Court File No.: CV-12-9667-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED, AND IN THE MATTER OF A PLAN OF COMPRISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Court File No.: CV-11-431153-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, THE TRUSTEES OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 793 PENSION PLAN FOR OPERATING ENGINEERS IN ONTARIO, SJUNDE AP-FONDEN, DAVID GRANT and ROBERT WONG

Plaintiffs

- and -

SINO-FOREST CORPORATION, ERNST & YOUNG LLP, BDO LIMITED (formerly known as BDO MCCABE LO LIMITED), ALLEN T.Y. CHAN, W. JUDSON MARTIN, KAI KIT POON, DAVID J. HORSLEY, WILLIAM E. ARDELL, JAMES P. BOWLAND, JAMES M.E. HYDE, EDMUND MAK, SIMON MURRAY, PETER WANG, GARRY J. WEST, PÖYRY (BEIJING) CONSULTING COMPANY LIMITED, CREDIT SUISSE SECURITIES (CANADA), INC., TD SECURITIES INC., DUNDEE SECURITIES CORPORATION, RBC DOMINION SECURITIES INC., SCOTIA CAPITAL INC., CIBC WORLD MARKETS INC., MERRILL LYNCH CANADA INC., CANACCORD FINANCIAL LTD., MAISON PLACEMENTS CANADA INC., CREDIT SUISSE SECURITIES (USA) LLC and MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED (successor by merger to Banc of America Securities LLC)

Defendants

Proceeding under the *Class Proceedings Act, 1992*

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OTHER SOURCES

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Canada Post Corp. v. Lépine

Canada Post Corporation, Appellant;
v.
Michel Lépine, Respondent, and
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Interveners.

[2009] 1 S.C.R. 549

[2009] 1 R.C.S. 549

[2009] S.C.J. No. 16

[2009] A.C.S. no 16

2009 SCC 16

File No.: 32299.

Supreme Court of Canada

Heard: November 17, 2008;
Judgment: April 2, 2009.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Charron and Rothstein JJ.

(58 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Catchwords:

Private international law -- Foreign or external judgments -- Recognition procedure -- Parallel class proceedings commenced in different provinces -- Whether Quebec court hearing application for recognition of judgment can take account of doctrine of forum non conveniens in determining

whether foreign authority had jurisdiction -- Civil Code of Québec, S.Q. 1991, c. 64, arts. 3135, 3155(1), 3164.

Private international law -- Foreign or external judgments -- Recognition procedure -- Parallel class proceedings commenced in different provinces -- Notice procedure for Ontario judgment certifying class proceeding and approving settlement agreement -- Quebec residents bound by settlement agreement -- Whether notice procedure for Ontario judgment entailed contravention of fundamental principles of procedure that precluded recognition of Ontario judgment in Quebec -- Civil Code of Québec, S.Q. 1991, c. 64, art. 3155(3).

Private international law -- Foreign or external judgments -- Recognition procedure -- Lis pendens -- Parallel class proceedings commenced in different provinces -- Whether Quebec and Ontario proceedings gave rise to situation of lis pendens -- Civil Code of Québec, S.Q. 1991, c. 64, art. 3155(4).

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Summary:

In September 2000, the Canada Post Corporation began marketing a lifetime Internet service in Canada, but it terminated its commitment in September 2001. This led to complaints and various proceedings. In Quebec, a customer who had purchased this service filed a motion for authorization to institute a class action on behalf of every natural person residing in Quebec who had purchased it. Subsequently, in Ontario, the Superior Court of Justice certified a class proceeding and approved a settlement agreement pursuant to which Canadian consumers could obtain a refund of the purchase price of the CD-ROM and receive three months of free Internet access. According to the Ontario judgment, the settlement agreement was binding on every resident of Canada who had purchased the service except those in British Columbia. On the next day, the Quebec Superior Court authorized the Quebec class action on behalf of a group limited to residents of Quebec. The Corporation then sought to have the Ontario judgment recognized under art. 3155 *C.C.Q.* The Quebec Superior Court dismissed the Corporation's application on the basis that the notice of certification of the Ontario proceeding was inadequate in Quebec and created confusion with the class action under way in Quebec, which constituted a contravention of the fundamental principles of procedure (art. 3155(3) *C.C.Q.*). The Quebec Court of Appeal affirmed that judgment on this issue and added that although the Ontario court had jurisdiction over the proceeding, it should have declined jurisdiction over Quebec residents by applying the doctrine of *forum non conveniens* (arts. 3155(1), 3164 and 3135 *C.C.Q.*). Finally, the two class proceedings gave rise to a situation of *lis pendens*, since the Quebec proceeding had been commenced first (art. 3155(4) *C.C.Q.*).

Held: The appeal should be dismissed.

In applying the doctrine of *forum non conveniens*, the Court of Appeal added an irrelevant factor to its analysis of the foreign court's jurisdiction. Although the application of this doctrine finds support, at first glance, in the very broad wording of the reference in art. 3164 *C.C.Q.* to Title Three on the international jurisdiction of Quebec authorities, such an interpretation disregards the main principle underlying the legal framework for the recognition and enforcement of foreign judgments set out in the *Civil Code of Québec*. In reviewing an application for recognition of a foreign judgment, the Quebec court does not have to consider how the court of another province or of a foreign country should have exercised its jurisdiction or, in particular, how it might have exercised a discretion to decline jurisdiction over the case or suspend its intervention. Enforcement by the Quebec court depends on whether the foreign court had jurisdiction, not on how that jurisdiction was exercised, [page551] apart from the exceptions provided for in the *Civil Code of Québec*. To apply *forum non conveniens* in this context would therefore be to overlook the basic distinction between the establishment of jurisdiction as such and the exercise of jurisdiction. The application of the specific rules set out in arts. 3165 to 3168 *C.C.Q.* will generally suffice to determine whether the foreign court had jurisdiction. It may be necessary in considering a complex legal situation to apply the general principle in art. 3164 *C.C.Q.* and to establish a substantial connection between the dispute and the originating court. But even when it is applying that general rule, the court hearing the application for recognition cannot rely on a doctrine that is incompatible with the recognition procedure. In the instant case, there is no doubt that the Ontario Superior Court of Justice had jurisdiction pursuant to art. 3168 *C.C.Q.*, since the Corporation, the defendant to the action, had its head office in Ontario. This connecting factor in itself justified finding that the Ontario court had jurisdiction. [paras. 34-38]

In the context in which they were published, the notices provided for in the judgment of the Ontario Superior Court of Justice contravened the fundamental principles of procedure within the meaning of art. 3155(3) *C.C.Q.* In a class action, it is important that the notice procedure be designed so as to make it likely that the information will reach the intended recipients. The wording of the notice must take account of the context in which it will be published and, in particular, the situation of the recipients. Compliance with these requirements constitutes an expression of the necessary comity between courts and a condition for preserving it within the Canadian legal space. In the instant case, the clarity of the notice was particularly important in a context in which, to the knowledge of all those involved, parallel class proceedings had been commenced in Quebec and in Ontario. The Ontario notice was likely to confuse its intended recipients, as it did not properly explain the impact of the judgment certifying the class proceeding on Quebec members of the national class established by the Ontario Superior Court of Justice. It could have led those who read it in Quebec to conclude that it simply did not concern them. [paras. 42-46]

The Quebec courts were also precluded from recognizing the Ontario judgment on the basis of *lis pendens* pursuant to art. 3155(4) *C.C.Q.* The interpretation to the effect that a class action exists only as of its filing date, after it has been authorized, is consistent neither with the wording of art. 3155(4) nor with the way that provision is applied in the context of a class action. The application for authorization to institute a class action is a form of judicial proceeding between parties for the

[page552] purpose of determining whether a class action will in fact take place. In the instant case, the three identities were present at the stage of this application. The basic facts in support of both proceedings were the same for Quebec residents, the object was the same and the legal identity of the parties was established. [paras. 51-55]

Cases Cited

Referred to: *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205; *Hocking v. Haziza*, 2008 QCCA 800, [2008] R.J.Q. 1189; *Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321; *Birdsall Inc. v. In Any Event Inc.*, [1999] R.J.Q. 1344; *Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 S.C.R. 440; *Thompson v. Masson*, [1993] R.J.Q. 69; *Hotte v. Servier Canada Inc.*, [1999] R.J.Q. 2598; *Roberge v. Bolduc*, [1991] 1 S.C.R. 374.

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Code of Civil Procedure, R.S.Q., c. C-25.

Fair Trading Act, R.S.A. 2000, c. F-2.

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History and Disposition:

APPEAL from a judgment of the Quebec Court of Appeal (Delisle, Pelletier and Rayle JJ.A.), 2007 QCCA 1092, [2007] R.J.Q. 1920, [2007] SOQUIJ AZ-50446058, [2007] J.Q. no 8498 (QL), 2007 CarswellQue 13496, affirming a decision of Baker J., J.E. 2005-1631, [2005] SOQUIJ AZ-50325631, [2005] Q.J. No. 9806 (QL), 2005 CarswellQue 5457, 2005 CanLII 26419. Appeal dismissed.

Counsel:

Serge Gaudet, *Gary D. D. Morrison* and *Frédéric Massé*, for the appellant.

François Lebeau and *Jacques Larochelle*, for the respondent.

Alain Préfontaine, for the intervener the Attorney General of Canada.

No one appeared for the intervener Cybersurf Corp.

English version of the judgment of the Court delivered by

LeBEL J.:--

I. Introduction
A. *Nature of the Appeal*

1 In September 2000, the appellant, the Canada Post Corporation ("Corporation"), began marketing a lifetime Internet service in Canada. Many consumers purchased the service. However, the Corporation terminated its lifetime commitment in September 2001 and discontinued the service, which led to complaints and various proceedings. There was a settlement in Ontario after the Ontario Superior Court of Justice had certified a class proceeding and approved a settlement agreement with the Corporation. A class action had also been instituted in Quebec. The Corporation sought to have the Ontario judgment recognized under art. 3155 of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), and to have the Quebec proceedings dismissed, but [page554] the Quebec Superior Court dismissed its application. The Quebec Court of Appeal affirmed that judgment. For reasons that differ in part from those given by the Court of Appeal, I would dismiss this appeal, which concerns the conditions under the *Civil Code of Québec* for recognizing a judgment rendered

outside Quebec. The appeal also raises issues concerning the management of parallel class actions instituted in different provinces.

B. *Origin of the Case*

2 The events on which this case is based began in September 2000, when the Corporation offered its customers a lifetime Internet access package using software designed by the intervener Cybersurf Corp., an Internet service provider. The software came on a CD-ROM that was sold for $9.95. In exchange for free service, purchasers agreed to have advertising transmitted to their computers. According to the Corporation, it sold 146,736 CD-ROMs across Canada. For reasons not specified by the parties, the Corporation discontinued the lifetime Internet service on September 15, 2001. Some consumers were upset, and their reactions led, *inter alia*, to the proceedings now before this Court.

3 In 2001, the Alberta government complained to the Corporation under the *Fair Trading Act*, R.S.A. 2000, c. F-2. Then, on February 6, 2002, Michel Lépine, the respondent in this appeal, filed a motion in the Quebec Superior Court for authorization to institute a class action under Quebec's *Code of Civil Procedure*, R.S.Q., c. C-25. He sought to institute the action against the Corporation on behalf of every natural person residing in Quebec who had purchased the Corporation's Internet package. On March 28, 2002, Paul McArthur also commenced a class proceeding against the Corporation in the Ontario Superior Court of Justice. He sought leave to represent everyone who had purchased the Corporation's CD-ROM and Internet service, except Quebec residents. Finally, on May 7, 2002, John Chen commenced a class proceeding in the British Columbia Supreme Court on behalf of residents of that province who had purchased the [page555] CD-ROM distributed by the Corporation. A settlement was reached in Alberta in December 2002, and the Corporation undertook to refund the purchase price of the CD-ROM to Canadian consumers who returned the CD-ROM to it.

4 Negotiations were conducted to settle the class proceedings under way in Quebec, Ontario and British Columbia. The Corporation offered the same settlement as in Alberta, which it later enhanced by offering three months of free Internet access. According to information provided by the parties, the applicants for certification of the class proceedings in British Columbia and Ontario accepted the Corporation's offers. The applicant for authorization in the Quebec action, Mr. Lépine, rejected them.

5 The application for authorization of the Quebec class action, which the Corporation contested vigorously, was still pending at the time of these negotiations. On June 18, 2003, the Quebec Superior Court decided to hear the application on November 5, 6 and 7 of that year.

6 In the meantime, in Ontario in early July 2003, the parties to the Ontario and British Columbia proceedings entered into a settlement agreement with the appellant based on the offer they had accepted. The agreement created two classes of claimants. The first was limited to British Columbia residents. For the purposes of the Ontario proceeding, the second class included residents of every

province of Canada except British Columbia, as it no longer excluded Quebec residents despite the fact that the respondent, Michel Lépine, was proceeding with his application for authorization to institute a class action in Quebec and had rejected the proposed settlement. To give effect to the settlement, the Ontario application for certification was amended on November 19, 2003 to include Quebec residents in the class.

7 Beginning at the time of negotiation of the settlement, various proceedings that had contradictory purposes and effects were commenced in the Ontario Superior Court of Justice and the [page556] Quebec Superior Court. When informed of the settlement with the Corporation, Mr. Lépine sought unsuccessfully to obtain safeguard orders from the Quebec Superior Court as well as a declaration that the Ontario agreement could not be set up against Quebec residents. His motion was heard on July 22, 2003, but the judge merely ordered the Corporation to give Quebec counsel details related to the applications for approval in Ontario and British Columbia.

8 Nevertheless, the Quebec Superior Court heard Mr. Lépine's application for authorization on the scheduled dates, November 5 to 7, 2003, despite attempts by the Corporation to obtain a stay of the hearing and the judgment. The judge reserved his decision on November 7.

9 The Ontario proceeding also continued. The Superior Court of Justice heard the application for certification of the class proceeding, to which the application for approval of the settlement agreement had now been added. Mr. Lépine's Quebec counsel did not appear in the Ontario proceeding. However, he sent the judge hearing the application for certification and approval a letter asking him to decline jurisdiction over Quebec residents for reasons he set out in detail. On December 22, 2003, the Superior Court of Justice certified the class proceeding and approved the settlement. It excluded British Columbia residents but not Quebec residents from the class. It did not comment on Mr. Lépine's request, but referred to that request in the following terms in its recitals: "... and upon being advised of the situation in the Province of Quebec and the correspondence forwarded to this Court by Quebec counsel, François LeBeau ... ." Thus, the Ontario Superior Court of Justice approved the settlement reached with the Corporation without reservation and ordered that notices of the judgment be published accordingly. The following are the most important heads of relief in its order:

> 1. THIS COURT ORDERS AND ADJUDGES that for purposes of the settlement, as set out in the Settlement Agreement attached as Schedule "A" ("the [page557] Settlement Agreement"), the within action is certified as a Class Proceeding pursuant to the *Class Proceedings Act*, 1992, S.O. 1992, c. 6.
>
> ...
>
> 3. THIS COURT ORDERS AND ADJUDGES that, as set out in the Settlement Agreement, the group of persons who are members of the Ontario Class be:

> "Any person in Canada, not a resident of the Province of British Columbia, who purchased a CD-Rom through any Canada Post outlet at a retail price of $9.95, exclusive of applicable taxes, the packaging of which displayed the words 'free internet for life', on or after September 27, 2000."

4. THIS COURT ORDERS AND ADJUDGES that the claims asserted on behalf of the Class are for breach of contract and misrepresentation and the relief sought is damages, including punitive, aggravated and exemplary damages, interest and costs as set out in the Amended Statement of Claim.

...

10. THIS COURT ORDERS AND ADJUDGES that any Class Member who does not opt-out within the time provided and in the manner described in the Settlement Agreement is bound by the Settlement Agreement and this Order and is hereby enjoined from pursuing any claims covered by the Settlement Agreement against the Defendants.

On the next day, December 23, 2003, the Quebec Superior Court rendered a judgment authorizing the institution of a class action against the Corporation on behalf of a group limited to residents of Quebec.

10 Finally, on April 7, 2004, the British Columbia Supreme Court approved the settlement for the class of British Columbia residents. The settlement with the Corporation had accordingly been completed.

11 In the meantime, the judgments rendered by the Ontario Superior Court of Justice and the Quebec Superior Court had created an unavoidable [page558] legal conflict. On the one hand, a class action against the Corporation was continuing in the Quebec Superior Court. On the other hand, the Corporation had obtained a judgment from the Ontario Superior Court of Justice declaring that the claims against it had been settled, including the claims of Quebec residents. To break the impasse, the Corporation applied to the Quebec Superior Court in June 2004 to have the judgment of the Ontario Superior Court of Justice recognized and declared enforceable. To this date, more than four years later, the Ontario judgment has not yet been recognized in Quebec, and the class action authorized by the Quebec Superior Court has not yet been heard.

II. Judicial History

A. *Quebec Superior Court*, [2005] Q.J. No. 9806 (QL)

12 On July 20, 2005, Baker J. of the Quebec Superior Court dismissed the Corporation's application for recognition of the judgment of the Ontario Superior Court of Justice on the basis that the application did not meet the requirements of art. 3155 *C.C.Q.* Baker J. based his decision to refuse recognition on the ground of contravention of the fundamental principles of procedure, which is provided for in art. 3155(3) *C.C.Q.* In his view, the notice of certification of the Ontario proceeding was inadequate in Quebec and created confusion with the class action under way in Quebec and the notices given in that action.

B. *Quebec Court of Appeal (Delisle, Pelletier and Rayle JJ.A.)*, 2007 QCCA 1092, [2007] R.J.Q. 1920

13 In a unanimous decision written by Rayle J.A., the Quebec Court of Appeal dismissed the Corporation's appeal from the Superior Court's judgment. Rayle J.A. found that there were three reasons to refuse recognition. She conceded that the Ontario Superior Court of Justice had jurisdiction over Mr. McArthur's application. But in her view, that court should have declined jurisdiction over Quebec residents by applying the doctrine of [page559] *forum non conveniens*. Next, she agreed with the trial judge that the confusion created by the notices concerning the class proceeding certified in Ontario had resulted in a contravention of the fundamental principles of procedure within the meaning of art. 3155(3) *C.C.Q.* Finally, the Court of Appeal found that the two class proceedings gave rise to a situation of *lis pendens*. Because the Quebec proceeding had been commenced first, art. 3155(4) *C.C.Q.* precluded the Quebec courts from recognizing the Ontario judgment. The Court of Appeal did not rule on the issue of violation of international public order under art. 3155(5) *C.C.Q.* However, Rayle J.A. stated that she was puzzled by the decision of the Ontario Superior Court of Justice judge to exclude British Columbia residents but not Quebec claimants from the class. She wondered why the Ontario court had not adhered to the principles of interprovincial comity in relation to the Quebec court, which had been the first one seised of the dispute. The Corporation appealed that judgment to this Court, asking that it be reversed.

III. Analysis

A. *Issues*

(1) Nature of the Issues

14 This appeal concerns the interpretation and application of art. 3155 *C.C.Q.* with regard to the recognition of a judgment rendered in a class proceeding in Ontario. I prefer to characterize that judgment as an external rather than a foreign one, despite the language used in the *Civil Code of Québec*. In essence, the dispute between the parties raises three issues. First, can a Quebec court hearing an application for recognition of an external judgment take account of the doctrine of *forum non conveniens*? Next, did the Ontario Superior Court of Justice adhere to the fundamental principles of procedure? If there were defects, did they entail a contravention of the fundamental principles of civil procedure within the meaning of art. 3155(3) *C.C.Q.*? Finally, did the application

for authorization in Quebec and the application for certification in Ontario give rise to a situation of *lis pendens*?

[page560]

15 The discussion of these issues will also require some comment on the issue of interprovincial judicial comity in the conduct of interprovincial class actions. Although the outcome of this appeal does not depend on the resolution of this last issue, it is one that now seems likely to affect the conduct of class actions involving two or more Canadian provinces, as well as relations between the superior courts of different provinces. It therefore merits some thought, as can be seen from the problems or reactions it appears to have provoked in this case.

(2) The Parties' Positions

16 The appellant submits that none of the provisions of art. 3155 *C.C.Q.* stood in the way of its application for recognition in Quebec and that the Quebec Superior Court should therefore have recognized the judgment of the Ontario Superior Court of Justice. According to the Corporation, the Quebec court could not raise the application of the doctrine of *forum non conveniens* by the Ontario court as an issue. The Corporation adds that the notices given in Quebec were consistent with the fundamental principles of procedure. Finally, it denies that the conditions for *lis pendens* were met.

17 The respondent relies primarily on the judgment of the Quebec Court of Appeal on the three issues being discussed. He also alleges that the Ontario proceedings were conducted in a manner inconsistent with international public order, which the appellant disputes. This argument need not be considered in the circumstances of this case. Finally, the Attorney General of Canada has intervened on the issue of the application of the doctrine of *forum non conveniens* in the procedure for the recognition of judgments rendered in the provinces of Canada. Before considering these questions, I believe it will be helpful to summarize the rules governing the recognition of external judgments by Quebec courts under the *Civil Code of Québec*.

[page561]

B. *Legal Framework for the Judicial Recognition of External Judgments*

18 The rules on the international jurisdiction of Quebec authorities and the recognition of foreign or external judgments are found, respectively, in Title Three (arts. 3134 to 3154) and Title Four (arts. 3155 to 3168) of Book Ten of the *Civil Code of Québec* on private international law. The two titles are closely related. I will come back to this in the course of my analysis.

19 In substance, Title Three sets out general rules and specific rules for identifying the connecting factors that will give Quebec authorities jurisdiction in an international context. Where there are no specific rules, whether a Quebec authority has jurisdiction will depend on whether the defendant is domiciled in Quebec (art. 3134). As a whole, these rules ensure compliance with the basic requirement that there be a real and substantial connection between the Quebec court and the dispute, as this Court noted in *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205, at paras. 55-56.

20 Other provisions of Title Three supplement these rules by giving the Quebec court a discretion to either intervene or decline to do so in a dispute. Article 3135 is particularly important, as it confirms the incorporation of the doctrine of *forum non conveniens* into private international law in Quebec. Under this provision, a Quebec court may decline to hear a case over which it has jurisdiction if it considers that the authorities of another country are in a better position to decide.

21 Title Four concerns foreign judgments or judgments rendered outside Quebec that are brought before the courts of that province. It establishes the conditions for the recognition and enforcement of such judgments.

22 In accordance with the evolution of private international law, which seeks to facilitate the free flow of international trade, the basic principle laid down in art. 3155 *C.C.Q.* for all the rules in [page562] Title Four is that any decision rendered by a foreign authority must be recognized unless an exception applies. The exceptions are limited: the decision maker had no jurisdiction, the decision is not final or enforceable, there has been a contravention of the fundamental principles of procedure, *lis pendens* applies, the outcome is inconsistent with international public order, and the judgment relates to taxation. This legislative intent is clear from the wording of art. 3155:

> **3155.** A Québec authority recognizes and, where applicable, declares enforceable any decision rendered outside Québec except in the following cases:
>
> (1) the authority of the country where the decision was rendered had no jurisdiction under the provisions of this Title;
>
> (2) the decision is subject to ordinary remedy or is not final or enforceable at the place where it was rendered;
>
> (3) the decision was rendered in contravention of the fundamental principles of procedure;
>
> (4) a dispute between the same parties, based on the same facts and having

> the same object has given rise to a decision rendered in Québec, whether it has acquired the authority of a final judgment (*res judicata*) or not, or is pending before a Québec authority, in first instance, or has been decided in a third country and the decision meets the necessary conditions for recognition in Québec;
>
> (5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations;
>
> (6) the decision enforces obligations arising from the taxation laws of a foreign country.

23 Article 3158 limits the scope of a Quebec court's power to review a foreign decision. The court must confine itself to considering whether the requirements for recognizing the decision have been met. It cannot review the merits of the case or retry the case. Article 3158 expressly prohibits this:

> **3158.** A Québec authority confines itself to verifying whether the decision in respect of which recognition or enforcement is sought meets the requirements prescribed in this Title, without entering into any examination of the merits of the decision.

[page563]

24 However favourable these principles may be to the recognition of foreign decisions, it must still be found that none of the exceptions provided for in art. 3155 *C.C.Q.* apply. In particular, as art. 3155(1) provides, the Quebec court must find that the court of the country where the judgment was rendered had jurisdiction over the matter. In this regard, Title Four also contains arts. 3164 to 3168, which set out rules the Quebec court is to apply to determine whether the foreign authority had jurisdiction. The main analytical tool for art. 3164 relates to the technique of referring to the rules in Title Three on establishing the jurisdiction of Quebec authorities.

25 This provision creates a mirror effect. The foreign authority is deemed to have jurisdiction if the Quebec court would, by applying its own rules, have accepted jurisdiction in the same situation (G. Goldstein and E. Groffier, *Droit international privé*, vol. I, *Théorie générale* (1998), at p. 416). To this principle, art. 3164 *C.C.Q.* adds the requirement of a substantial connection between the dispute and the foreign authority seised of the case:

> **3164.** The jurisdiction of foreign authorities is established in accordance with the rules on jurisdiction applicable to Québec authorities under Title Three

> of this Book, to the extent that the dispute is substantially connected with the country whose authority is seised of the case.

26 Articles 3165 to 3168 then set out more specific rules applicable to a variety of legal situations. Only art. 3168 is important for the purposes of this case. It identifies the cases in which a Quebec court will recognize a foreign authority's jurisdiction in personal actions of a patrimonial nature. This provision applies to the matters in dispute here. It provides for six situations in which a foreign authority's jurisdiction will be recognized in such actions:

> **3168.** In personal actions of a patrimonial nature, the jurisdiction of a foreign authority is recognized only in the following cases:
>
> (1) the defendant was domiciled in the country where the decision was rendered;

[page564]

> (2) the defendant possessed an establishment in the country where the decision was rendered and the dispute relates to its activities in that country;
>
> (3) a prejudice was suffered in the country where the decision was rendered and it resulted from a fault which was committed in that country or from an injurious act which took place in that country;
>
> (4) the obligations arising from a contract were to be performed in that country;
>
> (5) the parties have submitted to the foreign authority disputes which have arisen or which may arise between them in respect of a specific legal relationship; however, renunciation by a consumer or a worker of the jurisdiction of the authority of his place of domicile may not be set up against him;
>
> (6) the defendant has recognized the jurisdiction of the foreign authority.

27 Because of the way these rules of recognition are set out in the legislation, a problem rises that

is of particular significance for the analysis of the instant case. Do the jurisdictional rules in arts. 3164 to 3168 incorporate, by reference to Title Three, the doctrine of *forum non conveniens*? Do they thus give a Quebec court the power, even if the foreign authority's jurisdiction has been established, to determine whether the court that rendered the decision should have applied the doctrine of *forum non conveniens*? Can a Quebec court refuse to recognize a judgment rendered outside Quebec because, in its opinion, the foreign court should, pursuant to that doctrine, have declined jurisdiction over the case?

C. *Mirror Effect and Application of the Doctrine of Forum Non Conveniens*

28 The question of the mirror effect and its scope has been a problem in Quebec private international law since the *Civil Code of Québec* came into force. In art. 3164 *C.C.Q.*, the legislature has not been as clear as might be hoped about the scope of its reference to the provisions of Title Three of Book Ten (see, for example, Goldstein and Groffier, at p. 416). This drafting problem has led some Quebec authors and judges to support what is known as the "little mirror" theory. This theory seems to be based on a literal interpretation of the reference in art. 3164 [page565] to the general provisions of Title Three on determining whether a Quebec authority has jurisdiction and on the exercise of such jurisdiction. Under that interpretation, because the reference does not exclude any of Title Three's provisions, it necessarily encompasses the doctrine of *forum non conveniens*, which is accepted in Quebec private international law under art. 3135 *C.C.Q.*

29 Thus, according to the theory, the possibility of applying the doctrine of *forum non conveniens*, when considering a motion for judicial recognition of a foreign or external judgment, supplements the provisions on establishment of the foreign court's jurisdiction by enabling the Quebec authority to more effectively ensure compliance with the basic requirement under art. 3164 *C.C.Q.* of a substantial connection between the dispute and the country whose authority is seised of the case. Moreover, this interpretation means that, when considering whether a foreign court has jurisdiction over an action of a patrimonial nature, the Quebec authority will not limit itself to determining whether the application for recognition corresponds to one of the situations provided for in art. 3168 *C.C.Q.* The Quebec court can also consider how the foreign authority should have applied the doctrine of *forum non conveniens* to decide whether or not to decline jurisdiction.

