

Court File No. 17-71659
Divisional Court File No. 333/19

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

B E T W E E N:

DAVID PARKER

Plaintiff

- and -

BLACKBERRY LIMITED

Defendant

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

**FACTUM OF THE MOVING PARTY, BLACKBERRY LIMITED
(MOTION FOR LEAVE TO APPEAL)**

July 23, 2019

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PART I – NATURE OF THE PROPOSED APPEAL

1. The defendant, BlackBerry Limited, seeks leave to appeal from the decision of Mr. Justice Charbonneau of May 27, 2019, certifying this class action (the “Decision”). The Decision to certify (which contains limited analysis and no reference to case law) rests on a basis contrary to established employment law principles, and conflicts with principles governing the requirements for certification.
2. This is a wrongful dismissal action arising from former BlackBerry employees who received and chose to accept individual offers of employment from Ford Motor Company of Canada during a specified period of time. Based on the communications the plaintiff had with BlackBerry and his understanding of his own employment situation and options, the plaintiff says he believed he would likely have no continuing role at BlackBerry if he chose to decline his Ford offer. He therefore alleges his decision to accept Ford’s offer was neither voluntary nor a resignation, but rather a termination.
3. BlackBerry’s defence is that at least most (if not all) of the individual employees made a voluntary decision to accept Ford’s job offer and resign from BlackBerry. BlackBerry did not terminate their employment, and thus there was no wrongful dismissal of them. The merit of this defence must be determined based on the situation of individual class members, a number of whom have testified they voluntarily chose to resign and understood they were not being terminated. The majority of communications with employees were individualized, and the specific circumstances, prospects, intentions and understandings of many members of the proposed class differed from those alleged by the plaintiff.

4. The threshold liability issue put forward for certification was: “Does BlackBerry’s conduct amount to a termination of the class Employees’ employment?” All other proposed common issues related to damages and could only arise if the threshold liability issue were first determined in an employee’s favour.

5. In concluding that the threshold liability issue could be decided on a common basis for all employees, the Decision is contrary to and ignores without explanation employment law and class action principles in other decisions. There is accordingly good reason to doubt the correctness of the Decision. The well-established legal tests for the plaintiff’s allegation (employees were terminated) and BlackBerry’s defence (employees resigned) require an individual, fact-specific inquiry for each employee. The court must consider the particular employee’s situation, the communications between the employer and the employee about his/her situation and continuing employment at BlackBerry, and all other surrounding circumstances, to determine whether it would be reasonably understood that (i) the employee was being terminated by BlackBerry, or (ii) the employee voluntarily intended to resign. The relevant facts differed from employee to employee.

6. The motions judge erroneously concluded that this threshold liability issue could be decided solely based on the facts and factual theory on which the plaintiff seeks to rely. The plaintiff’s theory is that BlackBerry agreed to and did facilitate Ford making offers of employment to class members in order to avoid having to pay the latter severance pay if they were terminated in the future (the “scheme”), and that this “amounted” to a termination. Even if true, the existence of such a “scheme” cannot determine the success of the threshold liability issue. In focusing solely on the plaintiff’s theory, the Decision disregards other relevant factors

that must be considered under the applicable legal test, and precludes BlackBerry from asserting its individual defences of resignation.

7. This threshold liability issue – termination versus resignation – has never before been certified by any Canadian court. Courts have refused to certify other analogous wrongful dismissal cases precisely because determining liability requires individual factual enquiry of each employee. The Decision is thus contrary to established legal principles, with serious adverse implications to the ability to resolve this action according to the established law, to employers and employees more generally and to the development of employment and class actions law.

PART II – FACTS

The Nature of the Action

8. The plaintiff, Mr. Parker, and other employees were working on a project at BlackBerry providing engineering services to Ford, known as “Project Silver”. Partway through that project, Mr. Parker and various other employees received an individual offer of full-time employment from Ford. He and many (though not all) other employees chose to accept these offers they each received and leave BlackBerry’s employ, and began working at Ford.¹

9. Mr. Parker says that – based on certain communications he had with BlackBerry at the time, and his understanding of his own employment situation and future prospects at BlackBerry – he believed he would likely have no continuing role at BlackBerry if he chose to decline the Ford offer. He alleges that when he chose to accept the Ford offer “he believed he had no other

¹ Affidavit of David Parker sworn June 9, 2017 [“First Parker Affidavit”], paras. 10, 19, Motion Record of the Defendant for Leave to Appeal [“DMR”], Tab 6, pp. 50-51; Affidavit of Rebecca Graham sworn October 2, 2017, [“First Graham Affidavit”], paras. 99-104, DMR, Tab 7, pp. 173-174.

practical choice; his decision was not voluntary.” In the circumstances, he alleges that he did not resign from BlackBerry, but instead was terminated.² He further alleges that other employees in the proposed class had the same understanding or belief regarding their own employment situation and options. Although a number of class members have testified to the contrary, he alleges that no other class member employees made a voluntary decision to resign.³

10. BlackBerry’s position is that employees who received a Ford job offer had a choice: they could choose to accept the offer and leave BlackBerry’s employ if they found the Ford opportunity and offer attractive, or they could choose to decline the offer. If they chose to decline it, they would remain a BlackBerry employee with all of their existing contractual and employment law rights preserved (including the right to severance pay if subsequently terminated at any point). At the end of Project Silver, like when previous projects came to an end, BlackBerry would take steps to place them on another comparable project or team (to the extent possible).

11. The motions judge misstated and apparently misunderstood the choice employees were given and BlackBerry’s defence that flows from it, and that error tainted his analysis of the alleged commonality of the plaintiff’s claim. The motions judge stated: “The defendant submits that once the Ford’s offer was in each individual’s hands, he or she had an option to either resign from BlackBerry or accept the offer.” That was not BlackBerry’s submission or position. In fact, the employees were given the choice referred to in the paragraph immediately above, and

² Amended Statement of Claim, para. 32, DMR, Tab 5, p. 37; First Parker Affidavit, paras 14-27, DMR, Tab 6, pp. 50-53.

³ Amended Statement of Claim, para. 47, DMR, Tab 5, pp. 39-40; First Parker Affidavit, paras. 16, 19, 23, 27, DMR, Tab 6, pp. 50-53

BlackBerry's defence is that the plaintiff and other individual employees who chose to accept a Ford offer made a voluntary decision to accept that offer and resign from BlackBerry.

12. For each employee, the threshold liability issue is: in his/her particular circumstances – taking into account the communications the employee had with BlackBerry, the understanding he/she had as to his/her own employment situation and options, and the reasons he/she chose to accept Ford's offer – was the employee terminated (*i.e.* wrongfully dismissed) by BlackBerry or did he/she choose to leave BlackBerry's employ (*i.e.* resign)? This issue cannot be answered on a common basis for all employees.

