to by all employees, executives, and subsidiaries. The record also establishes that throughout the proposed class period Canopy released reports and statements that repeatedly referred to its corporate policies. Those policies required, among other things, that board of directors monitor compliance with the Code of Conduct, that the audit committee monitor the employees involved in the company's audit and

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financial reporting, that corporate governance committee ensure that the company had effective governance systems in place, and, generally, that these internal controls would bolster the credibility of the company's financial reporting.

[43] These various statements turned out to be untrue. Moreover, Klein and Hong, the responsible officers of Canopy, had to have known they were untrue. As early as its Statement of Defense to the 2020 BioSteel claim, Canopy had conceded that the management of BioSteel intentionally inflated revenue for personal financial gain, in violation of the Code of Conduct; and yet BioSteel's management personnel remained in office during the entire proposed class period.

[44] It is self-evident that there was no monitoring of compliance with the Code of Conduct and no effective review by the audit and corporate government committees. It is equally self-evident that Canopy's two most responsible officers – CEO Klein and CFO Hong – were either aware that no such monitoring was actually taking place or had never inquired as to whether the requisite monitoring was taking place.

[45] Plaintiff's counsel point out that both Canopy and KPMG, in their respective Statements of Defense in the BioSteel action (copies of which are in the record), pleaded that BioSteel had, since the inception of the proposed class period (and, in fact, prior thereto), deficient ICFR and DC&P. These deficiencies allowed BioSteel to falsely report supposed sales that were undocumented paper sales with no likelihood of becoming profitable transactions. Canopy has also admitted that, at the end of the proposed class period, Canopy itself had ineffective ICFR and CD&P which resulted in material overstatements of BioSteel's revenue.

[46] In other words, the same problems that Canopy has conceded existed at the end of the proposed class period also existed at the beginning of the proposed class period. These deficiencies in DC&P and ICFR resulted in an overstatement of revenue during the entirety of the proposed class period, and not just during the period covered by the company's restated financial reports. Added to this is the fact that Canopy's own disclosure documentation states that Canopy never made any changes to its DC&P and ICFR from the start of the proposed class period until the end of the proposed class period when it admitted that they were ineffective.

[47] I note that Canopy has included in its responding record an expert report by former PriceWaterhouseCooper partner, Jacqueline Peterson, that takes issue with this assessment of Canopy's governance and audit controls. Ms. Peterson does not opine directly on the issue at hand, but rather expresses her opinion as a critique of Plaintiff's expert, University of Toronto Professor Ramy Elitzur. She concludes that "…the information in the motion record does not contain sufficient support to conclude, as the Elitzur Report does, that each of Canopy's annual and quarterly reports constituting the Class Period Financial Statements contained errors that were material."

[48] The materiality of the errors published by Canopy during the proposed class period will be discussed in the section below. It is beyond debate, however, that Canopy made and published erroneous statements. No one, including Ms. Peterson, denies that Canopy made misstatements in each of its reports during the relevant period that warranted public correction. Whether she and

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Professor Elitzur disagree over the materiality of those misstatements by Canopy is a separate question. It is also one whose very relevance is open to question.

> For now, however, it suffices to say that Canopy's periodic reports contained misstatements and errors, and that these were in respect of BioSteel's sales and profitability as well as Canopy's audit, accounting, and overall governance controls. Canopy's ICFR and DC&P were admittedly clearly ineffective during the proposed class period, and the reports and statements by Canopy, and the further statements by Klein and Hong, that said otherwise during this period, were untrue statements.

c) Materiality of Canopy's misstatements

[49] The parties have each produced expert witnesses whose reports address the question of materiality. As already indicated, Canopy has publicly disclosed in its Material Change Reports and other Corrective Disclosure documents that it had made "material misstatements" in several years' financial statements. The question remains, however, as to whether the misstatements reach threshold of materiality for the purposes of leave to proceed and potential liability under s. 138 of the *OSA*.

[50] There are two debates between experts contained in the record. One of them, already briefly discussed in the section above, is between Professor Elitzur (for the Plaintiff) and Ms. Peterson (for Canopy). That debate centres on the effort to measure materiality by assessing the impact of Canopy's misstatements and admittedly faulty governance and audit controls.

[51] The other debate is between Professor Elitzur and another PriceWaterhouseCooper expert on behalf of Canopy, Jake Dwhytie, over the use and application of several quantification methodologies – specifically, Benford's Law and the Beneish Manipulation Index. These quantitative tools are deployed by Professor Elitzur, and critiqued by Mr. Dwhytie, for their use in determining the probability of Canopy having engaged in "intentional earnings management" – i.e. manipulation or falsification – during the proposed class period.

i) The Elitzur-Dwhytie debate

[52] Turning first to the latter debate, Professor Elitzur utilizes Benford's Law and the Beneish Manipulation Index in an effort to quantitatively measure the presence of statistical anomalies which, in theory, could reflect a level of financial manipulation. Mr. Dwhytie challenges this analysis point-by-point, demonstrating that Professor Elitzur's quantifications are either miscalculated or unreliable due to improper sample size or other faulty measurement.

[53] Both experts take a strictly quantification approach, and, I say with great respect, are non-explanatory and impenetrable in doing so.

[54] Professor Elitzur describes his methodology by indicating that he conducted a Benford's Law analysis on Canopy's originally reported income statements from FY 2021 to FY 2022 and then from FY 2021 to FY 2023, and then goes on to explain that Benford's Law examines whether any given series of numbers is anomalous by examining the first and second digits of the numbers.

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Those numbers are then measured against a postulate that states that "naturally occurring numbers follow a certain frequency distribution of their digits and, therefore, deviations from those natural frequencies signify that the series is anomalous."

[55] Professor Elitzur elaborates on Benford's Law by stating that the statistical test commonly used to determine whether a series of accounting numbers demonstrate anomalous patterns is the Pearson Chi Square Test. In that test, he says, "[t]he null hypothesis (H0) is that the population's distribution of first- and second-digit numbers conforms to Benford's Law and the H1 (the alternate hypothesis) is that the population's distribution of first- and second-digit numbers is different from Benford's Law.

[56] Professor Elitzur illustrates the Benford's Law approach in two not fully self-explanatory diagrams. The first [Table 8] demonstrates the frequency with which certain digits appear in relevant spots in the examined financial reports, while the second [Figure 3] depicts the distribution frequency of the digits depicted in Table 8.

