CITATION: Hawkmount v. Navitax, 2025 ONSC 1877
COURT FILE NO.: CV-22-01939
DATE: 2025/03/25

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: HAWKMOUNT INVESTMENT INC., Plaintiff

AND:

NAVITAX PROPERTY TAX CONSULTING PARALEGAL PROFESSIONAL CORPORATION, Defendant

BEFORE: Justice M.A. Cook

COUNSEL: J. Winstanley and C. Hermanson, Counsel for the Plaintiff

M. Steiber and D. Treilhard, Counsel for the Defendant

HEARD: September 10, 2024

ENDORSEMENT

Introduction

[1] In this proposed class action proceeding, the defendant Navitax Property Tax Consulting Paralegal Professional Corporation ("**Navitax**") moves to strike out certain paragraphs of the Statement of Claim as frivolous, vexatious and an abuse of process in accordance with r. 25.11 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "***Rules***").

[2] The Plaintiff, Hawkmount Investment Inc. ("**Hawkmount**") resists the motion to strike and seeks an order certifying the class proceeding pursuant to s. 5 of the *Class Proceedings Act, 1992,* S.O. 1992, c. 6 ("**CPA**"). Navitax opposes certification.

[3] For the reasons set out below, I dismiss Navitax's motion to strike, and the action is certified as a class proceeding.

Background

[4] This proposed class action arises from a contract dispute relating to the municipal property tax assessment process governed by the *Assessment Act*, R.S.O. 1990, c. A.31, the *Assessment Review Board Act*, R.S.O. 1990, c. A.32 and the *Municipal Property Assessment Corporation Act*, 1997, S.O. 1997, c. 43, Sch G.

Municipal Property Assessment in Ontario

[5] The Municipal Property Assessment Corporation ("**MPAC**") is responsible for the preparation of property tax assessment rolls for each municipality and carrying out other various duties assigned to it by the *Assessment Act*. MPAC's assessment rolls identify the assessed value of a property and the property tax payable.

[6] A property owner who disagrees with MPAC's property tax assessment may file a request for reconsideration. A property owner who disagrees with the result of MPAC's reconsideration decision is entitled to appeal to the Assessment Review Board.

[7] MPAC historically operated on a consistent and predictable four-year assessment cycle. In 2016, a Property Assessment Notice was delivered to every property owner in Ontario, which reflected the assessed value and classification as of January 1, 2016. The next assessment cycle was due in 2020.

[8] In 2020, the COVID-19 pandemic intervened. The property assessment process was paused by the Ontario government and has never resumed. Property assessments for the current 2025 property tax year continue to be based on January 1, 2016 values.

Navitax Contingency Fee Agreements

[9] Hawkmount is an Ontario property holding company that has received property tax assessments from MPAC.

[10] Navitax is an Ontario paralegal professional services corporation owned and operated by Jonas Perov. Jonas Perov is licenced by the Law Society of Ontario to carry on his practice as a paralegal through Navitax, which represents property owners like Hawkmount in MPAC property tax assessment reconsideration requests and appeals. Navitax charges its clients on a contingency fee basis, calculated as a percentage of the property tax savings realized.

[11] Navitax has used several versions of contingency fee agreements. The first version of contingency fee agreement (the "**Fee Agreement**") used by Navitax were contained the following specific and standard terms:

> **Term:** This Agreement is for the period beginning January 1, 2016 and ending on the later of December 31, 2020 or the conclusion of any appeals in progress.
>
> **Fees & Disbursements:** The Client agrees to pay a contingency fee (the "**Rate**") payable to Navitax that will equate to 50% of all property tax savings realized for each year subject to this Agreement. Navitax will invoice the Client for each year that the property tax savings are realized.

[12] In September 2017, Hawkmount retained Navitax to represent it in "property assessment and taxation proceedings" for two of its Ontario properties. Navitax sent Hawkmount a

standard Fee Agreement. After some negotiation, Hawkmount signed a Fee Agreement dated September 26, 2017, with the contingency fee reduced from 50% to 45%.

[13] Navitax was successful in its efforts to reduce Hawkmount's 2016 property tax assessment. As a result, Hawkmount enjoyed a reduction in tax payable for its Ontario properties retroactive to January 1, 2016.

[14] In 2018, 2019 and 2020, Navitax invoiced Hawkmount for its contractual Rate as contemplated by the terms of the Fee Agreement. Navitax invoiced Hawkmount for 45% of the property tax savings realized, and Hawkmount paid the invoices without dispute.

[15] As of December 31, 2020, there were no appeals outstanding with respect to the Hawkmount properties forming the subject of the Fee Agreement.