Project Silver and the Employees Working on It

13. Mobility Solutions is BlackBerry's business unit relating to the development and licensing of BlackBerry's software for mobile devices. It has shifted away from the design and manufacture of hardware (*i.e.* smartphones and tablets), and remains active in developing, testing and updating BlackBerry's software. It is the business unit that was providing engineering services to Ford under Project Silver.⁴

14. In the fall of 2016, BlackBerry entered into contractual arrangements with Ford in which BlackBerry agreed to provide engineering services related to software systems and technologies in Ford cars, comprising Project Silver. Ford is investing heavily in this work to become a leader in connected vehicles and mobility, and has committed significant resources to developing a fully autonomous vehicle by 2021.⁵

⁴ First Graham Affidavit, paras. 6-7, DMR, Tab 7, p. 149.

⁵ First Graham Affidavit, paras. 9-11, DMR, Tab 7, p. 150.

15. In addition to securing engineering services from BlackBerry, Ford ultimately sought to in-source various engineering services upon the conclusion of Project Silver. Under the parties' contractual arrangements, BlackBerry permitted Ford to make offers of employment to BlackBerry employees working on Project Silver, if Ford chose in its sole discretion to do so.⁶

16. There were many employees working on Project Silver from late 2016 until the end of February 2017. It is not uncommon for employees to work on a number of different projects or team assignments during their employment at BlackBerry. Project Silver was one such project.⁷

17. Project Silver employees' individual employment circumstances and terms of employment varied from employee to employee. The employees had various different job functions, roles and seniority. The majority of proposed class members worked in software-related roles (job functions that were a continuing focus of Mobility Solutions and BlackBerry), while a small minority worked in hardware-related roles (from which Mobility Solutions was shifting away).⁸

The Ford Employment Offer Process and Communications with Employees

18. In alleging that the "scheme" amounted to a termination of employment by BlackBerry, Mr. Parker highlights a small number of common communications or meetings that involved most of the members of the proposed class.⁹ However, in large part the process through which employees received and considered their employment offers from Ford was an individual one involving individual communications with employees. Most employees had individual

⁶ First Graham Affidavit, para. 11, DMR, Tab 7, p. 150.

⁷ Cross-examination of David Parker, dated January 17, 2018 ["Parker Cross"], qq. 21-26, DMR, Tab 24, pp. 478-480.

⁸ First Graham Affidavit, paras. 13-14, DMR, Tab 7, pp. 151-152

⁹ First Parker Affidavit, paras. 6-9, 14-17, 20, 22, DMR, Tab 6, pp. 49-52

discussions with BlackBerry human resource representatives and/or their own BlackBerry manager in respect of their own and differing employment situation and their own and differing options, prior to deciding whether to accept their Ford offer. They also had individual discussions with Ford representatives about their offer.¹⁰

19. The nature of these individual discussions, and the specific questions posed by employees, necessarily differed from employee to employee. Employees were having these discussions for purposes of considering their own situation and the factors they were taking into account in deciding whether to accept their Ford job offer and leave BlackBerry. The record includes evidence from BlackBerry human resources representatives, some managers, and various employees about the nature of the job offer process and the individual discussions that took place (discussions which did not involve Mr. Parker and of which he does not know the details).¹¹

¹⁰ First Graham Affidavit, paras. 16-21, 26-31, 34-41, 43-47, 52-58, 74-87, 97-104 (and exhibits cited), DMR, Tab 7, pp. 152-174; Affidavit of Amber Jessup sworn October 3, 2017 ["Jessup Affidavit"], paras. 5-31 (and exhibits cited), DMR, Tab 8, pp. 334-340; Affidavit of Lisa Carswell sworn October 2, 2017 ["Carswell Affidavit"], paras. 3-17 (and exhibits cited), DMR, Tab 9, pp. 360-363; Affidavit of Jennifer Mascarin sworn October 2, 2017 ["Mascarin Affidavit"], paras. 3-14 (and exhibits cited), DMR, Tab 10, pp. 369-371; Affidavit of Zoltan Racz sworn September 18, 2017 ["Racz Affidavit"], paras. 6-13 (and exhibits cited), DMR, Tab 11, pp. 377-379; Affidavit of Colin Ho sworn October 3, 2017 ["Ho Affidavit"], paras. 7-10, DMR, Tab 12, pp. 388-389; Affidavit of Nick Landry sworn September 29, 2017 ["Landry Affidavit"], paras. 5-10 (and exhibits cited), DMR, Tab 14, pp. 393-394; Affidavit of Michael Mullin sworn September 29, 2017 ["Mullin Affidavit"], paras. 4-10 (and exhibits cited), DMR, Tab 15, pp. 398-399.

¹¹ *Ibid.* See also: First Graham Affidavit, Exhibits B-GG, LL-OO, RR-TT, VV-XX, DMR, Tab 7; Jessup Affidavit, Exhibits A-G, DMR, Tab 8; Carswell Affidavit, Exhibits A-B, DMR, Tab 9; Mascarin Affidavit, Exhibits A-B, DMR, Tab 10; Racz Affidavit, Exhibits B-C, DMR, Tab 11; Landry Affidavit, Exhibit A, DMR, Tab 14; Mullin Affidavit, Exhibits A-B, DMR, Tab 15. See also: Cross-examination of Rebecca Graham dated January 29, 2018 ["Graham Cross"], qq. 46-47, 263-278, 281-298, 311-319, 327-369, 438-446, 457-493, 601-627, 633-641, 756, 850-867, DMR, Tab 28; Cross-examination of Amber Jessup dated January 18, 2018 ["Jessup Cross"], qq. 168-182, 200-207, 259-297, 314-334, 339-386, 415-449, 454-474, 522-556, 590-594, 604-609, DMR, Tab 29; Cross-examination of Lisa Carswell dated January 29, 2018, qq. 51-109, DMR, Tab 30; Cross-examination of Jennifer Mascarin dated January 29, 2018, qq. 94-175, 185-190, DMR, Tab 31; Cross-examination of Zoltan Racz dated January

Communications with employees prior to receiving offers from Ford

20. At a “town hall” meeting with Mobility Solutions employees in early December 2016, the chief operating officer of BlackBerry described the ongoing shift in focus of Mobility Solutions toward software development and licensing, including the Project Silver engineering services for Ford. The following day, representatives of Ford and BlackBerry jointly held another meeting for Project Silver employees. At that point Ford made offers of employment to a small number of managerial employees and it announced that it intended to make offers of employment to other employees in January 2017.¹²