[57] According to Professor Elitzur, these numerical values show sufficient anomalies or deviations from their expected sequences that something untoward may have taken place in producing them – although, to be clear, he does not, and through this methodology cannot, know what that something is.

TABLE 8 - Benford's Law 1st and 2nd Digits Frequency

Digit	1st	2nd
0	-	12.00%
1	30.10%	11.40%
2	17.60%	10.90%
3	12.50%	10.40%
4	9.70%	10.00%
5	7.90%	9.70%
6	6.70%	9.30%
7	5.80%	9.00%
8	5.10%	8.80%
9	4.60%	8.50%

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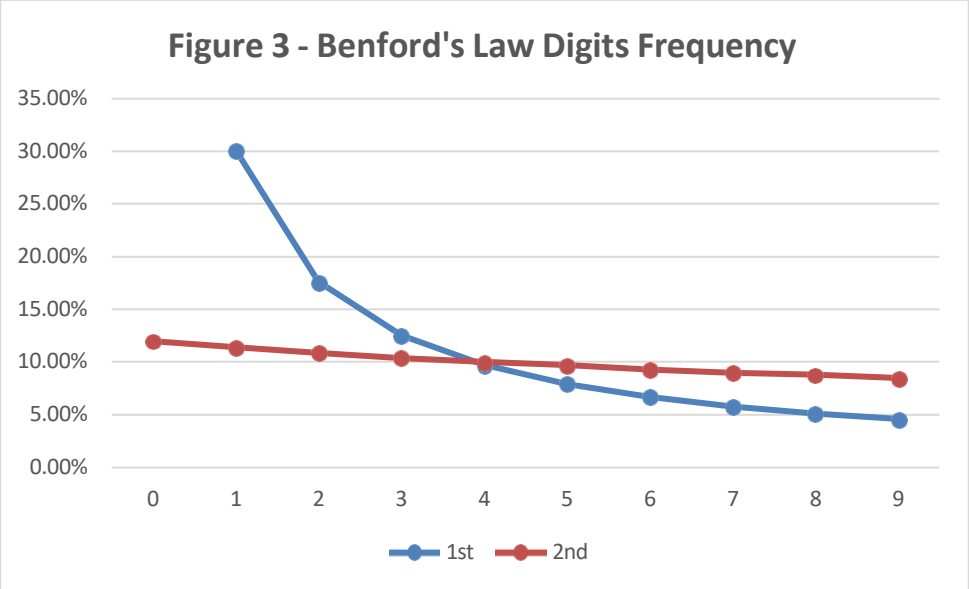

[58] Mr. Dwhytie takes issue with the Benford's Law analysis performed by Professor Elitzur. He contends that "[t]he Elitzur Report leads the reader to believe that the first-digits and second-digits have been separately analyzed to test conformity with Benford's Law, treating each digit as a distinct observation." He goes on to demonstrate that "the Elitzur Report claims to have '61 observations for the first test (31 for the first digit and 30 for the second digit) and 89 observations for the second test (45 for the first digit and 44 for the second digit)' [but this] is incorrect. The actual number of observations is simply the number of line items in each dataset – 31 for the FY 2021 to FY 2022 analysis and 45 for the FY 2021 to FY 2023 analysis – and is reported in the output generated by the software packages as the 'Number of observations used'".

[59] In Mr. Dwhytie's view, Professor Elitzur improperly conflates the main analysis (i.e. the number of line items) with the second order analysis, which is a separate statistical approach for assessing conformity to Benford's Law. He argues that this conflating of outputs results in Professor Elitzur "incorrectly interpreting them as representing the number of observations for first-digit and second-digit tests, respectively. In reality, both figures are derived from the same underlying dataset, and the 'second order' analysis does not correspond to a second-digit test." As a result, the sample size is overstated, thus reducing the reliability of the statistical tests used.

[60] Moreover, Mr. Dwhytie points out that Professor Elitzur takes so-called p-values – i.e. a unit of measurement of the observed deviation of Canopy's financial results from conformance with the Benford's Law statistical model – and uses them to quantify the likelihood that anomalies are present in the data. Citing the American Statistical Association's published principles regarding the interpretation of p-values, Mr. Dwhytie states that "[s]tatistical significance, as indicated by a p-value, does not measure the size or importance of an effect… and [that] a p-value, by itself, does not provide a good measure of evidence regarding a model or hypothesis." He goes on to explain that, "Without additional context or supporting evidence, a p-value offers limited information."