30 Goldstein and Groffier, who support the little mirror theory, stress the importance they attach to the wording of art. 3164 *C.C.Q.*, which does not limit the scope of the reference to the general provisions of Title Three (at p. 417):

> [TRANSLATION] It must first be noted that the jurisdiction of Quebec authorities that is extended to foreign authorities is logically determined not only through specific connecting principles, *but also through the general provisions* such as those on *forum non conveniens, forum conveniens* and exclusive jurisdiction. In referring to the Quebec rules on jurisdiction, art. 3164 C.C.Q. does not limit them to the specific rules (arts. 3141 to 3154 C.C.Q.) and therefore

> refers implicitly to arts. 3134 to 3140 C.C.Q. as well. The latter provisions considerably alter the specific rules on jurisdiction [page566] in Quebec by giving the courts a broad discretion. It should therefore be accepted that foreign authorities can have the same freedom to exclude heads of jurisdiction that the Quebec courts would have excluded. As Professor Glenn points out:
>
> > The foreign authority's jurisdiction is assessed not broadly, in light of the connections accepted under the various heads of jurisdiction, but in light of the specific circumstances of each case. The question is whether the Quebec authority would have agreed to exercise its jurisdiction in such circumstances. The mirror principle becomes the principle of a "little mirror" that reflects the specific circumstances of the case in light of the general provisions.
>
> (Emphasis in original.)

These authors add that the Quebec court may therefore apply the doctrine of *forum non conveniens* to determine how, in its view, the foreign court should have applied that very doctrine (p. 417; along the same lines, see also: H. P. Glenn, "Droit international privé", in *La réforme du Code civil* (1993), vol. 3, 669, Nos. 117-19, at pp. 770-72).

31 The Quebec Court of Appeal adopted this approach in the instant case. It recognized that the Ontario Superior Court of Justice had jurisdiction over the subject matter in the usual sense of the term (para. 64). However, because it found that it had to consider the jurisdiction of the Ontario court through the prism of the reciprocity required by the little mirror theory, it concluded that the Superior Court of Justice should have applied the doctrine of *forum non conveniens* and should, on that basis, have excluded Quebec residents from the class in the class proceeding it was certifying (paras. 64-69). The Superior Court of Justice should have recognized that it was not the most appropriate forum with respect to this class of claimants, and thus deferred to the jurisdiction of the Quebec Superior Court.

32 However, some Quebec authors reject the application of *forum non conveniens* in the recognition of foreign or external judgments. They would limit the effect of the reference to Title Three in art. 3164 by excluding *forum non conveniens* from [page567] it. For example, in a study on the rules for recognizing and enforcing foreign or external judgments in Quebec, Professor Geneviève Saumier is highly critical of the application of this doctrine ("The Recognition of Foreign Judgments in Quebec -- The Mirror Crack'd?" (2002), 81 *Can. Bar Rev.* 677). According to her, this interpretation of art. 3164 *C.C.Q.* is not justified despite the very general language used in drafting that provision. In her opinion, to apply the doctrine of *forum non conveniens* when considering an application for recognition confuses the establishment of the foreign court's jurisdiction as such with the exercise of that jurisdiction (pp. 691-92). Thus the literal interpretation

of art. 3164 *C.C.Q.* cannot be reconciled with the general principle in art. 3155 *C.C.Q.* that a foreign or external judgment should be recognized once the originating court has been shown to have jurisdiction in the strict sense, and it is inconsistent with the fact that this principle remains the cornerstone of the system of recognition of foreign judgments established by the *Civil Code of Québec*. The addition of a mechanism based on the discretion of the court to which the application has been made, one that depends in all cases on the existence of a specific factual context, is inconsistent with this principle (pp. 693-94).

33 Professor Jeffrey Talpis refers to a few cases in which Quebec courts have favoured the application of the doctrine of *forum non conveniens* in the recognition and enforcement of foreign decisions. However, he expresses serious reservations about the soundness of this approach, which he considers incompatible with the legal framework for the recognition of foreign or external judgments set out in the *Civil Code of Québec*:

> Despite the fact that some support obviously exists in jurisprudence and doctrine for the "little mirror" approach, it is somewhat distressing to note that a reviewing court can decide that the originating court should have declined jurisdiction on *forum non conveniens* grounds and that the first court's failure to do so may be justification for denial of recognition of the resulting judgment is rather distressing. To deny [page568] recognition for failure to do something that is only discretionary in the first court would seem to contradict the very foundations of the exceptional character of the *forum non conveniens* doctrine in Quebec. This "second guess" approach is even more disturbing in an inter-provincial context. Be that as it may, one cannot deny that application of the two grounds does provide a good antidote to inappropriate foreign forum shopping.
>
> (*"If I am from Grand-Mère, Why Am I Being Sued in Texas?" Responding to Inappropriate Foreign Jurisdiction in Quebec--United States Crossborder Litigation* (2001), at p. 109; see also the critical comments of Bich J.A. of the Quebec Court of Appeal in *Hocking v. Haziza*, 2008 QCCA 800, [2008] R.J.Q. 1189, at paras. 174 *et seq.*)

34 In my view, these reservations about extending the application of the doctrine of *forum non conveniens* to the recognition of foreign or external judgments in Quebec are justified. I do not deny that the application of this doctrine finds support, at first glance, in the very broad wording of the reference to Title Three in art. 3164 *C.C.Q.* However, such an interpretation disregards the main principle underlying the legal framework for the recognition and enforcement of foreign or external judgments set out in the *Civil Code of Québec*. Enforcement by the Quebec court depends on whether the foreign court had jurisdiction, not on how that jurisdiction was exercised, apart from the exceptions provided for in the *Civil Code of Québec*. To apply *forum non conveniens* in this context

would be to overlook the basic distinction between the establishment of jurisdiction as such and the exercise of jurisdiction. In this respect, I believe that it will be helpful to repeat the quotation of the first paragraph of art. 3155 of the *Civil Code of Québec*, which sets out the following exception to the obligation to recognize a foreign decision:

> ... the authority of the country where the decision was rendered had no jurisdiction ... .

The words chosen by the legislature specify the nature of the analysis the court hearing the application for recognition must conduct. The court must ask whether the foreign authority had jurisdiction, but is not to enquire into how that jurisdiction was supposed to be exercised.

[page569]

35 Furthermore, this distinction between jurisdiction and the exercise thereof is recognized in the wording of the provisions of the *Civil Code of Québec* on the jurisdiction of Quebec authorities. Article 3135 *C.C.Q.* provides that a Quebec court may refuse to exercise jurisdiction it has under the relevant connecting rules. However, in reviewing an application for recognition of a foreign or external judgment, the Quebec court does not have to consider how the court of another province or of a foreign country should have exercised its jurisdiction or, in particular, how it might have exercised a discretion to decline jurisdiction over the case or suspend its intervention.

36 Article 3164 *C.C.Q.* provides that a substantial connection between the dispute and the originating court is a fundamental condition for the recognition of a judgment in Quebec. Articles 3165 to 3168 then set out, in more specific terms, connecting factors to be used to determine whether, in certain situations, a sufficient connection exists between the dispute and the foreign authority. The application of specific rules, such as those in art. 3168 respecting personal actions of a patrimonial nature, will generally suffice to determine whether the foreign court had jurisdiction. However, it may be necessary in considering a complex legal situation involving two or more parties located in different parts of the world to apply the general principle in art. 3164 in order to establish jurisdiction and have recourse to, for example, the forum of necessity. The Court of Appeal added an irrelevant factor to the analysis of the foreign court's jurisdiction: the doctrine of *forum non conveniens*. This approach introduces a degree of instability and unpredictability that is inconsistent with the standpoint generally favourable to the recognition of foreign or external judgments that is evident in the provisions of the *Civil Code*. It is hardly consistent with the principles of international comity and the objectives of facilitating international and interprovincial relations that underlie the *Civil Code*'s provisions on the recognition of foreign judgments. In sum, even when it is applying the general rule in art. 3164, the court hearing the application for recognition cannot rely on a [page570] doctrine that is incompatible with the recognition procedure.

37 It would accordingly have been sufficient had the Quebec authorities asked whether the

Ontario Superior Court of Justice had jurisdiction, in the strict sense, over the dispute. If it did, their next step would have been to determine whether the respondent, Mr. Lépine, had established that there were other obstacles to the recognition of the Ontario judgment, as indeed the Quebec Court of Appeal found that he had.

D. *Jurisdiction of the Ontario Superior Court of Justice*

38 There is no doubt that the Ontario Superior Court of Justice had jurisdiction pursuant to art. 3168 *C.C.Q.*, since the Corporation, the defendant to the action, had its head office in Ontario. This connecting factor in itself justified finding that the Ontario court had jurisdiction. The question whether there were obstacles to the recognition of the judgment is more problematic, especially given the allegations that it had been rendered in contravention of the fundamental principles of procedure and that the motion for authorization made in Quebec and the parallel application for certification made in Ontario had given rise to a situation of *lis pendens*.

E. *Issue of Notices to the Quebec Members of the National Class*

39 One of the main arguments made by the respondent in contesting the application for recognition relates to the issue of contravention of the fundamental principles of civil procedure. Under art. 3155(3) *C.C.Q.*, such a contravention precludes enforcement. The Court of Appeal accepted this argument, among others, to justify dismissing the application for recognition.

40 The issue of the application of art. 3155(3) arises in relation to the notices given pursuant to the Ontario Superior Court of Justice's judgment certifying the class proceeding. The respondent submits that the very content of the notices contravened the [page571] fundamental principles of procedure. In his opinion, the notices published in Quebec newspapers were insufficient and confusing. Their wording did not enable class members residing in Quebec to understand the impact of the Ontario judgment on their rights and on the authorization of the class action by the Quebec Superior Court on December 23, 2003.

41 This argument does not amount to a request to review the Ontario Superior Court of Justice's decision. The judge hearing the application for recognition does not examine the merits of the judgment (art. 3158 *C.C.Q.*). However, at the stage of recognition and, therefore, of enforcement of the judgment, he or she must consider whether the procedure leading up to the decision and the procedure for giving effect to it are consistent with the fundamental principles of procedure. The judge hearing the application is concerned not only with the procedure prior to the judgment but also with the procedural consequences of the judgment. This approach is particularly important in the case of class actions.

42 A class action takes place outside the framework of the traditional duel between a single plaintiff and a single defendant. In many class proceedings, the representative acts on behalf of a very large class. The decision that is made not only affects the representative and the defendants, but may also affect all claimants in the classes covered by the action. For this reason, adequate

information is necessary to satisfy the requirement that individual rights be safeguarded in a class proceeding. The notice procedure is indispensable in that it informs members about how the judgment authorizing the class action or certifying the class proceeding affects them, about the rights -- in particular the possibility of opting out of the class action -- they have under the judgment, and sometimes, as here, about a settlement in the case. In the instant case, the question raised by the respondent relates not to the Ontario statute but to the way it was applied by the Ontario Superior Court of Justice in a case in which that court knew that a parallel proceeding was under [page572] way in Quebec. Were the notices provided for in the Ontario court's judgment therefore consistent, in the context in which they were published, with the fundamental principles of procedure applicable to class actions?

43 The Ontario Court of Appeal stressed the importance of notice to members in a case involving an application for recognition of a judgment rendered in Illinois, in the United States. It emphasized the vital importance of clear notices and an adequate mode of publication (*Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321, at paras. 38-40). In a class action, it is important to be able to convey the necessary information to members. Although it does not have to be shown that each member was actually informed, the way the notice procedure is designed must make it likely that the information will reach the intended recipients. The wording of the notice must take account of the context in which it will be published and, in particular, the situation of the recipients. In some situations, it may be necessary to word the notice more precisely or provide more complete information to enable the members of the class to fully understand how the action affects their rights. These requirements constitute a fundamental principle of procedure in the class action context. In light of the requirement of comity between courts of the various provinces of Canada, they are no less compelling in a case concerning recognition of a judgment from within Canada. Compliance with these requirements constitutes an expression of such comity and a condition for preserving it within the Canadian legal space.

44 In the context of the instant case, I agree with the opinion expressed by the Quebec Court of Appeal and with the findings of the trial judge on the notice issue. The procedure adopted in the Ontario judgment certifying the class proceeding for the purpose of notifying Quebec members of the national class established in the judgment contravened the fundamental principles of procedure within the meaning of art. 3155(3) *C.C.Q.*, and enforcement was therefore precluded.

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45 The clarity of the notice to members was particularly important in a context in which, to the knowledge of all those involved, parallel class proceedings had been commenced in Quebec and in Ontario. The notice published in Quebec pursuant to the Ontario judgment did not take this particular circumstance into account. Those who prepared it did not concern themselves with the situation resulting from the existence of a parallel class proceeding in Quebec and the publication of

a notice pursuant to the Quebec Superior Court's judgment authorizing the class action. The notice made it look like the Ontario proceeding was the only one. Nor, even though Quebec residents were also a group under the Quebec class action, did the notice clearly state that the settlement applied to them. In this regard, the Quebec Superior Court carefully described the problems that had resulted from the procedure adopted to give effect to the Ontario court's judgment certifying the class proceeding in the context in which that procedure was conducted. Thus, on February 21, 2004, the designated representative in the Quebec class action published a notice of the authorization to institute a class action on behalf of a group that was limited to Quebec residents. The notice indicated that the members could request exclusion on or before April 21, 2004. In the Ontario class proceeding, the notice published on April 7, 2004, that is, shortly before the expiry of the time limit for requesting exclusion from the Quebec action, stated that a settlement had been reached in class proceedings commenced in Ontario and British Columbia but did not mention that the settlement also applied to Quebec residents. The way the notice was written was likely to confuse its intended recipients, as Rayle J.A. of the Quebec Court of Appeal correctly noted in her opinion (see para. 73).

46 In sum, the Ontario notice did not properly explain the impact of the judgment certifying the class proceeding on Quebec members of the national class established by the Ontario Superior Court of Justice. It could have led those who read it in Quebec to conclude that it simply did not concern them. The argument made by the respondent in this respect was in itself sufficient to justify dismissing the application for recognition. However, another [page574] argument raised by the respondent and accepted by the Quebec Court of Appeal -- *lis pendens* -- should also be examined.

F. *Lis Pendens*

47 The respondent has argued since the beginning of the recognition proceedings that enforcement was precluded by a situation of *lis pendens*, as provided for in art. 3155(4) *C.C.Q.* The Quebec Superior Court expressed no opinion on this point, but the Court of Appeal accepted this argument.

48 There are two different legal situations in which *lis pendens* is dealt with in Quebec private international law. The first reference to *lis pendens* in the *Civil Code of Québec* appears in art. 3137, which is found among the general rules that establish the bases for the jurisdiction of Quebec authorities and the fundamental conditions for exercising that jurisdiction in relation to a dispute involving a foreign element. Under art. 3137, a Quebec court may stay its ruling on a dispute over which it otherwise has jurisdiction if there is a situation of *lis pendens* with respect to an action under way before a foreign authority. *Lis pendens* depends on the existence of three identities, that of the parties, that of the facts on which the actions are based and that of the object of the actions:

> **3137.** On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same object is pending before a foreign

> authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority.

49 The second situation of *lis pendens*, the one with which we are concerned in this appeal, arises in respect of an application for recognition of a judgment rendered by a foreign authority. Under art. 3155, this situation is one of the cases in which a decision rendered outside Quebec cannot be declared enforceable in that province.

50 The first situation concerns the discretion of a Quebec court to decide whether it will exercise [page575] its jurisdiction despite a finding of *lis pendens* (*Birdsall Inc. v. In Any Event Inc.*, [1999] R.J.Q. 1344 (C.A.), at p. 1351). In the second situation, the one that arises in respect of an application for recognition of a foreign or external judgment, the court hearing the application has been given no discretion under art. 3155(4) *C.C.Q.* The legislature has precluded the application of the general principle of recognition of foreign or external judgments in a situation of *lis pendens* (see: Glenn, No. 105, at pp. 763-64). Thus, when the conditions for *lis pendens* are met, the *Civil Code of Québec* guarantees that the Quebec court has priority, provided that it was seised of the case first.

51 What must now be determined is whether, as a result of *lis pendens*, the Quebec courts were precluded in the case at bar from recognizing the judgment of the Ontario Superior Court of Justice. The conditions for *lis pendens* are well established in the domestic context in Quebec civil law. Like *res judicata*, *lis pendens* depends on identity of the parties, identity of the cause of action and identity of the object (J.-C. Royer, *La preuve civile* (4th ed. 2008), Nos. 788-89, at p. 635; *Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 S.C.R. 440). However, in private international law matters, the nature of the required identities is altered somewhat in the *Civil Code of Québec* in the case of *lis pendens*. In particular, in art. 3137, as in art. 3155(4), the Code retains identity of the parties and identity of the object but substitutes identity of the facts on which the actions are based for identity of the cause of action.

52 This change takes account of the problems involved in reconciling the specific features of legal systems that come into contact with each other, as well as the diversity in their substantive law concepts and procedural rules. The Quebec judge therefore considers the facts on which the actions are based and does not go beyond the differences in the legal systems in question to try to find an identity of the cause of action. The analysis thus focuses more on the respective objects of the two actions (*Birdsall*, at pp. 1351-52; Goldstein and Groffier, at pp. 325-26).

[page576]

53 However, the appellant argues that, in any event, the Quebec courts did not even have to consider the question of *lis pendens*. According to art. 3155(4), *lis pendens* is relevant only if the

Quebec proceeding predates the foreign action. The Corporation submits that the Quebec proceeding commenced no earlier than the date the Quebec Superior Court authorized the class action, that is, December 23, 2003. In support of this argument, the appellant relies, *inter alia*, on *Thompson v. Masson*, [1993] R.J.Q. 69, in which the Quebec Court of Appeal stressed that a class action does not commence until it is filed, that is, after the judgment authorizing the class action. Before that time, there is only an authorization proceeding whose purpose is to screen applications. In the instant case, according to the appellant, the Ontario proceeding predated the Quebec action because it was certified one day before the class action was authorized in Quebec.

54 This interpretation is consistent neither with the wording of art. 3155(4) nor with the way that provision is applied in the context of a class action. While it is true that Mr. Lépine's action did not exist yet in Quebec at the time the judgment certifying the class proceeding was rendered in Ontario, an application for authorization was nevertheless before the Quebec Superior Court prior to December 23, 2003. The term "dispute" has a broad meaning that encompasses all types of legal proceedings (see *Black's Law Dictionary* (8th ed. 2004), at p. 505; see also, regarding the term "*litige*" used in the French version of art. 3155(4), H. Reid, *Dictionnaire de droit québécois et canadien* (3rd ed. 2004), at p. 355; *Le Grand Robert de la langue française* (2nd ed. enl. 2001), vol. 4, at p. 864; Goldstein and Groffier, at p. 384). The application for authorization is a form of judicial proceeding between parties for the specific purpose of determining whether a class action will take place. The Quebec proceeding predated the one in Ontario, and the Quebec court was therefore seised before the Ontario court, which means that art. 3155(4) *C.C.Q.* was applicable.

55 At that stage, the three identities were present. The basic facts in support of both proceedings were [page577] the same for Quebec residents, namely the purchase and discontinuation of an Internet access service. The object was also the same: compensation for breach of the undertaking. Identity of the parties was established: a legal representative, the applicant at the authorization stage, was acting for the entire group of residents. The identity of the representative in a class action may vary in the course of the proceeding, but there is always one representative for all the members. What the courts have required is not physical identity of the parties, but legal identity (*Hotte v. Servier Canada Inc.*, [1999] R.J.Q. 2598 (C.A.), at p. 2601; *Roberge v. Bolduc*, [1991] 1 S.C.R. 374, at pp. 410- 11). The *lis pendens* argument was well founded, and the Court of Appeal rightly accepted it. Like the contravention of the fundamental principles of procedure, the *lis pendens* situation precluded judicial recognition of the decision of the Ontario Superior Court of Justice.

G. *National Classes and Parallel Class Actions*

56 In addition to its conclusions of law, the Quebec Court of Appeal seems to have had reservations or concerns about the creation of classes of claimants from two or more provinces. We need not consider this question in detail. However, the need to form such national classes does seem to arise occasionally. The formation of a national class can lead to the delicate problem of creating subclasses within it and determining what legal system will apply to them. In the context of such proceedings, the court hearing an application also has a duty to ensure that the conduct of the

proceeding, the choice of remedies and the enforcement of the judgment effectively take account of each group's specific interests, and it must order them to ensure that clear information is provided.

57 As can be seen in this appeal, the creation of national classes also raises the issue of relations between equal but different superior courts in a federal system in which civil procedure and the administration of justice are under provincial [page578] jurisdiction. This case shows that the decisions made may sometimes cause friction between courts in different provinces. This of course often involves problems with communications or contacts between the courts and between the lawyers involved in such proceedings. However, the provincial legislatures should pay more attention to the framework for national class actions and the problems they present. More effective methods for managing jurisdictional disputes should be established in the spirit of mutual comity that is required between the courts of different provinces in the Canadian legal space. It is not this Court's role to define the necessary solutions. However, it is important to note the problems that sometimes seem to arise in conducting such actions.

IV. Conclusion

58 For these reasons, I would dismiss the appeal with costs.

Solicitors:

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Solicitor for the intervener the Attorney General of Canada: Deputy Attorney General of Canada, Ottawa.

cp/e/qllls

Chadha et al. v. Bayer Inc. et al.*
[Indexed as: Chadha v. Bayer Inc.]

63 O.R. (3d) 22

[2003] O.J. No. 27

Docket No. C37224

Court of Appeal for Ontario

Austin, Rosenberg and Feldman JJ.A.

January 14, 2003

*Application for leave to appeal to the Supreme Court of Canada dismissed with costs July 17, 2003 (Gonthier, Major and Arbour JJ.). S.C.C. File No. 29651. S.C.C. Bulletin, 2003, p. 1152.

Civil procedure -- Class proceedings -- Certification -- Class action by home purchasers -- Purchasers alleged to have suffered damages from price-fixing conspiracy -- Representative plaintiff alleging that defendants conspired to fix prices which affected cost of concrete brick and paving stones used in construction of homes -- Certification refused -- Plaintiffs providing insufficient evidentiary basis to satisfy test for class proceedings -- Class Proceedings Act, 1992, S.O. 1992, c. 6.

The appellants, who had purchased a new home that contained coloured bricks and paving stones, were representative plaintiffs in a proposed class action against the respondents, who were the major manufacturers and suppliers to the Canadian market of the iron oxide pigments used to colour concrete brick and paving stones. The appellants alleged that between 1985 and 1991, the respondents engaged in a price-fixing scheme, thereby illegally increasing the price of bricks and paving stones. Although the appellants were not direct purchasers of iron oxide from the defendants, they alleged that as a result of the price-fixing activities of the defendants, they overpaid for their home. On a motion for certification, the record disclosed that if the appellants could prove their claim and show that the increased cost of coloured bricks was passed through to them as home buyers, the amount of each claim would be between $70 and $112 on a $150,000 home. Sharpe J. certified the plaintiffs' action as a class proceeding under the Class Proceedings Act, 1992 ("CPA"). However, on appeal to the Divisional Court, a majority of the court held that liability could not be a

common issue and that the class action process was not the preferable procedure. Disagreeing with the motions judge, a majority of the Divisional Court held that the actual losses could not be proved on a class-wide basis or on the basis of statistics. The majority concluded that proof of loss could only be established on an individual basis and that, in this case, the procedures in the Competition Act, R.S.C. 1985, c. C-34 were better suited to the goal of behaviour modification. The Divisional Court set aside the certification order, and the appellants appealed to the Court of Appeal.

Held, the appeal should be dismissed.

The Divisional Court was correct in concluding that the issue of liability, including proof of loss, could not be a common issue. The appellants assumed but did not show what method of proof could be used to establish loss on a class-wide basis. The motion judge did not address the complexities of proving the extent to which the participants in a chain of purchase bear the higher price caused by an illegal conspiracy to fix the price of an ingredient product, and he erred by relying on the expert evidence filed by the appellants as the basis for the certification order. That evidence did not address the issue of what method could be used at trial to prove that all end-purchasers of buildings using materials with the respondent's iron oxide pigment overpaid for the buildings as a result. Rather, the appellants' expert assumed that higher costs of products would have been passed on to end-users. However, the assumed issue was the very issue that the court must be satisfied is provable by some method on a class-wide basis before the common issue can be certified as such. In the immediate case, the appellants presented no evidence from industry representatives to explain how the manufacturers and [page23] distributors of bricks and the developers of new homes price their products, and, in particular, whether there is a direct pass-through of the price of every component into the sale price of all homes, the relevance of the value of the land, and how other factors such as the real estate market and the individual bargaining process of the purchaser and vendor affect the price. The evidence presented by the appellants on the motion did not satisfy the requirements prescribed by the Supreme Court of Canada in Hollick v. Metropolitan Toronto (Municipality) of providing sufficient evidence to support certification.

On the issue of preferable procedure, the motion judge did not have the benefit of the Supreme Court's decision in Hollick and it is unlikely that he would have certified the class action had he not viewed liability as a common issue. He discounted apparent problems of self-identification of potential plaintiffs who might have large claims and who might therefore want to opt out of the class procedure. This was a problem of under-inclusion. There was, however, a problem of both under-inclusion and over-inclusion of parties in the class. These problems were masked by accepting proof of loss as a common issue. The appellants' argument that the goal of behaviour modification would be defeated if a class action was not certified was not compelling given the other deficiencies and the fact that the Competition Act provides criminal sanctions to achieve that goal. The appellants' argument that a rejection of class actions would bar class actions in price-fixing cases was not correct. The question of whether consumers should be able to use class proceedings to obtain relief from price fixing remained an open question. In the immediate case, the appellants did not provide the evidentiary basis to justify a class proceeding.

The Divisional Court was also correct in concluding that the class definition was in error because the definition was not objective but turned on the outcome of the litigation or the merits of the claim. Accordingly, the appeal should be dismissed.

Cases referred to

Bogosian v. Gulf Oil Corp., 561 F. 2d 434 (3d Cir. 1977); Caputo v. Imperial Tobacco Ltd. (1997), 34 O.R. (3d) 314, 148 D.L.R. (4th) 566, 13 C.P.C. (4th) 163 (Gen. Div.); Hanover Shoe Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968); Hollick v. Metropolitan Toronto (Municipality), 2001 SCC 68, [2001] 3 S.C.R. 158, 56 O.R. (3d) 214n, 205 D.L.R. (4th) 19, 277 N.R. 51, 24 M.P.L.R. (3d) 9, 13 C.P.C. (5th) 1; Illinois Brick v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 62 L. Ed. 2d 707 (1977); In re Linerboard Antitrust Litigation, 305 F.3d 145 (3d Cir. 2002), revg 203 F.R.D. 197 (E.D. Pa. 2001); Newton v. Merill Lynch, Pierce, Fennerd Smith, Inc., 259 F. 3d 154 (3d Cir. 2001); Robertson v. Thomson Corp. (1999), 43 O.R. (3d) 161, 171 D.L.R. (4th) 171, 85 C.P.R. (3d) 1, 30 C.P.C. (4th) 182 (Gen. Div.), supp. reasons (1999), 43 O.R. (3d) 389, 43 C.P.C. (4th) 166 (Gen. Div.); Taub v. Manufacturers' Life Insurance Co. (1999), 42 O.R. (3d) 576n (Div. Ct.), affg (1998), 40 O.R. (3d) 379 (Gen. Div.); VitaPharm Canada Ltd. v. F. Hoffmann-LaRoche Ltd. (2000), 4 C.P.C. (5th) 169 (Ont. S.C.J.)

Statutes referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 5, 23, 24, 26
Clayton Act, 15 U.S.C. 15, s. 4
Competition Act, R.S.C. 1985, c. C-34, s. 36(1)
Sherman Act, 15 U.S.C. 1

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 21, 39.01(4) [page24]

Authorities referred to

Page, W.H., "The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick" (1999) 67 Antitrust L.J. 1

APPEAL from the judgment of the Divisional Court (Somers, Thomson JJ., O'Driscoll J. dissenting) (2001), 54 O.R. (3d) 520, 200 D.L.R. (4th) 309 (Div. Ct.), setting aside an order of Sharpe J. (1999), 45 O.R. (3d) 29, 36 C.P.C. (4th) 188 (S.C.J.) certifying an action under the Class Proceedings Act, 1992, S.O. 1992, c. 6.

Paul J. Pape, for appellants.

J.L. McDougall, Q.C., and Kent E. Thomson, for respondents.

The judgment of the court was delivered by

[1] **FELDMAN J.A.**: -- The appellants are representative plaintiffs in a class action. The respondents were the major manufacturers and suppliers to the Canadian market of iron oxide pigments used to colour concrete bricks and paving stones which were incorporated into the construction of homes, buildings and landscaping. The bulk of their sales were for the construction of new homes. It is alleged that during the period between 1985 to 1991, the respondents engaged in a price-fixing scheme, thereby illegally increasing the price of concrete bricks and paving stones coloured by iron oxide pigment.

[2] The appellants purchased a new home during that period from a new home developer. Their home contains some coloured concrete bricks and paving stones. They believe that they were indirect purchasers of bricks and stones containing the respondents' iron oxide pigments. The appellants allege that they suffered damage by overpaying for their home.

[3] The issue under appeal is the propriety of certification of the class action. The issue turns on the efficacy and method of proof of whether all indirect purchasers of the respondents' product overpaid for their homes as a result, and thereby suffered damage. The majority of the Divisional Court held that damage, a necessary component of the cause of action of each plaintiff, could not be proved on a class-wide basis; rather, damage must be proved individually for each plaintiff, making the class action process not the preferable process. The dissenting judge essentially adopted the reasons of the motion judge. For the reasons which follow, I would uphold the conclusion reached by the majority of the Divisional Court and dismiss the appeal. [page25]

I. Facts and History of the Proceeding

[4] The motion for certification is based on s. 5(1) of the Class Proceedings Act, 1992, S.O. 1992, c. 6 which provides:

> 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.