21. In the weeks following these meetings, many employees followed up individually with BlackBerry human resources representatives as well as their managers at BlackBerry by email, phone and in person. Employees asked questions on a range of topics regarding the Ford opportunity and what it meant for their individual and differing employment positions at BlackBerry. Some individual employees specifically sought to clarify that the Ford opportunity would be an offer of employment, not a mandatory transfer, and that the Ford offer could be declined. Those employees were told that they could decline Ford’s offer, and if they did so, they would remain BlackBerry employees and BlackBerry would take steps to place them on another BlackBerry project or team after the conclusion of Project Silver.¹³

18, 2018 [“Racz Cross”], qq. 20-29, 34-44, 65-64, 75-89, 114-129, DMR, Tab 32; Cross-examination of Colin Ho dated January 18, 2018, qq. 45-55, 61-65, 82-123, DMR, Tab 33; Parker Cross, qq. 4-9, 48-56, 118-123, DMR, Tab 24.

¹² First Graham Affidavit, paras. 22-23, DMR, Tab 7, p. 154; Ford PowerPoint presentation from December 9, 2016 Town Hall Meeting, DMR, Tab 35(10)C, pp. 1437, 1482.

¹³ First Graham Affidavit, paras. 28, 30-31, DMR, Tab 7, pp. 155-156; Jessup Affidavit, paras. 7-13, DMR, Tab 8, pp. 334-335; Carswell Affidavit, paras. 3-5, 10, DMR, Tab 9, pp. 360-361; Mascarin Affidavit, paras. 3-8, 11, DMR, Tab 19, pp. 369-370.

The individual employment offers from Ford

22. In January 2017, representatives from Ford were on-site at BlackBerry's offices to present individual offers of employment to Project Silver employees.¹⁴

23. Ford decided in its sole discretion which Project Silver employees it would make offers to and what the terms of those offers were. Ford presented its offers at individual meetings with each employee (except for employees who were not able to attend an in-person meeting, and who received their offer by phone). Each employee had the opportunity to discuss their offer and their employment opportunity with Ford's representatives. No BlackBerry representative attended those meetings, and neither BlackBerry nor the plaintiff was privy to those discussions or to the content of Ford's offers.¹⁵

Communications with employees while they were considering their offers

24. In most cases, it appears that Ford gave each employee approximately one week to consider his/her offer of employment. During this time period, while employees were considering their offers, BlackBerry human resources representatives and employees' managers met extensively with employees individually to answer questions from them and to discuss their employment situation and options. These discussions necessarily differed among employees, as each employee was focused on his/her own employment situation, the terms of the offer each had received from Ford, and the factors he/she was taking into account in considering Ford's offer.¹⁶

¹⁴ First Graham Affidavit, paras. 48, 50, DMR, Tab 7, pp. 161-162.

¹⁵ First Graham Affidavit, paras. 48, 49, DMR, Tab 7, p. 161.

¹⁶ First Graham Affidavit, paras. 51-54, 62, DMR, Tab 7, pp. 162-163, 165; Jessup Affidavit, paras. 19-20, DMR, Tab 8, p. 337; Carswell Affidavit, paras. 7-11, DMR, Tab 9, p. 361; Mascarin Affidavit, paras. 10-13, DMR, Tab 10, pp. 370-372; Racz Affidavit, paras. 9-12, DMR, Tab 11, pp. 377-378; Ho Affidavit, paras. 8-10, DMR, Tab 12, pp. 388-389; Landry Affidavit, paras. 5-10, DMR, Tab 14, pp. 393-394; Mullin Affidavit, paras. 4-9, DMR, Tab 15, p. 398; Affidavit of Adrienne Lee sworn June 12,

25. In many cases employees' reactions to Ford's offers seemed positive, including because Ford was offering signing bonuses and increased compensation compared to the compensation that BlackBerry was paying. If employees raised questions or concerns about the terms of Ford's offer, BlackBerry representatives encouraged them to take steps to discuss or negotiate the terms with Ford.¹⁷

26. Some employees asked about their options for remaining at BlackBerry or the implications of declining the Ford offer. Individual employees who asked this question of a human resources representative were told that if they chose to decline the offer, they would remain a BlackBerry employee, and BlackBerry would take steps in an effort to place them in a comparable role on another team or project at BlackBerry. There were many roles on other projects and teams to be filled going forward. Where employees asked about specific available roles, or wanted to better understand their continuing options at BlackBerry, they were encouraged to speak individually with appropriate managers. Many employees did so.¹⁸

27. The individual discussions between managers and employees would have informed those employees' understanding concerning their options for their continuing role if they chose to remain at BlackBerry. Those discussions differed among employees because employees had

2018 ["Lee Affidavit"], paras. 6-7, DMR, Tab 21, p. 455; Affidavit of Andrew Mackie sworn July 6, 2018 ["Mackie Affidavit"], paras. 5-7, DMR, Tab 23, p. 470; Affidavit of Lee Watson sworn June 29, 2018 ["Watson Affidavit"], paras. 5-7, DMR, Tab 22, p. 466; Cross-Examination of Matthew Stephenson dated January 17, 2018 ["Stephenson Cross"], q. 72, DMR, Tab 19.

¹⁷ First Graham Affidavit, paras. 53-54, 59-60, DMR, Tab 7, pp. 162-164

¹⁸ First Graham Affidavit, paras. 55-56, DMR, Tab 7, p. 163; Jessup Affidavit, para. 19, DMR, Tab 7, p. 337.

differing considerations they were taking into account in making their decision, and employees were in differing roles and had differing future prospects at BlackBerry.¹⁹

Evidence from individual employees discussing their circumstances

28. The record includes affidavits from a number of employees describing the process they went through and the reasons they each decided to either accept or decline their Ford job offers. These employees describe individual and differing communications they had through the process with BlackBerry human resources representatives, managers and/or others (including in respect of their continuing role at BlackBerry), that they took into account in making their decision. They describe what they understood from various communications they had and how this affected their decision.²⁰ By way of example, the following four affiants (who are all in the proposed class) expressly confirm that, in light of their own circumstances and the discussions they had, they each made a voluntary decision to accept Ford's offer and resign from BlackBerry:

- Adrienne Lee, formerly a Senior Quality Manager at BlackBerry, received her offer from Ford in mid-January 2017. She confirms that she understood, based on a discussion with the head of BlackBerry's Quality department, that if she declined the offer from Ford,

¹⁹ Racz Affidavit, paras. 9-13, 18, DMR, Tab 11, pp. 377-379; Ho Affidavit, paras. 8-10, DMR, Tab 12, pp. 388-389; Mullin Affidavit, paras. 4-9, DMR, Tab 15, p. 389; Landry Affidavit, paras. 5-10, DMR, Tab 14, pp. 393-394; Lee Affidavit, para. 6, DMR, Tab 21, p. 466; Mackie Affidavit, paras. 5-6, DMR, Tab 23, p. 470; Watson Affidavit, paras. 5-7, DMR, Tab 22, p. 466; Parker Cross, qq. 48, 74-75, 80-84, DMR, Tab 24.