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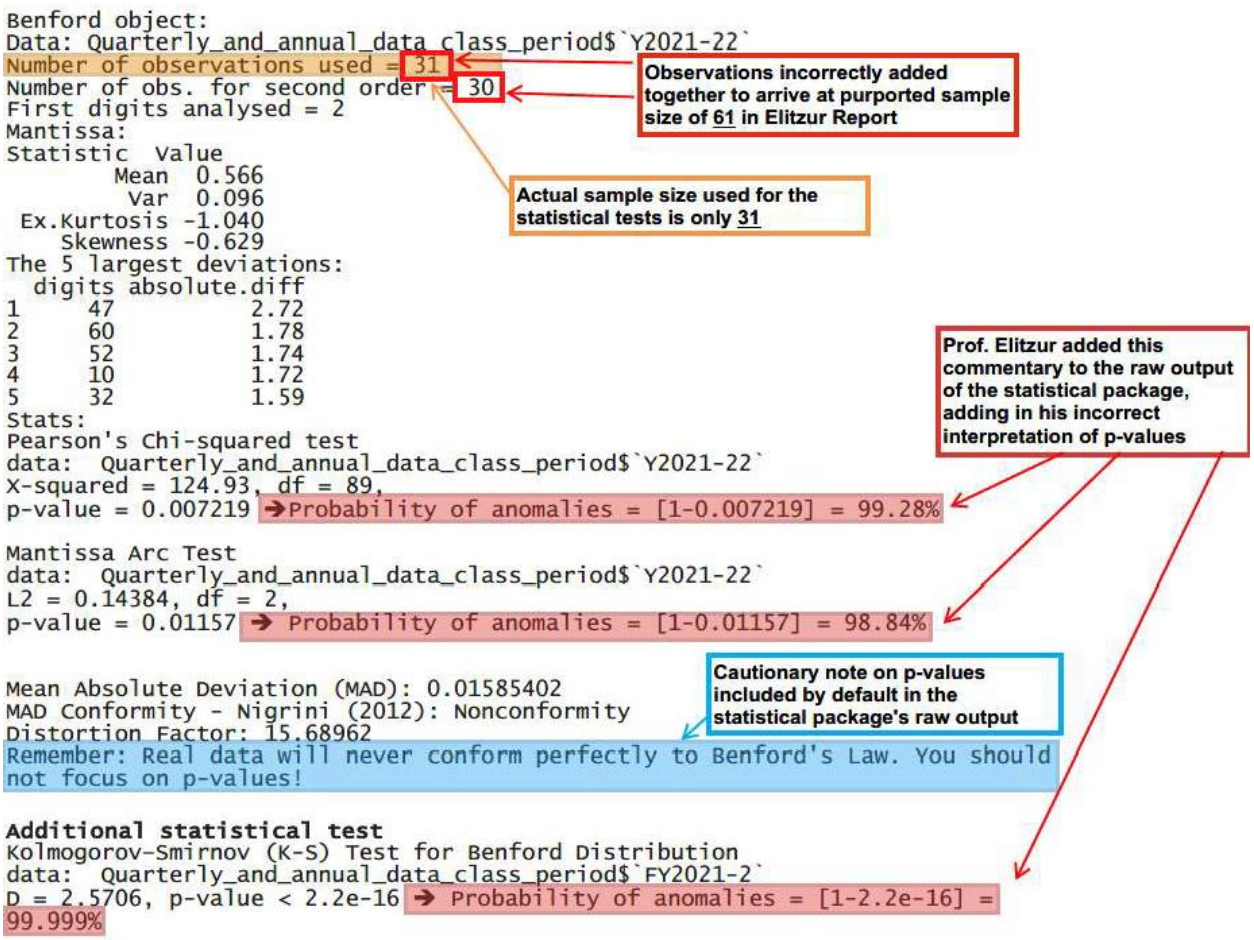
[61] Like Professor Elitzur, Mr. Dwhytie illustrates his point with use of a chart. He outlines Professor Elitzur's approach, and adds his own criticisms in square boxes. In doing so, he has produced as complicated an explanatory diagram as an expert witness could dream up:

D. Benford's Law Analysis for Canopy FY 2021 – FY 2022



[62] On one hand, Mr. Dwhytie seems to have accurately critiqued certain aspects of Professor Elitzur's approach. The inadequacies of sample size, the conflating of outputs, and the over-reliance on p-values are all indicative of technical problems associated with the analysis outlined in the Elitzur Report. Those technical issues inevitably translate into unreliability of the conclusory opinions expressed by Professor Elitzur.

[63] On the other hand, Mr. Dwhytie's conclusion is so far reaching that the technical errors may not be of any real significance in the greater scheme of his critique. As he puts it in his Report:

> Even if a properly conducted Benford's Law analysis had been performed (though it was not), and even if a properly-performed analysis had shown that Canopy's income statement data do not conform to Benford's Law (though that was not shown), the Elitzur Report commits the further analytical error of asserting that

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such non-conformity would constitute evidence of a 'high likelihood of intentional earnings management.'

[64] In other words, the approach is wrong on all fronts. Its application has from a technical, or statistical analysis gone wrong, and its use as an applicable statistical methodology at all is wrong. That is, the specific conclusions are unsupportable, and the methodology could not lead to the overall conclusion for which it was implemented. Whatever could be wrong about the statistical analysis engaged in at some length by the experts, is indeed wrong. As used here, Benford's Law has become Murphy's Law.

[65] The Beneish Manipulation Index is no better. That Index is composed of eight separate indices weighted to create an aggregate score for the company. As Professor Elitzur describes it, "Under the Beneish Manipulation Index, the threshold to conclude that earnings manipulation occurred is -1.78. Any score of -1.78 or greater (*i.e.*, moves toward positive values) predicts and categorizes a company as a manipulator (as opposed to a non-manipulator). Like with the Benford's Law explanation, Professor Elitzur illustrates the Beneish Manipulation Index with charts, one for Canopy's original financial statements [Table 6, with scores below -1.78] and one for its restated 2023 financial statement [Table 7, with scores above -1.78].

Table 6 - Beneish Manipulation Index Analysis for Canopy Financial Statements FY 2021- 2023 (using original amounts)

Canopy	2020	2021	2022	2023	Weighted Predictor Ratios	2021	2022	2023
Accounts Receivable	51,166.0	67,106.0	78,059.0	66,820.0	Days Receivables Index	0.88020	1.12430	1.01705
Current Assets	2,564,373.0	2,838,194.0	1,737,402.0	1,077,254.0	Gross Margin Index	-0.34249	-0.17432	0.75792
Prop. Plant & Eq-Net	1,524,803.0	1,074,537.0	942,780.0	499,466.0	Asset Quality Index	0.42688	0.49501	0.27328
Total Assets	6,857,745.0	6,823,480.0	5,615,050.0	2,439,098.0	Sales Growth Index	1.22278	0.84905	0.69070
Current Liabilities	420,589.0	284,330.0	212,898.0	803,842.0	Depreciation Index	0.08566	0.09515	0.08435
Long-term Debt	449,022.0	1,573,136.0	1,491,695.0	749,991.0	Sell. & Admin. Exp. Index	-0.10407	-0.14847	-0.21436
Sales	398,772.0	546,649.0	520,325.0	402,904.0	Leverage Index	-0.70197	-0.36467	-0.68621
Cost of Goods Sold	430,456.0	479,689.0	713,379.0	507,044.0	Total Accruals/Total Assets	-0.82636	0.18776	-5.27925
Selling & Admin. Exp.	693,737.0	575,389.0	472,756.0	456,225.0	Constant	-4.84	-4.84	-4.84
Income from Cont. Oper.	(1,387,440.0)	(1,670,820.0)	(320,485.0)	(3,309,546.0)	Value of y	-4.19935	-2.77618	-8.19650
Cash Flow from Oper.	(772,635.0)	(465,729.0)	(545,811.0)	(557,546.0)				
Depreciation	73,716.0	70,914.0	76,247.0	56,736.0				

Table 7 - Beneish Manipulation Index Analysis for Canopy Financial Statements FY 2023 (using restated amounts)