[5] The Statement of Claim of the appellants describes the details of a conspiracy by the respondents who were manufacturers and distributors of iron oxide pigments for use in making bricks, paving stones and other building materials, and who, between 1984 and 1992, held between 90 per cent and 100 per cent of the Canadian market for iron oxide. The alleged conspiracy to fix and thereby raise the price of iron oxide pigments in Canada was carried out between 1985 and 1991. The appellants plead that they purchased a new house in Ontario which was built in 1988 with bricks containing iron oxide pigment supplied by the defendants. The pleading alleges that as a result of the respondents' price-fixing conspiracy, the purchase price of products containing pigments was increased over what it would have been had there been an open competitive market, and that the appellants and the rest of the members of the class suffered damages as a result by overpaying for their homes. There is no dispute by the appellants that their cause of action includes proof of damage. Under the heading "Effects of the Illegal Activities", para. 28 of the Statement of Claim reads:

> The Plaintiffs plead that as a result of the Defendants' illegal actions, the Plaintiffs and class were harmed by having to pay higher prices and were deprived of the benefits of a free and open competition for the purchase of products containing pigments. [page26]

[6] The members of the class are described in the Statement of Claim as follows:

> All persons in Canada who have suffered loss or damage as a result of the Defendants' agreement to wrongfully increase or maintain the price of iron oxide and black pigment and otherwise unduly lessen competition, and in general restrict and inhibit competition in the pigment market; in particular all persons who purchased either directly or indirectly, bricks or other construction products containing iron oxide pigment or black pigment manufactured or distributed by one or more of the Defendants (or, where applicable, their corporate predecessors), between 1985 and 1992.

(Emphasis added)

[7] The appellants subsequently revised the definition of the proposed class to exclude direct purchasers of the respondents' products, and to include only the ultimate end-users of the products

after they had been incorporated into construction, particularly home owners. In his Order, the motion judge certified the class with the following description:

> All homeowners or other end users in Canada who have suffered loss or damage as a result of the Defendants' agreement to wrongfully increase or maintain the price of iron oxide and black pigment and otherwise unduly lessen competition, and in general restrict and inhibit competition in the pigment market; in particular, all home owners or other end users of bricks, interlocking or other construction products containing iron oxide pigment or black pigment manufactured or distributed by Bayer Canada and Northern Pigment Company or where applicable, their corporate predecessors between 1985 and 1992.

[8] The respondents first moved before Sharpe J. under Rule 21 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, to strike the claim on the basis that the pleading disclosed no cause of action. Because the appellants, as indirect purchasers, did not buy any iron oxide pigment directly from the respondents, but only purchased an end-product that incorporated bricks made with the respondents' product, it was argued that the appellants could not be the object of an unlawful conspiracy by the respondents to affect the price of their product. The Rule 21 motion was dismissed on the basis that, although the cause of action was a novel one, it was not plain and obvious that it could not succeed.

II. The Certification Motion

[9] The appellants then brought their motion for certification of the action as a class proceeding. On that motion, affidavit material was filed by both sides. The record disclosed that if the appellants could prove their claims and show that the increased cost of the coloured bricks was passed through to them as homebuyers, [page27] the magnitude of each claim would be between $70 and $112 on a $150,000 home.

[10] The respondents again raised the issue, this time under s. 5(1)(a) of the Class Proceedings Act, that the appellants' claim raised no cause of action, relying on authority from the United States Supreme Court (Illinois Brick v. Illinois, 431 U.S. 720, 97 S.C.T. 2061 (1977)), which precludes class action claims by indirect purchasers for damages for conspiracy to fix prices. The motion judge held, as he had on the earlier motion, that the pleading did disclose a cause of action, rejecting the American authorities as inapplicable in Canada.

[11] The second issue before the motion judge was whether there was an identifiable class. The problem raised by the respondents was that potential members of the class could have great difficulty self-identifying because, as home-owners, they would not know whether their home was built with materials which contained the iron oxide pigments. The motion judge described the problem as follows: "[t]he question is whether the impracticality or inefficiency of applying the definition to actually identify the members of the class on an individual basis renders it unacceptable." He approached the issue by considering the three important objectives of the Class

Proceedings Act: (a) judicial economy; (b) improved access to the courts for actions that may not otherwise be asserted; and (c) behaviour modification for actual or potential wrongdoers. He held that in this case, the primary object of certification was behaviour modification and that because of the small size of any individual award, compensation for the appellants and therefore access to justice for individual claims would be a secondary goal, making the ability of potential plaintiffs to self-identify of less concern to the court.

[12] The third issue addressed by the motion judge was identifying and articulating three common issues. The first common issue was whether the respondents had entered into a price-fixing agreement. He defined the remaining common issues as follows:

> Are the defendants liable to the members of the plaintiff class for conspiracy to fix the price of iron oxide, and if so, what is the appropriate measure of damages?

[13] The fourth matter addressed by the motion judge under s. 5(1) of the Class Proceedings Act was whether a class proceeding was the preferable procedure "for the resolution of the common issues". The motion judge concluded that it was. It is that conclusion and the basis for that conclusion, combined with the identification of liability as a common issue, that form the main focus of the appeals to the Divisional Court and to this court. The [page28] majority of the Divisional Court reversed the decision of the motion judge, concluding that liability could not be a common issue and that a class action was not the preferable procedure for determining the issues between the respondents and the members of the plaintiff class.

[14] Finally, the motion judge held that the appellants were representative plaintiffs. Although the appellants could not confirm that the bricks in their home contained the respondents' iron oxide pigment, or that they had overpaid for their home as a result, the motion judge found that there was a sufficient factual basis to qualify them as representative plaintiffs.

III. The Appeal to the Divisional Court

[15] The majority of the Divisional Court found that the motion judge had erred in his interpretation of s. 5(1)(d) of the Class Proceedings Act in the determination of whether a class action is the "preferable procedure". The motion judge had stated that ". . . the specific wording of s. 5(1)(d) . . . requires only that a class action be the preferable procedure for the resolution of the common issues." Somers J., writing for the majority of the Divisional Court, rejected limiting the preferable procedure analysis to the resolution of the common issues. Instead he took a broader approach, including considering the individual issues and whether a class action is the preferable procedure to advance the interests of all the parties in accordance with the objectives of the Class Proceedings Act.

[16] The Divisional Court then focused on the nature of the causes of action asserted by the appellants and the requirements for establishing those causes of action. The appellants' causes of action are based on a breach of s. 36(1) of the Competition Act, R.S.C. 1985, c. C-34, as well as the

common law torts of conspiracy and infliction of economic injury by unlawful means. All causes of action require that the appellants establish that they suffered actual loss. In particular, s. 36(1) provides:

> 36(1) Any person who has suffered loss or damage as a result of
>
> (a) conduct that is contrary to any provision of Part VI, or
> (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

(Emphasis added) [page29]

The appellants' claim is that they suffered loss by paying higher prices for their houses, built using bricks containing the respondents' product.

[17] The Divisional Court disagreed with the motion judge that such a loss could be proved on a class-wide basis. The court concluded that proof that the appellants had suffered such loss by overpaying for their houses could only be established on an individual basis. The appellants would have to prove that any overcharge by the respondents to the direct purchasers of the iron oxide pigment was passed on through the chain of manufacture and distribution of the bricks to the ultimate purchaser of a home which was built using those bricks. The majority of the Divisional Court also focused on the multitude of variables that can affect the price of a building, including regional differences and delivery costs, and the fact that ". . . the product in question, iron oxide, is used merely as a small component in another product or series of products and the alleged overcharge is only a trivial part of the purchase price of residential or commercial buildings, which are highly individualized end products" (para. 23), as well as many subjective factors, such as the relative bargaining skills of the purchasers and vendors. The court also rejected the concept that statistical evidence could be used to prove the fact of loss, as opposed to the quantum of the loss. As a result, the Divisional Court concluded that the issue of liability could not be a common issue in the proceeding.

[18] The Divisional Court further found that establishing the price-fixing conspiracy would not advance the litigation in a legally material way, because the balance of the action would be an unmanageable series of individual trials of the "pass-on" issue. Therefore, certifying the class action

would not further the purposes of the Class Proceedings Act, particularly judicial economy, but also access to justice and behaviour modification, the purpose singled out by the motion judge. The Divisional Court was of the view that the procedures in the Competition Act were better suited to the goal of behaviour modification in this case, and noted that an investigation under the Competition Act had been conducted and discontinued by the Director of Investigation and Research of the Competition Bureau.

[19] The Divisional Court found the following further errors in the Order that had been made below:

(a) the class definition is circular as it defines the class in terms that depend on the merits of the individual claims; [page30]
(b) the affidavit of a proposed representative plaintiff should have been rejected as it did not state that his home construction included paving stones which actually contain iron oxide manufactured by the defendants, and should have been amended to excise the portion stating his belief that the cost of his home had been artificially inflated when he did not state the basis for his belief as required by rule 39.01(4) of the Rules of Civil Procedure;
(c) the motion judge erred in concluding that s. 24 of the Class Proceedings Act could be used to assess damages on an aggregate basis.

IV. Issues

(1) Was the Divisional Court correct to conclude that the issue of liability, including proof of loss, could not be a common issue?
(2) Was the Divisional Court correct that a class action is not the preferable procedure for the conduct of the action?
(3) Is the class definition, as formulated by the motion judge, in error because it defines the class in terms of those who have suffered damages and not in objective terms, and therefore turns on the outcome of the litigation or the merits of the claim?

V. Analysis

(i) Common issue

[20] The difference in approach between the motion judge and the appellants on one hand, and the majority of the Divisional Court and the respondents on the other, turns on whether this is a case where all end-purchasers paid a higher price for their homes and therefore the loss can be proved on a class-wide basis, or whether each individual end-purchaser of a building that contains, as one component, bricks made with iron oxide pigment from the defendants, may or may not have had the inflated price of the iron oxide pigment passed through as part of the purchase price of the home they bought.

[21] The motion judge concluded that liability was a common issue and that it could be proved on a class-wide basis. Based on that premise, he turned to the issue of preferable procedure.

[22] The motion judge based his decision on preferable procedure on his view of the correct interpretation of s. 5(1) (d), which [page31] requires the plaintiff to prove that "a class proceeding would be the preferable procedure for the resolution of the common issues." His interpretation was that the section requires only that the class action be the preferable procedure for resolution of the common issues, not for the remaining individual issues. However, having already concluded that liability was not an individual issue, the spectre of an unmanageable judicial proceeding for determining liability on a plaintiff-by-plaintiff basis was not a concern for him.

[23] The critical finding of the motion judge on preferable procedure is at para. 22 of the reasons where he states:

> If the plaintiffs are successful in establishing a price fixing conspiracy and in establishing that damages from such conspiracy flowed through to the ultimate owners of buildings containing the pigments supplied by the defendants, it will be for the trial judge to determine whether it is necessary to have individual hearings to assess and distribute damages. As I have already indicated, the Act contains provisions which contemplate damage assessment and distribution in cases of this kind without such individual hearings. In any event, for the purposes of the preferable procedure test, I have no difficulty in finding that a class proceeding is the preferable procedure for resolution of the common issues. This is not a case like Abdool v. Anaheim Management Ltd. (1995), 21 O.R. (3d) 453 (Div. Ct.); Mouhteros v. DeVry Canada Inc. (1998), 41 O.R. (3d) 63 (Gen. Div.); or Rosedale Motors Inc. v. Petro-Canada Inc., [1998] O.J. No. 5461 (Gen. Div.); where it was simply not possible to resolve the common issues without scrutinizing the individual circumstances of each member of the proposed class. Here, there is an allegation of a general price-fixing agreement which is alleged to have a price impact upon the ultimate consumers of the product in question. If those are to be litigated at all, it seems apparent that a class proceeding is the preferable procedure. It would advance the goal of modification of behaviour as discussed earlier.

(Emphasis added)

And he concluded at para. 24:

> While there is no doubt that this will be a complex action involving the claims of a large number of individuals, as the claims have at their core significant common issues which can be readily dealt with on a class action basis, it is my view that the complexity of the proceeding favours rather than detracts from a class proceeding.

[24] In other words, the motion judge contemplated the possibility of individual hearings only for

the assessment of damages, but not for proof of loss as a component of liability. On that basis, he concluded that the class action is the preferable procedure.

[25] The difference in the fundamental premises of the two sides is reflected in the way the appellants formulate in their factum the two issues for decision on this appeal. The issues as stated assume, rather than raise for decision, that proof of loss is a common issue which will not require the participation of any [page32] class member to prove. The issues are set out in the appellants' factum as follows:

> (1) Should the case be certified where liability and damages can be proven at a trial of the common issues without the participation of any class member?
> (2) Should the case be certified where the damages suffered by each class member can be assessed and distributed to them without the participation of the defendants?

It is clear from this formulation that the appellants assume that the issue of the loss component of liability can be proved on a class-wide basis. The difficulty is that the question of what method of proof could be used to establish loss on a class-wide basis has not been addressed, and it is the major subject of dispute on the certification motion.

[26] Although the appellants recognize and acknowledge that "[l]oss is a critical component of the causes of action pleaded", they rely on the finding by the motion judge that the loss would be proved at the trial of the common issues through proof of two components: (1) an overall assessment of damages on the basis of the net gain realized by the defendants as a result of their allegedly unlawful agreement; and (2) a measurable price impact upon the ultimate consumer of the building products containing the iron oxide pigments. The appellants argue further that proving these two components of loss would not require the participation of the plaintiff class. Finally, and critically, they state that there was "probative evidence" before the motion judge to support as reasonable the judge's conclusion on proof of loss through the two proposed components.

[27] The motion judge's finding in that regard is at para. 11 of his reasons:

> Third, the parties filed expert evidence from economists as to the effect of a price increase at the manufacturing stage on the ultimate consumer of the product. The defendants' expert deposed that it is not possible to trace the impact of such prices through to the consumer. The expert retained by the plaintiffs disagreed with the defendants' expert and deposed that there would be a measurable price impact upon the ultimate consumer of the building products containing the iron oxide pigment. The plaintiffs' expert also deposes that it would be possible to determine an over-all assessment of damages on the basis of the net gain realized by the defendants as a result of their allegedly unlawful agreement. While I am not to be taken as holding that it was necessary to adduce such evidence at this stage of the proceedings, the conflict on the evidence only highlights the point that the issue will have to be resolved at trial,

> rather than on the pleadings.

(Emphasis added) [page33]

[28] Although the motion judge expressed reservations about the need for the appellants' expert evidence at this stage of the proceedings, it is only on the basis of that evidence that any determination can be made as to whether loss can be proved on a class-wide or an individual basis, and therefore whether it can be a common issue. In Hollick v. Metropolitan Toronto (Municipality), [2001] 3 S.C.R. 158, 2001 SCC 68 at para. 22, McLachlin C.J.C., writing for the court, clarified the role of evidence at the certification stage:

> The 1990 Report of the Attorney General's Advisory Committee . . . suggests that "[u]pon a motion for certification . . . , the representative plaintiff shall and the defendant may serve and file one or more affidavits setting forth the material facts upon which each intends to rely" [emphasis added in Hollick]: see Report of the Attorney General's Advisory Committee on Class Action Reform, supra, at p. 33. In my view the Advisory Committee's report appropriately requires the class representative to come forward with sufficient evidence to support certification, and appropriately allows the opposing party an opportunity to respond with evidence of its own.

[29] The Supreme Court also noted that this evidentiary scheme represented the existing practice in Ontario, referring to the case of Caputo v. Imperial Tobacco Ltd. (1997), 34 O.R. (3d) 314, 148 D.L.R. (4th) 566 (Gen. Div.) at p. 319 O.R., where the court held that the adequacy of the record on a certification motion was of "primary concern". The Supreme Court also quoted with approval from the case of Taub v. Manufacturers Life Insurance Co. (1998), 40 O.R. (3d) 379 (Gen. Div.). The relevant passage in Hollick reads as follows [at para. 24]:

> The court wrote (at pp. 380-1) that "the CPA requires the representative plaintiff to provide a certain minimum evidentia[ry] basis for a certification order". While the Class Proceedings Act, 1992 does not require a preliminary merits showing, "the judge must be satisfied of certain basi[c] facts required by s. 5 of the CPA as the basis for a certification order".

(Emphasis added in Hollick)

McLachlin C.J.C. concluded [at para. 25]:

> In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action.

[30] In my view, with respect, the motion judge erred by relying on the expert evidence filed by the appellants as the basis for the certification order. That evidence does not address the issue of

what method could be used at a trial to prove that all end-purchasers of buildings constructed using some bricks or paving stones that contain the respondents' iron oxide pigment overpaid for the buildings as a result. Rather, the appellants' expert effectively assumes that higher costs of products containing the [page34] respondents' iron oxide pigment would have been passed on to end-users, reasoning that they would have been willing to pay the higher cost because the amounts in question were so minimal. He made it clear that he did not know how willing end-purchasers would be to pay higher costs and that he had not had sufficient time to do any analysis to determine the response of the marketplace. He then went on to postulate a conceptual model for calculating the damages "to the extent that buyers of homes or other buildings made of construction materials using iron oxide pigment incur the damages of the conspiracy". The expert's models are based on the assumption of a full pass-through of the price increase of the iron oxide to the homebuyers. However, it is that assumption that is the very issue that the court must be satisfied is provable by some method on a class-wide basis before the common issue can be certified as such.

[31] The motion judge relied on the opinion of the appellants' expert that "there would be a measurable price impact upon the ultimate consumer of the building products containing the iron oxide pigment". However, the fact that any price impact may be "measurable" goes only to the issue of how the damages can be calculated and distributed, not whether the inflated price charged to the direct buyers of the product was passed through to all of the ultimate consumers. The issue of whether there would be a price impact on all ultimate consumers of iron oxide coloured products, i.e., a pass-through to the class members of the inflated price charged by the respondents to their direct buyers, was what the expert assumed, but he did not indicate a method for proving, or even testing that assumption.

[32] The critical importance of the issue of whether, and if so, by what method, loss is provable on a common basis in class action anti-trust suits was canvassed in detail in the recent decision of the U.S. Federal Court of Appeals Third Circuit in In Re: Linerboard Antitrust Litigation, 305 F.3d 145 (2002). The case involved an alleged conspiracy by linerboard (i.e., corrugated cardboard) manufacturers to reduce the industry inventory of linerboard and then, once supply was limited, to implement price increases. The linerboard manufacturers challenged a lower court ruling that had certified two classes of plaintiffs on the basis that they would be able to prove "common impact".[1] at end of document] The two classes were both direct purchasers, one of corrugated sheets [page35] and one of corrugated boxes. Although the plaintiffs purchased the product directly from the defendants, the issue of whether the conspiracy affected the price of these products on a class-wide basis was a live one because corrugated cardboard was only a component of the finished product.

[33] The manufacturers' challenge to the lower court decision was two-pronged. The main argument was that the lower court should not have relied on a legal presumption of impact, that it failed to apply rigorous scrutiny of the plaintiffs' impact evidence and that the existence of injury required an individualized inquiry. Second, the manufacturers argued that a question of fraudulent concealment also raised individualized issues. The parallel to the case at bar lies in the court's approach to the first prong, and its analysis of the type and strength of evidence required at the

certification stage to satisfy the court that there is a method in a price-fixing case by which impact on the plaintiff class can be proved as a common issue.

[34] The lower court in Linerboard based its decision that loss could be proved on a common basis for all members of the class on two types of evidence and analysis. The first was expert evidence that the price-fixing conspiracy can be presumed to have a common impact on all purchasers. The relevant portion of the lower court judgment on the presumption of common impact is approved at p. 152 F.3d of the appeal reasons and reads:

> Plaintiffs have shown that they plan to prove common impact by introducing generalized evidence which will not vary among individual class members. For example, plaintiffs contend that even though prices may have varied among regions, the alleged conspiracy caused these prices to rise throughout the country. Although the prices for corrugated sheets and boxes may have increased due to demand, because defendants allegedly conspired to reduce production of linerboard, the price was higher than it would have been under competitive conditions. Such allegations, supported by the evidence presented, are of the kind contemplated by the Third Circuit in [Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977)] and [Newton v. Merill Lynch, Pierce, Fennerd Smith, Inc., 259 F.3d 154 (3d Cir. 2001)]. See also [Lumco Indus., Inc. v. Jeld-Wen, Inc., 171 F.R.D. 168, 173 (E.D. Pa. 1997)].
>
> The Court recognizes that defendants dispute plaintiffs' allegations. However, at the class certification stage, "the Court need not concern itself with whether Plaintiffs can prove their allegations regarding common impact; the Court need only assure itself that Plaintiffs' attempt to prove their allegations will predominantly involve common issues of fact and law." Lumco Indus., 171 F.R.D. at 174. "Plaintiffs need only make a threshold showing that the element of impact will predominantly involve generalized issues of proof, rather than questions which are particular to each member of the plaintiff class." Id. (citing In re Disposable Contact Lens Antitrust Litig., 170 F.R.D. 524 (M.D. Fla. 1996)). Therefore, the Court concludes that plaintiffs' [page36]allegations regarding impact, like their allegations regarding conspiracy, will focus the inquiry on defendants' actions, not on individual questions relating to particular plaintiff class members.

(Emphasis added)

[35] According to the court of appeals, the lower court's ruling represented a sound application of the concept of "presumed impact" approved in an earlier decision of the same appeals court in Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977). The foundational essence of this approach to determining impact is that the focus of the evidence will be on the actions of the defendants and not on individual questions relating to particular plaintiffs. In applying the concept of presumed

impact, the court takes notice of the laws of economics as support for a theory that an individual plaintiff can prove the fact of damage simply by proving that the free market prices would be lower than the prices actually paid by the plaintiff. In the Linerboard case, a deliberate cut in supply was alleged. A reduction in supply will cause prices to rise. The concomitant rise in linerboard prices in the relevant market, on the presumed impact theory, represents the laws of supply and demand at work.

[36] In addition to relying on the presumed impact theory, the lower court in Linerboard relied on the extensive empirical investigations that had been undertaken by the plaintiffs' experts. The plaintiffs' experts' testimony was that advanced economic models could be prepared to establish class-wide impact. In the evidence before the lower court, the experts supported their opinions with charts, studies, company records, industry data and articles from leading trade publications. The key issue on which the experts focused was whether the variations in purchasers, products, regions, etc., precluded common impact. Taking the variations into account, they concluded that all purchasers would have paid a higher price because of the conspiracy. As a result, the fact of loss was common. Only the quantum of loss would vary. One expert stated categorically: "[b]ased on my analysis of the pricing data and company records, I conclude that the alleged unlawful conduct to raise linerboard prices would have impacted all members of the proposed class through higher corrugated sheet prices" (p. 154 F.3d). The court of appeals noted that this conclusion was supported by relevant data.

[37] The court of appeals in Linerboard approved of what it referred to as the lower court's use of a "belt and suspenders rationale" (p. 153 F.3d) by relying on both the presumed impact theory together with the expert evidence, to form the evidentiary [page37]basis for its conclusion that loss as a component of the cause of action could be proved on a class wide basis.

[38] The defendants in Linerboard also argued that the Linerboard case was exactly comparable to the case of Newton v. Merill Lynch, Pierce, Fennerd Smith, Inc., 259 F.3d 154 (3d Cir. 2001), where the same court of appeals overturned the lower court's decision to certify. In Newton, the complaint was that brokers in stock transactions had not obtained the best price for their clients. The evidence on the certification motion showed that the computer system used by the defendant brokers obtained variable prices, some of which were the best, and some of which were not. Consequently, some stock purchasers suffered loss while others did not. The appeals court rejected the comparison with the Newton case, essentially because in Newton, not all members of the putative class had suffered loss. In Newton, the court of appeals noted that "[w]hether a class member suffered economic loss from a given securities transaction would require proof of the circumstances surrounding each trade, the available alternative process, and the state of mind of each investor at the time the trade was requested" (p. 187 F.3d). Based on the evidence before the court on the Linerboard motion, no similar individual inquiries were required to prove loss to every member of the class of linerboard purchasers.

[39] A useful comparison can be made between the evidentiary record in the Linerboard

certification motion and the record in this case. In Linerboard, the court had both evidence based on economic theory as well as industry evidence that formed the basis for expert opinions of what actually occurred in the market when corrugated cardboard was sold as sheets and boxes. The evidence demonstrated to the certification court that it could be proved at trial that the plaintiffs did in fact suffer loss on a class-wide basis. The certification of the plaintiff class in Linerboard did not, of course, mean that there would not be contrary evidence and substantial opposition to the plaintiffs' position at trial. It did mean that, on a preliminary basis, there was a sufficient record to support a decision to certify based on liability as a common issue.

[40] In this case, the appellants presented no evidence from industry representatives to explain how the manufacturers and distributors of bricks and the developers of new homes price their products, and in particular, whether there is a direct pass-through of the price of every component into the sale price of all homes, the relevance of the value of the land component, and how other factors such as the real estate market and [page38]the individual bargaining of the purchaser and vendor affect the price. The evidence on the issue of loss to the members of the plaintiff class came only from the affidavit of an expert economist who did not address those issues. In his affidavit, the expert does not suggest that he consulted any industry records or other data which would substantiate a pass-through analysis.

[41] Finally, in the Linerboard case, the defendants asked the court to apply the decision of the U.S. Supreme Court in Illinois Brick, supra, which the respondents in this case also seek to rely on. Illinois Brick was an anti-trust treble damages action, brought under s. 4 of the Clayton Act, 15 U.S.C. 15, by end-purchasers of structures built using concrete blocks. They alleged that the manufacturers of the concrete blocks had engaged in a conspiracy to fix prices in violation of federal antitrust legislation (Sherman Act, 15 U.S.C. 1). The issue was whether indirect purchasers, as opposed to the intermediaries who had purchased directly from the manufacturers, could sue based on the alleged overcharge. In its earlier decision in Hanover Shoe Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), the U.S. Supreme Court had held that where the plaintiffs were direct purchasers from the defendants, the defendants could not use the defence that the alleged overcharge had been passed through to the ultimate consumer and therefore that the direct purchaser had suffered no damage. In Illinois Brick, the same bar was applied to indirect purchasers as plaintiffs: they could not sue for treble damages for price fixing because allowing claims by both direct and indirect purchasers would create the risk of double recovery and make the process of determining who had suffered what proportion of the price overcharge too complex, thereby undermining the effectiveness of the remedy.

[42] In the Linerboard litigation, both classes of plaintiffs were direct purchasers from the defendant manufacturers. Because both the sheets and the boxes contained linerboard only as a component, so that the price-fixed product formed only one ingredient of the product purchased, the defendants argued that the class members were akin to indirect purchasers, and that the Illinois Brick prohibition should apply. The appeals court rejected the analogy and held that the class members were direct purchasers and "entitled to recover the full amount of any overcharge" (pp.

159-60 F.3d).

[43] In his reasons in the case at bar, the motion judge declined to follow Illinois Brick, which, as discussed above, bars actions by indirect purchasers for price fixing as a matter of law [page39] in the U.S.[2] at end of document] However, in so doing he did not address the underlying reasoning of the U.S. Supreme Court that led to the result in Illinois Brick and in Hanover Shoe, namely, the complexities of proving the extent to which the different players in the chain of purchase bear the higher price caused by the illegal conspiracy to fix the price of the base product.

[44] The complexity of the "pass-through" problem was recognized by the Divisional Court. The court referred with approval to the following passage from pp. 742-43 of Illinois Brick:

> . . . "in the real economic world rather than an economist's hypothetical model," the latter's drastic simplifications generally must be abandoned. Overcharged direct purchasers often sell in imperfectly competitive markets. They often compete with other sellers that have not been subject to the overcharge; and their pricing policies often cannot be explained solely by the convenient assumption of profit maximization. As we concluded in Hanover Shoe, 392 U.S., at 492, attention to "sound laws of economics" can only heighten the awareness of the difficulties and uncertainties involved in determining how the relevant market variables would have behaved had there been no overcharge.

[45] The Divisional Court noted the many problems of proof facing the appellants with respect to the pass-on issue, including the number of parties in the chain of distribution and the "multitude of variables" which would affect the end-purchase price of a building. The appellants would have to show that the price increase (or a part of it) was passed through from the respondents to the building materials manufacturer and distributor, to the builder, to the purchaser and on to any subsequent purchaser. If the price increase was absorbed at any point, the chain would be broken. The problem is compounded by the fact that the iron oxide pigment forms such a minimal part of the whole structure and therefore a similarly minimal portion of the purchase price of a building.

[46] As noted above, neither the variables nor the issue of how to prove the flow of the price increase through the distribution [page40] chain were addressed by the appellants' expert in his evidence. Nor does he discuss the effect of the market on real estate prices and the relative effects on the purchase price of (a) the market, (b) the value of the land, (c) the value of the building, and (d) how one assesses the value of the component parts of the building at any particular point in time, remembering that the proposed class members are not only purchasers of new homes, but of resale homes as well, and that not all homes were constructed using the impugned materials.