²⁰ Racz Affidavit, paras. 4-13, DMR, Tab 11, pp.377-378; Ho Affidavit, paras. 5-10, DMR, Tab 12, pp. 388-389; Affidavit of Martin van Hoeckel sworn October 2, 2017, paras. 4-5, DMR, Tab 13, p. 391 ["van Hoeckel Affidavit"]; Landry Affidavit, paras. 5-10, DMR, Tab 14, pp. 393-394; Mullin Affidavit, paras. 4-10, DMR, Tab 15, pp. 398-399; First Parker Affidavit, paras. 9, 16, 21, DMR, Tab 6, pp. 49-52; Lee Affidavit, paras. 3-9, DMR, Tab 21, p. 455-456; Mackie Affidavit, paras. 2-8, DMR, Tab 23, pp. 469-500; Watson Affidavit, paras. 2-8, DMR, Tab 22, pp. 465-466.

BlackBerry would take steps to place her on another project or team. Ms. Lee states, “I always understood that it was my choice whether to accept the offer or decline it.” She found “the terms of the Ford offer very attractive, including the compensation terms and signing bonus.” She “made a voluntary decision to accept Ford’s job offer and leave BlackBerry’s employ.”²¹

- Andrew Mackie (formerly a Software Tools Developer at BlackBerry) and Lee Watson (formerly an HMT (handheld management and tracking) Specialist at BlackBerry) each describe their own individual discussions with their managers, their understandings that they could remain at BlackBerry, their process of weighing the benefits of the Ford offer against remaining at BlackBerry, and their voluntary choice to accept the Ford offers.²² They each state: “I understood I would be resigning from BlackBerry, and intended to do so.”
- Martin van Hoeckel (formerly a Camera Designer at BlackBerry) was never on Project Silver and did not attend any of the employee meetings relating to it or receive communications sent to employees who were on it. In early 2017 he was informed by some colleagues who were on Project Silver that they accepted job offers at Ford. In early February 2017 he learned that Ford was looking for someone with skills in camera development, and sought out an interview for that role. After his interview, he received an offer from Ford, which he then accepted. Accordingly, he informed BlackBerry that he was resigning.²³

²¹ Lee Affidavit, paras. 3-6, DMR, Tab 21, p. 455.

²² Watson Affidavit, DMR, Tab 22; Mackie Affidavit, DMR, Tab 23.

²³ Van Hoeckel Affidavit, DMR, Tab 13.

29. Unlike Mr. Parker, each of these employees submitted resignation letters to BlackBerry.

30. The record includes affidavits from two of the managers, Zoltan Racz and Colin Ho, who themselves received and accepted offers from Ford, and who had individual and differing discussions with various employees on their teams about those employees' offers. Mr. Racz (formerly a Vice President, Platform Software at BlackBerry) indicates that he had "numerous one-on-one conversations with employees about their Ford offers" which "differed from employee to employee depending on the particular employee, his or her situation, and the factors he or she was taking into account in evaluating their offer." "Different employees asked different questions" and it was obvious that "employees were weighing the factors they each thought were important". In respect of his own employment offer from Ford, Mr. Racz states: "I clearly understood that it was my choice whether to accept the offer or not"; "I also understand that if I accepted this offer, I would be resigning from BlackBerry and therefore was not expecting to receive a severance package from BlackBerry"; and "the terms of the Ford offer were attractive to me and that is why I decided to accept the offer."²⁴

31. Mr. Ho (formerly a Senior Manager, Input Systems at BlackBerry) also had individual discussions with a number of employees on his team after they received their offers. He confirms that "people I spoke to were taking into account their own offer and situation (and appeared to be weighing their particular considerations) in coming to a decision whether to accept their offer or not. I told them it was entirely their choice whether to accept or not." Mr. Ho also confirms that

²⁴ Racz Affidavit, paras. 4-13, DMR, Tab 11, pp. 377-378.

he voluntarily chose to accept his job offer from Ford “based on [his] own situation and considerations,” and that he intended to resign and provided a resignation letter.²⁵

32. The record includes examples of emails from other individual employees showing their deliberations when considering their Ford offer. For example, one employee created an excel spreadsheet that he planned to use to evaluate his offer from Ford in comparison with his current situation at BlackBerry, to assist in his deliberations (a spreadsheet he shared with some other colleagues for their use).²⁶

33. The record also includes evidence regarding seven employees who were working on Project Silver, received offers from Ford, and made the decision to decline their offers. All seven remained employed by BlackBerry after the conclusion of Project Silver and were placed in equivalent roles on different BlackBerry projects. They were in the same position and went through the same process as members of the proposed class (*i.e.* they were subjected to the same “scheme” alleged by the plaintiff), but made a different decision. They each clearly understood they could remain at BlackBerry (*i.e.* they were not being terminated), and they did so. Two of these employees provided affidavits in which they confirmed that they: understood the choice as to whether to accept Ford’s offer was entirely theirs; spoke to their BlackBerry manager about their continuing options at BlackBerry; and based on those discussions and their own considerations they chose to remain at BlackBerry.²⁷

²⁵ Ho Affidavit, paras. 5-10, DMR, Tab 12, pp. 388-389.

²⁶ First Graham Affidavit, paras. 26-31, 43-47, 52-62, 69-72, 75-87, 90-92, 97-105 and exhibits cited in those paragraphs, DMR, Tab 7, pp. 155-156, 159-175; The example discussed is: First Graham Affidavit, Exhibit “M”, DMR, Tab 7M.

²⁷ First Graham Affidavit, paras. 83-87, DMR, Tab 7, pp. 169-171; Landry Affidavit, DMR, Tab 14, pp. 498-500; Mullin Affidavit, DMR, Tab 15, pp. 504-506.