[16] In April 2020, Navitax delivered a letter to Hawkmount advising it that the Ontario government had extended the current assessment cycle by one full year. Navitax went on to state in its letter that, because of the extended assessment cycle, Navitax was "immediately amending the end of the term of our agreements from 2020 to 2021".

[17] In 2021, Navitax invoiced Hawkmount as follows:

a) Invoice number 1078 dated June 30, 2021 in relation to Hawkmount's property at 6580 Wellington Road 43 in the amount of $1,774,10; and

b) Invoice number 1147 dated July 13, 2021 in relation to Hawkmount's property at 21-23 Kenyon Street in the amount of $570.65.

[18] Hawkmount paid Navitax's invoice 1147 but not invoice 1078.

[19] MPAC did not complete property tax assessments in 2020, 2021, or 2022. As it did in 2020, Navitax notified its clients that the property assessments were not being completed, and later delivered invoices for contingency fee invoices for fees attributable to the post-term tax year.

[20] Hawkmount disputed Navitax's claim to contingency fees for the period after December 31, 2020. In October 2022, Hawkmount received a letter from Navitax demanding payment for its unpaid invoices delivered since January 1, 2021 and threatening collection proceedings. For the balance of these reasons, and for ease of reference, I will refer to invoices sent by Navitax in relation to taxation years 2021-present as "post-term invoices".

[21] A total of 165 of Navitax's clients received post-term invoices. Of those, ninety paid the post-term invoices without protest, while twenty-three paid the post-term invoices only after negotiating a resolution with Navitax. Navitax commenced twenty-three Small Claims Court actions to collect contingency fees billed under post-term invoices, of which five were settled and seven were ongoing as of the date the motion was heard.

Procedural History

[22] Hawkmount commenced the action by statement of claim issued on December 13, 2022.

[23] Hawkmount proposes to prosecute this claim on behalf of "all persons who entered into a contingency fee agreement with Navitax for representation in property assessment and taxation proceedings on their behalf with respect to properties in Ontario; and paid money to Navitax in satisfaction of one or more invoices sent by Navitax in relation to one or more taxation years after the end of the stated term of the original fee agreement from January 1, 2021 to the present."

[24] In its statement of claim, Hawkmount claims general, special and punitive damages for breach of contract and unjust enrichment. Hawkmount alleges that Navitax breached the Fee Agreement when it rendered post-term invoices and/or received contingency fee payments for the period after December 31, 2020. Hawkmount further alleges that Navitax was unjustly enriched by any payments received by Navitax for any period following the termination of the Fee Agreement on December 31, 2020.

[25] In support of its claim for punitive damages, Hawkmount pleads and relies on the provisions of the *Solicitors Act*, R.S.O. 1990, c. S.15 and the related *Contingency Fee Regulation*, O. Reg. 195/04 (as it was then in force) which, together with the Law Society of Ontario Paralegal Rules of Conduct, regulate how paralegals may charge contingency fees to clients in Ontario. Hawkmount alleges that Navitax's post-term invoices were rendered and collected in breach of Navitax's statutory obligations in a manner that supports an award of punitive damages. Hawkmount seeks to enjoin Navitax from sending any further post-term invoices for taxation years beyond the original term of the fee agreements made with class members.

[26] Navitax defended the action by statement of defence dated June 15, 2023. Navitax pleads that the expiry of the agreement on December 31, 2020 did not extinguish clients' obligation to pay Navitax a fee for "each year that tax savings are being realized". Navitax argues that it is contractually entitled to payment because tax savings have been realized in each year that the Ontario government has extended the MCAP assessment period.

[27] On August 18, 2023, Hawkmount served its motion record for certification.

[28] In response to the certification motion, Navitax delivered an amended statement of defence in which it pleads, at para. 26, that Hawkmount's claim in breach of contract is legally untenable. Navitax then served a notice of motion returnable together with Hawkmount's certification motion for, among other things, an order striking out part of the statement of claim.

[29] I will address Navitax's motion to strike first, before moving on to consider Hawkmount's motion for certification.

Navitax Motion to Strike

[30] Navitax moves under r. 25.11 of the *Rules of Civil Procedure* to strike out paragraphs 38-39 of the statement of claim on the basis that the allegations fail to disclose a cause of action, are irrelevant, and should be struck as scandalous, frivolous, and vexatious.

[31] Rule 25.11 provides that the Court may strike or expunge all or part of a pleading or other document on the ground that it may prejudice or delay the fair trial of the action, is scandalous, frivolous or vexatious, or is an abuse of process.