[47] In my view, this latter point -- that not all buildings built and sold during the relevant period contained the respondents' materials -- highlights a significant aspect of the problem with the appellants' theory and their position. The appellants' expert alludes to the issue of whether the increase in price of iron oxide pigmented materials may have had the effect of causing an increase

in all substitute materials as well. In other words, the effect of the increase in price of coloured bricks might have been to cause the price of all bricks to rise, or looking at it another way, the homebuilders may have increased the prices of all houses built with bricks regardless of what bricks they used, in order to accommodate and at the same time to take advantage of the price increase of the iron oxide pigmented bricks. The expert suggests that if that were true, then "all homebuyers or other end-users would have been damaged by the iron oxide conspiracy to a greater or lesser extent", not just buyers of homes containing the defendants' product. However, he goes on to say that he did no analysis to determine whether this in fact occurred, and opined that there was no practical relevance to the issue.

[48] To the contrary, from the point of view of proof of loss to homebuyers as a class based on a pass-through of the price increase, if it could be shown that all home prices were artificially inflated as a result of the use of both iron oxide pigmented and non-iron oxide pigmented building materials, that could well have formed the basis for concluding that proof of loss could be presented on a class-wide basis as a common issue.

[49] The Divisional Court also rejected several other methods referred to by the motion judge for arriving at class-wide proof of loss. First, the Divisional Court held that s. 24 of the Class Proceedings Act, which deals with an aggregate assessment of monetary relief, cannot resolve the problems of proving loss on a class-wide basis. I agree that s. 24 of the Class Proceedings Act is applicable only once liability has been established, and provides a method to assess the quantum of damages on a global basis, but not the fact of damage. [page41]

[50] Second, the Divisional Court rejected the suggestion that the variables in circumstances of different plaintiffs could be addressed by the creation of plaintiff sub-classes. Again, the creation of subclasses is an evidentiary matter. I note that the appellants have not relied on this solution before this court, nor is there any evidentiary foundation to suggest that different sub-classes of plaintiffs can be formed which will effectively create a basis for commonality on the issue of proof of loss.

[51] Finally, the Divisional Court concluded that s. 23 of the Class Proceedings Act, which contemplates the use of statistical evidence to determine the amount or distribution of a monetary award, would not allow the issue of liability to be proved through otherwise inadmissible statistical evidence. I do not adopt this comment by the Divisional Court. In the American cases, as discussed above, expert evidence that includes an analysis of statistical data has been used to establish loss on a class-wide basis. The admissibility of any such evidence will have to be considered when the issue arises.

Conclusion on common issue

[52] In my view, the motion judge erred in finding that liability could be proved as a common issue in this case. The evidence presented by the appellants on the motion does not satisfy the requirement prescribed by the Supreme Court in Hollick of providing sufficient evidence to support certification. The evidence of the appellants' expert assumes the pass-through of the illegal price

increase, but does not suggest a methodology for proving it or for dealing with the variables that affect the end price of real property at any particular point in time. The motion judge focused on the expert's opinion that the loss could be measured, rather than on how any such loss could first be established on a class-wide basis.

(ii) Preferable procedure

[53] In reaching his conclusion under s. 5(1)(d) of the Class Proceedings Act that "a class proceeding would be the preferable procedure for the resolution of the common issues", the motion judge specifically limited his focus to whether the class action procedure was preferable for resolution of the common issues only, and not of any other individual issues that would have to be resolved in the course of the litigation. In so doing, the motion judge did not have the benefit of the Supreme Court of Canada's decision in Hollick, supra, where the court specifically dealt with the breadth of the inquiry under s. 5(1)(d) of the Act. After noting that the section [page42] only speaks about the preferable procedure for resolving the common issues, McLachlin C.J.C. stated [at para. 29]:

> I would not place undue weight, however, on the fact that the Act uses the phrase 'resolution of the common issues' rather than 'resolution of class members' claims.

[54] The Chief Justice concluded that "[t]he question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole", and quoted with approval [at para. 30] the statement of the Chairman of the Attorney General's Advisory Committee that the class representative must

> "demonstrate that, given all the circumstances of the particular claim, [a class action] would be preferable to other methods of resolving these claims and, in particular, that it would be preferable to the use of individual proceedings".

(Emphasis added in Hollick)

[55] Regardless of whether the motion judge was correct in concluding that a class action would be the preferable procedure when there were three major common issues, as I have concluded based on the record, that proof of loss as a component of liability cannot be a common issue, the only common issues are the price fixing conspiracy, and possibly, the measure of damages, if the scope of liability can be determined.

[56] I do not believe the motion judge would have certified the action as a class action had he not viewed liability as a common issue. The number of potential plaintiffs in this case is very large, estimated at 1.1 million. Clearly, if individual trials are needed to establish loss and therefore liability, the action will be unmanageable.

[57] Together with the issue of proof of loss is the question whether a home purchased by any

plaintiff actually contains bricks or paving stones coloured with the respondents' iron oxide pigment. As part of the proof of loss, a massive record-tracing exercise will be required to establish the inclusion of the respondents' product in any particular structure. The respondents point out that the period over which records must be obtained spans 17 years. The respondents also point to the many intermediary parties from whom those records, if they exist, must be sought.

[58] In his discussion regarding the class definition and the potential difficulties of identifying class members because of this extensive tracing exercise required, the motion judge discounted apparent problems of self-identification of potential plaintiffs who might have large claims and would therefore want to opt out [page43] of the class procedure. He did so because all potential plaintiffs' claims appeared to be very minimal, so that the goal of certification would not be compensation of individual plaintiffs but rather behaviour modification. Consequently, the motion judge concluded that possible under-inclusion of potential plaintiffs was not a serious matter.

[59] The motion judge did not consider how the same problem of identification of class members can also arise in the context of possible over-inclusion of parties in the class. The potential problem was masked by making proof of loss a common issue. However, with liability as an individual rather than a common issue, identification and proof of those actually affected is required, with all of the difficulties referred to above.

[60] The appellants also base their argument on ss. 24 and 26 of the Class Proceedings Act. The expert evidence filed by the appellants opined that the illegal profits gained by the respondents could be calculated on an aggregate basis. The appellants argue that the loss to the class is equal to the gain of the respondents based on their illegal conspiracy. The appellants suggest that by finding that individual trials are needed to prove a loss in each case, the Divisional Court confused the process of assessing damages on an aggregate basis with the process of distributing damages to the class members. Section 24(1)(b) of the Class Proceedings Act 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,
>
> . . . . .
>
> (b) no questions of fact or law 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; . . .

[61] It is clear to me that the Divisional Court made no such error. Section 24(1)(b) is a mechanism for assessing damages where there is no issue of liability. Section 26 also deals with the distribution of the damage award. The Divisional Court focused its analysis on the mechanism of proving the loss necessary to base liability. By seeking to equate the respondents' gain with the class members' alleged loss, the appellants effectively skip over the process of determining who in the chain, beginning with the direct purchasers from the respondents, absorbed the loss. In the U.S., this

problem has been resolved by limiting the civil remedy of treble damages for price fixing to direct purchasers only and attributing the entire loss to them. The effect of the appellants' approach is to attribute the entire loss to the indirect or end-purchasers rather than to determine whether those [page44] parties suffered loss as required by s. 36(1) of the Competition Act and as part of the common law causes of action.

[62] The appellants complain that if the action is not certified, this will effectively end the litigation, and thereby defeat the goal of behaviour modification which would be accomplished through the action and which is one of the three goals of the Class Proceedings Act. However, where access to justice through compensation of individual plaintiffs who have suffered a loss is not a significant goal (because the amounts in issue are so minimal, and most plaintiffs do not know if or that they suffered any damage), and where judicial economy would be undermined, not enhanced, by certifying the action, the circumstances requiring behaviour modification would have to be extremely compelling to allow that single goal to overcome the other deficiencies. In this case, the Competition Act provides criminal sanctions to achieve that goal.

[63] The appellants argue further that if certification is not allowed in this case, the effect would be a complete bar on all class actions by consumers in price-fixing cases. They argue that the civil action under the Competition Act, used together with the Class Proceedings Act, is an important tool for preventing and effectively punishing price-fixing activity. It must be able to be used along with the enforcement mechanisms in the Competition Act in order to effectively regulate and discourage anti-competitive behaviour in the marketplace. The appellants point to the limited resources of the Competition Bureau for carrying out comprehensive enforcement and therefore the necessity that class actions exist as an effective threat to potential anti-competitive market behaviour.

[64] Although the civil remedy for anti-competitive behaviour can be an important component of the enforcement of the goals of the Competition Act, it is only one component. In appropriate cases, the Competition Act and Class Proceedings Act can work together as a valuable tool against price-fixing. However, in this case, the obstacles to an effective class proceeding override its potential benefits.

[65] In my view, the question of whether and how consumers will be able to use class actions to obtain relief from price fixing by suppliers and manufacturers remains an open one in this jurisdiction. The appellants were unsuccessful in this case because they did not present the evidentiary basis for a certifying court to be satisfied that loss as a component of liability could be proved on a class-wide basis. Whether such evidence could have been obtained is not clear. [page45]

[66] The Divisional Court's approach suggested that it could not: that the variables in house purchase prices were such that the type of evidence that would have been required to show "pass-through" on a class-wide basis would not have been available in this case, in large part

because of the nature of real estate and the individualized pricing factors on each sale. The Divisional Court's concerns follow the U.S. approach as defined in the Illinois Brick and Hanover Shoe cases.

[67] The difficulties with proving pass-through of price increases on a class-wide basis are illuminated in an article that discusses Illinois Brick. (William H. Page, "The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick" (1999) 67 Antitrust L.J. 1). The author essentially concludes that indirect purchaser litigation for price-fixed goods is not a viable method of achieving behaviour modification against anti-competitive behaviour. At pp. 36-37 the author states:

> Thus, only a highly artificial subset of indirect purchasers of price-fixed goods will ever be compensated by class actions. Moreover the denial of certification is largely unrelated to the merits of the underlying claim. Most of the factors that preclude certification of classes of indirect purchasers have little to do with whether a price fixing conspiracy actually existed or whether indirect purchasers bore an overcharge. The number of levels of intermediate purchasers between the price fixers and plaintiff class is unrelated to the success of the conspiracy. Similarly, whether plaintiff intermediate purchasers alter or add value to the product, or use it as an ingredient in another product, has nothing to do with whether price fixing has occurred upstream, or even whether the overcharge was passed on. Yet these factors may preclude certification because they make it impossible to establish harm to each class member by any kind of common proof.
>
> Thus, in many cases, a price-fixing overcharge will simply dissolve into the currents of the channels of distribution. Eighty years ago, Justice Holmes noted the "endlessness and futility of the effort to follow every transaction to its ultimate result," even though "in the end the public pays the damages in most cases of compensated torts." Now, as then, it may well be that an overcharge is passed on but the legal system cannot identify its incidence. Common proof is impossible and individualized proof would be more costly than the amount of the harm. The emerging reality of the indirect purchaser class action offers no realistic mechanism for accomplishing compensation for remote purchasers of price-fixed goods. If the indirect purchaser class action is only available to a small subset of indirect purchaser injuries, even among price-fixing conspiracies that are actually detected, it is not fulfilling its stated purpose.

(Internal citations omitted)

[68] In this jurisdiction it remains to be determined whether in a particular case a sufficient evidentiary record can be brought before a certifying court to satisfy that liability can be proved as a common issue. Whether it can be done is a question left open for future cases. [page46]

(iii) Definition of the class

[69] Leave to appeal to the Divisional Court was granted by Lane J. on the basis that the motion judge erred in his definition of the class. As part of its decision, the majority of the Divisional Court held that the class definition was in error because the definition is not objective, but turns on the outcome of the litigation or the merits of the claim. I agree with that conclusion. As Sharpe J. stated in another case, (Robertson v. Thomson Corp. (1999), 43 O.R. (3d) 161, 171 D.L.R. (4th) 171 (Gen. Div.) at p. 169 O.R.):

> I agree with Winkler J. in [Bywater v. Toronto Transit Commission, [1998] O.J. No. 4913 (Gen. Div.)] and with [H. Newberg and A. Conte, Newberg on Class Actions, 3rd ed. (West Group, 1992)] at p. 6-61, that the class should be defined in objective terms, and that circular definitions referencing the merits of the claim or subjective characteristics ought to be avoided. Such definitions make it difficult to identify who is a member of the class until the merits have been determined. Definitions based upon the merits of the claim also violate the statutory policy that the merits are not to be decided at the certification stage.

[70] As discussed earlier, when the motion judge was considering the class definition, he rejected the problems of self-identification of potential class members because he did not consider under-inclusion as a problem. However, by defining the class as those who suffered damage, he in effect defined away any potential over-inclusion that could occur if proof of loss is a common issue. In my view, the two errors were linked in this case.

V. Conclusion

[71] In light of my conclusion that the action cannot be certified as a class action because a class action is not the preferable procedure given the limited common issues, it is not necessary to address the propriety of the motion judge's reliance on the appellant's affidavit.

[72] I would dismiss the appeal.

[73] The respondents have provided their bill of costs. The appellants shall have ten days from release of these reasons to provide the Senior Legal Officer with their submissions as to costs. The respondents may respond within seven days thereafter.

Order accordingly.

[page47]

Notes

Note 1: The lower court decision is reporte at In Re: Linerboard Antitrust Litigation, 203 F.R.D. 197 (E.D. Pa. 2001).

Note 2: The same approach has been followed, for example by Cumming J. in VitaPharm Canada Ltd. v. F. Hoffmann-Laroche Ltd. (2000), 4 C.P.C. (5th) 169 (Ont. S.C.J.) where he named lead counsel for the plaintiff classes in a class action involving both direct and indirect purchasser classes of plaintiffs affected by a worldwide conspiracy to increase the price of vitamins to both wholesale and retail users. The ability of the different classes to prove loss did not appear to be a disputed issue in the motion. The issue of concern was the allocation of the global loss among the various groups. The class action procedure did not fail based on the potential difficulty of allocating damages. In the Divisional Court decision in the case at bar, Somers J. specifically left open the possibility that there could be indirect purchaser anti-trust claims advanced by way of class proceeding, and at para. 44, referred to the VitaPharm case.

Case Name:

Lavier v. MyTravel Canada Holidays Inc.

Between
Suzanne Lavier, Plaintiff, and
MyTravel Canada Holidays Inc. and MyTravel Group PLC,
Defendants
PROCEEDINGS UNDER the Class Proceedings Act, 1992

[2011] O.J. No. 2340

2011 ONSC 3149

Court File No. 05-CV-300187CP

Ontario Superior Court of Justice

P.M. Perell J.

Heard: By written submissions.
Judgment: May 25, 2011.

(40 paras.)

Counsel:

Joel P. Rochon and Sakie Tambakos, for the Plaintiff.

Sally Gomery and Jamie A. Macdonald, for the Defendants.

REASONS FOR DECISION

P.M. PERELL J.:--

A. INTRODUCTION

1 In this action, which alleged that a travel company was negligent in sending vacationers to a resort where there was an outbreak of Norovirus, I certified the action as a class action, and I approved a settlement. See *Lavier v. MyTravel Canada Holidays Inc.*, 2010 ONSC 6823 and 2011 ONSC 1222.

2 The Representative Plaintiff, Suzanne Lavier, now moves for an order authorizing what she describes as "Enhanced Notice Efforts," which are changes to the notice plan designed to improve the take-up by Class Members of the benefits of the settlement. Ms. Lavier also asks that the costs of the "Enhanced Notice Efforts" be paid from the Settlement Fund and that the deadline for making claims be extended to July 15, 2011.

3 Ms. Lavier submits that the court has the jurisdiction to approve the Enhanced Notice Efforts and that it ought to exercise this jurisdiction to facilitate the important policy objectives of access to justice and behaviour modification.

4 MyTravel Canada Holidays Inc., the remaining defendant, opposes the relief sought.

5 For the Reasons that follow, I dismiss Ms. Lavier's motion.

B. FACTUAL BACKGROUND

6 On October 22, 2010, after lengthy negotiations, in which a variety of settlement structures were discussed, Ms. Lavier and MyTravel Canada signed a Settlement Agreement. The settlement structure negotiated involved establishing a fixed fund from which Class Members' claims would be paid if they filed a claim. The amount of the fund was caped. If the Class Members' claims exceeded the fund, the payments would be prorated. If the Class Members' claims did not deplete the fund plus the costs of administration, the surplus would be repaid to MyTravel Canada.

7 The Settlement Agreement established a fund of $2.25 million for an estimated class of approximately 4,000 members. Class Counsel anticipated that this fund would be sufficient to pay all claims without any proration. In reaching the settlement, Class Counsel sought to ensure that the fund was large enough to pay out all of the anticipated claims.

8 The Settlement Agreement provided that the action would be certified as a class action and that the notice program would be approved before the settlement fairness hearing. The Settlement Agreement provided that the publication of the notice to Class Members would be substantially in the form described in the notice plan included in the agreement.

9 The notice plan negotiated by the parties did not contemplate direct contact with all the Class Members. The notice plan acknowledged that achieving direct contact would be difficult because independent travel agents and not MyTravel Canada would have much of the pertinent contact information. Thus, in addition to direct mailings to known Class Members, the notice plan provided for letters to travel agents in Canada using lists provided by MyTravel Canada, notice in national

and regional papers, webpage notice by the Administrator and Class Counsel, and e-mail notice to travel agents.

10 On December 9, 2010, the action was certified as a class proceeding and the notices advising of certification and of the proposed settlement were approved.

11 The notice of certification and of the fairness hearing was distributed in mid-December 2010 and in January 2011, in accordance with the notice plan. Claims forms were mailed to 499 Class Members, of which there were 43 notice and claim packages returned as undelivered. Notice by e-mail was sent to 66 Class Members. Thus, 522 Class Members received a direct notice and of these 29% (150) submitted a claim. In contrast, the take-up rate of the balance of the class, approximately, 3,500 persons, who did not receive a direct notice, was approximately 2%.

12 As already noted, the notice plan involved, among other things, that notice be sent to travel agents. Notice to travel agents was important because most of the Class Members booked their vacations with travel agents and not directly with MyTravel Canada. In hindsight, Ms. Lavier believes that the notice to travel agents was underproductive because it came during the holiday season, a very busy time for agents when their attention was on other matters.

13 At the time of the settlement approval, only 50 claims had been filed with the Settlement Administrator, but claims were still being received and although the matter of the apparently low take-up was discussed at the hearing, no formal order was made to alter the settlement, the notice plan, or the administration of the settlement.

14 Rather, I approved the settlement as it had been submitted to the court. In my Reasons, I noted factors that favoured the settlement included the recommendation of experienced Class Counsel, the presence of good faith, arms-length intense bargaining, the absence of collusion, and adequate settlement funds assuming a high take-up rate. As an unfavourable factor, I noted that the settlement included "the possibility that the take-up will be low and the residue correspondingly high."

15 I concluded that a final assessment of the quality of the settlement would depend upon the degree of take-up but the settlement already provided adequate tangible benefits and was in the best interests of Class Members.

16 Thus, on February 23, 2011, I approved the settlement. My order provides that the court retains jurisdiction "to consider any further appropriate applications concerning the administration of the settlement."

17 Following the hearing, Class Counsel consulted with the Administrator and with MyTravel Canada, and it was agreed that Class Counsel would issue a press release to media outlets across Canada on March 3, 2011, advising of the court approval and of the deadline to file a claim under the settlement.

18 After the press release, there was not a significant increase in the take-up of the settlement, and Class Counsel continued its discussions with the Administrator about improving the take-up and a proposal, which is described as "Enhanced Notice Efforts" was prepared. Under this proposal, certain Class Members who had not filed a claim would be contacted by Class Counsel or by the Administrator.

19 The Class Members to be contacted under the Enhanced Notice Efforts included: (a) Class Members who shared a booking number with a Class Member that had filed a claim; (b) Class Members for whom there was direct contact information; (c) through the use of skip tracing services, Class Members for whom 35 claim packages had been returned by Canada Post; and (d) using "Canada 444", a search facility, Class Members with unique names would be traced and then contacted.

20 The Enhanced Notice Efforts also contemplated developing additional class member contact information by obtaining additional information from MyTravel Canada to identify travel agencies where Class Members had booked vacations.

21 Without court authorization and at the request of Class Counsel, the Administrator conducted some sampling of the effect of the Enhanced Notice Efforts, and the Administrator concluded that these efforts would significantly increase the take-up of the settlement.

22 The claims filed before the settlement approval and the Administrator's sampling indicates, the not surprising effect, that direct notice has a higher take-up rate than other kinds of notice.

23 The costs of the Enhanced Notice Efforts is estimated to be between $10,000 to $15,000.

24 MyTravel Canada opposes the introduction of the Enhanced Notice Efforts, and at a case conference on April 14, 2011, I directed that the matter be resolved by a motion in writing (with oral argument if I felt that it was necessary).

25 MyTravel Canada submits that the under the *Class Proceedings Act, 1992*, the court's supervisory jurisdiction over a settlement does not authorize it to rewrite the settlement either before or after settlement approval. It submits that the settlement was not an admission of liability, and it is not for the court to impose obligations beyond what is set out in the Settlement Agreement. It submits that in the case at bar the Enhanced Notice Plan was not contemplated by the Settlement Agreement and that authorizing the Enhanced Notice Efforts, which would have the effect of increasing the net cost of the settlement to MyTravel Canada, would rewrite the terms of a negotiated settlement.

26 MyTravel Canada submits that the court, having concluded that the Settlement Agreement was fair, reasonable, and in the best interests of class members cannot and should not impose new obligations. In its factum, it submits:

> The Court has already found that the Settlement Agreement was fair reasonable, and in the best interests of class members. Class Counsel is an experienced class actions litigation firm with extensive experience in negotiating settlements. Both Class Counsel and the Representative Plaintiff urged the Court to approve the settlement and Notice Plan. The Court cannot and should not impose new obligations on MyTravel Canada that it did not bargain for because the implementation of the Settlement Agreement did not produce the results that Class Counsel expected.
>
> Defendants in class proceedings should be able to enter into fair and reasonable settlements with Class Counsel confident that the courts will hold both parties to their bargain. Allowing class counsel to modify the terms of the agreement when the settlement does not have the effect they expected will introduce a degree of uncertainty into the class actions regime that will make defendants hesitant to settle any action. This would have a chilling effect on the settlement of class actions in Ontario.

27 Ms. Lavier, however, submits that the Enhanced Notice Efforts are not an impermissible variation of the settlement but were envisioned changes because the Settlement Agreement provides that the "method of dissemination/publication shall be substantially in the form as described in the Notice Plan".

28 Further, she submits that because the take-up did not deplete the settlement fund it was appropriate to seek ways to improve the take-up. She also submits that it was appropriate for Class Counsel, which has a lawyer-client relationship with Class Members, to directly contact them to notify them of the benefits of the settlement.

C. DISCUSSION

29 Generally speaking, I agree with the submissions of MyTravel Canada and those submissions provide the reason for dismissing Ms. Lavier's motion.

30 I disagree with Ms. Lavier's submission that the variations to the notice plan are within the language of the Settlement Agreement. The variations sought are not minor; they are a difference in kind not a difference in degree as might be captured by the words "substantially in the form as described in the Notice Plan".

31 Although the court's settlement approval order reserved a jurisdiction to consider applications about the administration of the settlement, the court does not have jurisdiction to change the nature of the settlement reached by the parties.

32 While a court has the jurisdiction to reject or approve a settlement, it does not have the

jurisdiction to rewrite the settlement reached by the parties: *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (S.C.J.) at para. 10. *Harrington v. Dow Corning Corp.* 2010 BCSC 673 at para. 15. In particular, the court does not have the jurisdiction to impose burdens on the defendant that the defendant did not agree to assume: *Stewart v. General Motors*, (S.C.J.) unreported, September 15, 2009, *per* Justice Cullity at pp. 8-9.

33 Nothing turns on the fact that the Settlement Agreement expressly addressed the matter of the court's jurisdiction to administer the settlement. The court's administrative jurisdiction does not need to be reserved in a settlement agreement. The court has administrative jurisdiction independent of any conferral of jurisdiction. See: *Fantl v. Transamerica Life Canada,* 2009 ONCA 377 at para. 39; *Spavier v. Canada (Attorney General),* [2006] S.J. No. 752, at para. 13. But after the settlement has been approved, the court's administrative and implementation jurisdiction does not include power to vary the settlement reached by the parties.

34 In some instances - and the case at bar is not one of them - the court's administrative jurisdiction may allow adjustments to be made to the scheme of the settlement, and at first blush, these variation might resemble a variation of the settlement agreement. For example, in my opinion, an extension of the deadline for making claims would be permissible administrative adjustment in a settlement in which the contribution of the defendant was fixed with any surplus being paid *cy pres*. In such a settlement, the defendant should be indifferent to how the settlement funds are allocated.

35 In contrast, in a claims made, no-cap settlement, unless the settlement agreement provided for an extension of the deadline for making claims, an extension of time for making claims would vary the settlement and not be a permissible administrative adjustment because the defendant would not be indifferent to having to pay more claims. See *Gray v. Great-West Lifeco Inc.*, 2011 MBQB 13 at paras. 41-42, 63.

36 Notwithstanding Ms. Lavier's appeal to the policy goals of the *Class Proceedings Act, 1992* of access to justice and behaviour modification, the court does not have the jurisdiction to rewrite the settlement agreement. In the court's approving or rejecting a settlement, the factors of achieving access to justice for plaintiffs and behaviour modification of the defendants may be unintelligible because in a settlement there is no finding of liability and who is to say whether the defendant is rationalizing the costs of the settlement as a nuisance payment and who is to know whether the payment was made without any plans to modify behaviour. In any event, the court has no power to vary a settlement agreement because of the Act's policy goals of access to justice and behaviour modification, which may or may not be achieved by a settlement of a class action.

37 In the case at bar, in my opinion, the proposed changes to the notice plan, the additional costs of administration, and the extension of the claims deadline go beyond administration of the settlement.

38 Although Class Counsel did not express its submissions in this way, Class Counsel would appear to be disappointed in the efficacy of the notice plan it negotiated and with the resultant

take-up of the settlement fund. Class Counsel's purpose was to establish a fund that would be exhausted without any proration of the compensation to Class Members and without any refund to MyTravel Canada. That purpose, which is a manifestation of loyalty to the class, however was not achieved. Class Counsel's loyalty to the Class Members is commendable, but once the settlement is reached and approved by the court, Class Counsel cannot improve and enhance the settlement to the detriment of the defendant. The Representative Plaintiff and the Class Members are bound by the settlement that has been approved by the court.

D. CONCLUSION

39 For the above Reasons, I dismiss Ms. Lavier's motion.

40 If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with MyTravel Canada within 10 days of the release of these Reasons for Decision followed by Ms. Lavier's submissions within a further 10 days.

P.M. PERELL J.

cp/e/qllxr/qlvxw/qlced

Case Name:

McCarthy v. Canadian Red Cross Society

PROCEEDING UNDER the Class Proceedings Act, 1992
Between
Michael McCarthy, Christine McCarthy and Derek Marchand, Plaintiffs, and
The Canadian Red Cross Society and The Attorney General of Canada, Defendants
And between
Michael McCarthy and Christine McCarthy, Plaintiffs, and
Connaught Laboratories Limited, Connaught Biologics Limited, Continental Pharma Cryosan Inc., North American Biologicals Inc. and The Attorney General of Canada, Defendants

[**2007] O.J. No. 2314**

158 A.C.W.S. (3d) 12

Court File No. 98-CV-143334

Ontario Superior Court of Justice

W.K. Winkler J.

Heard: February 5-6, 2007.
Judgment: June 8, 2007.

(22 paras.)

Civil procedure -- Parties -- Class or representative actions -- Certification -- The proposed settlement of the class action seeking compensation for those who had contracted Hepatitis C through the receipt of blood from the Canadian blood supply system and their family members was approved, the class action was certified, and the fees and disbursements sought by class counsel were approved -- The settlement was fair, reasonable, and in the best interests of the class.

Civil procedure -- Settlements -- Approval -- The proposed settlement of the class action seeking

compensation for those who had contracted Hepatitis C through the receipt of blood from the Canadian blood supply system and their family members was approved, the class action was certified, and the fees and disbursements sought by class counsel were approved -- The settlement was fair, reasonable, and in the best interests of the class.

Health law -- Blood services -- The proposed settlement of the class action seeking compensation for those who had contracted Hepatitis C through the receipt of blood from the Canadian blood supply system and their family members was approved, the class action was certified, and the fees and disbursements sought by class counsel were approved -- The settlement was fair, reasonable, and in the best interests of the class.

The plaintiffs and class counsel sought certification of the actions as class proceedings for the purpose of approval of a proposed settlement -- Class counsel further sought approval of their fees -- A class member brought a motion seeking intervenor status -- The action sought compensation for Canadians infected with Hepatitis C through the receipt of blood from the Canadian blood supply system and their family members -- HELD: The settlement was approved as being fair, reasonable, and in the best interests of the class -- The motion to intervene was dismissed -- The class definitions were not under-inclusive or particularly "arbitrary" in the sense that there was a basis for the distinction between siblings and spouses -- The fees and disbursements sought on the motion were approved -- In seeking the approval of the fee request, class counsel in all of the jurisdictions, in response to concerns expressed by the courts had undertaken to perform such administrative work as may be required to implement the settlement without any further fees or charges, save for disbursements.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, s. 14(1), s. 35

Counsel:

David Harvey, Peter L. Roy and **R. Douglas Elliott**, for the Plaintiffs.