34. Mr. Parker's other affiants, who are members of the proposed class (Messrs. Dawson, Stephenson and Veniot), confirmed on cross-examination that they made a decision to accept Ford's offer, and in making their decision they each took into account the individual discussions they had with BlackBerry representatives, their own employment situations and what they understood their own options to be.²⁸ One of these affiants, Mr. Veniot, stated in an email to a close family member at the time: "Well it's official. I excepted [accepted] the offer from Ford today... Should be fun!" and "They were very generous. Got a nice raise. A signing bonus. They gave me 4 weeks vacation plus an extra 6 days... and a great annual bonus being in the management level...All good".²⁹

35. Two other individual Project Silver employees, who received and accepted offers from Ford, brought applications to the Ministry of Labour raising allegations similar to Mr. Parker. A Ministry of Labour investigator considered their individual circumstances and communications they had with BlackBerry during the job offer process. In each of those two cases, the investigator concluded that, in light of their particular communications with BlackBerry, these employees each knew they had the choice to stay at BlackBerry, and they resigned from BlackBerry. BlackBerry did not terminate their employment.³⁰

36. The record further includes evidence of other differing individual circumstances of various members of the proposed class. For example, certain employees were added to Project Silver at a late stage – in February 2017 – after most of the group communications on which

²⁸ Dawson Cross, qq. 9-15, 19-23, 29-34, 37, 39, DMR, Tab 25; Veniot Cross, qq. 10-17, 27-32, 54-59, 63-73, DMR, Tab 26; Stephenson Cross, qq. 5-7, 10-13, 21-22, 30-62; 69-70, DMR, Tab 27.

²⁹ Veniot Cross, qq. 32-54, DMR, Tab 26; Veniot Cross, Exhibit 3, DMR, Tab 26C.

³⁰ Supplementary Affidavit of Rebecca Graham sworn July 6, 2018 ["Second Graham Affidavit"], para. 12, Exhibits "B" and "C", DMR, Tab 20, pp. 444, 449-452.

Mr. Parker relies in alleging termination had already taken place. Some other employees took various active steps to pursue obtaining offers of employment from Ford, such as Mr. van Hoeckel (discussed above).³¹

The Request for Confirmatory Resignation Letters

37. At the end of January 2017, Ford informed BlackBerry of the list of employees that had chosen to accept their Ford job offer. After that, BlackBerry human resources personnel sent an email in early February 2017 to those employees who had accepted Ford's offer, asking for written confirmation from the employee of their decision to join Ford and resign from BlackBerry's employ, and confirmation as to the timing of their last day at BlackBerry.³² Different employees responded in different ways to this BlackBerry email.

38. The majority of the employees who accepted Ford's job offer in fact subsequently provided BlackBerry with a letter of resignation.³³

39. Various other employees did not submit a resignation letter or notice and were silent on the request for one.³⁴

40. A relatively small number of other employees – including Mr. Parker – did not provide resignation letters, but instead engaged in individual communications with BlackBerry

³¹ First Graham Affidavit, paras. 31, 78-81, DMR, Tab 7, pp. 156, 168-169.

³² First Graham Affidavit, paras. 63-64, DMR, Tab 7, p. 165; Jessup Affidavit, para. 22, DMR, Tab 8, p. 338; Lee Affidavit, DMR, Tab 21; Mackie Affidavit, DMR, Tab 23; Watson Affidavit, DMR, Tab 22.

³³ Some employees signed and submitted a template form of resignation letter BlackBerry had provided. Others drafted their own version of a resignation notice. First Graham Affidavit, para. 69, DMR, Tab 7, pp. 166-167.

³⁴ First Graham Affidavit, para. 70, DMR, Tab 7, p. 167.

representatives in which they raised concerns, and BlackBerry responded to those communications individually.³⁵

Mr. Parker's individual circumstances

41. The record includes evidence about Mr. Parker's own employment situation and the individual communications he had with BlackBerry representatives, both prior to and after he decided to accept Ford's job offer.³⁶

42. During the process, Mr. Parker had individual discussions with BlackBerry's chief operating officer, his human resources representative and his manager about his situation. In evaluating his offer from Ford, Mr. Parker weighed the information he had received from them, as well as the terms of the offer from Ford. He has confirmed that this information "affected [his] understanding" as he "weigh[ed] the pros and cons of accepting the offer or not".³⁷

43. After Mr. Parker accepted his offer of employment from Ford, he raised an issue with his human resources representative regarding wrongful termination. The human resources representative responded that he had not been terminated by BlackBerry. There were further communications between Mr. Parker and BlackBerry while he was still employed by it. BlackBerry indicated that it had available roles at the same level matching Mr. Parker's skill set, and that human resources would work with him to find a suitable role if he preferred to stay at BlackBerry.³⁸

³⁵ First Graham Affidavit, paras. 69-72, 97-104, DMR, Tab 7, pp. 166-167, 172-174.

³⁶ First Graham Affidavit, paras. 97-104, DMR, Tab 7, pp. 172-174.

³⁷ Parker Cross, qq. 79-95, DMR, Tab 24; First Graham Affidavit, paras. 98-100, DMR, Tab 7, pp. 173-174.

³⁸ First Graham Affidavit, paras. 102-104, DMR, Tab 7, p. 174; Jessup Affidavit, paras. 26-30, DMR, Tab 2, pp. 338-339.

Employees who Accepted Ford's Offer Left BlackBerry

44. The employees who accepted Ford's offer – including Mr. Parker – left BlackBerry's employ at the end of February 2017 at the conclusion of Project Silver and started work at Ford on March 1, 2017.³⁹

45. Since that time, BlackBerry has hired, and continues to hire, additional employees within Mobility Solutions. BlackBerry was left with a need for additional employees in light of the number of employees that chose to accept Ford's offer. Had additional employees chosen to decline their offers from Ford, there were many continuing roles available for them.⁴⁰

The Motions Judge's Decision

46. The short 7 page Decision certifying this case contains less than 2 pages of analysis, cites no case law and, although the Court heard extensive written and oral submissions on the applicable employment tests and principles required to determine the merits of the claim, does not refer to them.

47. The motions judge noted that “the main common issue put forward by the plaintiff is: ‘Does BlackBerry’s conduct amount to a termination of the Class Employees’ employment?’” This is a true threshold issue – and was recognized as such by both sides – and is the sole liability issue in the action. As noted by the motions judge, “the other proposed common issues deal with calculation and quantum of damages should the trial judge find there was termination.”⁴¹

³⁹ First Graham Affidavit, paras. 70, 73, DMR, Tab 7, p. 167.

⁴⁰ First Graham Affidavit, paras. 88-89, DMR, Tab 7, p. 171.

⁴¹ Decision, para. 6, DMR, Tab 3, p. 14.