[32] Pleadings that demonstrate a complete absence of material facts, constitute bare allegations, or which are irrelevant and are merely for colour or to attack the character of another party may be struck out as scandalous or embarrassing: *George v. Harris*, 2000 CarswellOnt 1714 (S.C.J.) at para. 20; *Abbasbayli v Fiera Foods Company*, 2021 ONCA 95 ("***Fiera Foods***") at para. 49.

[33] The focus in considering a challenge to a pleading under this rule is on the relevance of the pleading to a cause of action or defence: *Fiera Foods,* para. 49.

[34] Paragraphs 38 and 39 of the statement of claim allege that Navitax owed Hawkmount and other class members statutory duties under the *Solicitors Act* and related *Contingency Fee Agreements Regulation*, and that Navitax breached its statutory duties. Paragraphs 38 and 39 read as follows:

> Navitax Breaches Obligations Under the Law Society of Ontario Rules
>
> 38. As a paralegal professional corporation providing legal services, paralegals working at Navitax owe duties to Class members under the *Solicitors' Act* and the *Contingency Fee Agreements Regulation*.
>
> 39. Navitax breached the *Solicitor's Act* or the *Contingency Fee Agreements* Regulation by:
>
> (a) failing to disclose that it intended to charge Contingency Fees for taxations years beyond the Term of the Fee Agreements at the time Class members signed the Fee Agreements;
>
> (b) failing to disclose to Class members that they retained the right to ask the Superior Court of Justice to review and approve invoices sent under the Fee Agreement; and
>
> (c) purporting to unilaterally extend the Term of the Fee Agreements without written agreement from the Class members, or consideration.

[35] Navitax submits that the allegations at paragraphs 38 and 39 of the statement of claim fail to disclose a cause of action, and in fact are not anchored in the text of the applicable legislation and regulation. Navitax urges the court that these paragraphs are irrelevant and the allegations serve only to malign it.

[36] Hawkmount acknowledges, and I agree, that there is no nominate tort of statutory breach in Canada: *Canadian Alliance of Pipeline Landowners' Assn. v. Enbridge Pipelines Inc.*, 2008 ONCA 227, 237 O.A.C. 200 at paras. 31 and 32. However, Hawkmount submits that the allegations at paragraphs 38-39 of the statement of claim set out material facts needed to support its claim for punitive damages.

[37] Hawkmount's claim for punitive damages must be supported by particulars: *Whiten v. Pilot Insurance Co*., 2002 SCC 18 (CanLII), [2002] 1 SCR 595 at paras. 87, 94. Navitax admits that it provided paralegal services to Hawkmount and was compensated by way of contingent fee arrangements. Navitax and the contingency Fee Agreement at issue in this case were subject to the provisions of the *Solicitors Act* and *Contingency Fee Regulation*. In the circumstances, allegations that Navitax breached statutory obligations relating to the contingency Fee Agreement are relevant to the issue of whether Navitax's conduct was the kind of "high-handed, malicious, arbitrary or highly reprehensible misconduct" warranting sanction in the form of punitive damages.

[38] Navitax's motion to strike paragraphs 38-39 of the statement of claim is dismissed.

Hawkmount Certification Motion

General Principles

[39] Under s. 5(1) of the CPA, the court must certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff; (c) the claims of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and (e) there is a representative plaintiff who would fairly and adequately represent the interests of the class without conflict of interest, and who has produced a workable litigation plan.

[40] The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim. The question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding.

[41] The test for certification is to be applied in a purposive and generous manner, to give effect to the goals of class actions; namely: (a) to provide access to justice for litigants; (b) to encourage behaviour modification; and (c) to promote the efficient use of judicial resources.

[42] Although s. 5(1) of the CPA requires the plaintiff to satisfy five requirements, the bar for certification is actually quite low. First, the plaintiff must establish a plausible cause of

action under the first prerequisite. Then the plaintiff must establish that there is "some basis in fact" for each of the four remaining prerequisites: *Hollick v. Toronto (City)*, 2001 SCC 68 (CanLII), [2001] 3 S.C.R. 158 ("***Hollick***") at para. 16; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 (CanLII), [2013] 3 S.C.R. 477 ("***Pro-Sys***") at para. 99.

Evidence on the Certification Motion

[43] In support of its certification motion, Hawkmount relies on affidavit evidence from its director, Shizhen Wu, sworn July 24, 2024.[1] Hawkmount also relies on a solicitor's affidavit from paralegal Douglas Claridge sworn August 17, 2023.

[44] In response, Navitax relies on affidavit evidence from its sole shareholder, Jonas Perov, sworn October 31, 2023.

[45] The parties conducted cross-examinations. Transcripts of the cross-examinations were filed together with answers to undertakings made on cross-examination.