Paul B. Vickery, John Spencer, William Knights and **Catharine Moore**, for the Defendants, The Attorney General of Canada.

L. Waxman, for the Children's Lawyer.

Laurie Redden, for the Public Guardian and Trustee.

David Baker and **John Plater**, for the Proposed Intervener Gary Gagnier.

W.A. Derry Millar, for Class Counsel.

W.K. WINKLER J.:--

Nature of the Motions

1 The plaintiffs and class counsel bring a number of motions in these actions. They seek certification of the actions as class proceedings against the Attorney General of Canada for the purpose of approval of a proposed settlement. A settlement was previously reached, and approved by this court, with the other named defendants. In addition, class counsel seek approval of their fees. Finally, a class member brings a motion seeking intervenor status.

2 As is now the norm in class action practice where multi-jurisdictional or national classes are concerned, the proposed settlement before the court is pan-Canadian in nature. Save for the intervenor motion, similar motions have been brought before the courts in Alberta, British Columbia and Quebec. All four courts must approve the proposed settlement without material changes or the settlement fails. The Attorney General has consented to the certification, conditional upon the approval of the settlement. Should the proposed settlement fail to receive approval from all courts, the parties will revert to their positions prior to these motions.

Settlement Approval

3 The putative classes are persons who were infected with Hepatitis C through the receipt of blood from the Canadian blood supply system and their family members. In 1999, this Court approved a settlement in a similar class action, albeit for a circumscribed period from January 1, 1986 to July 1, 1990 (see *Parsons v. Canadian Red Cross*, [1999] O.J. No. 3572 (S.C.J.)). The classes described in this action span time periods prior to and after the period at issue in *Parsons*. Under the terms of the settlement, the courts in Alberta, British Columbia and Quebec will have jurisdiction over the classes in their respective provinces and this Court will have jurisdiction over Ontario and the remaining provinces as well as claimants who may currently be residing outside the country.

4 Unlike the United States federal court system, Canada does not have specific legislation to deal with the multi-jurisdictional aspects of class proceedings where putative class actions in respect of the same subject matter have been commenced in the superior courts of two or more provinces. Fortunately, in keeping with the access to justice principle that underpins class action legislation, courts and counsel have developed practical *ad hoc* means of minimizing procedural obstacles where multi-jurisdictional settlement approvals are involved.

5 One practical approach to removing procedural hurdles utilized in this case, as it has been in other similar situations recently, is to ensure that courts have the ability to communicate with each

other in respect of the settlement approval and ancillary motions. Here, counsel have facilitated that communication by consent, meaning that judges are in a position to discuss with each other the aspects of the settlement. This is a positive development and should be encouraged in the future.

6 As a result of that ability to communicate, I have had the advantage of reading the Reasons of Ouellette J. in respect of the settlement approval motion brought in Alberta in the action styled as *Adrian v. Canada (Minister of Health)*, [2007] A.J. No. 619. Although his decision has been written in the context of Alberta legislation, the factors he has considered in granting approval of the settlement are equally applicable to the approval of a proposed settlement under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. I adopt the Reasons of Ouellette J. and I approve the settlement as being fair, reasonable and in the best interests of the class.

7 It is implicit in my decision to approve the settlement that the motion to intervene has been dismissed and that I have not accepted the objections made to the settlement. However, since those matters were not raised before Justice Ouellette, I have set out my Reasons in respect of each below.

Motion to Intervene

8 A motion was brought for leave to intervene by Gary Gagnier, a putative family class member. Mr. Gagnier's membership in the family class is based on the contention his brother would be a "Primarily-Infected Class Member" as defined in the settlement.

9 The issue underlying the motion for leave to intervene is essentially an objection to the settlement. There is no need for such a motion in order for a class member to posit an objection to the settlement. Although the *C.P.A.* does not expressly provide a process for receiving objections by class members, there is now a well-established practice of combining the settlement approval motion with a fairness hearing, on notice to the class, at which objections to the settlement are routinely received and considered by the court. The statutory authority for the receipt and consideration of objections is to be found in ss. 12 and 19(1) of the *C.P.A.*, which provide, respectively,

> 12. The court, on the motion of a party or class member, may make an order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.
>
> ...
>
> 19(1) At any time in a class proceeding, the court may order any party to give such notice as it considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding.

10 Similarly, the *C.P.A.* also provides for participation by class members, if necessary, under s. 14(1):

> 14(1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding.

11 Although the *C.P.A.* states in s. 35 that "the rules of court apply to class proceedings", the preceding provisions of the *C.P.A.*, specifically ss. 12, 14 and 19(1), render the general rule regarding intervenors inapplicable insofar as class members are concerned. Where a class member wishes to participate in a proceeding, the proper approach is to bring a motion under s. 14 of the *C.P.A.*. However, where the participation is sought simply for the purpose of making an objection to a proposed settlement, and a process for objections has been otherwise provided, there is no basis for granting a participation order.

12 As stated above, Mr. Gagnier's motion essentially concerns an objection to the settlement. Mr. Gagnier is infected with Hepatitis C. He claims that he became infected through contact with his brother who, it is claimed, was infected himself through a blood transfusion in the class period. While acceptance of his brother's claim will make Mr. Gagnier a family member under the settlement, he will not be entitled to compensation for infection on that basis. Only spouses will be able to obtain benefits for that manner of indirect infection under the terms of the settlement.

13 Secondarily infected siblings, unlike spouses, are not a defined class under the terms of the settlement. Mr. Gagnier's objection is that this is an arbitrary exclusion that should be revisited with the result that an additional class definition, relating to secondarily infected siblings, should be added to the proposed settlement. I am unable to accept that objection.

14 In my view, the class definitions are not under-inclusive or particularly "arbitrary" in the sense that there is a basis for the distinction between siblings and spouses. Since Hepatitis C is spread by the virus coming into contact with the blood of a previously uninfected person, it is common knowledge that blood transfusions are not the only means of transmission. Sexual activity is one such recognized means of transmission and certain reasonable assumptions can be made about spousal relationships in determining whom to include as class members entitled to compensation. On the other hand, siblings may be in no different position than friends, roommates, working colleagues or others who may come into occasional or even more frequent contact with an infected person.

15 In effect, the true arbitrary distinction would be the inclusion of a sibling class without the addition of classes comprised of similarly situated people. The parties in negotiating this settlement have drawn a line to circumscribe the class definitions and the line is neither unreasonable nor "arbitrary". In addition, quite apart from the reasonableness of the class definitions set out in the settlement, the amendment proposed by Mr. Gagnier would constitute a material change and is

beyond the power of the Court to impose on the parties in the context of a settlement approval. It would not amount to the creation of a sub-class within an already defined class, but would rather create a new class to include persons in the settlement who would not otherwise have been entitled to claim benefits for infection with Hepatitis C under this settlement.

16 In conclusion, I note that in Mr. Gagnier's motion, although ostensibly styled as a motion for leave to intervene, he does set out s. 14 of the *C.P.A.* as one of the grounds relied upon. Since it is primarily an objection to the settlement, I find no basis to grant a participation order under that provision and I cannot give effect to the objection.

Objections

17 The other objections received by the court relate to the allocation of the monies among the class members. Although I understand the concerns expressed by the objectors, it is trite law that settlements do not have to be perfect. Where there is a finite fund, decisions have to be made as to how best to allocate that fund. As this Court stated in respect of similar objections in *Fraser v. Falconbridge Ltd.*, [2002] O.J. No. 2383 (S.C.J.) at para 13:

> This settlement is conditional on having a distribution formula. Without this aspect the entire settlement, which no one objects to, would be lost to the plaintiff class. The test applied by the court is whether the settlement is fair and reasonable and in the best interests of the class as a whole. See: *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151. The court does not, and cannot, seek perfection in every aspect, nor can it insist that every person be treated equally. The settlement must, however, come within a zone or range of reasonableness.

Here, the allocation falls within that range of reasonableness.

Fees

18 The total fees being sought by class counsel across Canada in respect of the settlement is $37.29 million plus disbursements. From that amount, the Ontario class counsel seek approval of a fee in the amount of $11 million plus disbursements. In addition, Ontario class counsel are seeking a fee for the time and expenses of the representative plaintiff, Mr. McCarthy, in the amount of $75,000.

19 I will deal with the two requests made in Ontario in reverse order. I am unable to accede to the fee request on behalf of Mr. McCarthy. While I have no doubt his efforts and perseverance have benefited the class through the attainment of this settlement, the statute requires that type of commitment on the part of the representative plaintiff. As stated by McLachlin C.J.C. in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 41:

> ... the class representative must adequately represent the class. In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class ... (Emphasis added, internal citation omitted).

20 Mr. McCarthy has fulfilled his obligation to the class as their representative. However, a distinction must be drawn between the professional advisors to the class and the representative plaintiff with respect to fees. Where it is necessary for the representative plaintiff to incur out-of-pocket expenses in acting in that capacity, such as attendance at discoveries as one example, it may be appropriate for class counsel to reimburse such amounts and claim it as a disbursement subject to recovery on approval by the Court. While each case turns on its facts, in my view, it is not generally appropriate for a representative plaintiff to receive a payment for fees or for time expended in the pursuit of the action. Further, any payment made to a representative plaintiff in connection with the action, whether directly or indirectly, and whether for reimbursement or otherwise, must be disclosed to the Court.

21 The global fees being sought are subject to an agreement between class counsel and the Attorney General. However, such agreements do not eliminate the requirement of court approval. The main concern of the court in settlements in complex cases such as this is to ensure that claimants are able to access, in total, the benefits promised. This means that the administrative system proposed is of paramount importance. It must be adequate and complete at the point at which the administration of the settlement begins. Here, in seeking the approval of the fee request, class counsel in all of the jurisdictions, in response to concerns expressed by the courts have undertaken to perform such administrative work as may be required to implement the settlement without any further fees or charges, save for disbursements. In consideration of this, as well as the risk undertaken by counsel and the results achieved for the class, I am prepared to approve the fees and disbursements sought on this motion.

22 Orders to go accordingly.

W.K. WINKLER J.

cp/e/qlfxs/qlmxt/qlhcs

Case Name:

Nortel Networks Corp. (Re)

RE: IN THE MATTER OF a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, Applicants

[2010] O.J. No. 572

2010 ONSC 976

Court File No. 09-CL-7950

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: February 9, 2010.
Judgment: February 9, 2010.
Released: February 10, 2010.

(7 paras.)

Counsel:

D. Tay and J. Stam, for the Applicants.

B. Wadsworth, for the CAW.

A. Jacques, for Nortel Canada Corporation Continuing Employees.

S.R. Orzy, for the Bondholders.

K. Rosenberg and L. Harmer, for the Superintendent of Financial Institutions.

J. Carfagnini and G. Rubenstein, for Ernst & Young Inc., Monitor.

M. Zigler, for the Former Employees and Disabled Employees.

A. MacFarlane, for the Unsecured Creditors' Committee.

ENDORSEMENT

1 **G.B. MORAWETZ J.**:-- I am satisfied that the proposed Notice Procedures are adequate and will provide all interested persons with sufficient notice and time to prepare for a motion to approve the Settlement Agreement on March 3, 2010.

2 However, in order to ensure that maximum time is provided to all parties who wish to make representations, the Notice of Appearance Bar Date is to be modified from the proposed date to 10:30 a.m. (Eastern) Monday, March 1, 2010 with the hearing set for 10:30 a.m. Wednesday, March 3, 2010.

3 There is no question that certain aspects of the Settlement Agreement are being disputed by the main creditor groups; namely, the Bondholders and the UCC. In particular, these groups take exception to clause H.2 as contained in the Settlement Agreement which addresses the possibility of future changes to the *Bankruptcy and Insolvency Act*. This issue is not being debated today and nothing in this endorsement or the formal court order shall be considered to be determinative, in any way, of any aspect of this issue. This issue, and perhaps others, will be the subject of argument on March 3, 2010. It is desirable that the order today be neutral on this point.

4 The parties have agreed to delete paragraph 6 of the draft order. This is of assistance as it underscores that the substance of the matter remains to be determined on the motion to approve the Settlement Agreement and not on today's motion.

5 I consider the Notice Letter to be an information notice and, in my view, the amendment proposed by Mr. Zigler is appropriate as it provides information to the recipient of a portion of the Settlement Agreement that will be considered on March 3, 2010. The suggested language provided by Mr. Zigler is to be included in the Notice.

6 Further, irrespective of any determination to be made on the motion to approve the Settlement Agreement, all parties are in agreement that they will not challenge the Notice Procedures approved today.

7 An order shall issue to give effect to the foregoing, which will take into account any consequential changes.

G.B. MORAWETZ J.

cp/e/qllxr/qljxr

Court File No.: 59725

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	Tuesday, the 1st day
	)	
JUSTICE TAUSENDFREUND	)	of March, 2011

BETWEEN:

ALEXANDER DOBBIE and MICHAEL BENSON

Plaintiffs

- and -

ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC., RICHARD L. JOHNSON, KEITH W. MCMAHON, DOUGLAS A. BAILEY, FRANK LARSON, GARY COOLEY and, in their personal capacity and as Trustees of Arctic Glacier Income Fund, JAMES E. CLARK, ROBERT J. NAGY, GARY A. FILMON and DAVID R. SWAINE

Defendants

Proceeding under the *Class Proceedings Act, 1992*

ORDER

THIS MOTION made by the Plaintiffs, for an order certifying the action as a class proceeding, was argued during the hearing of October 4, 5, 6, 7 and 8, 2010 in London, Ontario.

ON READING the materials filed and on hearing the submissions of counsel for the Plaintiffs, for the Defendants, and for the Proposed Defendants Larson and Cooley, and for Reasons for Judgment released this day:

1. **THIS COURT ORDERS** that, for the purposes of this Order, the following definitions apply:

i. "Arctic" means Arctic Glacier Inc.;

ii. "Class Period" means the period from March 13, 2002 to September 16, 2008;

iii. "Defendants" means the Income Fund, Arctic and the Individual Defendants (as defined below);

iv. "Excluded Persons" means the Defendants and Larson and Cooley, members of the immediate families of the Individual Defendants and Larson and Cooley, any officers, directors or employees of the Income Fund or Arctic or any subsidiary of the Income Fund or Arctic or any subsidiary of the Income Fund or Arctic, any entity in respect of which any such person has a legal or *de facto* controlling interest, and any legal representatives, heirs, successors or assigns of any such person or entity;

v. "Income Fund" means Arctic Glacier Income Fund;

vi. "Individual Defendants" means the Defendants, Richard L. Johnson, Keith W. McMahon, Douglas A. Bailey, and, in their personal capacities and as trustees of the Income Fund, James E. Clark, Robert J. Nagy, Gary A. Filmon and David R. Swaine;

vii. the "OSA Order" means the Order issued on the concurrent motion of the Plaintiffs for leave to commence an action against the Defendants and Frank Larson and Gary Cooley under Part XXIII.1 of the *Securities Act*;

viii. the "Rule 21 Order" means the Order issued on the concurrent motion of the Defendants to strike portions of the Plaintiffs' pleading in this matter;

ix. "Securities Act" means the *Securities Act*, R.S.O. 1990, c. S.5;

x. "Trustees" means the Defendants Clark, Nagy, Filmon and Swaine, collectively.

2. **THIS COURT ORDERS** that the proceeding, as amended by the Rule 21 and *OSA* Orders, is hereby certified as a class proceeding pursuant to s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

3. **THIS COURT ORDERS** that the Class be defined as:

> All persons and entities, wherever they may reside or be domiciled, other than Excluded Persons, who acquired Units of the Income Fund during the period from March 13, 2002 to September 16, 2008.

4. **THIS COURT ORDERS** that the Plaintiffs Alexander Dobbie and Michael Benson are appointed as the representative plaintiffs for the Class.

5. **THIS COURT DECLARES** that the causes of action asserted on behalf of the Class are:

i. On behalf of the members of the Class ("Class Members") who purchased Units of the Income Fund during a period of distribution or distribution to the public pursuant to the Income Fund's prospectuses dated May 17, 2006 and January 25, 2007, statutory claims for misrepresentation in a prospectus pursuant to s.130 of the *Securities Act* and the analogous provisions of the securities legislation of each other Canadian jurisdiction;

ii. On behalf of Class Members who purchased Units of the Income Fund pursuant to any prospectus issued by the Income Fund during the Class Period, negligence *simpliciter*;

iii. On behalf of Class Members who acquired Units of the Income Fund in the secondary market, statutory claims for misrepresentation in secondary market disclosure documents pursuant to s.138.3 of the *Securities Act* and the analogous provisions of the securities legislation of each other Canadian jurisdiction;

iv. On behalf of all Class Members, negligent misrepresentation; and

v. On behalf of all Class Members, breach of trust.

6. **THIS COURT DECLARES** that the common issues are:

[1] Did some or all of the following disclosure documents of the Income Fund contain a misrepresentation?

(i) Prospectus dated March 13, 2002

(ii) Management's Discussion and Analysis and Interim Financial Statements, for the period ended March 31, 2002

(iii) Management's Discussion and Analysis and Interim Financial Statements, for the period ended June 30, 2002

(iv) Management's Discussion and Analysis and Interim Financial Statements, for the period ended September 30, 2002

(v) Annual Report, for the year ended December 31, 2002

(vi) Management's Discussion and Analysis, for the year ended December 31, 2002

(vii) Audited Annual Financial Statements, for the year ended December 31, 2002

(viii) Amended Annual Report, for the year ended December 31, 2002

(ix) Renewal Information Form, for the year ended December 31, 2002

(x) Management's Discussion and Analysis and Interim Financial Statements, for the period ended March 31, 2003

(xi) Prospectus dated June 17, 2003

(xii) Management's Discussion and Analysis and Interim Financial Statements, for the period ended June 30, 2003

(xiii) Prospectus dated September 29, 2003

(xiv) Prospectus dated October 8, 2003

(xv) Management's Discussion and Analysis and Interim Financial Statements, for the period ended September 30, 2003

(xvi) Management's Discussion and Analysis, for the year ended December 31, 2003

(xvii) Audited Annual Financial Statements, for the year ended December 31, 2003

(xviii) Annual Information Form, for the year ended December 31, 2003

(xix) Annual Report, for the year ended December 31, 2003

(xx) Management's Discussion and Analysis and Interim Financial Statements, for the period ended March 31, 2004

(xxi) Management's Discussion and Analysis and Interim Financial Statements, for

the period ended June 30, 2004

(xxii) Management's Discussion and Analysis and Interim Financial Statements, for the period ended September 30, 2004

(xxiii) Annual Information Form, for the year ended December 31, 2004

(xxiv) Annual Report, for the year ended December 31, 2004

(xxv) Management's Discussion and Analysis, for the year ended December 31, 2004

(xxvi) Audited Annual Financial Statements, for the year ended December 31, 2004

(xxvii) Management's Discussion and Analysis and Interim Financial Statements, for the period ended March 31, 2005

(xxviii) Management's Discussion and Analysis and Interim Financial Statements, for the period ended June 30, 2005

(xxix) Prospectus dated September 13, 2005

(xxx) Management's Discussion and Analysis and Interim Financial Statements, for the period ended September 30, 2005

(xxxi) Annual Information Form, for the year ended December 31, 2005

(xxxii) Annual Report, for the year ended December 31, 2005

(xxxiii) Management's Discussion and Analysis, for the year ended December 31, 2005

(xxxiv) Audited Annual Financial Statements, for the year ended December 31, 2005

(xxxv) Management's Discussion and Analysis and Interim Financial Statements, for the period ended March 31, 2006

(xxxvi) Prospectus dated May 17, 2006

(xxxvii) Management's Discussion and Analysis and Interim Financial Statements, for the period ended June 30, 2006

(xxxviii) Management's Discussion and Analysis and Interim Financial Statements, for the period ended September 30, 2006

(xxxix) Prospectus dated January 25, 2007

(xl) Annual Information Form, for the year ended December 31, 2006

(xli) Annual Report, for the year ended December 31, 2006

(xlii) Management's Discussion and Analysis, for the year ended December 31, 2006

(xliii) Audited Annual Financial Statements, for the year ended December 31, 2006

(xliv) Management's Discussion and Analysis and Interim Financial Statements, for the period ended March 31, 2007

(xlv) Management's Discussion and Analysis and Interim Financial Statements, for the period ended June 30, 2007

(xlvi) Management's Discussion and Analysis and Interim Financial Statements, for the period ended September 30, 2007

(xlvii) Press Release, dated March 6, 2008

(xlviii) Press Release, dated March 9, 2008

(xlix) Annual Information Form, for the year ended December 31, 2007

(l) Amended Annual Report, for the year ended December 31, 2007

(li) Management's Discussion and Analysis, for the year ended December 31, 2007

(lii) Audited Annual Financial Statements, for the year ended December 31, 2007

(liii) Management's Discussion and Analysis and Interim Financial Statements, for the period ended March 31, 2008

(liv) Press Release, dated August 7, 2008

(lv) Material Change Report, dated August 12, 2008

(lvi) Management's Discussion and Analysis and Interim Financial Statements, for the period ended June 30, 2008

[2] If the answer to [1] is yes, are any of the Defendants, Larson or Cooley liable to any Class Members pursuant to Section 138.3 of the *Securities Act* or the analogous provisions of the securities legislation of the other Canadian jurisdictions?

[3] If the answer to [2] is yes, what damages are payable by each such Defendant, Larson, or Cooley in respect of that liability?

[4] If the answer to [1] regarding the prospectuses of May 17, 2006 and/or of January 25, 2007 is yes, are any of the Defendants liable to any Class Members pursuant to s.130 of the *Securities Act* or the analogous provisions of the securities legislation of the other Canadian jurisdictions?

[5] If the answer to [4] is yes, what damages are payable by each such Defendant in respect of that liability?

[6] Did any of the Defendants (other than the Income Fund) owe any Class Members a duty of care? If so, which such Defendants owed what duty and to whom?

[7] If the answer to [6] is yes, did any such Defendants breach their duty of care? If so, which such Defendants breached their duty and how?

[8] If the answer to [7] is yes, did the breach of that duty of care cause damage to those Class Members? If so, what is the appropriate measure of that damage?

[9] In respect of the Class Members' negligent misrepresentation claim, what is the procedure whereby Class Members must demonstrate their individual reliance upon those Defendants' misrepresentations (if so found)?

[10] Did any Trustees commit a breach of trust?

[11] If so, what damages are payable by those Trustees to the Class Members in respect of their breach of trust?

[12] Is the Income Fund vicariously liable or otherwise responsible for the acts of the other Defendants, Larson or Cooley?

[13] Is Arctic Glacier Inc. vicariously liable or otherwise responsible for the acts of the other Defendants, Larson, or Cooley?

[14] Should any Defendants (other than the Income Trust) pay punitive damages to Class Members? If so, who, in what amount, and to whom?

[15] Should the Defendants pay the cost of administering and distributing the recovery? If so, which Defendants should pay, and how much?

7. **THIS COURT ORDERS** that the Plaintiffs' Litigation Plan is approved in the form attached hereto as Schedule A.

8. **THIS COURT ORDERS** that Class Members may only opt-out of the Class in accordance with the directions and prior to the date specified in the notice of certification to be approved by this Court

9. **THIS COURT ORDERS** that no other proceeding relating to the subject matter of this action may be commenced without leave of the Honourable Justice Tausendfreund obtained on notice to the parties hereto.

10. **THIS COURT ORDERS** that costs be awarded to the Plaintiffs for this motion, on consent, in the amounts of $12,500 payable by Larson, $12,500 payable by Cooley, and

$75,000 payable by the other Defendants jointly and severally, each sum inclusive of all fees, disbursements and interest, and payable within 30 days of the date of this Order.

THE HONOURABLE JUSTICE TAUSENDFREUND

ORDER ENTERED
77-72
SEP 13 2011

SCHEDULE "A"

PLAINTIFFS' LITIGATION PLAN

UPDATED AS OF MARCH 1, 2011

DEFINED TERMS

1. This Litigation Plan supercedes the Plaintiffs' Litigation Plan dated June 1, 2009. It is subject to further direction of the court and input of the defendants.

2. Capitalized terms that are not defined in this litigation plan ("Plan") have the meanings as particularized in the statement of claim.

CLASS COUNSEL

3. The Plaintiffs have retained Siskinds LLP ("Class Counsel") to prosecute this class action. Class Counsel has the requisite knowledge, skill, experience, and resources to prosecute the action to resolution.

THE COMPOSITION OF THE CLASS

4. The Plaintiffs seek to represent the Class, consisting of:

> all persons and entities, wherever they may reside or be domiciled, other than Excluded Persons, who acquired Units of Arctic Glacier during the period of March 13, 2002 to September 16, 2008.

5. "Excluded Persons" means:

> the Defendants and Larson and Cooley, members of the immediate families of the Individual Defendants and Larson and Cooley, any officers, directors or employees of the Income Fund or Arctic or any subsidiary of the Income Fund or Arctic, any entity in respect of which any such person has a legal or *de facto* controlling interest, and any legal representatives, heirs, successors or assigns of any such person or entity.

REPORTING AND COMMUNICATION

6. Class Counsel has posted information about the nature and status of this action on their website at http://www.classaction.ca/content/actions/arctic.asp (the "Website"). That information will be updated regularly. Copies of important, publicly available court

documents, court decisions, notices, documentation and other information relating to the action are or will be accessible from the Website.

7. The Website also:

(a) contains a communication webpage, a feature that permits putative Class Members to submit inquiries to Class Counsel which are sent directly to a designated member of Class Counsel team, who will promptly respond;

(b) lists a toll-free telephone direct dial number for a designated person with Class Counsel, permitting putative Class Members to make inquiries to a live person.

DOCUMENT MANAGEMENT

8. Class Counsel will use data management systems to organize, code and manage the documents produced by the defendants and all relevant documents in the Plaintiffs' possession. The agreement of Defendants' counsel will be sought to facilitate electronic exchange of documents.

LITIGATION SCHEDULE

9. The Plaintiffs will seek agreement on a litigation schedule going forward. In the alternative, the Plaintiffs will ask the Court, acting in its case management capacity, to fix such a schedule.

NOTICE PURSUANT TO SECTION 138.9 OF THE *OSA*

10. Pursuant to s. 138.9 of the *OSA*, the Plaintiff will:

(a) promptly issue a news release disclosing that leave has been granted to commence an action under Part XXIII.1;

(b) send a written notice to the OSC within seven days, together with a copy of the news release; and

(c) send a copy of the Proposed Claim, as filed, to the OSC.

11. Prior to the issuance of that notice, the Plaintiff will bring a motion for an order approving the form, content and manner of distribution of the s. 138.9 notice, and requiring the defendants to pay the costs thereof. In the event that the Court does not order the Defendants to pay those costs, then the Plaintiff will issue that notice at its own expense, reserving its right to seek recovery of these costs from the Defendants by order of the judge presiding at the trial of the common issues.

NOTICE OF CERTIFICATION OF THE ACTION AS A CLASS PROCEEDING AND THE OPT-OUT PROCEDURE

12. The Plaintiffs propose that a notice advising of the certification be circulated to advise Class Members, among other things, that:

(a) the court certified the action as a class proceeding;

(b) a person may only opt out of the class proceeding by sending a written election to opt out to the recipient designated by the court before a date fixed by the court;

(c) a person may not opt out of the class proceeding after the date fixed by the court; and

(d) if the common issues are resolved in favour of the Class Members, claimants may be required to register, file a claim and submit documentation to a designated person in order to be entitled to any compensation.

13. The Plaintiffs propose that the notice advising of certification, in a form approved by the court, be distributed and published in the following manner:

(a) posted by Class Counsel on the Website;

(b) provided by Class Counsel to any person who requests it.

(c) published once in the national edition of *The Globe and Mail,* Report on Business section;

(d) published once in the national edition of the *National Post*, Financial Post section;

(e) made available orally by recorded message at Class Counsel's toll-free line;

(f) sent electronically by Class Counsel to the list of brokers in Canada attached as Schedule 1 asking them to bring the Notice to the attention of their clients who acquired Arctic Glacier Units during the Class Period, and offering to reimburse the actual cost of doing so up to an amount per Class Member to be fixed by the Court, provided that the notice is mailed or emailed within 30 days of the request having been made;

(g) placed online at the websites listed on Schedule 2; and

(j) posted by Arctic Glacier in a prominent location on its website at www.arcticglacierinc.com.

14. The plaintiffs and defendants shall each pay 50 percent of the costs of the Notice Program. The successful parties at the trial of the common issues may seek to recover their share of these costs from the unsuccessful parties by order of the trial judge.

THE PLAINTIFFS' EXPERTS

15. To date, the Plaintiffs have retained Forensic Economics Inc., a firm of economists and damages experts to provide assistance on the efficiency of the market for trading in the Income Fund's units during the Class Period, as well as damages calculations.