48. The motions judge noted the plaintiff's position that "the court will only need to look at the scheme put in place by BlackBerry to find whether or not there was a termination by BlackBerry." In his analysis, the motions judge stated: "The plaintiff's theory is that BlackBerry devised an elaborate scheme to terminate the class employees without having to pay them their severance entitlements." The motions judge found that "although difficult to prove, the theory of the plaintiff is not without merit," and the judge concluded that the threshold liability should be determined in a common trial.⁴²

49. The motions judge correctly noted: "The defendant is right that if a distinct determination for each individual employee must be made on the threshold issue the action cannot be certified." However, the motions judge then focused his analysis solely on the plaintiff's factual theory (*i.e.* the "scheme"), without considering the applicable employment law tests for termination and for resignation, and without considering whether (and, if so, how) the court could apply those tests on a common basis for all employees to decide the threshold liability issue.⁴³ As discussed further below, those legal tests would necessarily require individual fact-specific enquiries.

50. The motions judge seriously misstated BlackBerry's position on the termination issue as being: "once the Ford's offer was in each individual's hands, he or she had an option to either resign from BlackBerry or accept the offer." Rather, BlackBerry's position is that each employee who received an offer had the option to either choose to accept the offer and thus leave BlackBerry's employ (and resign) or *decline* the offer and remain a BlackBerry employee (as

⁴² Decision, paras. 7, 15-16, DMR, Tab 3, pp. 14-16.

⁴³ Decision, paras. 15-17, DMR, Tab 3, pp. 15-16.

some employees in fact did). This position was emphasized in BlackBerry's factum and in the record.⁴⁴

PART III – QUESTIONS RAISED BY THIS APPEAL

51. The proposed appeal raises the following questions:

- (1) Whether the certification of one “common” threshold liability issue:
 - (i) is contrary to established employment law principles in respect of the tests for termination and the defence of resignation; and
 - (ii) precludes BlackBerry from being able to assert, and the court to consider, its individual resignation defences; and
- (2) whether the Decision is contrary to the principles governing the commonality requirement of the certification test?

PART IV – LAW & ARGUMENT

52. In respect of the issues raised by this proposed appeal, the Decision conflicts with established employment law and class action principles in other decisions, and would unfairly preclude BlackBerry from asserting its individual resignation defences. Accordingly, there is good reason to doubt the correctness of the Decision. The proposed appeal raises matters of substantial importance relating to the development of employment and class action law, going well beyond the interests of these immediate parties.

⁴⁴ Decision, para. 12, DMR, Tab 3, p. 15; BlackBerry's factum on the certification motion, paras. 19, 32-33, 35-38, 41-44, 86-104, DMR, Tab 36; First Graham Affidavit, DMR, Tab 7.

(1) The Decision Conflicts with Established Employment Law Principles

The test for termination

53. As this Court has noted, “[a] certification motion cannot be considered in a vacuum... [The] criteria in the *CPA* must be considered with a correct understanding of the employment law that will ultimately govern the success of the action at trial.”⁴⁵ Where the applicable employment law test will require individual fact-specific analysis, the certification test (in particular, the commonality requirement of the test) cannot be met.⁴⁶ That is the case here.

54. The plaintiff’s allegation is that BlackBerry wrongfully terminated his and other employees’ employment. The well-established employment law test for termination – including the plaintiff’s own formulation of the test as set out in his factum on the certification motion – will inevitably require an individual, fact-specific analysis for each employee. The formulation of the test, taken directly from the plaintiff’s factum, is: “whether a reasonable person, in the Class Employees’ circumstances, would understand, through the employer’s words and actions, in the situation of that particular industry, workplace and surrounding circumstances, that their employment was terminated.”⁴⁷

55. The case law, including the law cited by the plaintiff, highlights how “all of the circumstances” must be considered when applying the test.⁴⁸ This will require the court to consider the particular employee’s employment situation, the discussions the employee had with

⁴⁵ *Kafka v. AllState Insurance Company of Canada*, 2011 ONSC 2305; aff’d 2012 ONSC 1035 (“*Kafka*”), BlackBerry BOA, Tab 1.

⁴⁶ See the case law cited at note 53 below.

⁴⁷ Plaintiff’s certification motion factum, at para. 55 (DMR, Tab 37) and the case law cited there: *Rajput v. Menu Foods Ltd.* (1984), 5 ACWS (2d) 450 (ONSC) at para. 18, BlackBerry BOA, Tab 2; and *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 161 OAC 302 (ONCA) at para. 17, BlackBerry BOA, Tab 3.

⁴⁸ *Ibid.*

BlackBerry – including what the employee was told about their particular situation and continuing options at BlackBerry – and all other relevant surrounding circumstances, to determine whether the employee would reasonably have understood that their employment was being terminated by BlackBerry. The factual record here (referred to at paragraphs 18 to 36 above) demonstrates that the particular employment situations and discussions with BlackBerry differed materially from employee to employee, and that employees had differing understandings regarding their own situation and future options going forward at BlackBerry.

56. Although these points were the main focus of BlackBerry’s submissions on the motion, the Decision fails to even refer at all to or consider the applicable employment law test for termination, or how the question of termination could be decided in common for all employees across the board, without regard to the individual facts pertaining to each employee. Instead, the motions judge focused only on the plaintiff’s factual theory of termination, *i.e.* the “scheme”. The plaintiff’s theory, however, comprises only *some* of the relevant facts the trial judge would have to consider. The individual circumstances, discussions and understandings of the employee, and why the employee decided to accept Ford’s offer and leave BlackBerry – including whether the employee did so voluntarily or not – would also have to be considered.

The test for the defence of resignation

57. Further, and importantly, the analysis on the liability issue cannot focus solely on the plaintiff’s allegation of termination. BlackBerry’s *defence* to the allegation must also be considered in the analysis. As stated, BlackBerry’s defence is that, for reasons that are somewhat different in each case, each (or at least most) of the individual employees made a voluntary decision to leave BlackBerry’s employ, and thus resigned. For employees that did so, there can be no wrongful dismissal at law.

58. As highlighted by the case law, the test for resignation requires an individual fact-specific enquiry to assess whether the employee intended to resign. Where an employee claims wrongful dismissal and the employer's position is that the employee resigned, these questions must be considered together as they are essentially two sides of the same coin:

- (a) In *Rajput v. Menu Foods* – a case relied on by the plaintiff on the certification motion, in which the issue was whether the employee was terminated or alternatively resigned – the court stated the applicable test was:

In deciding whether or not a person was entitled to think that he had been fired, or whether in fact the person had resigned, a Court ought to ask itself: What would a reasonable man understand from the words used in the context in which they were used in the particular industry, in the particular working place, and in all of the surrounding circumstances?