Canopy	2022R	2023	Weighted Predictor Ratios	2023
Accounts Receivable	68,197	66,820	Days Receivables Index	1.14175
Current Assets	1,727,612	1,077,254	Gross Margin Index	0.81313
Prop. Plant & Eq-Net	942,780	499,466	Asset Quality Index	0.27281
Total Assets	5,605,260	2,439,098	Sales Growth Index	0.70424
Current Liabilities	213,190	803,842	Depreciation Index	0.08435

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Long-term Debt	1,491,695	749,991	Sell. & Admin. Exp. Index	-0.21024
Sales	510,321	402,904	Leverage Index	-0.68489
Cost of Goods Sold	713,457	507,044	Total Accruals/Total Assets	-5.27925
Selling & Admin. Exp.	472,756	456,225	Constant	-4.84
Income from Cont. Oper.	(330,567)	(3,309,546)	Value of y	-7.99809
Cash Flow from Oper.	(545,811)	(557,546)		
Depreciation	76,247	56,736		

[66] In his responding Report, Mr. Dwhyte argues that, "Despite the M-Score indicating a low probability of earnings management in Canopy's annual financial statements, the Elitzur Report departs from the validated use of the model by focusing on individual components and asserts a high probability of revenue inflation in fiscal years 2022 and 2023." He criticizes Professor Elitzur's specific reliance on the Days Receivable Index, noting that it comes in at 1.12 in FY 2022 and 1.02 in FY 2023, which supposedly denotes an inconsistency between Canopy's revenues and its accounts receivables. But Mr. Dwhyte observes that there is no support in the literature on these studies for extracting data from one index in isolation in this way.

[67] Mr. Dwhyte also takes issue with Professor Elitzur's recording of quarterly results on the Beneish Manipulation Index rather than sticking with annual results that match the company's annual reports. He argues that "[t]he model's weights and the -1.78 threshold are specifically calibrated for annual reporting periods." Accordingly, he finds no basis for applying those weights to quarterly data, and doubts that the 01.78 benchmark is applicable to a quarterly analysis. As Mr. Dwhyte explains, in a quarterly financial analysis "greater volatility (e.g., seasonality, short-term operational fluctuations, and timing differences in revenue and expense recognition) would be expected."

[68] To make a rather long story short, it is Mr. Dwhyte's view that the Beneish Manipulation Index was itself subject to Professor Elitzur's manipulation. Much like BioSteel and Canopy improved their financial reports by artificially augmenting certain elements of them, one expert contends that the other improved his expert report by artificially augmenting certain elements of it. The art (or science?) of statistics thereby mirrors real life, *albeit* in an ironic way.

[69] Although I know the eight factors listed in the Beneish Manipulation Index charts, I do not know how they relate to any management misdeeds. And nothing about the statistical analysis that accompanies them sheds any light on that issue. The 2023 chart may show increases in one index – e.g. current liabilities – and decreases in another – e.g. long term debt – but nothing in those figures tells me why or how that came about, or whether or not it resulted from legitimate business changes over the course of the year.

[70] The original developer of the Index has himself highlighted this shortcoming of the analysis in providing an explanation of the benefits, and limitations, of his theory:

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> Although the model is cost-effective relative to a strategy of treating all companies as non-manipulators, its large rate of classification errors makes further investigation of the screening results important. The model's variables exploit distortions in financial statements that might or might not result from manipulation. For example, the distortions could be the result of a material acquisition during the period examined, a material shift in the company's value-maximizing strategy, or a significant change in the company's economic environment.
>
> Messod D. Beneish, "The Detection of Earnings Manipulation", *Financial Analysts Journal*, 1999, p. 34.

[71] In a similar way, I know from the application of Benford's Law to the sequences of Canopy's financial statements that certain of the figures contained in those statements display deviations from the expected or naturally flowing sequences of numerical values. But nowhere in that analysis can one discern what, if any, wrongdoing has caused the graph lines to go off their expected curve.

[72] There is simply no connection drawn by the Benford's Law tests between deviation and causation, let alone between deviation and malintent. As one critic has put it, "Using Benford's Law as a lie detector and concluding that nonconformity to Benford by a vaguely described set of numbers signals fraud or error is incorrect": Mark J. Nigrini, *Benford's Law: Applications for Forensic Accounting, Auditing, and Fraud Detection*, 2012, pp. 244-245.

[73] The deepest problem with the entire statistical approach is, however, that it seems altogether detached from the real subject matter it is meant to highlight. The Elitzur-Dwhytie debate has the feel of organic chemists examining the microscopic, molecular interactions of dairy, wheat, tomato, and pineapple drops in a petri dish, as a way of opining on, but never mentioning, the good or bad taste of a Hawaiian pizza.

[74] One side may 'get the better' of the other, but the victory and defeat is entirely internal to the experts' discipline. The discussion of p-values and M-scores never strays from its self-contained and self-referential discourse. It is an entirely quantitative analysis of a subject that cries out for qualitative evaluation.

ii) The Elitzur-Peterson debate

[75] The other expert debate – between Professor Elitzur and Jacqueline Peterson – is less difficult and more transparent than that between Professor Elitzur and Jake Dwhytie, but nevertheless is also not particularly helpful.

[76] As discussed above, Ms. Peterson takes issue with Professor Elitzur's conclusion that the misstatements in Canopy's financial reporting were "material" for the purposes of assessing liability under section 138.3 of the *OSA*: see *Kerr v. Danier Leather Inc.*, [2007] 3 SCR 3, at para. 35. In coming to his conclusion that Canopy's misstatements were material, Professor Elitzur utilizes the definition from SEC Staff Accounting Bulletin: No. 9, SEC (1999), which provides

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that "an item is material if its omission or misstatement would probably change, or influence, the judgement of a reasonable user of the financial statements."

[77] In setting out her conclusions, Ms. Peterson states in her Report that "the Elitzur Report does not contain sufficient and appropriate support to conclude that… Canopy failed to maintain effective internal controls over financial reporting (ICFR) and/or disclosure controls and procedures (DC&P) between June 1, 2021 and June 22, 2023." She further emphasizes that the applicable accounting standards "must be assessed through an integrated evaluation of the consolidated financial statements as a whole, with emphasis on the qualitative and contextual relevance of information available to a user – not through isolated or purely quantitative metrics."