Analysis

Section 5(1)(a): Plausible Cause of Action

[46] The test under s. 5(1)(a) of the CPA is the same as that under Rule 21 of the *Rules of Civil Procedure*. The claim meets the first criterion unless it is "plain and obvious" that it cannot succeed: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 (CanLII), [2020] 2 SCR 420 ("***Atlantic Lottery***") at par. 68. The court must ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. A claim will be satisfactory unless it has a radical defect, or it is plain and obvious that it could not succeed. It is an obviously low hurdle.

[47] Hawkmount claims damages for breach of contract and unjust enrichment. I will consider each in turn.

Breach of Contract

[48] The elements of a cause of action for breach of contract are the existence of a contract and the breach of a term of that contract, whether express or implied.

[49] Hawkmount's allegations of breach of contract are at paras. 5, 8, 10, 21-23 and 28 of the statement of claim. The statement of claim pleads that:

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[1] Shizen Wu initially swore a first affidavit on August 23, 2023 and a second affidavit on February 16, 2024. After Ms Wu availed herself of a language interpreter for her cross-examination, Navitax challenged the validity of Ms Wu's affidavits because she had been assisted with translation by her daughter rather than a certified language interpreter. To resolve Navitax's concerns, Hawkmount delivered a fresh affidavit affirmed July 24, 2024 which repeated the evidence in the prior affidavits.

a. Class members entered into Fee Agreements with Navitax between January 1, 2016 and December 31, 2020;

b. The term of each Fee Agreement was to end on the later of December 31, 2020 or the conclusion of any property tax appeals in progress;

c. For the term of the Fee Agreement,

   i. class members would appoint Navitax as its representatives for all matters relating to property assessment and taxation proceedings;

   ii. Navitax would use all reasonable efforts to achieve property tax savings for class members;

   iii. in consideration for Navitax's efforts, class members would pay Navitax a percentage of all property tax savings realized for each taxation years during the term of the fee agreement, plus disbursements;

d. Navitax breached the Fee Agreements by:

   i. sending notices to class members purporting to unilaterally extend the term of the Fee Agreements;

   ii. sending invoices to class members for contingency fees in relation to taxation years beyond the term of the Fee Agreements; and

   iii. receiving payments from class members on account of invoiced contingency fees for taxation years beyond the term of the Fee Agreements, together with any taxes, interest, and late fees.

[50] The thrust of Hawkmount's claim is that Navitax was not entitled to charge contingency fees for any period after the agreed term of the Fee Agreement. Navitax's delivery and demand for payment of post-term invoices and receipt of payment breached the terms of the Fee Agreement, and Navitax has been unjustly enriched by any monies it has received on account of its post-term invoices. Hawkmount seeks damages in an amount equal to the amount paid by class members in satisfaction of invoices sent by Navitax for contingency fees charged in relation to taxation years beyond the term of the Fee Agreements.

[51] Navitax submits that Hawkmount cannot succeed on its claim because the pleadings do not allege that the Fee Agreements included express or implied promises not to send post-term invoices and not to accept payment of post-term invoices. Because the statement of claim does not allege such promises, the breach of contract claim is untenable.

[52] I reject this submission. The Fee Agreements contain express terms about the term of the agreement and how Navitax's contingency fee, or Rate, is calculated. The fundamental question raised on the pleadings is whether the Navitax is entitled to contingency fees beyond the initial and anticipated term of the Fee Agreement, or whether Navitax is

entitled to continue receiving contingency fees every year until the subject property is reassessed.

[53] A pattern of overcharging for services outside the scope of the contract has been found to be a breach of the contract. For example, in *Ottawa Community Housing Corporation v. Foustanellas (Argos Carpets)*, 2013 ONSC 973 (CanLII), affirmed, 2015 ONCA 276 (CanLII) at para. 72, the Court held the defendant liable for breach of contract where the plaintiff was induced to pay more than the contract called for through the delivery of falsified invoicing.

[54] While the claim for breach of contract could be more particularly pleaded, I am satisfied that it discloses a reasonable cause of action in breach of contract.

Unjust Enrichment

[55] The cause of action for unjust enrichment has three elements: (i) enrichment of the defendant; (ii) a corresponding deprivation of the plaintiff; and (iii) an absence of juristic reason for the defendant's enrichment: *Moore v. Sweet*, 2018 SCC 52 (CanLII), [2018] 3 SCR 303.

[56] Hawkmount pleads that Navitax has been unjustly enriched by the amounts it has received from class members in payment of post-term invoices, that class members have suffered a corresponding deprivation, and that there is no juristic reason for the deprivation. Hawkmount specifically pleads that the fee agreements do not constitute a juristic reason for Navitax's enrichment.