The court in *Rajput* assessed the communications and conduct of both the employer and the employee, and the surrounding factual circumstances, to decide the issue.⁴⁹

- (b) In *Gebreselassie v. VCR Active Media*, the court noted (citing the Supreme Court of Canada's decision in *Farber v. Royal Trust Co.*) that: "in the context of an indeterminate employment contract, one party can resiliate the contract unilaterally – the resiliation is considered a dismissal if it originates with the employer and a resignation if it originates with the employee." The court's analysis on the issue highlights the fact-specific nature of the enquiry to determine whether there was a termination or a resignation.⁵⁰

⁴⁹ *Rajput, supra*, at para. 18, BlackBerry BOA, Tab 2.

⁵⁰ *Gebreselassie v. VCR Active Media*, 2007 CanLII 45710 (S.C.J.) at paras. 41-42, BlackBerry BOA, Tab 4.

Where an employee severs the employment relationship by way of voluntary resignation rather than dismissal, the employee has no remedy by way of a wrongful dismissal action. In an action for wrongful dismissal, the plaintiff then bears the burden of establishing the threshold fact of dismissal as opposed to resignation. The employer has the onus to show a resignation, such as it may appear to exist, was voluntary in the legal sense.

Whether words or action equate to resignation must be viewed contextually – the totality of the surrounding circumstances are relevant to determine whether a reasonable person, viewing the matter objectively, would have understood the employee resigned.

Whether a resignation is clear and unequivocal requires a fact-driven assessment of all relevant evidence.

- (c) In *Beggs v. Westport Foods Ltd.*, the court discussed what constitutes a dismissal versus a resignation. In respect of dismissal, it was noted the court must consider whether the employer clearly communicated that his/her employment was at an end. The court then noted that “the test for voluntary resignation (as opposed to dismissal) is objective, focusing on the perceptions of a ‘reasonable employer’ of the intentions of the employee based on what the employee actually says or does or, in some cases, on what he or she fails to say or do.” The court also noted that the relevant circumstances include the “employee’s state of mind.”⁵¹

59. The factual record here highlights the differences between different employees that will be relevant when considering whether any particular employee voluntarily intended to resign or instead reasonably understood he/she was being terminated. For instance, Mr. Parker says he understood – in light of *his own* situation and the discussions *he* had with BlackBerry representatives – that he likely would have no continuing role at BlackBerry if he turned down

⁵¹ *Beggs v. Westport Foods Ltd.*, 2011 BCCA 76 at para. 37, BlackBerry BOA, Tab 5.

his Ford offer. By contrast, however, a number of other employees have confirmed that they: understood they would continue to be a BlackBerry employee if they were to decline Ford's offer; thought the Ford offer was a good opportunity and an attractive offer; made a voluntary decision to accept the offer and leave BlackBerry's employ; and intended to resign, and then provided resignation letters.

60. In the Decision, the motions judge failed to refer to, or consider, the test for the defence of resignation, or how it could possibly be decided in common for all employees. Put differently, the motions judge did not address how a finding of termination for one employee could possibly apply equally to all other employees regardless of their particular situations and regardless of whether they voluntarily intended to and chose to resign.

The Decision precludes BlackBerry from asserting its individual defences

61. For the reasons outlined above, the motions judge's conclusion that the liability issue could be determined in common for all employees based solely on the plaintiff's factual theory (and that individual factual assessments will not be required), unfairly precludes BlackBerry from being able to assert, and have the court consider, its individual resignation defences. Those defences require individualized fact-specific enquiries.

62. Other certification motion decisions – including the decision affirmed by this Court in *Kafka v. Allstate Insurance Company of Canada*, a wrongful dismissal case – have emphasized that a plaintiff “cannot preclude the defence from conducting an inquiry into the individual and unique circumstances of each plaintiff...”⁵²

⁵² *Kafka* ONSC at paras. 156-162, BlackBerry BOA, Tab 1.

(2) The Decision Conflicts With Established Principles Governing the Commonality Requirement

63. The Decision is also contrary to, or fails to apply, the legal principles governing the commonality requirement of the certification test under section 5(1)(c) of the *CPA*: in order to meet the requirement, the resolution of the proposed common issue must not be dependent on individual findings of fact having to be made in respect of each class member. As held by the Supreme Court of Canada “success for one member must mean success for all,” and the answer to the common issue “must be capable of extrapolation to each member of the class.” The motions judge correctly noted that “if a distinct determination for each individual employee must be made on the threshold issue the action cannot be certified,” but then failed to give effect to this principle.⁵³

64. The threshold (and sole) liability issue in this case will require individual factual findings in order to determine if any particular employee was terminated by BlackBerry (as the plaintiff alleges) or voluntarily chose to resign (as BlackBerry asserts). The court would need to consider:

- the particular conduct of the employee and BlackBerry;
- the communications they had during the job offer process;
- the terms of each job offer, and what each employee’s understanding and assessment was of his/her employment situation and options in respect of their continuing role at BlackBerry;

⁵³ *Class Proceedings Act*, s.5(1)(c); *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54 at para. 39 (S.C.J.), aff’d (2001), 17 C.P.C. (5th) 103 (Div. Ct.), aff’d (2003), 226 D.L.R. (4th) 112 (C.A.), leave to appeal to S.C.C. refused [2003] S.C.C.A. No. 283, BlackBerry BOA, Tab 6; *Fehring v. Sun Media Corp.*, [2002] O.J. No. 4110 at paras. 16-21 (Ont. S.C.J.), aff’d [2003] O.J. No. 3918 (Div. Ct.), BlackBerry BOA, Tab 7; *Brown v. Canadian Imperial Bank of Commerce*, 2014 at para. 36 ONCA 677, BlackBerry BOA, Tab 8; *Hollick v. Toronto (City)*, 2001 at para. 18 SCC 68, BlackBerry BOA, Tab 9; *Western Canadian Shopping Centres v. Dutton*, 2001 at paras. 39-40 SCC 46, BlackBerry BOA, Tab 10.

- why he/she made the decision to accept his/her Ford employment offer, and whether it was a voluntary decision by the employee to leave BlackBerry's employ; and
- whether he/she provided express notice of resignation (and, if so, why).

65. The evidence in the record highlights the various differences among employees that would be relevant, which were ignored by the Decision. If the court were to accept Mr. Parker's evidence and conclude that he did not voluntarily choose to resign, that finding could not possibly apply equally to employees such as Ms. Lee or Messrs. Mackie or Watson (referred to at paragraph 28 above) since they have confirmed the opposite in their evidence, and they voluntarily submitted resignation letters to BlackBerry. Unlike Mr. Parker, Mr. Van Hoeckel (referred to at paragraph 28 above) was not even on Project Silver and so was not subjected to the "scheme" on which Mr. Parker relies; and a number of other employees similarly took some active steps to pursue obtaining a job offer from Ford.