[78] That said, Ms. Peterson concedes in her report that she has not been provided with a significant portion of Canopy's internal documentation, and that the nature of the materials with which she has been presented leads to certain limitations in her ability to express any opinion. More specifically, she states that, "while a critical assessment of the Elitzur Report is possible, definitive conclusions regarding Canopy's financial practices cannot be made without analysis of additional information."

[79] Ms. Peterson further conceded in cross-examination that she knew that the financial restatement in Q1 2023 was due to weakness in Canopy's financial and governance controls. She added that she simply did not know what caused the misstatements in the other quarters in which Canopy admitted there were misstatements.

[80] In other words, Professor Elitzur opines that all of Canopy' misstatements in its financial reports were due to inadequate ICFR and DC&P, while Ms. Peterson says that she's not so sure but provides no other possible source of the problem. On a strictly evidentiary basis, Professor Elitzur's opinion must prevail at least for the purposes of the leave to proceed test. It certainly amounts to evidence that there is a reasonable prospect that the Plaintiff will prevail at trial. In fact, the very fact that there is a "clash of opinions between [the parties' experts] as to whether the weakness relating to [the issuer's] financial statements and its internal controls existed in the Pre-Restatement Period [or otherwise]… is a matter better left to be decided at trial…": *Catucci v. Valeant Pharmaceuticals International Inc.*, 2017 QCCS 3870, at para. 240.

[81] Having said that, I am of the view that the entire expert debate is an unnecessary part of the evidentiary record. The Supreme Court of Canada has held that the share price of a company immediately dropping upon disclosure of information "demonstrate[s] the "materiality" of this information: *Danier Leather*, at para. 18. Similarly, the Ontario Securities Commission has stated, "[c]learly, if disclosure when made actually has a significant effect on the market price of securities, that is strong evidence suggesting that the test for materiality may have been satisfied at an earlier time": *Cornish v. Ontario Securities Commission*, 2013 ONSC 1310, at para. 69.

[82] What is clear to the Supreme Court and to the province's securities regulator must be equally clear to the investing public: the market impact test for materiality is met where the market has been impacted by the disclosure of the misstatements. At this point, subsequent to the Corrective Disclosures, "the market impact can be objectively determined by an examination of

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the stock's subsequent price movements, and the market, reflecting economically rational investor behaviour, becomes the determinant of what the reasonable investor might think": *Gowanlock v. Auxly Cannabis Group Inc*., 2021 ONSC 4205, at para. 39.

[83] Plaintiff's counsel observe that, as detailed in part II above, on release of the Corrective Disclosures there was a significant negative market impact. The Ontario Securities Commission has observed that "events that would reasonably be expected to have had a significant effect on the market price or value of Coventree [or Canopy] shares would be of interest to the reasonable shareholder or investor": *Cornish*, at para. 78. Canopy itself has admitted to material misstatements in its financial reporting; likewise, the record shows that market analysts at a number of financial institutions found BioSteel's abnormal growth (compared to Canopy overall) to be material to Canopy, and after the release of the Corrective Disclosures found the disclosed information to be material and lowered their target prices for Canopy's shares.

[84] Accordingly, this is an instance where the market speaks louder than the experts. Ms. Peterson qualifies her views by stating that it is possible that other unknown factors caused the drops in price of Canopy's shares. And it is true that, theoretically, an external phenomenon such as a pandemic or sudden eruption of a trade war or a 'Black Monday' across the broader market could cause the share price to plummet on the very day following a Corrective Disclosure. But under the circumstances, that is a purely hypothetical possibility.

[85] There is no indication that anything else transpired beside the Corrective Disclosure announcements to impact Canopy's share price so dramatically downward. The coincidence of timing serves to confirm the fact that the downward movement of the market reflected the impact of Canopy having disclosed material misstatements and made material changes to its financial reporting. Since "the share price dropped immediately upon release of the [new information]", the market impact of the disclosures has been sufficiently established: *Danier Leather*, at para. 18. No expert evidence was necessary to complete the analysis.

[86] The record shows that there is a reasonable possibility that the Plaintiff will succeed at trial in its claim under section 138.3 of the *OSA*.

IV. Certification

[87] The analysis followed for certification of a proposed class action is set out as a five-step process in section 5(1) of the *CPA*. The following analysis follows the pattern of that statutory test, and incorporates the findings and analysis detailed above with respect to leave to proceed under section 138.8 of the *OSA*.

a) Section 5(1)(a) – cause of action

[88] Given the above analysis of the Plaintiff's claim under section 138.3 of the *OSA*, there is certainly a reasonable cause of action for secondary market misrepresentation. The Court of Appeal has confirmed that if leave to proceed under the *OSA* is granted, the cause of action

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criterion under s. 5(1)(a) of the *CPA* will also be satisfied in relation to the statutory claim: *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90 at para 91.

[89] The Plaintiff has also pleaded that Canopy is liable under the oppression remedy. That claim does not require leave, and so is to be analyzed under the *CPA*'s more lenient test for a cause of action. The pleadings will be considered on their own, without any evidence, and the claim will only fail the test if it is plain and obvious that the Plaintiff cannot succeed, or if the action is certain to fail because it contains a radical defect: *Hollick v. Toronto (City)*, [2001] 3 SCR 158, at para. 25.

[90] Section 241 of the *Canada Business Corporations Act*, RSC, 1985, c. C-44 ("*CBCA*") provides, in part:

> Application to court re oppression
>
> 241(1) A complainant may apply to a court for an order under this section.
>
> Grounds
>
> (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
>
> > (a) any act or omission of the corporation or any of its affiliates effects a result,
> >
> > (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
> >
> > (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

[91] In short, a complainant under section 241(1) – for which the Plaintiff and each class member qualify as shareholders – must identify the reasonable expectations they claim were violated by the conduct at issue, and must demonstrate that these reasonable expectations were undermined by corporate conduct that was oppressive or unfairly prejudicial to or that unfairly disregarded their interests. To impose personal liability against directors and officers, there must be oppressive conduct that is properly attributable to the individual's involvement in the oppression.

[92] The Plaintiff's basis for the oppression claim is that Canopy and Klein failed to take the steps required to rectify the known deficiencies in BioSteel's ICFR and DC&P. They further failed to terminate the employment or adequately monitor the BioSteel executives who were responsible

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for intentionally inflating BioSteel's calendar revenue as soon as Canopy and Klein became aware of the fact.