[57] Navitax concedes that the statement of claim discloses a reasonable cause of action in unjust enrichment, and I agree. Navitax has admitted that it was enriched by payments received from Hawkmount and the proposed class members on account of post-term invoices, and that there was a corresponding deprivation. Navitax defends the claim on the basis that the Fee Agreement constitutes a juristic reason for the enrichment or, in the alternative, that the monies it received were a gift.

[58] Hawkmount's statement of claim discloses a reasonable cause of action in unjust enrichment.

Punitive Damages

[59] Hawkmount seeks punitive damages in its action. In support of its claim, Hawkmount alleges that Navitax was a paralegal delivering legal services to class members, and it breached its statutory obligations to class members under the *Solicitors' Act* and the *Contingency Fee Regulation*. Hawkmount alleges that Navitax's conduct was "high-handed, entirely without care, deliberate, wilful, without good faith and an intentional disregard of the rights of Class members."

[60] Navitax submits that Hawkmount's claim for punitive damages is untenable. It relies on well-established principles that an award of punitive damages can only be legally tenable where there is extreme misconduct on the part of the defendant which amounts to an independently actionable wrong. In the absence of an independently actionable wrong, the claim for punitive damages is doomed to fail.

[61] There is no question that Hawkmount must plead an independent actionable wrong to support its claim for punitive damages. In *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701 the Supreme Court of Canada held, at paras. 73 and 79, that any award of damages beyond compensation for breach of contract must be founded on a *separately actionable* course of conduct. Similarly, in *McKinley v. BC Tel* (2001), 2001 SCC 38 (CanLII), 200 D.L.R. (4th) 385, the Supreme Court of Canada again affirmed that punitive damages arising from breach of contract must be supported by an independent, actionable wrong.

[62] Reading the pleading generously, I find that the plaintiff's claim for punitive damages has a reasonable chance of success. The relationship between Navitax and Hawkmount, as regulated paralegal and client, was a *per se* fiduciary relationship governed by the *Solicitors' Act*, the *Contingency Fee Regulation* and the *Paralegal Rules of Conduct* governing Navitax. The material facts pleaded, if true, could support an award of punitive damages.

[63] Even leaving aside the *per se* fiduciary relationship, a breach of statutory entitlement has been recognized as an "independent actionable wrong" sufficient to support a claim for punitive damages. For example, in *Gigliotti v. Masev Communications Inc*., 2004 BCSC 85, the BC Supreme Court held that breaching the Human Rights Code could constitute an "independently actionable wrong", even though it was not "actionable" in the sense of giving rise to a claim in a lawsuit. Justice Garton reached the same conclusion in this Court in *Rinaldo v. Royal Ontario Museum*, 2004 CanLII 47770 (ON SC) at paras. 151-152. I recognize that these cases arose in the employment context, however, they stand for the principle that a statutory breach is capable of supporting a claim for punitive damages in a breach of contract case.

[64] Punitive damages are similarly available to remedy Hawkmount's claim of unjust enrichment: *Air Canada v. Ontario (Liquor Control Board)*, 1997 CanLII 361 (SCC), [1997] 2 S.C.R. 581 at para. 83.

[65] Hawkmount's claim for punitive damages has a reasonable prospect of success.

General Damages and Disgorgement

[66] Navitax submits that Hawkmount's claims for general damages and disgorgement have no prosect of success.

[67] In its written and oral submissions, Hawkmount concedes that class members' losses are pecuniary and calculable before trial. Hawkmount proposes amending its statement of claim to plead only special damages.

[68] Similarly, Hawkmount submits it seeks restitution for unjust enrichment and not the remedy of disgorgement. At paragraph 30 of the statement of claim, Hawkmount pleads that Navitax "must disgorge and make restitution of the moneys paid by Class members in satisfaction of Post-Term invoices". Hawkmount proposes to resolve any confusion by its use of the word "disgorge" by amending paragraph 30 of the claim to delete the words "must disgorge".

[69] In my view, the statement of claim does not support any claim in general damages, and it does not plead disgorgement. As there is no motion to amend the pleadings before me, I decline to make the amendments proposed by Hawkmount without the written consent of Navitax. The parties are urged to address the proposed amendment on consent.

Section 5(1)(b): Identifiable Class

[70] Section 5(1)(b) of the CPA requires that there be an identifiable class of two or more persons that would be represented by the representative plaintiff.

[71] Class membership must be determinable by stated, objective criteria, and there must be a rational relationship between the class and the common issues.