16. Class Counsel has the expertise and resources to identify and retain appropriate expert assistance as the matter proceeds.

THE CLAIMS OF CLASS MEMBERS WHO RESIDE OUTSIDE OF ONTARIO

17. The Class may include persons who reside outside of Ontario. Therefore, the defendants may assert defences concerning conflicts of laws. The Plaintiffs assert that the laws of the Province of Ontario apply to the claims of each Class Member wherever resident. If the defendants dispute this assertion, the plaintiffs may seek an order amending the certification order to include a common issue determining whether Ontario law applies to the claims of all Class Members, and if not what factors are determinative in deciding which forum's law applies.

REFINEMENT OF COMMON ISSUES

18. Following the filing of statements of defence and the completion of discovery, the parties may seek an amendment of the order certifying this proceeding to deal with any necessary refinement to the common issues arising from those processes.

TRIAL OF THE COMMON ISSUES

19. The Plaintiffs will ask the court to hold the trial of the common issues six (6) months after the completion of the examinations for discovery and the production of the information required by the undertakings and any motions.

NOTICE OF THE RESOLUTION OF THE COMMON ISSUES

20. If the common issues, or some of them, are resolved in favour of the Plaintiffs, the court will be asked to:

(a) settle the form and content of the notice of resolution of the common issues;

(b) order that the notice of the resolution of the common issues be distributed to those Class Members who did not validly opt out;

(c) prescribe the information required from Class Members in order to make a claim under Part XXIII.1 of the *OSA*;

(d) prescribe the information and procedure required in order for Class Members to make a claim at common law; and

(e) set a date by which each Class Member will be required to file a claim.

21. The Plaintiffs propose that the notice of resolution advise Class Members, among other things:

(a) that the Plaintiffs were successful on the common issues, or some of them;

(b) that no Class Member will be entitled to any compensation unless a claim is filed in a prescribed manner by a fixed date;

(c) of the procedure to file a claim;

(d) that damages for each Class Member under Part XXIII.1 of the *OSA* will be calculated based on her/his/its trading particulars;

(e) that each Class Member will have the opportunity to review and, if necessary, provide information to correct the calculation of his/her/its damages under Part XXIII.1 of the *OSA* by accessing personal transaction particulars through the secure portion of the Website;

(f) that if the liability caps under Part XXIII.1 of the *OSA* are engaged, each Class Member will have the opportunity to come forward and establish the Defendants' liability at common law by proving the facts prescribed by the court, should the claimant choose to do so; and

(g) that their rights against the Defendants in relation to the misrepresentations contained in the Class Period disclosure documents will be deemed to have been finally adjudicated whether they submit a claim or not.

22. The Plaintiffs will ask the court to order that the notice of resolution of the common issues be distributed substantially in accordance with the procedure set out in paragraph 13 and 14 above.

CLAIMS PROCESS

23. The Plaintiffs will ask the court to appoint an Administrator, with such rights, powers and duties as the court directs, to receive and evaluate claims in accordance with the protocols approved by the court pursuant to section 25 of the *CPA*.

24. The Plaintiffs will ask the court to appoint one or more Referees with such rights, powers and duties as the court directs to conduct references in accordance with protocols approved by the court.

25. In order to simplify the claims process, the Administrator will, wherever practical, utilize:

(a) a paperless, electronic state-of-the-art web-based technology system which will include a secure database that is incorporated into the Website ("Database");

(b) standardized claims forms and filing procedures; and

(c) summary methods of introducing documentary evidence.

26. The court will be asked to set a deadline ("Claims Deadline") by which Class Members must file their claims with the Administrator.

27. Any person who does not file a claim with the Administrator before the Claims Deadline will not be eligible to participate in the damages assessment procedure and will not be entitled to recover any damages without leave of the court.

28. In order to file a claim, a person must, on or before the Claims Deadline:

(a) register on the Database, or by mail or by fax, with the Administrator; and

(b) submit such documentation to the Administrator as required by the court in support of the claim.

29. The types of records which shall constitute sufficient proof of a claim shall be specified in a protocol to be approved by the court and may include trading account statements, trade confirmation slips or other evidence confirming acquisition of Arctic Glacier Units, and, if applicable, evidence confirming disposition of the Arctic Glacier Units. The nature of the claims asserted suggest that such documentation will conclusively determine an individual's eligibility to file a claim and may be conclusive of their entitlement to damages, depending on the resolution of the common issues.

30. The name, address and amount claimed by each person who files a claim with the Administrator before the Claims Deadline shall be added to the Database and provided with an identification name and a password by the Administrator to permit the person access to her/his/its claims information in the Database.

31. If any claimant disagrees with the Administrator's decision relating to eligibility or calculation of damages, she/he/it may elect to have the Administrator's decision reviewed by the Referee within a time period fixed by the court. The Referee will carry out the review of the Administrator's decision in the least expensive, most summary manner possible in accordance with a protocol to be approved by the court. The Referee's decisions will be final. There shall be no right of appeal from the Referee's decision.

DAMAGES GENERALLY

32. Each Class Member may be entitled to:

(a) damages assessed in accordance with the assessment formula provided in s. 138.5 of the *OSA*, or a pro rated amount in respect thereof; or

(b) damages with respect to the claims for common law negligence, misrepresentation or conspiracy; and

(c) a share of the punitive damage award, if any, allocated as the court directs at the trial of the common issues; plus

(d) prejudgment interest; plus

(e) postjudgment interest.

STATUTORY DAMAGES UNDER PART XXIII.1 OF THE *OSA*

33. Part XXIII.1 of the *OSA* provides specific directions for the calculation of damages payable under those provisions. The Plaintiffs will ask the court at the common issues trial to determine the formula by which the damages of Class Members are to be calculated.

34. The Administrator will review the share purchase and sale data of each Class Member who makes a claim, and calculate damages under Part XXIII.1 of the *OSA* pursuant to the formulae ordered by the court in the judgment on the common issues.

35. In respect of each claimant who files a claim before the Claims Deadline, the Administrator shall make a decision, and promptly notify the claimant of the following:

(a) whether the person is an eligible claimant; and

(b) the amount of the person's damages calculated pursuant to Part XXIII.1 of the *OSA*.

36. The Administrator shall post its conclusions on the Database and/or communicate them electronically or in writing by mail or by fax to the persons affected in accordance with a protocol to be approved by the court.

37. Each claimant will be able to access the Administrator's decision and damage calculations by going to the Database and inputting an identification name and password. The Defendants determined by the court to be liable shall also have access to the Database.

38. After a claimant has reviewed damage calculations in the Database, the claimant, or the Defendants determined by the court to be liable, can advise the Administrator, within a time period fixed by the court, of any disagreement they may have with the information and/or calculations.

39. After being advised of a disagreement by the Class Member within the period fixed by the court, the Administrator shall consider any information provided by the claimant

and/or the Defendants and provide its decision on eligibility and/or the damages calculation.

COMMON LAW AND EQUITABLE DAMAGES

40. In the event that:

(a) the damages payable by the Defendants are capped pursuant to section 138.7 of the *OSA* and the Class Members' statutory recovery provides them with less than full compensation; and

(b) the court's findings at the completion of the common issues trial are such that there remain individual issues to be resolved in order for Class Members to prevail on their claims for breach of trust, negligence, misrepresentation or conspiracy at common law;

Class Members will be provided with the opportunity to come forward to prove any such individual issues and their damages pursuant to those causes of action.

41. The Class Members will be notified of the court's judgment following the Administrator's First Report to Court. Within 60 days of the date of notification Class Members will be required to give notice of their intention to proceed with a claim at common law by providing a statement of the facts (limited to those facts relating solely to the individual issues) on which they rely.

Small Claims (Under $25,000)

42. Class Members with remaining claims of less than $25,000 wishing to proceed with such claims will be required to file affidavit evidence setting out their evidence with respect to the individual issues remaining to be proven. Any Defendant may cross-examine an

affiant on their affidavit by written interrogatories (in accordance with rule 35 of the *Rules of Civil Procedure*) should they wish to challenge the evidence. The Referee will then make a decision with respect to the Class Member's claim on the basis of the affidavit and the answers to the written interrogatories.

Summary Claims ($25,000-$100,000)

43. Class Members with remaining claims worth between $25,000 and $100,000 wishing to proceed with such claims shall proceed in accordance with the simplified procedure set out in rule 76 of the *Rules of Civil Procedure* and will be required to file:

(a) an affidavit of documents prepared in accordance with rule 76.03; and

(b) affidavit evidence relating to the individual issues remaining to be proven.

44. The Referee may make decisions on the claims of the Class Member on the basis of the record, or may, in her or his discretion, conduct a summary trial of such claims in a manner analogous to the procedure contained in rule 76.12 of the *Rules of Civil Procedure.*

Full Claims (Over $100,000)

45. Class Members with remaining claims in excess of $100,000 wishing to proceed with such claims will be required to:

(a) serve on the Defendants an affidavit of documents prepared in accordance with rule 30.03 of the *Rules of Civil Procedure;* and

(b) attend for an oral examination for discovery (in accordance with rule 34), or provide answers to written interrogatories (in accordance with rule 35), as any Defendant wishing to examine them may elect.

46. The Referee may, in its discretion, make a decision on the individual issues based on the documentary and discovery evidence, or conduct a trial of such claims.

THE ADMINISTRATOR'S FIRST REPORT TO COURT

47. Once the Referee(s) has conducted all of the proceedings described above, the Administrator will present the findings to the court in the Administrator's Second Report to the Court.

48. The court will be asked:

(a) to review the Administrator's Second Report to the Court and enter judgment in accordance with it;

(b) decide whether or not to authorize the Administrator to make a distribution to the eligible Class Members; and

(c) discharge the Referee(s) from his or her mandate.

49. If the total available for distribution to Class Members is not fully disbursed to the Class Members within a period of time fixed by the court, the unpaid amount shall be distributed by the Administrator to designated recipients cy près in such manner and on such terms as the court may direct.

ADMINISTRATOR'S FINAL REPORT TO COURT

50. After the Administrator makes its final distribution, it shall report to the court and be discharged as the Administrator.

ORDERS RELATING TO CLASS COUNSEL'S FEES AND THE COSTS OF ADMINISTRATION

51. After the trial of the common issues, the Plaintiffs will ask the court to approve an agreement respecting fees and disbursements with Class Counsel. To the extent that the approved Class Counsel's fees, disbursements and GST are not completely paid by the costs recovered from the Defendants, the unpaid balance shall be a first charge on the total recovery and paid before any distribution to the Class Members.

52. The Plaintiffs will ask the court to order that the defendants pay all administration costs, including the costs of all notices associated with the process and the fees and disbursements of the Administrator and Referee as these costs are incurred. Absent that court order, the Plaintiffs will seek an order that these costs be paid out of the total recovery after payment of Class Counsel's fees and disbursements but before any distribution to the Class Members.

MOTIONS FOR DIRECTIONS

53. Any party, the Administrator or the Referees may at any time apply to the court for directions in respect of this Litigation Plan.

FURTHER ORDERS CONCERNING THIS PLAN

54. This Plan may be amended from time-to-time by directions given at case conferences or by further order of the court.

EFFECT OF THIS PLAN

55. This Plan shall be binding on all Class Members who do not opt out in accordance with the procedure directed by the court whether or not they make a claim under the Plan.

Schedule 1

Brokers

- Assante Corp
- BMO Nesbitt Burns
- Canaccord Capital
- CIBC Wood Gundy
- Desjardins Securities
- Dundee Wealth Management Inc.
- E*Trade Canada
- Edward Jones
- HSBC InvestDirect
- Investors Group Inc.
- National Bank Financial
- RBC Dominion Securities Inc.
- Raymond James Ltd.
- Scotia McLeod
- TD Waterhouse

Schedule 2

List of Websites

- Google Finance
- Google Finance Canada
- MarketWatch
- Stockhouse.ca
- TheStreet.com
- Google (in response to searches for "Arctic Glacier class action in Canada")
- Google.ca (in response to searches for "Arctic Glacier class action in Canada")
- Yahoo! (in response to searches for "Arctic Glacier class action in Canada")
- Yahoo! Canada (in response to searches for "Arctic Glacier class action in Canada")
- Live Search (in response to searches for "Arctic Glacier class action in Canada")

DOBBIE & BENSON v. ARCTIC GLACIER INCOME FUND, et al.

Court File No: 59725

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at London

ORDER
(Certification)

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Barristers & Solicitors
680 Waterloo Street
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London, ON N6A 3V8

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Lawyers for the Plaintiffs

Court File No.: CV-10-412963-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	Monday, the 26th day
	)	
JUSTICE PERELL	)	of March, 2012

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

ANDREW SORENSEN

Plaintiff

- and -

EASYHOME LTD., DAVID INGRAM, STEVE GOERTZ, CHRIS FREGREN, ~~DOUGLAS ANDERSON, DONALD K. JOHNSON, RONALD G. GAGE, ROBERT W. KORTHALS, NANCIE LATAILLE, DAVID LEWIS and JOSEPH ROTUNDA~~ et al.

Defendants

Proceeding under the *Class Proceedings Act*, 1992

ORDER

THIS MOTION made by the Plaintiffs was for an order certifying the action as a class proceeding.

ON CONSENT of the counsel for the Plaintiff and for the Defendants:

1. **THIS COURT ORDERS** that, for the purposes of this Order, the following definitions apply:

i. "EH" means easyhome Inc.;

ii. "Class Period" means the period from means the period from April 8, 2008 to October 14, 2010;

iii. "Defendants" means EH and the Individual Defendants;

iv. "Excluded Persons" means the past or present subsidiaries, officers, directors, partners, affiliates, legal representatives, heirs, predecessors, successors and assigns of EH, a predecessor of EH, and all family members of the current or former officers and directors of EH and any entity in which any Defendant has or had a controlling interest;

v. "Individual Defendants" means the defendants David Ingram, Steve Goertz and Chris Fregren;

vi. "OSA Order" means the Order issued on the concurrent motion of the Plaintiff for leave to commence an action against the Defendants and Frank Larson and Gary Cooley under Part XXIII.1 of the *Securities Act*; and

vii. "Securities Act" means the *Securities Act*, R.S.O. 1990, c. S.5.

2. **THIS COURT ORDERS** that the action, as amended by the OSA Order, is hereby certified as a class proceeding pursuant to s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

3. **THIS COURT ORDERS** that the Class be defined as:

> all persons, other than Excluded Persons, who acquired the securities of easyhome Ltd. during the Class Period.

4. **THIS COURT ORDERS** that the Plaintiff Andrew Sorensen is appointed as the representative plaintiff for the Class.

5. **THIS COURT DECLARES** that the causes of action asserted on behalf of the Class are:

i. On behalf of Class Members who acquired EH securities in the secondary market, statutory claims for misrepresentation in secondary market disclosure documents

pursuant to s.138.3 of the *Securities Act* and the analogous provisions of the securities legislation of each other Canadian jurisdiction.

6. **THIS COURT DECLARES** that the common issues are:

[1] Did some or all of the following disclosure documents of easyhome Ltd. contain a misrepresentation?

a. Management's Discussion and Analysis and Audited Annual Financial Statements the fiscal year ended December 31, 2007;

b. Management's Discussion and Analysis and Interim Financial Statements, for the 3 months ended March 31, 2008;

c. Management's Discussion and Analysis and Interim Financial Statements, for the 3 and 6 months ended June 30, 2008;

d. Management's Discussion and Analysis and Interim Financial Statements, for the 3 and 9 months ended September 30, 2008;

e. Management's Discussion and Analysis and Audited Annual Financial Statements for the fiscal year ended December 31, 2008;

f. Management's Discussion and Analysis and Interim Financial Statements, for the 3 months ended March 31, 2009;

g. Management's Discussion and Analysis and Interim Financial Statements, for the 3 and 6 months ended June 30, 2009;

h. Management's Discussion and Analysis and Interim Financial Statements, for the 3 and 9 months ended September 30, 2009;

i. Management's Discussion and Analysis and Audited Annual Financial Statements, for the fiscal year ended December 31, 2009;

j. Management's Discussion and Analysis and Interim Financial Statements, for the 3 months ended March 31, 2010; and

k. Management's Discussion and Analysis and Interim Financial Statements, for the 3 and 6 months ended June 30, 2010.

[2] If the answer to [1] is yes, are any of the Defendants liable to any Class Members pursuant to Section 138.3 of the *Securities Act* or the analogous provisions of the securities legislation of the other Canadian jurisdictions?

[3] If the answer to [2] is yes, what damages are payable by each such Defendant in respect of that liability pursuant to s 138.5 of the *Securities Act*?

[4] Should the Defendants pay the cost of administering and distributing the recovery? If so, which Defendants should pay, and how much?

7. **THIS COURT ORDERS** that the Plaintiff's Litigation Plan is approved in the form attached hereto as Schedule A.

8. **THIS COURT ORDERS** that Class Members may only opt-out of the Class in accordance with the directions and prior to the date specified in the notice of certification to be approved by this Court

9. **THIS COURT ORDERS** that no other proceeding relating to the subject matter of this action may be commenced without leave of the Honourable Justice Perell obtained on notice to the parties hereto.

10. **THIS COURT ORDERS** that no costs are payable with respect to this motion.

Perell J.

THE HONOURABLE JUSTICE PERELL

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

MAY - 3 2012

AS DOCUMENT NO.:
À TITRE DE DOCUMENT NO.:
PER / PAR:

SCHEDULE "A"

ANDREW SORENSEN

V.

EASYHOME LTD., DAVID INGRAM, STEVE GOERTZ and CHRIS FREGREN

PLAINTIFF'S AMENDED LITIGATION PLAN

AS OF MARCH 19, 2012

DEFINED TERMS

1. Capitalized terms that are not defined in this litigation plan ("Plan") have the meanings as particularized in the statement of claim.

CLASS COUNSEL

2. The Plaintiff has retained Siskinds LLP ("Class Counsel") to prosecute this class action. Class Counsel has the requisite knowledge, skill, experience, and resources to prosecute the action to resolution.

THE COMPOSITION OF THE CLASS

3. The Plaintiff seeks to represent the Class, consisting of:

> all persons, other than Excluded Persons, who acquired securities of easyhome Ltd. during the period of April 8, 2008 to October 15, 2010 (the "Class Period"), or such other definition as may be approved by the Court.

4. "Excluded Persons" means:

> The past or present subsidiaries, officers, directors, partners, affiliates, legal representatives, heirs, predecessors, successors and assigns of EH, a predecessor of EH, and all family members of Ingram, Goertz, Fregren, Anderson, Johnson, Gage, Korthals, Lataille, Lewis, Rotunda, Bowland, Gates, Voorheis and Appel, and any entity in which any of Defendant has or had a controlling interest.

REPORTING AND COMMUNICATION

5. Class Counsel has posted information about the nature and status of this action on their website at:

http://www.classaction.ca/classaction-ca/masterpage/actions/Securities/Current-Actions/EasyHome.aspx (the "Website").

That information will be updated regularly. Copies of important, publicly available court documents, court decisions, notices, documentation and other information relating to the action are or will be accessible from the Website.

6. The Website also:

(a) contains a communication webpage, a feature that permits putative Class Members to submit inquiries to Class Counsel which are sent directly to a designated member of the Class Counsel team, who will promptly respond; and

(b) lists a toll-free telephone direct dial number for a designated person with Class Counsel, permitting putative Class Members to make inquiries to a live person.

DOCUMENT MANAGEMENT

7. Class Counsel will use data management systems to organize, code and manage the documents produced by the Defendants and all relevant documents in the Plaintiff's possession. The agreement of Defendants' counsel will be sought to facilitate electronic exchange of documents.

LITIGATION SCHEDULE

8. The Plaintiff has brought a motion seeking leave to amend the statement of claim to assert the cause of action available under Part XXIII.1 of the Ontario *Securities Act,* R.S.O. 1990, c. S.5 ("*OSA*").

9. The Plaintiff intends to request that the class action case management judge schedule that motion on the same day(s) as the certification motion.

10. In the event that the motion for leave to commence a proceeding under Part XXIII.1 of the *OSA* is disposed of prior to the motion for certification, the Plaintiff may ask the court to order the Defendants to deliver their statements of defence before the hearing of the certification motion.

11. After disposition of the motion seeking leave pursuant to the *OSA* and the certification motion, absent agreement among counsel, the Plaintiff will ask the court to set a litigation schedule for the remaining steps in the action. The Plaintiff may ask from time to time that the litigation schedule be amended.

SECTIONS 138.8(4), 138.8(5) AND 138.9 OF THE *OSA*

12. Pursuant to s. 138.8(4) of the OSA, the Plaintiffs are providing to the OSC a copy of their motion record in support of their motion for leave under Part XXIII.1, and will provide to the OSC a copy of their factum in support of such motion promptly following the service of such factum upon the Defendants' counsel.

13. Promptly following the scheduling of the hearing of the Plaintiffs' motion for leave under Part XXIII.1, the Plaintiffs will provide the OSC with notice in writing of the date on which the motion for leave is scheduled to proceed, in accordance with s. 138.8(5) of the *OSA*.

14. In the event that leave is granted by the court under Part XXIII.1, then, pursuant to s. 138.9 of the *OSA*, the Plaintiff will:

(a) promptly issue a news release disclosing that leave has been granted to commence an action under Part XXIII.1;

(b) send a written notice to the OSC within seven days, together with a copy of the news release;

(c) send a copy of the Proposed Claim, as filed, to the OSC; and

(d) provide the OSC with notice in writing of the date on which the trial of the action is scheduled to proceed, at the same time such notice is given to each defendant.

15. Prior to the issuance of the notice referred to in paragraph 14(a) above, the Plaintiff will bring a motion for an order approving the form, content and manner of distribution of the s. 138.9 notice. If the Defendants are not required to pay the costs of notice, or the Plaintiff does not so request, then the Plaintiff will issue that notice at its own expense, reserving its right to seek recovery of these costs from the Defendants by order of the judge presiding at the trial of the common issues.

NOTICE OF CERTIFICATION OF THE ACTION AS A CLASS PROCEEDING AND THE OPT-OUT PROCEDURE

16. If the action is certified as a class proceeding, the Plaintiff proposes that a notice advising of the certification be circulated to advise Class Members, among other things, that:

(a) the court certified the action as a class proceeding;

(b) a person may only opt out of the class proceeding by sending a written election to opt out to the recipient designated by the court before a date fixed by the court;

(c) a person may not opt out of the class proceeding after the date fixed by the court; and

(d) if the common issues are resolved in favour of the Class Members, claimants may be required to register, file a claim and submit documentation to a designated person in order to be entitled to any compensation.

17. The notice advising of certification, in a form approved by the court, will be distributed and published in the following manner:

(a) posted by Class Counsel on the Website;

(b) provided by Class Counsel to any person who requests it;

(c) published once in the national edition of *The Globe and Mail,* Report on Business section;

(d) published once in the national edition of the *National Post*, Financial Post section;

(e) made available orally by recorded message at Class Counsel's toll-free line;

(f) sent electronically by Class Counsel to the list of brokers in Canada attached as Schedule 1 asking them to bring the Notice to the attention of their clients who acquired EH's securities during the Class Period;

(g) placed online at the websites listed on Schedule 2; and

(j) posted by EH in a prominent location on its website at http://www.easyhome.ca.

18. The Plaintiff may ask the court to order that the Defendants pay the costs of disseminating the notice in the above manner. Alternatively, the Plaintiff will pay the

costs in the first instance, reserving its right to seek recovery of these costs from the Defendants by order of the judge presiding at the trial of the common issues.

DISCOVERY

19. No later than 60 days following the close of pleadings, the parties will agree to a discovery plan meeting the requirements of Rule 29.1.03 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and thereafter will update the plan in accordance with Rule 29.1.04 thereof.

REFINEMENT OF COMMON ISSUES

20. Following the filing of statements of defence and the completion of discovery, the parties may seek an amendment of the order certifying this proceeding to deal with any necessary refinement to the common issues arising from those processes.

TRIAL OF THE COMMON ISSUES

21. The Plaintiff will ask the court to hold the trial of the common issues six (6) months after the completion of the examinations for discovery and the production of the information required by the undertakings and any motions.

NOTICE OF THE RESOLUTION OF THE COMMON ISSUES

22. Following the trial of the common issues, the Court will be asked to:

(a) settle the form and content of the notice of resolution of the common issues;

(b) order that the notice of the resolution of the common issues be distributed to those Class Members who did not validly opt out;

(c) prescribe the information required from Class Members in order to make a claim under Part XXIII.1 of the *OSA*;

(d) prescribe the information and procedure required in order for Class Members to make a claim at common law; and

(e) set a date by which each Class Member will be required to file a claim, if necessary.

23. If the common issues, or some of them, are resolved in favour of the Plaintiff, the Plaintiff will propose that the notice of resolution of the common issues advise Class Members, among other things:

(a) that the Plaintiff was successful on the common issues, or some of them;

(b) that no Class Member will be entitled to any compensation unless a claim is filed in a prescribed manner by a fixed date;

(c) of the procedure to file a claim;

(d) that damages for each Class Member under Part XXIII.1 of the *OSA* will be calculated based, at least in part, on her/his/its trading particulars;

(e) that each Class Member will have the opportunity to review and, if necessary, provide information to correct the calculation of his/her/its damages under Part XXIII.1 of the *OSA* by accessing personal transaction particulars through the secure portion of the Website;

(f) that each Class Member will have the opportunity to come forward and establish his/her/its damages by proving any facts, other than his/her/its trading particulars, as may be prescribed by the court; and

(g) that their rights against the Defendants in relation to the Representation will be deemed to have been finally adjudicated whether they submit a claim or not.

24. The Plaintiff will ask the court to order that the notice of resolution of the common issues be distributed substantially in accordance with the procedure set out in paragraph 17 above. This notice, to the extent possible, should be sent directly to each Class Member.

CLAIMS PROCESS

25. The Plaintiff will ask the court to appoint an Administrator, with such rights, powers and duties as the court directs, to receive and evaluate claims in accordance with the protocols approved by the court pursuant to s. 25 of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 ("*CPA*").

26. The Plaintiff will ask the court to appoint one or more Referees with such rights, powers and duties as the court directs to conduct references in accordance with protocols approved by the court.

27. In order to simplify the claims process, the Administrator will, wherever practical, utilize:

(a) a paperless, electronic state-of-the-art web-based technology system which will include a secure database that is incorporated into the Website ("Database");

(b) standardized claims forms and filing procedures; and

(c) summary methods of introducing documentary evidence.

28. The court will be asked to set a deadline ("Claims Deadline") by which Class Members must file their claims with the Administrator.

29. Any person who does not file a claim with the Administrator before the Claims Deadline will not be eligible to participate in the damages assessment procedure and will not be entitled to recover any damages without leave of the court.

30. In order to file a claim, a person must, on or before the Claims Deadline:

(a) register on the Database, or by mail or by fax, with the Administrator; and

(b) submit such documentation to the Administrator as required by the court in support of the claim.

31. The types of records which shall constitute sufficient proof of a claim shall be specified in a protocol to be approved by the court and may include trading account statements, trade confirmation slips or other evidence confirming acquisition of the EH securities, and, if applicable, evidence confirming disposition of the EH securities.

32. The name, address and amount claimed by each person who files a claim with the Administrator before the Claims Deadline shall be added to the Database and provided with a user name and a password by the Administrator to permit the person access to her/his/its claims information in the Database.

33. If any claimant disagrees with the Administrator's decision relating to eligibility or calculation of damages, she/he/it may elect to have the Administrator's decision reviewed by the Referee within a time period fixed by the court. The Referee will carry out the review of the Administrator's decision in the least expensive, most summary manner possible in accordance with a protocol to be approved by the court. The Referee's decisions will be final. There shall be no right of appeal from the Referee's decision.

DAMAGES GENERALLY

34. Each Class Member may be entitled to:

(a) damages assessed in accordance with the assessment formula provided in s. 138.5 of the *OSA*, or a pro rated amount in respect thereof; plus

(b) prejudgment interest; plus

(c) postjudgment interest.

STATUTORY DAMAGES UNDER PART XXIII.1 OF THE *OSA*

35. Part XXIII.1 of the *OSA* provides specific directions for the calculation of damages payable under those provisions. The Plaintiff will ask the court at the common issues trial to determine the formula by which the damages of Class Members are to be calculated.

36. The Administrator will review the share purchase and sale data of each Class Member who makes a claim, and calculate damages under Part XXIII.1 of the *OSA* pursuant to the formulae ordered by the court in the judgment on the common issues.

37. In respect of each claimant who files a claim before the Claims Deadline, the Administrator shall make a decision, and promptly notify the claimant of the following:

(a) whether the person is an eligible claimant; and

(b) the amount of the person's damages calculated pursuant to Part XXIII.1 of the *OSA*.

38. The Administrator shall post its conclusions on the Database and/or communicate them electronically or in writing by mail or by fax to the persons affected in accordance with a protocol to be approved by the court.

39. Each claimant will be able to access the Administrator's decision and damage calculations by going to the Database and inputting a user name and password. The Defendants determined by the court to be liable shall also have access to the Database.

40. After a claimant has reviewed damage calculations in the Database, the claimant, or the Defendants determined by the court to be liable, can advise the Administrator, within a time period fixed by the court, of any disagreement they may have with the information and/or calculations.