[93] More specifically, the Statement of Claim pleads that the Plaintiff and proposed class members had a reasonable expectation, informed by Canopy's Code of Conduct, governance structure and board committees, applicable laws and regulations, and various disclosure documents and public pronouncements by Canopy and its officials, that ethical and appropriate governance practices would be adhered to, and that financial reporting would be done accurately and with no material misstatements. The Plaintiff further pleads that he had a reasonable expectation that any of Canopy's or its subsidiaries' directors, officers, or employees who failed to adhere to these standards and expectations would be immediately terminated.

[94] The Plaintiff also pleads that these reasonable expectations were violated by the Defendants' conduct – i.e. by Canopy refusing to abide by its own policies, failing to terminate or monitor unethical employees, failing to stop unethical behaviour, failing during the proposed class period to fix known defects in internal controls. The Plaintiff states that all of this was oppressive and/or unfairly prejudicial to and/or that unfairly disregarded the interests of the class members to the benefit of BioSteel's minority shareholders.

[95] The allegations going to the oppression claim are not plainly and obviously going to fail. In fact, the same or similar allegations underpinning the *OSA* statutory claim have been found to have a likelihood of success. Plaintiff's counsel point out that the central allegations supporting both causes of action have essentially been admitted by Canopy in its Corrective Disclosures and in its defense to the BioSteel claim.

[96] Counsel for Canopy submit that the oppression remedy is unsuitable for a class action because it inherently rests on the individualized, subjective expectations of each shareholder. They argue that the reasonable expectations of potential class members will always be subjective in nature, and that this important element in a shareholder oppression claim renders it antithetical to the common issues inquiry that is at the heart of a class action.

[97] Canopy's position harks back to earlier cases where courts had opined that the oppression remedy is premised, first and foremost, on the individualized, subjective expectations of the claimant having not been met. Justice Farley, for example, expressed the view in *Shaw v. BCE Inc*., [2003] O.J. No. 2695 (SCJ), that "a claim based on reasonable expectations is also highly individualized and depending on an assessment of what the individual's expectations were..."

[98] Counsel for the Plaintiff reply that the expectations relied on in the present claim arise from Canopy's public disclosures, statutory obligations, and governance framework, and can be considered objectively as they are identical for all shareholders. They submit that the Supreme Court of Canada has acknowledged that the oppression remedy can be applicable to entire classes of corporate stakeholders, and not just to individual claimants: see *BCE Inc. v. 1976 Debentureholders*, [2008] 3 SCR 560, at para. 75.

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[99] The Plaintiff further relies on the Court of Appeal's reasoning in *Ford Motor Company of Canada, Ltd. v. Ontario Municipal Employees Retirement Board* (2006), 79 OR (3d) 81, at para. 100, that the reasonable expectations of minority shareholders in an oppression claim may be "founded on the public statements of Ford Canada and the implicit assumptions about the manner in which a public company operates." The oppression inquiry can, in a case like this, focus on whether the claim raises concerns about corporate conduct that was contrary to what was "objectively reasonable for the stakeholders to expect": *Ernst & Young Inc. v. Essar Global Fund Limited* (2017), 139 OR (3d) 1, at para. 160.

[100] I have to agree with the Plaintiff that, as the Supreme Court has observed, "the concept of reasonable expectations is objective and contextual": *BCE,* a para. 62. For that reason, courts have frequently found that, "Expectations can be proven through inference like any other fact": *Lord v. Clearspring Spectrum Holdings, L.P.*, 2017 ONSC 2246, at para. 57, aff'd 2017 ONCA 1016. The inference in shareholder actions is most frequently based on the understanding that "[t]he public pronouncements of corporations, particularly those that are publicly traded, become its commitments to shareholders within the range of reasonable expectations that are objectively aroused: *Themadel Foundation v. Third Canadian General Investment Trust Ltd*. (1998), 38 OR (3d) 749, 753-54 (CA).

[101] The Court of Appeal in *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 OR (3d) 481, 490 articulated the point with great clarity:

> The law is clear when determining whether there has been oppression of a minority shareholder, the court must determine what the reasonable expectations of that person were according to the arrangements which existed between principals...
>
> Shareholder interests would appear to be intertwined with shareholder expectations. It does not appear to me that the shareholder expectations which are to be considered are those that a shareholder has as his own individual 'wish list'. They must be expectations which could be said to have been (or ought to have been considered as) part of the compact of the shareholders. [citations omitted]

[102] In recent years, an argument similar to that advanced by Canopy has been specifically rejected by this Court in *Rooney v. ArcelorMittal*, 2018 ONSC 1878, where, as here, at para. 65, "the defendants submit[ed] that the oppression claims require individual evaluations and cannot be determined on a class-wide basis." The Court's response, at paras. 69-70, unambiguously rejected the defendants' understanding of the oppression remedy in the class action context:

> [69] I agree with the plaintiffs. First, it seems to me that shareholder expectations have both an objective and a subjective component. Regardless of subjective expectations, which deal with risk tolerance and profit seeking risk taking, the objective component deals with the integrity of the market and the information that is disseminated in it. The objective component is something every shareholder would reasonably expect...

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> [70] Second, to the extent that subjective expectations arise, the Supreme Court of Canada [in *BCE*] has made it clear that an individual's reasonable expectations are evaluated objectively but direct evidence is not necessarily required...

[103] Before leaving the topic of the Plaintiff's cause of action, I will note that counsel for Canopy go out of their way to make the point that a similar claim against Canopy was rejected, and the action was dismissed, in an initial proposed U.S. class action by American shareholders. Plaintiff's counsel submit, accurately, that the U.S. decision turned on legal requirements that do not exist under either the *OSA* or the *CBCA*, and addressed issues not relevant in Canadian litigation.

[104] Specifically, the U.S. District Court for the Southern District of New York held that the shareholders' claims were "too speculative to give rise to a strong inference of scienter": *In Re Canopy Growth Securities Litigation*, 23 Civ. 4302 (2024), at p. 26. The U.S. legal requirement of scienter – an intent to deceive, manipulate, or defraud – plays no part in our securities litigation: *DALI Local 675 Pension Fund (Trustees) v. Barrick Gold*, 2019 ONS, at para. 113; *Gould v. Western Coal Corporation*, 2012 ONSC 5184, at para. 100. The Ontario Court of Appeal has instructed that a defendant need not even know that its statements are false, let alone have formed an intent to deceive, for shareholders to have a valid cause of action: *Drywall Acoustic Lathing and Insulation, Local 675 v. SNC-Lavalin Group Inc.*, 2015 ONCA 718, at para 66.