[72] Class members need not have identical claims and class membership identification is not commensurate with the elements of the causes of action advanced on behalf of the class. Hawkmount is not required to show that everyone in the proposed class shares the same interest in the resolution of the asserted common issue, only that each member has an interest in the resolution of the common issue.

[73] Hawkmount proposes a single class (the "**Class**") for the proposed action, comprising all persons who:

(a) entered into a contingency Fee Agreement with Navitax for representation in property assessment and taxation proceedings on their behalf with respect to properties in Ontario; and

(b) paid money to Navitax in satisfaction of one or more invoices sent by Navitax in relation to one or more taxation years after the end of the stated term of the original fee agreement from January 1, 2021, to the present.

[74] Navitax does not dispute that the proposed Class is identifiable but submits that the proposed Class definition is overbroad because it includes clients who paid Navitax pursuant to a subsequent settlement agreement with Navitax. A subsequent settlement agreement is a recognized juristic reason for enrichment capable of defeating a claim for unjust enrichment. Class members who have signed a full and final release in favour of

Navitax may be estopped from advancing claims. The record indicates that there is at least one presumptive Class member that signed a full and final release in favour of Navitax.

[75] A proposed Class definition is not overbroad merely because it may include persons who will not have a successful claim. In defining the persons who have a potential claim against Navitax, there must be a rational relationship between the Class, the causes of action, and the common issues.

[76] I agree with Hawkmount that refining the Class definition to exclude those who have paid Navitax pursuant to a settlement agreement with Navitax would require determination of each Class member's claim as a precondition of Class membership. Such an approach is inconsistent with the efficiency goals of class proceedings.

[77] I am satisfied that the proposed Class is defined by reference to objective criteria, is bounded and bears a rational relationship with the common issues which I discuss below.

Section 5(1)(c): Common Issues Criterion

[78] Section 5(1)(c) of the *Class Proceedings Act* requires that there be "some basis in fact" that the proposed common issues are real issues in the case and that they can be answered in common across the class members: *Kuiper v. Cook (Canada) Inc.* (2020), 2020 ONSC 128 (CanLII), 149 O.R. (3d) 521, at para. 27 (Div Ct).

[79] The principles for determining whether issues are common are outlined by the Supreme Court of Canada in *Pro-Sys*, at para. 108:

a) The commonality question should be approached purposively;

b) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim;

c) It is not essential that the class members be identically situated *vis-à-vis* the opposing party; and

d) It not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.

[80] The common issue criterion presents a low bar. An issue can be a common issue 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. Attorney General of Canada* (2004), 2004 CanLII 45444 (ONCA), 73 O.R. (3d) 401, at para. 53. Even a significant level of individuality does not preclude a finding of commonality. A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation.

[81] The common issues criterion does not entail an examination of the merits of the claim: *Hollick*, at para. 16. At the certification stage, the Court is serving a gatekeeping function, ensuring that the common issues are realistic considering the record but not necessarily provable at this stage*: Crosslink v. BASF Canada*, 2014 ONSC 4529 at para. 35.

[82] Hawkmount proposes the following nine common issues:

(1) Did Navitax breach the Fee Agreements when it issued invoices to and accepted payment from Class members for contingency fees in relation to taxation years beyond the term stated in the Fee Agreement?

(2) Do the Fee Agreements constitute a juristic reason for Navitax's enrichment?

(3) In the alternative, does the alleged donative intent of Hawkmount and the proposed Class in paying the contingency fee constitute a juristic reason for Navitax's enrichment?

(4) If the answer to common issues 2 and 3 is no, must Navitax make restitution of the amount paid by Class members to Navitax in relation to tax years beyond the stated Term of the Fee Agreement?

(5) Can the restitution and/or damages sought by the plaintiff and other Class members be calculated on an aggregate basis for the Class as provided by the *Class Proceedings Act 1992*, S.O. 1992, c. 6, s. 24?

(6) If the answer to common issue 5 is yes, in what amount is Navitax liable to the Class?

(7) Did Navitax or its employees breach the *Solicitors' Act* or the *Contingency Fee Agreements* regulation?

(8) Is Navitax liable to pay punitive damages having regard to the nature of its conduct?

(9) What is the liability, if any, of Navitax for court-ordered interest?

Common Issues #1 & #2

[83] On the basis of the pleadings, and the evidence, I am satisfied that the first and second of the proposed common issues are acceptable. There is commonality in that Hawkmount, and all Class members, were parties to standard form Fee Agreements with common provisions governing term and fees.

[84] Courts routinely certify common issues based on a standard form contract where there is "a common standard contract and where the external context is common or typical across members of the class": *Wellman v. TELUS Communications Co.*, 2014 ONSC 3318 ("***Wellman***") at para. 58.