41. After being advised of a disagreement by the Class Member within the period fixed by the court, the Administrator shall consider any information provided by the claimant and/or the Defendants and provide its decision on eligibility and/or the damages calculation.

THE ADMINISTRATOR'S FIRST REPORT TO COURT

42. Once the Referee(s) has conducted all of the proceedings described above, the Administrator will present the findings to the court in the Administrator's First Report to the court.

43. The court will be asked:

(a) to review the Administrator's First Report to the court and enter judgment in accordance with it;

(b) decide whether or not to authorize the Administrator to make a distribution to the eligible Class Members; and

(c) discharge the Referee(s) from his or her mandate.

44. If the total available for distribution to Class Members is not fully disbursed to the Class Members within a period of time fixed by the court, the unpaid amount shall be distributed by the Administrator to designated recipients cy près in such manner and on such terms as the court may direct.

ADMINISTRATOR'S FINAL REPORT TO COURT

45. After the Administrator makes its final distribution, it shall report to the court and be discharged as the Administrator.

ORDERS RELATING TO CLASS COUNSEL'S FEES AND THE COSTS OF ADMINISTRATION

46. After the trial of the common issues, the Plaintiff will ask the court to approve an agreement respecting fees and disbursements with Class Counsel. To the extent that the approved Class Counsel's fees, disbursements and GST are not completely paid by the costs recovered from the Defendants, the unpaid balance shall be a first charge on the total recovery and paid before any distribution to the Class Members.

47. The Plaintiff will ask the court to order that the Defendants pay all administration costs, including the costs of all notices associated with the process and the fees and disbursements of the Administrator and Referee as these costs are incurred. Absent that court order, the Plaintiff will seek an order that these costs be paid out of the total recovery after payment of Class Counsel's fees and disbursements but before any distribution to the Class Members.

FURTHER ORDERS CONCERNING THIS PLAN

48. This Plan may be amended from time-to-time by directions given at case conferences or by further order of the court.

EFFECT OF THIS PLAN

49. This Plan shall be binding on all Class Members who do not opt out in accordance with the procedure directed by the court whether or not they make a claim under the Plan.

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

ORDER
(Certification)

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Lawyers for the Plaintiff

Court File No. 2198/10 CP

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE) Tuesday, THE 22nd DAY
JUSTICE H. A. RADY) OF December, 2011

BETWEEN:

NOR-DOR DEVELOPMENTS LIMITED & DEBORAH BOZH

Plaintiffs

- and -

REDLINE COMMUNICATIONS GROUP INC., REDLINE COMMUNICATIONS, INC., THOMAS HEARNE, NANCY ORR, MAJED SIFRI, MAHESH VAIDYA, PHILIPPE DE GASPÉ BEAUBIEN III, TIMOTHY DIBBLE, MIHNEA MOLDOVEANU, DAVID ANDREWS & KPMG LLP

Defendants

Proceeding under the *Class Proceedings Act, 1992*

ORDER

THIS MOTION, made by the Plaintiffs for an Order that the within proceeding be certified as a class proceeding for settlement purposes only, and that the Settlement Agreement be approved, was heard on November 21, 2011, at the London Courthouse, 80 Dundas Street, London, Ontario.

ON READING the materials filed, including the Settlement Agreement dated September 6, 2011, attached hereto as **Schedule "A"** (the "Settlement Agreement") and on hearing submissions of counsel for the Plaintiffs and counsel for the Defendants:

1. **THIS COURT DECLARES** that except as otherwise stated, this Order incorporates and adopts the definitions set out in the Settlement Agreement.

2. **THIS COURT DECLARES** that the Settlement Agreement, in its entirety, forms part of this Order and is binding upon the Representative Plaintiffs, upon all Class Members who

do not opt out of the Class in accordance with the Approval Notices (as defined below), and upon the Defendants.

3. **THIS COURT ORDERS** that the within proceeding be certified as a class proceeding, for the purpose of settlement only, pursuant to the *Class Proceedings Act, 1992,* S.O. 1992, c.6, ss.2 and 5 ("*CPA*").

4. **THIS COURT ORDERS** that the Class be defined as:

> All persons, other than Excluded Persons and Opt-Out Parties, who acquired Eligible Shares.

5. **THIS COURT ORDERS** that Nor-Dor Developments Limited and Deborah Bozh are appointed as Representative Plaintiffs for the Class.

6. **THIS COURT ORDERS** that the causes of action asserted on behalf of the Class are negligence, negligent misrepresentation, conspiracy (as against the Defendants RCG, RCI, Sifri and Hearne), oppression pursuant to s. 241(3) of the *Canada Business Corporations Act*, RS, 1985, c C-44, as amended, and prospectus misrepresentation pursuant to s. 130 of the *Securities Act,* RSO 1990, c S.5, as amended ("*OSA*").

7. **THIS COURT ORDERS** that the within proceeding be certified on the basis of the following common issue:

> Did Redline's Class Period disclosure documents contain one or more misrepresentations relating to the preparation of its financial statements in accordance with Canadian generally accepted accounting principles?

8. **THIS COURT DECLARES** that the relief sought on behalf of the Class is the approval and implementation of the Settlement Agreement.

9. **THIS COURT DECLARES** that the Settlement Agreement is fair, reasonable and in the best interest of the Class.

10. **THIS COURT ORDERS** that the Settlement Agreement is approved pursuant to s.29 of the *CPA*.

11. **THIS COURT ORDERS** that the Settlement Agreement shall be implemented in accordance with its terms.

12. **THIS COURT DECLARES** that the Plan of Allocation, attached hereto as **Schedule "B"**, is hereby approved as fair and reasonable and that the Settlement Amount shall be distributed in accordance with the Plan of Allocation after the payment of Class Counsel Fees and Administration Expenses.

13. **THIS COURT ORDERS** that the Plan of Notice attached hereto as **Schedule "C"** is hereby approved.

14. **THIS COURT ORDERS** that the form and content of the Second Long Form Notice, attached hereto as **Schedule "D"**, is hereby approved.

15. **THIS COURT ORDERS** that the form and content of the Second Short Form Notice, attached hereto as **Schedule "E"** (together with the Second Long-Form Notice, the "Approval Notices"), is hereby approved.

16. **THIS COURT ORDERS** that the Opt-Out Form, substantially in the form attached hereto as **Schedule "F"**, is hereby approved.

17. **THIS COURT ORDERS** that the Claim Form, substantially in the form attached hereto as **Schedule "G"**, is hereby approved.

18. **THIS COURT ORDERS** that the Approval Notices, Claim Form and Opt-Out Form shall be disseminated in accordance with the Plan of Notice, attached hereto as **Schedule "C"**.

19. **THIS COURT ORDERS** that a person who would otherwise be a Class Member may opt out in accordance with the directions contained in the Second Long Form Notice attached hereto as **Schedule "D"**.

20. **THIS COURT ORDERS** that on notice to the Court but without further order of the Court, the parties to the Settlement Agreement may agree to reasonable extensions of time to carry out any of the provisions of the Settlement Agreement.

21. **THIS COURT ORDERS AND DECLARES** that, other than as provided in s. 4.1 (1)(e) of the Settlement Agreement, the Releasees have no responsibility for and no liability whatsoever with respect to the administration of the Settlement Agreement.

22. **THIS COURT ORDERS** that if the Settlement Agreement is terminated pursuant to any rights of termination therein, then:

    (a) the Order (except for paragraphs 1, 21 and 22 herein) shall be set aside, be of no further force or effect, and be without prejudice to any party;

    (b) the Action shall be immediately decertified as a class proceeding pursuant to Section 10 of the *CPA*, without prejudice to the Representative Plaintiffs' ability to reapply for certification and the Defendants' ability to oppose certification on any and all grounds; and

    (c) each party to the Action shall be restored to his, her or its respective position in the Action as it existed immediately prior to the execution of the Settlement Agreement.

23. **THIS COURT ORDERS AND DECLARES** that, upon the Effective Date, the Releasors shall release and discharge, and shall be conclusively deemed to have fully, finally and forever released and discharged the Releasees from the Released Claims.

24. **THIS COURT ORDERS** that, upon the Effective Date, the Action shall be dismissed against the Defendants with prejudice and without costs.

THE HONOURABLE
JUSTICE H. A. RADY

ORDER ENTERED

NOV 25 2011

SCHEDULE "A"

SETTLEMENT AGREEMENT

Made as of the 6th day of September, 2011

Between

Nor-Dor Developments Limited
Deborah Bozh

and

Redline Communications Group Inc.
Redline Communications, Inc.,
Thomas Hearne,
Nancy Orr,
Majed Sifri,
Mahesh Vaidya
Philippe De Gaspé Beaubien III
Timothy Dibble,
Mihnea Moldoveanu
David Andrews
KPMG LLP

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SETTLEMENT AGREEMENT

Subject to the approval of the Court as provided herein, the Parties hereby stipulate and agree that, in consideration of the promises and covenants set forth in the Agreement and upon the Approval Order approving the Settlement and directing the implementation of the terms and conditions of the Settlement as set forth in the Agreement becoming final, the Action will be settled and compromised on the terms and conditions contained herein.

SECTION 1 – RECITALS

1.1 WHEREAS:

A. Nor-Dor Developments and Deborah Bozh commenced the Action against the Defendants alleging, among other things, that the Defendants represented that the financial statements of Redline were prepared and reported in accordance with GAAP and fairly represented in all material respects Redline's financial results, and that such representations were misleading and/or false.

B. The Defendants have denied and continue to deny the Plaintiffs' claims in the Action, have denied any wrongdoing or liability to the Plaintiffs of any kind, and have raised numerous affirmative defences and would raise numerous other defences had the Action not been settled.

C. Based upon an analysis of the facts and law applicable to the Plaintiffs' claims, and taking into account the extensive burdens, risks and expense of continued litigation, including any potential appeals, as well as the fair, cost-effective and assured method of resolving the claims of the Class, the Plaintiffs, with the benefit of advice from Class Counsel, concluded that the Agreement is fair and reasonable, and in the best interest of the Class.

D. The Defendants similarly have concluded that the Agreement is desirable in order to avoid the time, risk and expense, including the executive time and expense, of continuing with the litigation, including any potential appeals, and to resolve finally and completely the pending claims of the Class.

E. The Plaintiffs and Defendants have engaged in hard-fought litigation and negotiations.

F. The Parties intend to and hereby do finally resolve the Action and the claims that were or could have been asserted in it, subject to the approval of the Court, without any admission of liability or wrongdoing whatsoever.

G. The Plaintiffs assert that they are suitable representatives for the Class and will seek to be appointed as the representative plaintiffs.

NOW, THEREFORE, FOR VALUE RECEIVED, the Parties stipulate and agree, subject to the approval of the Court, that any and all claims made or that could have been made in the Action shall be finally settled and resolved on the terms and conditions set forth in the Agreement.

SECTION 2 – DEFINITIONS

2.1 Definitions

In this Settlement Agreement, including the recitals hereto:

(1) ***Action*** means *Nor-Dor Developments Limited & Deborah Bozh v. Redline Communications Group Inc., et al.* brought in the Ontario Superior Court of Justice, Court File No. 2198/10 CP (London).

(2) ***Administration Expenses*** means all fees, disbursements, expenses, costs, taxes and any other amounts incurred or payable relating to approval, implementation and administration of the Settlement including the costs of publishing and delivering notices, the fees, disbursements and taxes paid to the Administrator, and any other expenses approved by the Court which shall all be paid from the Settlement Amount. For greater certainty, Administration Expenses include the Non-Refundable Expenses for the purposes of the Agreement but do not include Class Counsel Fees.

(3) ***Administrator*** means the third-party firm selected at arm's length by Class Counsel and appointed by the Court to administer the Agreement, and any employees of such firm.

(4) ***Agreement*** means this agreement, including the recitals.

(5) ***AIM*** means the Alternative Investment Market of the London Stock Exchange.

(6) ***Approval Hearing*** means the hearing of the Second Motion by the Court.

(7) ***Approval Order*** means the order made by the Court in connection with the motion for approval of the Settlement, such order to be substantially in the form agreed to by the Parties or fixed by the Court.

(8) ***Authorized Claimant*** means any Class Member who has submitted a completed Claim Form which, pursuant to the terms of the Agreement, has been approved for compensation by the Administrator.

(9) ***Claim Form*** means the form to be approved by the Parties and the Court which, when completed and submitted in a timely manner to the Administrator, constitutes a Class Member's claim for compensation pursuant to the Settlement.

(10) ***Claims Bar Deadline*** means the date by which each Class Member must file a Claim Form and all required supporting documentation with the Administrator, which date shall be ninety (90) days after the date on which the Second Notice is published.

(11) ***Class or Class Members*** means all persons, other than Excluded Persons and Opt-Out Parties, who acquired Eligible Shares.

(12) ***Class Counsel*** means Siskinds LLP.

(13) ***Class Counsel Fees*** means the fees, disbursements, costs, HST and other applicable taxes or charges of Class Counsel.

(14) ***Class Period*** means the period from December 06, 2006 up to and including March 15, 2010.

(15) ***Collateral Agreement*** means the agreement to be executed in a form agreed to by the Parties, which sets the Opt-Out Threshold, the terms of which shall be kept confidential unless the Court requires disclosure thereof.

(16) ***Contributing Parties*** means Redline, KPMG and the Insurer.

(17) ***Court*** means the Ontario Superior Court of Justice.

(18) ***CPA*** means the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, as amended.

(19) ***Defendants*** means Redline Communications Group Inc., Redline Communications, Inc., Thomas Hearne, Nancy Orr, Majed Sifri, Mahesh Vaidya, Philippe De Gaspé Beaubien III, Timothy Dibble, Mihnea Moldoveanu, David Andrews and KPMG LLP, the defendants in the Action.

(20) ***Effective Date*** means the date on which both of the following occur or have occurred:

(a) the Contributing Parties have paid the Settlement Amount into the Escrow account; and

(b) the Defendants' right to terminate the Settlement has expired and the Approval Order becomes a Final Order.

(21) ***Eligible Shares*** means the Shares acquired by a Class Member or Opt-Out party during the Class Period and still held by by the party on March 15, 2010.

(22) ***Escrow Account*** means the interest bearing trust account with one of the Canadian Schedule 1 banks in Ontario initially under the control of Siskinds LLP and then transferred to the control of the Administrator within ten (10) days of the Effective Date.

(23) ***Escrow Settlement Amount*** means the Settlement Amount plus any interest accruing thereon, whether on account of late payment into the Escrow Account as provided in section 5.2, or as a result of investment thereof after payment of all Non-Refundable Expenses.

(24) ***Excluded Persons*** means the Defendants and Redline's past or present subsidiaries, officers, directors, affiliates, legal representatives, heirs, predecessors, successors and assigns, and any member of the Individual Defendants' families and any entity in which any of them has or had a legal or *de facto* controlling interest.

(25) ***Final Order*** means any order contemplated by this Agreement from which no appeal lies or in respect of which any right of appeal has expired without the initiation of proceedings in respect of that appeal such as the delivery of a notice of motion for leave to appeal or notice of appeal.

(26) ***First Motion*** means a motion brought before the Court for an order:

(i) setting the date for the hearing of the Second Motion in the Court;

(ii) approving the form of and authorizing the manner of publication and dissemination of the First Notice; and

(iii) appointing Siskinds LLP to manage the Escrow Account;

the form of which order shall be agreed by the parties or fixed by the Court.

(27) ***First Notice*** means notice to the Class of the Second Motion in a form to be agreed by the Parties and approved by the Court.

(28) ***GAAP*** means Canadian generally accepted accounting principles;

(29) ***Individual Defendants*** means Thomas Hearne, Nancy Orr, Majed Sifri, Mahesh Vaidya, Philippe De Gaspé Beaubien III, Timothy Dibble, Mihnea Moldoveanu, and David Andrews.

(30) ***Insurer*** means Chubb Insurance Company of Canada.

(31) ***KPMG*** means the defendant, KPMG LLP.

(32) ***Newspapers*** means the following newspaper publications in Canada: National Post, Globe & Mail and La Presse.

(33) ***Non-Refundable Expenses*** means certain Administration Expenses stipulated in section 4.1(1) of the Agreement to be paid from the Settlement Amount.

(34) ***Opt-Out Deadline*** means the date sixty (60) days after the date on which the Second Notice is published in the Newspapers.

(35) ***Opt-Out Form*** means the document in a form to be approved by the Court that if completed and submitted by a Class Member to the Administrator before the expiry of the Opt-Out Deadline, excludes that Class Member from the Class and participation in the Settlement.

(36) ***Opt-Out Party*** means any person who would otherwise be a Class Member who opts out of the Class.

(37) ***Opt-Out Threshold*** means the total number of Eligible Shares held by all Opt-Out Parties particularized in the Collateral Agreement.

(38) ***Parties*** means the Plaintiffs and the Defendants in the Action.

(39) ***Plaintiffs*** means Nor-Dor Developments Limited and Deborah Bozh, the plaintiffs in the Action.

(40) ***Plan of Allocation*** means the distribution plan stipulating the proposed implementation and administration of the Settlement which shall be in a form agreed to by the Parties and approved by the Court.

(41) ***Plan of Notice*** means the plan for disseminating the First Notice and the Second Notice to the Class which shall be in a form agreed to by the Parties and approved by the Court.

(42) ***RCG*** means Redline Communications Group Inc.

(43) ***RCI*** means Redline Communications, Inc.

(44) ***Redline*** means, collectively, Redline Communications Group Inc., and Redline Communications, Inc.

(45) ***Redline Defendants*** means Redline Communications Group Inc., Redline Communications, Inc., Thomas Hearne, Nancy Orr, Majed Sifri, Mahesh Vaidya, Philippe De Gaspé Beaubien III, Timothy Dibble, Mihnea Moldoveanu and David Andrews.

(46) ***Released Claims*** (or ***Released Claim*** in the singular) means any and all manner of claims, demands, actions, suits, causes of action, whether class, individual or otherwise in nature, whether personal or subrogated, damages whenever incurred, and liabilities of any nature whatsoever, including interest, costs, expenses, Administration Expenses, penalties, Class Counsel Fees and lawyers' fees, known or unknown, suspected or unsuspected, in law, under statute or in equity, that Releasors, or any of them, whether directly, indirectly, derivatively, or in any other capacity, ever had, now have, or hereafter can, shall, or may have as against the Releasees, relating in any way to the purchase, sale, pricing, marketing or distributing of Eligible

Shares during the Class Period, or to any representations made by the Releasees during the Class Period to anyone concerning Redline, its operations or the Eligible Shares, or relating to any conduct alleged (or which could have been alleged) in the Action, including, without limitation, any such claims which have been asserted, would have been asserted or could have been asserted as a result of the purchase of Eligible Shares in the Class Period.

(47) ***Releasees*** means the Defendants, their insurers (including, but not limited to, the Insurer), their respective past and present affiliates, subsidiaries and associated partnerships (including, but not limited to, KPMG International and its member firms), and all of their respective past and present directors, officers, partners, employees, trustees, servants, consultants, underwriters, advisors, lawyers, representatives, successors, assigns and their heirs, executors, administrators, successors and assigns.

(48) ***Releasors*** means, jointly and severally, the Plaintiffs, the Class Members (excluding Opt-Out Parties), including any person having a legal and/or beneficial interest in the Eligible Shares purchased or acquired by these Class Members, and their respective past and present directors, officers, employees, agents, trustees, servants, consultants, underwriters, advisors, representatives, heirs, executors, attorneys, administrators, guardians, estate trustees, successors and assigns, as the case may be.

(49) ***Second Long Form Notice*** means notice to the Class of the Approval Order, in a form to be agreed by the Parties and approved by the Court.

(50) ***Second Motion*** means a motion brought by the Plaintiffs in the Court for the Approval Order.

(51) ***Second Short Form Notice*** means notice to the Class of the Approval Order, in a form to be agreed by the Parties and approved by the Court.

(52) ***Settlement*** means the settlement provided for in the Agreement.

(53) ***Settlement Amount*** means $3,600,000 inclusive of the Administration Expenses, Class Counsel Fees, and any other costs or expenses related to the Action or the Settlement.

(54) ***Shares*** means common shares of Redline Communications, Inc. and/or Redline Communications Group Inc.

(55) ***TSX*** means the Toronto Stock Exchange.

SECTION 3 – APPROVAL AND NOTICE PROCESS

3.1 First Motion and Notice

(1) The Plaintiffs will, as soon as is reasonably possible following the execution of the Agreement, bring the First Motion. Subject to the content of the First Notice and the order sought by the First Motion being satisfactory to the Defendants, and for the purpose of this Settlement Agreement only, the Defendants will consent to the order being sought.

(2) Class Counsel shall cause the First Notice to be published in accordance with the directions of the Court and the costs of so doing shall be paid as a Non-Refundable Expense as provided in section 4.1(1)(b).

3.2 Second Motion and Notice

(1) The Plaintiffs will thereafter bring the Second Motion before the Court in accordance with its directions. Subject to the Court's approval, and subject to the content of the Second Long Form Notice and the Approval Order being satisfactory to the Defendants, and for the purpose of this Settlement Agreement only, the Defendants will consent to the Approval Order.

(2) Upon the granting of the Approval Order, Class Counsel or the Administrator, as the case may be, shall cause the Second Short Form Notice and the Second Long Form Notice to be published in accordance with the Plan of Notice as approved by the Court and the costs of so doing shall be paid as a Non-Refundable Expense as provided in section 4.1(1)(c).

3.3 Notice of Termination

(1) If the Agreement is terminated after the Second Notice has been published and disseminated, a notice of the termination will be given to the Class. Class Counsel or the Administrator, as the case may be, will cause the notice of termination, in a form approved by the Court, to be published and disseminated as the Court directs and the costs of so doing shall be paid as a Non-Refundable Expense as provided in section 4.1(1)(d).

3.4 Report to the Court

(1) After publication and dissemination of each of the notices required by this section, Class Counsel or the Administrator, as the case may be, shall file with the Court an affidavit confirming publication and dissemination.

SECTION 4 – NON-REFUNDABLE EXPENSES

4.1 Payments

(1) Expenses reasonably incurred for the following purposes, as approved by the Court, shall be the Non-Refundable Expenses, and shall be payable from the Settlement Amount, as and when incurred:

(a) the costs incurred in connection with establishing and operating the Escrow Account;

(b) the costs incurred in publishing the First Notice including the associated professional fees;

(c) the cost incurred in publishing and distributing the Second Short Form Notice and the Second Long Form Notice including the associated professional fees and mailing expenses as may be applicable;

(d) if necessary, the costs incurred in publishing notice to the Class that the Agreement has been terminated, including the associated professional fees; and

(e) if the Court appoints the Administrator and thereafter the Settlement Agreement is terminated, the costs reasonably incurred by the Administrator for performing the services required to prepare to implement the Settlement, including any mailing expenses, to a maximum of $35,000, whether or not a claim has been filed or reviewed, as approved by the Court.

(2) Siskinds LLP shall account to the Court and the Parties for all payments it makes from the Escrow Account. In the event that the Agreement is terminated, this accounting shall be delivered no later than ten (10) days after such termination.

4.2 Disputes Concerning Non-Refundable Expenses

Any dispute concerning the entitlement to or quantum of Non-Refundable Expenses shall be dealt with by a motion to the Court on notice to the Parties.

SECTION 5 – THE SETTLEMENT BENEFITS

5.1 Payment of Escrow Settlement Amount

(1) Within 15 calendar days of execution of this Agreement by the Parties, Redline and its Insurer will pay into the Escrow Account the amount of $3,100,000, which amount includes a contribution of $50,000 on behalf of each of the Individual Defendants. Redline will pay interest at the rate of 5% per year on any portion of $3,100,000 not deposited into the Escrow Account by the specified date.

(2) Within 15 calendar days of execution of this Agreement by the Parties, KPMG will pay into the Escrow Account the amount of $500,000. KPMG will pay interest at the rate of 5% per year on any portion of $500,000 not deposited in the Escrow Account by the specified date.

5.2 Escrow Account

Siskinds LLP, and then the Administrator after the Settlement becomes final, shall hold the Escrow Settlement Amount in the Escrow Account and shall not pay out any amount from the Escrow Account, except in accordance with the terms of the Agreement, or pursuant to an order of the Court made on notice to the Parties.

5.3 Taxes on Interest

(1) Except as provided in section 5.3(2), all taxes payable on any interest which accrues in relation to the Settlement Amount, shall be the responsibility of the Class and shall be paid by Siskinds LLP or the Administrator, as appropriate, from the Escrow Settlement Amount, or by the Class as the Administrator considers appropriate.

(2) If the Administrator or Siskinds LLP returns any portion of the Settlement Amount plus accrued interest to the Contributing Parties, pursuant to the provisions of the Agreement, the taxes payable on the interest portion of the returned amount shall be the responsibility of the Contributing Parties to be allocated by agreement among themselves.

SECTION 6 – NO REVERSION

Unless the Agreement is terminated as provided herein, the Contributing Parties shall not, under any circumstances, be entitled to the repayment of any portion of the Settlement Amount and then only to the extent of and in accordance with the terms provided herein.

SECTION 7 - DISTRIBUTION OF THE SETTLEMENT AMOUNT

On or after the Effective Date, the Administrator shall distribute the remainder of the Settlement Amount in accordance with the following priorities:

(a) to pay Class Counsel Fees;

(b) to pay all of the costs and expenses reasonably and actually incurred in connection with the provision of notices, locating Settlement Class Members for the sole purpose of providing notice to them, soliciting Settlement Class Members to submit a Claim Form, including the notice expenses reasonably and actually incurred by the Administrator and brokerage firms in connection with the provision of notice of this Settlement to Settlement Class Members (provided, however, that the Administrator shall not pay in excess of five thousand Canadian dollars (CAN$5,000.00) in the aggregate to all brokerage firms and, if the aggregate amount claimed by such brokerage firms exceeds five thousand

Canadian dollars (CAN$5,000.00), then the Administrator shall distribute the sum of five thousand Canadian dollars (CAN$5,000.00) to such brokerage firms on a *pro rata* basis). The Settling Defendants are specifically excluded from eligibility for any payment of notice expenses under this subsection;

(c) to pay all of the Administration Expenses. For greater certainty, the Defendants are specifically excluded from eligibility for any payment of costs and expenses under this subsection;

(d) to pay any taxes required by law to be paid to any governmental authority; and

(e) to pay a *pro rata* share of the balance of the Escrow Settlement Amount to each Authorized Claimant in proportion to his, her or its claim as recognized in accordance with the Plan of Allocation.

SECTION 8 – EFFECT OF SETTLEMENT

8.1 No Admission of Liability

Neither the Agreement nor anything contained herein, shall be interpreted as a concession or admission of wrongdoing or liability by the Releasees, or as a concession or admission by the Releasees of the truthfulness of any claim or allegation asserted in the Action. Neither the Agreement nor anything contained herein shall be used or construed as an admission by the Releasees of any fault, omission, liability or wrongdoing in connection with any statement, release or written document or financial report, and in fact the Defendants continue to vigorously dispute and contest the allegations made in the Action. In addition, the fact of RCI entering into this Agreement shall not be construed as an attornment by RCI to the jurisdiction of Ontario.

8.2 Agreement Not Evidence

(1) Neither the Agreement, nor anything contained herein, nor any of the negotiations or proceedings connected with it, nor any related document, nor any other action taken to carry out the Agreement shall be referred to, offered as evidence or received in evidence in any pending or future civil, criminal, quasi-criminal, administrative or disciplinary action or proceeding.

(2) Notwithstanding section 8.2(1), the Agreement may be referred to or offered as evidence in order to obtain the orders or directions from the Court contemplated by this Agreement, in a proceeding to approve or enforce the Agreement, or to defend against the assertion of Released Claims, or as otherwise required by law.

8.3 Best Efforts

The Parties shall use their best efforts to implement the terms of the Agreement. The Parties agree to hold in abeyance all steps in the Action, including all discovery, other than proceedings provided for in the Agreement, the First Motion, the Second Motion and such other proceedings required to implement the terms of the Agreement, until the date the Settlement becomes final or the termination of the Agreement, whichever occurs last.

SECTION 9 – CERTIFICATION AND SETTLEMENT APPROVAL

9.1 Certification and Settlement Approval

(1) Subject to the approval of the Court, and for purposes of the Settlement only, the Defendants will consent to the certification of the Action as a class proceeding, pursuant to sections 2, 5 and 6 of the *CPA*;

9.2 Certification Without Prejudice

The Parties agree that the certification of the Action as a class proceeding in accordance with section 9.1 hereof is for the sole purpose of effecting the Settlement. In the event the Agreement is terminated as provided herein, the certification order will be set aside as set out herein and shall be without prejudice to any position that any of the Parties may later take on any issue in the Action including in a subsequent certification motion.

SECTION 10 – OPTING OUT

10.1 Awareness of any Potential Opt-Outs

(1) The Defendants represent and warrant that:

(a) they are unaware of any Class Member who has expressed an intention to opt out of the Settlement; and

(b) they will not encourage or solicit any Class Member to opt out of the Settlement.