[105] The U.S. ruling provides no support for Canopy's position in the present action. The Plaintiff has valid causes of action against Canopy for misrepresentation under the *OSA* and for oppression under the *CBCA*.

b) Section 5(1)(b) – Recognizable class

[106] The Plaintiff seeks to certify a class defined as follows:

> "Class" and "Class Members" means all persons or entities, other than the Excluded Persons, who, during the Class Period (June 1, 2021 to June 22, 2023), acquired Canopy's securities in the secondary market and who held some or all of those securities until the close of trading on May 10, 2023 or June 22, 2023 and who either:
>
> (i) are residents of Canada or were residents of Canada at the time of such acquisitions, regardless of the location of the exchange on which they acquired Canopy's securities; or
>
> (ii) acquired Canopy's securities on an exchange in Canada or another exchange located outside of the United States, regardless of where they reside or are domiciled;
>
> "Excluded Persons" means the Defendants and their subsidiaries, affiliates, officers, directors, senior employees, legal representatives, heirs, predecessors,

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> successors and assigns, the immediate family members of the Individual Defendants, or any entity in which the foregoing hold a controlling interest, as well as any individuals or entities who held shares of BioSteel that were acquired by Canopy on or about October 1, 2022.

[107] The criteria for analyzing a proposed class are well established in the case law. "The definition should state objective criteria by which members of the class can be identified... [and] should bear a rational relationship to the common issues asserted by all class members: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 SCR 534, at para. 38. Furthermore, the Plaintiff must propose a class definition that "is not unnecessarily broad – that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue": *Hollick v. Toronto (City)*, [2001] 3 SCR 158, at para. 21.

[108] The proposed definition generally satisfies the section 5(1)(b) criteria. It includes those with a potentially valid claim and confines the action to those so identified. The definition is defined objectively and is not unnecessarily broad or over-inclusive and is defined by objective criteria. It is limited to those who purchased Canopy's securities in the secondary market during the time when it is alleged that misrepresentations were outstanding and oppressive conduct was occurring, and who held their securities until the Corrective Disclosures were published and Canopy's stock price dropped, causing them their alleged loss.

[109] Counsel for Canopy asserts that the class should exclude all shareholders who reside outside Canada, and not just those who purchased their shares on a U.S.-based exchange. As they put it in their factum, "Before visiting a *global* securities class action on an issuer and its current shareholders, there should be some evidence justifying a global class."

[110] Counsel for the Plaintiff submit that the certification of a global class of those who purchased their Canopy securities on an exchange in Canada, apart from an exchange located in the United States, is appropriate in the circumstances. They point out that Canopy's corporate profile, which forms part of the record, shows it to be an Ontario-headquartered company, listed on the TSX, incorporated under the *CBCA*, whose principal regulator is the Ontario Securities Commission. They further explain that the definition excludes those who purchased their shares on a U.S. exchange as they are able to have their claims adjudicated under U.S. securities laws in an American class action (which has been restructured and filed in the Eastern District of New York since the dismissal of its earlier iteration in the Southern District of New York: *Baron v. Canopy Growth Corporation et al*., Case No. 1:25-cv-01877 (E.D.N.Y.)).

[111] I see no merit to Canopy's objection to the class' inclusion of non-Canadians who purchased their shares on a Canadian or other non-U.S. exchange. Given Canopy's real and substantial connection to Ontario and Canada, the Ontario courts have jurisdiction over the claim: *Club Resorts Ltd. v. Van Breda*, [2012] 1 SCR 572, at para. 109. The burden is on the party seeking to exclude foreign class members to demonstrate why they should not be included, and not the other way around: *Badesha v. Cronos Group, Inc*., 2023 ONSC 5678, at para. 37.

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[112] In any case, Justice Strathy observed in *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, at para. 588, that "a global class should be certified because non-residents who acquired their shares on the TSX could reasonably expect that a Canadian court would determine their substantive rights." That rationale applies wherever the shareholders purchased their shares of Canopy, given that their investment was in a Canadian corporation headquartered in Ontario and doing business in Canada: see *Currie v. McDonald's Restaurants Canada Ltd.* (2005), 74 OR (3d) 321, at para. 18 (CA). In addition, one of the certified causes of action here is the oppression remedy claim, and under sections 241 (oppression remedy) and 2(1) (definition of "court") of the *CBCA*, that claim must be pursued in a Canadian court.

[113] The Plaintiff's proposed class definition is therefore appropriate under the circumstances.

c) Section 5(1)(c) – Common issues

[114] When it comes to identifying common issues in a proposed class action, "[t]he underlying question is whether allowing the suit to proceed as a [class proceeding] will avoid duplication of fact-finding or legal analysis": *Dutton*, at para. 39. The test erects a low bar: *Carom v. Bre-X Minerals Ltd*., (2000), 51 OR (3d) 236, at para. 49 (CA). Thus, for example, "[a]n issue can constitute a substantial ingredient of the claims and satisfy s. 5(1)(c) even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution": *Cloud v. Canada (Attorney General)* (2004), 73 OR (3d) 401 , at para. 53 (CA).

[115] The common issues proposed by the Plaintiff are:

Statutory Claim for Secondary Market Misrepresentation

(i) Did any of the Impugned Documents contain one or more misrepresentations within the meaning of the *Securities Act*?

(ii) If the answer to (i) is yes, which Impugned Document(s) contained what misrepresentation(s)?

(iii) If the answer to (i) is yes, are the Defendants, or any of them, liable to some or all of the Class Members for damages? If so, which Defendants are liable and to whom?

(iv) If the answer to (iii) is yes, what are the per share damages?

Oppression Remedy

(v) Did any act or omission of Canopy and/or any of its affiliates and/or David Klein ("Klein") effect a result, or were the business or affairs of Canopy and/or any of its affiliates carried on or conducted in a manner, or were the powers of Canopy and/or any of its affiliates and/or Klein exercised in a

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manner that was oppressive or unfairly prejudicial to or that unfairly disregarded the interests of the Class?

(vi) If the answer to (v) is yes, should the Court make an order that Canopy and/or Klein compensate the Class Members?

(vii) If the answer to (vi) is yes, on what basis should the amount of compensation payable to the Class Members be determined?