[85] Navitax submits that the external context is neither common nor typical across members of the proposed class. In his affidavit, Jonas Perov states that Navitax solicited different kinds of clients in substantially different ways, and that his dealings with prospective clients varied widely. Even in the circumstance of the Fee Agreement between Hawkmount and Navitax, the percentage amount was subject to negotiation.

[86] The external context at issue is in relation to the relevant provisions governing the term and fee provisions of the Fee Agreements. The common external context to the central provisions of the Fee Agreements was that MPAC had historically operated on a consistent and predictable four-year assessment cycle, and none of Navitax, Hawkmount or the Class members expected the consistent and predictable four-year cycle to be altered by the onset of the COVID-19 pandemic. Moreover, there is commonality to the fact that each of Hawkmount and the Class members:

a) received notification from Navitax that it was unilaterally extending the terms of the Fee Agreements;

b) received post-term invoices from Navitax for contingency fees calculated for tax years outside the term of the Fee Agreement; and

c) paid money to Navitax on account of such post-term invoices.

[87] Given the commonality, proposed common issues #1 and #2 are acceptable.

Common Issue #3

[88] The third element of an unjust enrichment analysis requires consideration of whether there is a juristic reason to deny recovery. The three established categories of juristic reasons are contract, disposition of law, and gift (often referred to as donative intent).

[89] In its defence, Navitax has pleaded that its enrichment was a consequence of a gift. Mr. Perov's evidence is that Navitax's clients paid post-term invoices under a wide variety of circumstances and asserts that Hawkmount and Class members had a range of reasons for doing so. Navitax urges that the motivations for each client to pay the post-term invoices is idiosyncratic and must be determined on an individual basis.

[90] Navitax's bald allegation that amounts it received from its clients on account of post-term invoices were gifts is, to say the least, incongruous with the admitted facts that Navitax issued post-term invoices, demanded payment of the post-term invoices, and sued various of its clients when payment was not forthcoming.

[91] My consideration of commonality is informed by the principle that equity presumes bargains and not gifts. Given that the Fee Agreements were formed in the context of commercial relationships between Navitax and the Class members, each of the Class members enjoy the presumption. Given the presumption against gift, I find that it would be open to the Court to determine that gift (or donative intent) cannot be a juristic reason

for enrichment where each Class member signed a Fee Agreement, each Class member received a post-term invoice, and each Class member paid a post-term invoice in circumstances where they had received notice from Navitax that the term of the Fee Agreement had been unilaterally extended. Common issue #3 is acceptable.

Common Issue #4

[92] Proposed common issue #4 is acceptable as it speaks only to liability and, *prima facie*, it would appear to have the required element of commonality.

Common Issues #5 and #6

[93] Whether the court, on a common issues trial, could determine the amount of restitution or special damages depends on whether proposed common issue # 4 is acceptable. The latter appears to satisfy the requirement of commonality in that its resolution one way or the other would affect the claims of all Class members in essentially the same manner. The authority to make an aggregate assessment at trial is, however, subject to three preconditions in section 24 (1) of the CPA, which provides:

> 24(1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> (i) monetary relief is claimed on behalf of some or all class members;
>
> (ii) no questions of fact other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant’s monetary liability; and
>
> (iii) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[94] A question relating to an aggregate assessment should not be included if, at the certification stage, the court can determine that one or more of the three preconditions could not be satisfied even if the other common issues were decided in favour of the plaintiff at trial.

[95] If Hawkmount and the proposed Class are successful at the common issues trial, there is a reasonable likelihood that the three preconditions would be satisfied. The monetary relief claimed by all Class members is equal to the amount paid to Navitax by Class members on account of post-term invoices. If the Court concludes that Navitax breached the Fee Agreements or, in the alternative, was unjustly enriched as a result of collecting payment of the post-term invoices, liability can be reasonably determined on an aggregate basis without individual proof by individual Class members. Accordingly, common issues #5 and #6 are acceptable.

Common Issue #7

[96] On the basis of the pleadings, and the evidence, I am satisfied that proposed common issue #7 is acceptable. Navitax is a paralegal services firm that owed statutory duties to each individual Class member. There is commonality to which statutory duties were owed to the Class. The provisions of the *Solicitors' Act* and *Contingency Fee Regulation* applied equally to all Fee Agreements, and the conduct constituting the alleged statutory breaches was common to the entire Class.

Common Issue #8

[97] The availability and quantum of punitive damages are routinely certified as common issues because they can be determined on a Class-wide basis based solely on an examination of the defendant's conduct. Common issue #8 is acceptable.