66. These examples show how a finding on this issue in respect of one employee could not be extrapolated to all other employees across the board. Put differently, success for one employee on the liability issue cannot mean success for all, which is what the established class action principles require under the commonality element of the test. The motions judge failed to give effect to the above principles.

67. We have found no decision in which a Canadian court has ever certified the issue of whether employees voluntarily resigned (or alternatively were wrongfully terminated), this is not surprising given the inherently individual and highly fact-specific analysis that is required to determine the issue. In other analogous wrongful dismissal cases where determining liability

would require individual factual analysis for each employee (such as analogous constructive dismissal cases), courts have refused to certify such actions.⁵⁴ The *Kafka* case, for example, was a situation in which there was no express termination of employment and the plaintiff alleged that various communications and steps by the employer amounted to a constructive dismissal of a group of employees. Like here, the plaintiff in *Kafka* sought to focus on certain common communications and steps, but the court (affirmed by this Court on appeal) held this “approach is flawed” because individual enquiry would be required for each employee to determine if there had been a dismissal. The common communication from the employer to all of the employees, on which the plaintiff relied, was “merely the beginning” of the relevant inquiry; the defendant had to be permitted to “inquire into the individual and unique circumstances of each plaintiff”, the court noted. The commonality requirement of the certification test was therefore not met.⁵⁵ The same reasoning and conclusion apply here.

68. By contrast, the wrongful termination cases certified by Ontario courts as class proceedings (and referred to by the plaintiff on the certification motion) are those in which the fact of termination was not contested.

The Proposed Appeal Raises Matters of Substantial Importance

69. This proposed appeal raises matters of substantial importance, not only to the parties but also to employers and employees more generally and to the development of employment and class actions law.

⁵⁴ See by way of example, *Kafka, supra*, BlackBerry BOA, Tab 1; and *Service v. University of Victoria*, 2018 BCSC 2027 at paras. 69, 80-82, 94-96, 102, 116 (CanLII), BlackBerry BOA, Tab 11. See also *Aston v. Casino Windsor Ltd.*, [2005] O.J. No. 2879 at paras. 9, 15, 18 (SCJ), BlackBerry BOA, Tab 12 (a case relied on by the plaintiff on the certification motion).

⁵⁵ *Kafka, supra*, at paras. 138, 146, 156-162, BlackBerry BOA, Tab 1.

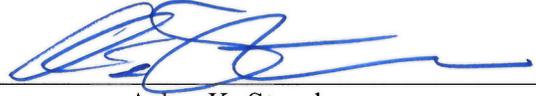
70. At the heart of the proposed appeal is the legal test for termination, and the availability of the defence of resignation to a termination claim in circumstances such as these. By suggesting that the termination analysis can focus solely on the plaintiff's factual theory – without regard for the individual circumstances, discussions and intentions of the employees – the Decision purports to be (or in the result, amounts to) a significant change in the legal test for termination. At a minimum, it creates confusion as to the test.

71. Further, the Decision suggests that the individual defences of resignation need not be considered in the liability analysis, which would be a significant change in the law, or at a minimum, creates doubt as to the availability of the resignation defence in these circumstances. The motions judge stated that “the defendant’s characterization of the proposed threshold issues as [sic] necessarily being one of termination versus resignation disregards the theory of the plaintiff’s action.” In making that statement, the motions judge failed to recognize that, as a matter of law, in a wrongful dismissal action resignation is a valid defence that must be considered, and thus the liability issue here is necessarily one of termination versus resignation, just like it was in cases such as *Rajput*, *Gebreselassie*, and *Beggs* (referred to at paragraph 58 above). It is important that the law of termination and the related defence be clarified and confirmed by this Court. This is of importance for the development of employment law, and to employers and employees generally.

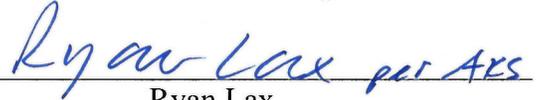
72. The proposed appeal is also centered on the application of the common issues requirement of the certification test in the employment law context. Canadian courts have not certified employment law cases where the fundamental (sole liability) issue is whether employees were terminated or resigned. The application of the commonality requirement principles of the certification test to this type of issue – and whether a class proceeding is capable

of addressing, on a common basis, the question of termination versus resignation – is a matter of importance going beyond just the interests of these immediate parties.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of July, 2019.



Arlen K. Sternberg



Ryan Lax

SCHEDULE “A”

LIST OF AUTHORITIES

1. *Kafka v. AllState Insurance Company of Canada*, 2011 ONSC 2305; aff’d 2012 ONSC 1035
2. *Rajput v. Menu Foods Ltd.* (1984), 5 ACWS (2d) 450 (ONSC)
3. *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 161 OAC 302 (ONCA)
4. *Gebreselassie v. VCR Active Media*, 2007 CanLII 45710 (S.C.J.)
5. *Beggs v. Westport Foods Ltd.*, 2011 BCCA 76
6. *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54 (S.C.J.), aff’d (2001), 17 C.P.C. (5th) 103 (Div. Ct.), aff’d (2003), 226 D.L.R. (4th) 112 (C.A.), leave to appeal to S.C.C. refused [2003] S.C.C.A. No. 283
7. *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110 (Ont. S.C.J.), aff’d [2003] O.J. No. 3918 (Div. Ct.)
8. *Brown v. Canadian Imperial Bank of Commerce*, 2014 ONCA 677
9. *Hollick v. Toronto (City)*, 2001 SCC 68
10. *Western Canadian Shopping Centres v. Dutton*, 2001 SCC 46
11. *Service v. University of Victoria*, 2018 BCSC 2027 (CanLII)
12. *Aston v. Casino Windsor Ltd.*, [2005] O.J. No. 2879

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

1. *Class Proceedings Act*, s. 5(1)

Certification

- 5 (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
 - (a) the pleadings or the notice of application discloses a cause of action;
 - (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
 - (c) the claims or defences of the class members raise common issues;
 - (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
 - (e) there is a representative plaintiff or defendant who,
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

Court File No. 17-71659
Divisional Court File No. 333/19

DAVID PARKER v.
Plaintiff

BLACKBERRY LIMITED
Defendant

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Proceeding commenced at TORONTO

**FACTUM OF THE MOVING PARTY,
BLACKBERRY LIMITED
(MOTION FOR LEAVE TO APPEAL)**

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