(viii) If the answer to (v) is yes, are there other remedies that should be ordered by the Court to rectify the harm caused by Canopy and/or Klein?

Other Matters

(ix) Can some or all of the damages of the Class or the compensation payable to the Class be calculated in the aggregate pursuant to s. 24 of the *CPA*?

(x) If the answer to (ix) is yes, in what amount?

(xi) Is Canopy vicariously liable for the acts and/or omissions of its officers, directors, agents, employees, and representatives?

(xii) Should the Defendants pay for the costs of administering the recovery? If so, who should pay and how much?

(xiii) If the Court determines that the Defendants, or any of them, are liable to the Class, and if the Court considers that the participation of some or all of the Class Members is required:

(a) are any directions necessary?

(b) should any special procedural steps be authorized?

(c) should any special rules relating to the admission of evidence and means of proof be made? and

(d) what directions, procedural steps, or evidentiary rules ought to be given or authorized?

[116] Counsel for Canopy have indicated that if leave is granted pursuant to the *OSA*, they would not contest certification of the common issues for which leave is granted. That makes sense, since the common issues relating to the *OSA* claim are all germane to the secondary market misrepresentation cause of action and will advance the analysis of that claim for all class members. The same can be said for the oppression remedy questions as formulated above. Canopy opposes those questions since it takes issue with the commonality of oppression claims more generally.

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However, as discussed in part IV(a) above, oppression claims can and do suit a class action and are common issues which make the above proposed questions relating to the oppression remedy appropriate.

[117] Overall, there is nothing unusual or novel about the proposed common issues. In fact, they are quite similar to issues certified in other securities class actions. None of the proposed questions require individual inquiry, and they are designed so that their resolution will advance the litigation and avoid duplication of fact-finding or legal analysis.

[118] The proposed common issues are therefore all suitable for certification.

d) Section 5(1)(d) – Preferable procedure

[119] Generally speaking, the preferabililty analysis is to be conducted through the lens of the three goals of class action litigation: judicial economy, behaviour modification, and access to justice: *Hollick*, at para. 27. This typically involves a court undertaking a comparative analysis of the proposed class proceeding with other available types of proceedings. The Supreme Court has instructed, however, that in engaging in that analysis "courts must focus on the statutory requirement of preferabilty and not impose on the representative plaintiff the burden of proving that all of the beneficial effects of the class action procedure will in fact be realized": *AIC Limited v. Fischer*, [2013] 3 SCR 949, at para. 22.

[120] Section 5(1.1) of the *CPA* specifies that a class proceeding is the preferable procedure if (1) it is superior to all reasonably available means of determining the entitlement of the class members to relief or addressing the impugned conduct of the defendants; and (2) the common issues predominate over any questions affecting only individual class members. The combination of securities misrepresentation claims and oppression remedy claims has proved manageable in prior cases and there is no reason to think that it will not be similarly manageable here: see, e.g., *Rooney*, *supra*; and *Abdula v. Canadian Solar*, 2015 ONSC 53. Further, the only real alternative – individual court actions – would be uneconomical and unviable for the large number of shareholders for whom the legal costs would exceed their potential recovery.

[121] It is apparent that in this action overall, common issues predominate over any individual issues. In this, "the critical question is whether, viewing the common issues in the context of the entire claim, their resolution will significantly advance the action": *Cloud*, at para. 76. Given the posing of the common issues questions, the *OSA* claim and oppression remedy claim will both likely be resolved in their entirety with the determination of those issues. Unless a common issues judge rules that damages cannot be determined in the aggregate and require individual assessments, there will be nothing left to litigate once the common issues are resolved.

[122] The proposed class proceeding will advance the three goals of class action litigation further than any other available procedure. It meets the criteria for preferability established under the *CPA*.

e) Section 5(1)(e) – Representative plaintiff and litigation plan

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[123] The Supreme Court has stated that the representative Plaintiff need not be "typical" of the class. In fact, the named Plaintiff need not be shown to be the "best" possible representative, so long as the Court is satisfied that the named representative will "vigorously and capably prosecute the interests of the class": *Dutton*, at para. 41.

[124] That said, Justice Perell observed in *Shah v LG Chem, Ltd.*, 2015 ONSC 6148, at para 29, that it is equally understood that the representative plaintiff will have the assistance of competent counsel, and, therefore, "one should not expect too much or be too demanding in evaluating whether a person can properly serve as a representative plaintiff…"

[125] The Plaintiff here has put forward affidavit evidence and confirmed in cross-examination that he understands his role and obligation to fairly and adequately represent the interests of the class. He has produced a litigation plan for the proceeding that sets out a workable path forward in the action and of advancing the proceeding on the class members' collective behalf. He shares interest in the common issues with the rest of the class, and does not have any known conflict of interest with other class members.

[126] As a form of objection to the Plaintiff as representative, counsel for Canopy argue that at the carriage motion it was represented to the Court that the Plaintiff had secured and would move for court approval of third-party litigation funding, but that he has not done so. However, the issue of how the litigation will be funded played no part in the decision awarding carriage to the Plaintiff: see *Dziedziejko v. Canopy Growth Corporation*, 2023 ONSC 63.

[127] I do not consider this to be an argument that has any force against the choice of representative Plaintiff, or otherwise. I have no doubt that if the Plaintiff and class require more funding than they already have through their counsel and/or their own means, they will seek third party funding and court approval for that funding. If they do not lack in funds they are free not to seek funding. While a defendant has standing and gets some limited input in a funding approval motion, a defendant gets no input at all into the funding of a claim that turns out to be self-funded and that therefore requires no funding approval from the Court.

[128] I do not find there to be any concerns with the Plaintiff as representative of the class, or with the litigation plan for this action.

V. Disposition

[129] Leave to proceed is granted for this action under s. 138.8 of the *OSA*.

[130] The action is certified as a class proceeding under s. 5(1) of the *CPA*.

[131] The Plaintiff is approved as representative Plaintiff. Plaintiff's counsel are appointed as class counsel.

[132] The class is defined as set out in paragraph 106 above, and the common issues are approved as set out in paragraph 115 above.

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[133] The parties may make written submissions on costs.

[134] I would ask Plaintiffs' counsel to email my assistant with brief submissions within three weeks of today, and for Defendants' counsel to email my assistant with equally brief submissions within three weeks thereafter.

Date: December 22, 2025 **Morgan J.**

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