Common Issue #9

[98] Like punitive damages, the issue of interest can be determined by reference to the damages or restitution paid to the Class. There is no dispute that interest can be determined without consideration of individual Class members' claims. Common issue #9 is acceptable.

Section 5(1)(d): Preferable Procedure

[99] Sections 5(1) and 5(1.1) of the CPA together govern the fourth criterion requiring Hawkmount to demonstrate that a class proceeding would be the preferable procedure for the resolution of the common issues. Those provisions states:

> Certification
>
> 5 (1) The court shall, subject to subsection (6) and to section 5.1, certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> […]
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> […]
>
> (1.1) In the case of a motion under section 2, a class proceeding is the preferable procedure for the resolution of common issues under clause (1) (d) only if, at a minimum,
>
> (a) 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 defendant, including, as applicable, a quasi-judicial or administrative proceeding, the case management of individual claims in a

civil proceeding, or any remedial scheme or program outside of a proceeding; and

(b) the questions of fact or law common to the class members predominate over any questions affecting only individual class members.

[100] In *Banman v. Ontario*, 2023 ONSC 6187 at paras. 317-322, Justice Perell concluded that the addition of s. 5(1.1) to the CPA in 2020 resulted in a stricter test for preferability than applied under the old legislation. Building on the guidance provided by the Supreme Court of Canada in *AIC Limited v. Fischer*, 2013 SCC 69 (CanLII), [2013] 3 SCR 949, Justice Perell concluded that the preferable procedure analysis involves determining, through the lens of judicial economy, behaviour modification, and access to justice:

a. whether the design of the class action is manageable as a class action;

b. whether there are reasonable alternatives;

c. whether the common issues predominate over the individual issues;

d. whether the proposed class action is superior (better) to the alternatives.

[101] Hawkmount submits that the proposed action is manageable as a class proceeding. It says that the proposed common issues can be readily determined by reference to Navitax's standard form Fee Agreement and business records. It submits that the common issues may wholly determine Hawkmount and the Class members' claims, and that common issues predominate over individual questions.

[102] Navitax resists certification but did not make specific submissions in relation to whether a class proceeding is the preferable procedure to resolve the claims.

[103] I agree with Hawkmount that the common issues predominate over individual questions in this case. Navitax has admitted that the Fee Agreement is a standard form agreement. Class proceedings have frequently been held to be the preferable procedure to resolve common issues based on standard form agreements: *King's Auto Ltd. v. Torstar Corporation*, 2018 ONSC 2451 at para. 38.

[104] There are no reasonable alternatives to a class proceeding to resolve the claims. The relatively small size of each claim and the substantial number of claims overall point to class proceedings as the preferable procedure to achieve the goals of (a) access to justice; (b) behaviour modification; and (c) judicial economy. Hawkmount's total expenditure on the post-term invoices was $570.65. Settled claims between Navitax and Class members involved payments not exceeding $5,000.00. The modest value of the claims involved puts any litigation within the monetary jurisdiction of the Small Claims Court and are modest enough to dissuade individual Class members to seek relief.

[105] In my view, there is no realistic alternative available for Hawkmount and the Class members to seek redress. The preferable procedure requirement for certification under section 5(1)(d) of the *Class Proceedings Act* is satisfied.

Section 5(1)(e): Suitable Representative Plaintiff

[106] Hawkmount has no apparent conflict with the proposed class members and the evidence demonstrates that its principal, Shizen Wu, is capable of instructing counsel and playing a constructive role as representative plaintiff.

[107] Hawkmount's lawyers have produced a reasonable litigation plan. Such plans are flexible instruments and are always a work in progress: *Pearson v. Inco Inc*. (2005), 2006 CanLII 913 (ONCA), 78 O.R. (3d) 641, at para. 97 (CA).

[108] The requirements with respect to the representative plaintiff and the litigation plan contained in section 5(1)(e) of the CPA are satisfied.

Disposition

[109] This action is certified as a class action under section 5(1) of the CPA.

[110] The Class is defined as in paragraph 74, above. Hawkmount is the representative plaintiff, and her counsel is Class counsel.

[111] The common issues are as set out above at paragraph 82.

[112] Hawkmount has acknowledged in its reply factum that its request for an order requiring Navitax to pay for the costs of distributing and publishing the notice of certification is expressly prohibited by s. 11 (1.1) of the CPA. The Court notes the request as abandoned on the motion.

[113] The parties may make written submissions on costs. I would ask Hawkmount's counsel to send brief submissions to my judicial assistant by email at angela.lukach@ontario.ca within two weeks of today and for Navitax's counsel to send equally brief submissions by email to my assistant within two weeks thereafter.

M.A. Cook J.

Justice M.A. Cook

Date: March 25, 2025