(2) Class Counsel represent and warrant that:

(a) they are unaware of any Class Member who has expressed an intention to opt out of the Settlement; and

(b) they will not encourage or solicit any Class Member to opt out of the Settlement.

10.2 Opt-Out Procedure

(1) Each Class Member who wishes to opt out must submit a properly completed Opt-Out Form along with all required supporting documents to the Administrator on or before the Opt-Out Deadline.

(2) In order to remedy any deficiency in the completion of the Opt-Out Form, the Administrator may require and request that additional information be submitted by a Class Member who submits an Opt-Out Form, and that such Class Members shall have until ten (10) days after the Opt-Out Deadline to remedy the deficiency.

(3) If a Class Member fails to submit a properly completed Opt-Out Form and/or all required supporting documents to the Administrator or fails to remedy any deficiency within ten (10) days after the Opt-Out Deadline, the Class Member shall not have opted out of the Action, subject to any order of the Court to the contrary, and will in all other respects be subject to, and bound by, the provisions of the Agreement and the releases contained herein.

(4) The Opt-Out Deadline will not be extended unless the Court orders otherwise.

(5) Opt-Out Parties will be excluded from any and all rights and obligations arising from the Settlement. Class Members who do not opt out shall be bound by the Settlement and the terms of the Agreement regardless of whether the Class Member files a Claim Form or receives compensation from the Settlement.

10.3 Notification of Number of Opt-Outs

Within thirty (30) days after the Opt-Out Deadline, the Administrator shall report to the Court and the Parties the number of Eligible Shares held by each Opt-Out Party, a summary of the information delivered by each Opt-Out Party and the total number of Eligible Shares held by the Opt-Out Parties.

SECTION 11 – TERMINATION OF THE AGREEMENT

11.1 General

(1) The Agreement shall, without notice, be automatically terminated if:

(a) the Approval Order is not granted by the Court; or

(b) the Approval Order is reversed on appeal and the reversal becomes a Final Order; or

(c) the Defendants elect to terminate the Agreement if the Opt-Out Threshold is exceeded.

(2) The failure of the Court to approve in full the request by Class Counsel for Class Counsel fees shall not be grounds to terminate this Agreement.

(3) In the event the Agreement is terminated in accordance with its terms:

(a) the Plaintiffs and the Defendants will be restored to their respective positions prior to the execution of the Agreement;

(b) the Plaintiffs and the Defendants will consent to the vacating or setting aside of any order certifying the Action as a class proceeding for the purposes of implementing this Agreement;

(c) the Escrow Settlement Amount will be returned to the contributing Parties in accordance with section 11.3(2)(d) hereof;

(d) the Agreement will have no further force and effect and no effect on the rights of the Plaintiffs or the Defendants except as specifically provided for herein;

(e) all statutes of limitation applicable to the claims asserted in the Action shall be deemed to have been tolled during the period beginning with the execution of this Agreement and ending with the day on which the orders contemplated by section 11.3(2)(c) are entered;

(f) any amounts paid for Non-Refundable Expenses pursuant to section 4.1(1) are non-recoverable from the Plaintiffs, the Class Members or Class Counsel;

(g) the Agreement will not be introduced into evidence or otherwise referred to in any litigation against the Defendants.

(4) Notwithstanding the provisions of section 11.1(3)(c), if the Agreement is terminated, the provisions of this section and sections 2, 4, 5.2, 5.3, 8.1,8.2, 9.2, 10.3, 11.1(3), 11.1(4), 11.3, and 17.4 and the recitals applicable thereto shall survive termination and shall continue in full force and effect.

11.2 Effect of Exceeding the Opt-Out Threshold, Conditions Precedent and Right to Terminate

(1) Notwithstanding any other provision in the Agreement, the Defendants in their sole discretion, may elect to terminate the Agreement if the Opt-Out Threshold is exceeded provided their election is made within fifteen (15) days of the Administrator notifying them of the number of Opt-Outs pursuant to section 10.3 after which date their right to terminate the Agreement will have expired.

(2) If the Opt-Out Threshold is not exceeded, the Defendants' right to terminate the Agreement pursuant to the provisions of this section is inoperative and of no force and effect.

(3) The Opt-Out Threshold shall be stated in the Collateral Agreement signed prior to, or contemporaneously with, the execution of the Agreement. The Collateral Agreement will state the Opt-Out Threshold shall be kept confidential by the Parties and their counsel, and may be shown to the Court but shall not be otherwise disclosed, unless disclosure is ordered by the Court.

11.3 Allocation of Monies in the Escrow Account Following Termination

(1) The Administrator and Siskinds LLP shall account to the Court and the Parties for the amounts maintained in the Escrow Account. If the Agreement is terminated, this accounting shall be delivered no later than ten (10) days after such termination.

(2) If the Agreement is terminated, the Defendants shall, within thirty (30) days after termination, apply to the appropriate Court, on notice to the Plaintiffs and the Administrator, for an order:

(a) declaring the Agreement null and void and of no force or effect except for the provisions of those sections listed in section 11.1(4);

(b) determining whether a notice of termination shall be sent out to the Class Members and, if so, the form and method of disseminating such a notice;

(c) requesting an order setting aside, *nunc pro tunc*, all prior orders or judgments entered by the Court in accordance with the terms of this Agreement including any order certifying the Action as a class proceeding for the purposes of implementing this Agreement; and

(d) authorizing the payment of:

(i) all funds received from any of the Contributing Parties and not yet paid into the Escrow Account pursuant to section 4.1; and

(ii) all funds in the Escrow Account, including accrued interest,

to the Contributing Parties and apportioned *pro rata,* based on their respective contributions, directly or indirectly, to the Escrow Account, as the case may be, minus any amounts paid out of the Escrow Account in accordance with the Agreement.

(3) Subject to section 11.4, the Parties shall consent to the orders sought in any motion made by the Defendants pursuant to section 11.3.

11.4 Disputes Relating to Termination

If there is any dispute about the termination of the Agreement, the Court shall determine any dispute by motion on notice to the Parties.

SECTION 12 – DETERMINATION THAT THE SETTLEMENT IS FINAL

(1) The Settlement shall be considered final on the Effective Date.

(2) Within ten (10) days after the Effective Date, Siskinds LLP shall transfer the Escrow Account to the Administrator.

SECTION 13 – RELEASES AND JURISDICTION OF THE COURT

13.1 Release of Releasees

As of the Effective Date and after the Settlement Amount has been deposited into the Escrow Account, the Releasors forever and absolutely release the Releasees from the Released Claims.

13.2 Mutual Release Between Releasees

As of the Effective Date and after the Settlement Amount has been deposited into the Escrow Account, each of the Releasees, except their insurers and the Insurer, forever and absolutely remise, release, waive and forever discharge the other Releasees, their successors and assigns of and from all claims, demands, actions, costs, and debts whatsoever in law or in equity arising from or relating to the Released Claims, save and except for any entitlements to indemnification. For greater clarity, nothing herein shall be taken as, or shall constitute, a release by any insured of rights he or she or it may have under any applicable policies of insurance.

13.3 No Further Claims

As of the Effective Date, the Releasors and Class Counsel shall not now or hereafter institute, continue, maintain or assert, either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any class or any other person, any action, suit, cause of action, claim or demand against any Releasee or any other person who may claim contribution or indemnity from any Releasee in respect of any Released Claim or any matter related thereto.

13.4 Dismissal of the Action

Except as otherwise provided in the Agreement and the Approval Order, the Action shall be dismissed without costs and with prejudice.

13.5 No Claims in Interim

As of the date of the Agreement, Class Counsel does not represent plaintiffs in any other proceeding related to any matter at issue in the Action.

SECTION 14 – ADMINISTRATION

14.1 Appointment of the Administrator

(1) The Court will appoint the Administrator to serve until further order of the Court, to implement the Agreement and the Plan of Allocation, on the terms and conditions and with the powers, rights, duties and responsibilities set out in the Agreement and in the Plan of Allocation.

(2) If the Agreement is terminated, the Administrator's fees, disbursements and taxes will be fixed as set out in section 4.1.

(3) If the approval of the Settlement becomes final as contemplated by section 12 the Court will fix the Administrator's compensation and payment schedule.

14.2 Information and Assistance from the Defendants

(1) Within thirty (30) days of the approval of the Settlement, Redline will, in writing, authorize and direct delivery of a computerized list of the names and addresses of persons who purchased Eligible Shares during the Class Period in its possession to Class Counsel and the Administrator. Redline will also assist Class Counsel or the Administrator as may be required in obtaining information about Class Members who hold or held beneficial interests in the Eligible Shares.

(2) Redline will provide a person to whom Class Counsel and/or the Administrator may address any requests for information. Redline agrees to make reasonable efforts to answer any reasonable inquiry from Class Counsel and/or the Administrator in order to facilitate the administration and implementation of the Agreement and the Plan.

(3) Class Counsel and/or the Administrator may use the information obtained in accordance with sections 14.2(1) and (2) for the purpose of delivering the Second Notice and for the purposes of administering and implementing the Agreement and the Plan of Allocation.

(4) Any information obtained or created in the administration of this Agreement is confidential and, except as required by law, shall be used and disclosed only for the purpose of distributing notices and the administration of the Agreement and Plan.

14.3 Claims Process

(1) In order to seek payment from the Settlement Amount, a Class Member must submit a completed Claim Form to the Administrator, in accordance with the provisions of the Plan of Allocation, on or before the Claims Bar Deadline, and any Class Member who fails to do so shall not share in any distribution made in accordance with the Plan unless the Court orders otherwise. Class Members shall be bound by the terms of the Settlement regardless of whether they submit a completed Claim Form or receive payment from the Settlement Amount.

(2) In order to remedy any deficiency in the completion of a Claim Form, the Administrator may require and request that additional information be submitted by a Class Member who submits a Claim Form. Such Class Members shall have until the later of thirty (30) days from the date of the request from the Administrator or the Claims Bar Deadline to rectify the deficiency. Any person who does not respond to such a request for information within the thirty (30) day period shall be forever barred from receiving any payments pursuant to the Settlement, subject to any order of the Court to the contrary, but will in all other respects be subject to, and bound by, the provisions of the Agreement and the releases contained herein.

14.4 Disputes Concerning the Decisions of the Administrator

(3) In the event that a Class Member disputes the Administrator's decision, whether in whole or in part, the Class Member may appeal the decision to the Court in accordance with the provisions in the Plan of Allocation. The decision of the Court will be final with no right of appeal.

(4) No action shall lie against Class Counsel or the Administrator for any decision made in the administration of the Agreement and Plan of Allocation without an order from the Court authorizing such an action.

14.5 Conclusion of the Administration

(1) Following the Claims Bar Deadline, and in accordance with the terms of the Settlement Agreement, the Plan of Allocation, and such further approval or order of the Court as may be necessary, or as circumstances may require, the Administrator shall distribute the Escrow Settlement Amount to Authorized Claimants.

(2) No claims or appeals shall lie against Class Counsel or the Administrator based on distributions made substantially in accordance with the Agreement, the Plan of Allocation, or with any other order or judgment of the Court.

(3) If the Escrow Settlement Account is in a positive balance (whether by reason of tax refunds, un-cashed cheques or otherwise) after one hundred eighty (180) days from the date of

distribution of the Escrow Settlement Amount to the Authorized Claimants, the Administrator shall, if feasible, allocate such balance among Authorized Claimants in an equitable and economic fashion. Any balance below CAN$40,000.00 which still remains thereafter shall be donated to the Small Investor Protection Association.

(4) Upon the conclusion of the administration, or at such other time as the Court directs, the Administrator shall report to the Court on the administration and shall account for all monies it has received, administered and disbursed and obtain an order from the Court discharging it as Administrator.

SECTION 15 – THE PLAN OF ALLOCATION

(1) The Defendants shall have no obligation to consent to but shall not oppose the Court's approval of the Plan of Allocation.

(2) Unless directed to do so by the Court, the Defendants will not make any submissions to the Court relating to the Plan of Allocation.

(3) Sections 15(1) and (2) are not an acknowledgement by the Class or Class Counsel that the Defendants have standing to make any submissions to the Court about the Plan of Allocation.

SECTION 16 – THE FEE AGREEMENT AND CLASS COUNSEL FEES

16.1 Motion for Approval of Class Counsel Fees

(1) At the Approval Hearing Class Counsel may seek the approval of Class Counsel Fees to be paid as a first charge on the Settlement Amount. Class Counsel are not precluded from making additional applications to the Court for expenses incurred as a result of implementing the terms of the Agreement. All amounts awarded on account of Class Counsel Fees shall be paid from the Settlement Amount.

(2) The Defendants acknowledge that they are not parties to the motion concerning the approval of Class Counsel Fees, they will have no involvement in the approval process to determine the amount of Class Counsel Fees and they will not make any submissions to the Court concerning Class Counsel Fees.

(3) The procedure for, and the allowance or disallowance by the Court of any requests for Class Counsel Fees to be paid out of the Settlement Amount are not part of the Settlement provided for herein, except as expressly provided in section 7(a), and are to be considered by the

Court separately from its consideration of the fairness, reasonableness, and adequacy of the Settlement provided for herein.

(4) Any order or proceeding relating to Class Counsel Fees, or any appeal from any order relating thereto or reversal or modification thereof, shall not operate to terminate or cancel the Agreement or affect or delay the finality of the Approval Order and the Settlement of the Action provided herein.

16.2 Payment of Class Counsel Fees

Forthwith after the Settlement becomes final, as contemplated in section 12 and the time for the Defendants to elect to terminate pursuant to the provisions of section 11 has expired or the Defendants have waived their right to elect, the Administrator shall pay to Siskinds LLP in trust the Class Counsel Fees approved by the Ontario Court from the Escrow Account.

SECTION 17 – MISCELLANEOUS

17.1 Motions for Directions

(1) Any one or more of the Parties, Class Counsel, or the Administrator may apply to the Court for directions in respect of any matter in relation to the Agreement and Plan of Allocation.

(2) All motions contemplated by the Agreement shall be on notice to the Parties.

17.2 Defendants Have No Responsibility or Liability for Administration

Except for the obligation to pay the Settlement Amount and provide the information and assistance contemplated by sections 14.3(1), (2), the Defendants shall have no responsibility for and no liability whatsoever with respect to the administration or implementation of the Agreement and Plan, including, without limitation, the processing and payment of claims by the Administrator.

17.3 Headings, etc.

(1) In the Agreement:

(a) the division of the Agreement into sections and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of the Agreement;

(b) the terms "the Agreement", "herein", "hereto" and similar expressions refer to the Agreement and not to any particular section or other portion of the Agreement;

(c) all amounts referred to are in lawful money of Canada; and

(d) "person" means any legal entity including, but not limited to, individuals, corporations, sole proprietorships, general or limited partnerships, limited liability partnerships or limited liability companies.

(2) In the computation of time in the Agreement, except where a contrary intention appears:

(a) where there is a reference to a number of days between two events, they shall be counted by excluding the day on which the first event happens and including the day on which the second event happens, including all calendar days; and

(b) only in the case where the time for doing an act expires on a holiday, the act may be done on the next day that is not a holiday.

17.4 Governing Law

(5) The Agreement shall be governed by and construed and interpreted in accordance with the laws of the Province of Ontario.

(6) The Parties agree that the Court shall retain exclusive and continuing jurisdiction over the Action, the Parties and Class Members to interpret and enforce the terms, conditions and obligations under the Agreement and the Approval Order.

17.5 Severability

(1) Any provision hereof that is held to be inoperative, unenforceable or invalid in any jurisdiction shall be severable from the remaining provisions which shall continue to be valid and enforceable to the fullest extent permitted by law.

17.6 Entire Agreement

(1) The Agreement constitutes the entire agreement among the Parties and supersedes all prior and contemporaneous understandings, undertakings, negotiations, representations, promises, agreements, agreements in principle and memoranda of understanding in connection herewith. None of the Parties will be bound by any prior obligations, conditions or representations with respect to the subject matter of the Agreement, unless expressly incorporated herein. The Agreement may not be modified or amended except in writing and on consent of all Parties and any such modification or amendment must be approved by the Court.

17.7 Binding Effect

(1) If the Settlement is approved by the Court and becomes final as contemplated in section 12, the Agreement shall be binding upon, and enure to the benefit of, the Plaintiffs, the Class Members, the Defendants, the Releasees, the Releasors, the Contributing Parties, the Insurers

and all of their respective heirs, executors, predecessors, successors and assigns. Without limiting the generality of the foregoing, each and every covenant and agreement made herein by the Plaintiffs shall be binding upon all Releasors and each and every covenant and agreement made herein by the Defendants shall be binding upon all of the Releasees.

(2) Redline and KPMG LLP represent and warrant that:

(a) they have all requisite corporate power and authority to execute, deliver and perform the Agreement and to consummate the transaction contemplated hereby on their own behalf;

(b) the execution, delivery, and performance of the Agreement and the consummation of the Action contemplated herein have been duly authorized by all necessary corporate action their part;

(c) the Agreement has been duly and validly executed and delivered by them and constitutes their legal, valid, and binding obligations;

(d) they agree to use their best efforts to cause all conditions precedent to the Effective Date to occur.

17.8 Survival

The representations and warranties contained in the Agreement shall survive its execution and implementation.

17.9 Negotiated Agreement

The Agreement and the underlying settlement have been the subject of negotiations and many discussions among the undersigned. Each of the undersigned has been represented and advised by competent counsel, so that any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafters of the Agreement shall have no force and effect. The Parties further agree that the language contained in or not contained in previous drafts of the Agreement, or any agreement in principle, shall have no bearing upon the proper interpretation of the Agreement.

17.10 Recitals

(1) The recitals to the Agreement are material and integral parts hereof and are fully incorporated into, and form part of, the Agreement.

17.11 Acknowledgements

Each of the Parties hereby affirms and acknowledges that:

(a) he, she or its representative has the authority to bind the Party with respect to the matters set forth herein has read and understood the Agreement;

(b) the terms of the Agreement and the effects thereof have been fully explained to him, her or its representative by his, her or its counsel;

(c) he, she or its representative fully understands each term of the Agreement and its effect.

17.12 Authorized Signatures

Each of the undersigned represents that he or she is fully authorized to enter into the terms and conditions of, and to execute, the Agreement on behalf of the Party for whom he or she is signing.

17.13 Counterparts

The Agreement may be executed in counterparts, all of which taken together will be deemed to constitute one and the same agreement, and a facsimile signature shall be deemed an original signature for purposes of executing the Agreement.

17.14 Confidentiality and Communications

(1) In any public discussion of, comment on, press release or other communication of any kind (with the media or otherwise) about the Agreement and Plan, the Parties and their respective counsel agree and undertake to describe the Settlement and the terms of this Agreement as fair, reasonable and in the best interests of the Class.

(2) The Parties' obligations under this section shall not prevent them, or any of them, from reporting to their clients, from complying with any order of the Court, or from making any disclosure or comment required by the Agreement, or from making any necessary disclosure or comment for the purposes of any applicable securities or tax legislation or from making any disclosure or comment to Class Members or the Court or for the purposes of any proceedings as between the Defendants.

(3) Without limiting the generality of the foregoing, the Parties specifically agree that the Parties will not make any public statements, comment or any communication of any kind about any negotiations or information exchanged as part of the settlement process. In addition, to the extent that there is public discussion of, comment on or communication of any kind about this Settlement Agreement, the Parties and their counsel agree and undertake to describe the Settlement Agreement as fair, reasonable and in the best interests of the Class.

17.15 Notice

Any notice, instruction, motion for Court approval or motion for directions or Court orders sought in connection with the Agreement or any other report or document to be given by any party to any other party shall be in writing and delivered personally, by facsimile or e-mail during normal business hours, or sent by registered or certified mail, or courier postage paid:

For Plaintiffs and for Class Counsel:
A. Dimitri Lascaris
Charles M. Wright
Elizabeth M. deBoer
Siskinds LLP
680 Waterloo Street
London, ON N6A 3V8

Telephone: 519.660.7814
Facsimile: 519.660.7815
Email: elizabeth.deboer@siskinds.com

For Redline, Nancy Orr, Philippe de Gaspé Beaubien III, Timothy Dibble, Mihnea Moldoveanu, David Andrews and Mahesh Vaidya:

Adrian C. Lang
Alan L.W. D'Silva
Stikeman Elliott LLP
Barristers & Solicitors
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Telephone: 416.869.5653
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For KPMG LLP:

Larry Lowenstein
Alexander Cobb
Osler, Hoskin & Harcourt LLP
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Toronto, ON M5X 1B8

Telephone: 416.862.6482
Facsimile: 416.862.6666
Email: llowenstein@osler.com

For Thomas Hearne:

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Toronto, ON M5X 1A4
M5X 1A4
M5X 1A4
Telephone: 416.777.5780
Facsimile: 416.863.1716
Email: hoakene@bennettjones.com

For Majed Sifri

Paul H. Le Vay
Stockwoods LLP
Royal Trust Tower, 77 King Street. Suite 4130
PO Box 140, Stn. Toronto-Dominion
Toronto, ON M5K 1H1

Telephone: 416.593.2493
Facsimile: 416.593.9345
Email: paullv@stockwoods.ca

The Parties have executed the Agreement as of the date on the cover page.

For Redline, Nancy Orr, Philippe de Gaspé Beaubien III, Timothy Dibble, Mihnea Moldoveanu, David Andrews and Mahesh Vaidya

By: _____
Name **Daniel S. Murdoch**
Title Counsel, Stikeman Elliott LLP

For Thomas Hearne

By: _____
Name

For Redline, Nancy Orr, Philippe de Gaspé Beaubien III, Timothy Dibble, Mihnea Moldoveanu, David Andrews and Mahesh Vaidya:

Adrian C. Lang
Alan L.W. D'Silva
Stikeman Elliott LLP
Barristers & Solicitors
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Toronto, ON M5L 1B9

Telephone: 416.869.5653
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For KPMG LLP:

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For Majed Sifri

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Email: paullv@stockwoods.ca

The Parties have executed the Agreement as of the date on the cover page.

For Redline, Nancy Orr, Philippe de Gaspé Beaubien III, Timothy Dibble, Mihnea Moldoveanu, David Andrews and Mahesh Vaidya

By: _____
Name
Title

For Thomas Hearne

By: _____ per: Thomas Hearne
Name
E. Hoaken

Title Bennett Jones LLP

For Majed Sifri

By: _____
Name
Title

For KPMG LLP

By: _____
Name
Title

Siskinds LLP has executed the Agreement as of the date on the cover page to signify its consent to hold the Non-Refundable Expense Fund and the Escrow Account on the terms provided in the Agreement and to be bound by the terms of the Agreement.

Siskinds LLP

By: _____
Name: Charles Wright
Title Partner

Title

For Majed Sifri

By: Paul LaVay per MS
Name Paul LaVay
Title Stockwoods LLP

For KPMG LLP

By:
Name
Title

Siskinds LLP has executed the Agreement as of the date on the cover page to signify its consent to hold the Non-Refundable Expense Fund and the Escrow Account on the terms provided in the Agreement and to be bound by the terms of the Agreement.

Siskinds LLP

By:
Name: Charles Wright
Title Partner

Title

For Majed Sifri

By:
Name
Title

For KPMG LLP

By:
Name PETER SARAGIAN
Title GENERAL COUNSEL

Siskinds LLP has executed the Agreement as of the date on the cover page to signify its consent to hold the Non-Refundable Expense Fund and the Escrow Account on the terms provided in the Agreement and to be bound by the terms of the Agreement.

Siskinds LLP

By:
Name: Charles Wright
Title Partner

SCHEDULE "B"

Court File No. 2198/10 CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

NOR-DOR DEVELOPMENTS

Plaintiff

- and -

REDLINE COMMUNICATIONS GROUP INC.,
REDLINE COMMUNICATIONS, INC., THOMAS HEARNE
NANCY ORR, MAJED SIFRI, MAHESH VAIDYA,
PHILIPPE DE GASPÉ BEAUBIEN III, TIMOTHY DIBBLE
MIHNEA MOLDOVEANU, DAVID ANDREWS & KPMG LLP

Defendants

Proceeding under the *Class Proceedings Act, 1992*

PLAN OF ALLOCATION

(Supplement to the Settlement Agreement, dated September 6, 2011)

DEFINED TERMS

1. For the purposes of this Plan of Allocation, the definitions set out in the Settlement Agreement apply to and are incorporated into this Plan of Allocation and, in addition, the following definitions apply:

   (a) "**Acquisition Expense**" means the total monies paid by the Claimant (including brokerage commissions) to acquire Eligible Shares;

   (b) "**Claimant**" means a Class Member who submits a properly completed Claim Form and all required supporting documentation to the Administrator, on or before the Claims Bar Deadline;

   (c) "**Disposition Proceeds**" means the total proceeds paid to the Claimant (without deducting any commissions paid in respect of the dispositions) in consideration of the sale of all of his/her/its Eligible Shares; provided, however, that with respect to any Eligible Shares that the Claimant continues to hold, they shall be deemed to have been disposed of for an amount equal to the number of Eligible Shares still held, multiplied by $0.33 [being the 10 trading day volume weighted average trading price of Redline common shares on the TSX from March 15, 2010 to March 29, 2010 inclusive];

(d) "**FIFO**" means the principle of first-in, first-out, wherein common shares are deemed to be sold in the same order that they were purchased (i.e. the first common shares purchased are deemed to be the first sold); and which requires, in the case of a Claimant who held common shares of Redline at the commencement of the Class Period, that those common shares be deemed to have been sold completely before Eligible Shares are sold or deemed sold;

(e) "**Net Loss**" means that the Claimant's Disposition Proceeds are less than the Claimant's Acquisition Expense;

(f) "**Net Settlement Amount**" means the Escrow Settlement Amount remaining after payment of Administration Expenses and Class Counsel Fees; and

(g) "**Nominal Entitlement**" means an Authorized Claimant's nominal damages as calculated pursuant to the formula set forth herein, and which forms the basis upon which each Authorized Claimant's *pro rata* share of the Net Settlement Amount is determined.

CALCULATION OF NET LOSS AND NOMINAL ENTITLEMENT

2. A Claimant must have sustained a Net Loss in order to be eligible to receive a payment from the Net Settlement Amount.

3. The Administrator shall first determine whether a Claimant sustained a Net Loss. If the Claimant has sustained a Net Loss, they become an Authorized Claimant, and the Administrator will go on to calculate his/her/its Nominal Entitlement.

4. The Administrator will apply FIFO to distinguish the sale of Redline common shares held at the beginning of the Class Period from the sale of Eligible Shares, and will continue to apply FIFO to determine the purchase transactions which correspond to the sale of Eligible Shares. The Administrator will use this data in the calculation of an Authorized Claimant's Nominal Entitlement according to the formulas listed below.

5. The date of a purchase, sale or deemed disposition shall be the trade date, as opposed to the settlement date, of the transaction.

6. For the purposes of any calculation under the Plan of Allocation, the Administrator will account for any stock splits or consolidations that occur during and after the Class Period, such that Authorized Claimants' holdings for the purposes of the calculations are completed in units equivalent to those traded during the Class Period.

7. An Authorized Claimant's Nominal Entitlement will be calculated as follows:

I. **No Nominal Entitlement shall be available for any Eligible Shares *disposed of* prior to the alleged corrective disclosure, that is, *prior to March 15, 2010.***

II. **For Eligible Shares *disposed of* during the 10 trading day period following the alleged corrective disclosure, that is, *on or between March 15, 2010 and March 29, 2010*, the Nominal Entitlement shall be:**

A. an amount equal to the number of Eligible Shares thus disposed of, multiplied by the difference between the volume weighted average price paid for those Eligible Shares (including any commissions paid in respect thereof) and the price per share received upon the disposition of those Eligible Shares (without deducting any commissions paid in respect of the disposition).

III. **For Eligible Shares *disposed of* after the 10 trading day period following the alleged corrective disclosure, that is, *on or after March 30, 2010*, the Nominal Entitlement shall be the lesser of:**

A. an amount equal to the number of Eligible Shares thus disposed of, multiplied by the difference between the volume weighted average price paid for those Eligible Shares (including any commissions paid in respect thereof) and the price per share received upon the disposition of those Eligible Shares (without deducting any commissions paid in respect of the disposition); and

B. an amount equal to the number of Eligible Shares thus disposed of, multiplied by the difference between the volume weighted average price paid for those Eligible Shares (including any commissions paid in respect thereof) and $0.33 [being the 10 trading day volume weighted average trading price of Redline common shares on the TSX from March 15, 2010 to March 29, 2010 inclusive].

IV. **For Eligible Shares still held at the time the Claim Form is completed, the Nominal Entitlement shall be:**

A. an amount equal to the number of Eligible Shares still held, multiplied by the difference between the volume weighted average price paid for those Eligible Shares (including any commissions paid in respect thereof) and

$0.33 [being the 10 trading day volume weighted average trading price of Redline common shares on the TSX from March 15, 2010 to March 29, 2010 inclusive].

8. In determining whether a Claimant sustained a Net Loss and calculating a Claimant's Nominal Entitlement, transactions in Eligible Shares in U.K. pounds sterling shall be converted to Canadian currency based on the Bank of Canada noon exchange rate between the Canadian dollar and the U.K. pound sterling on the date on which the Administrator calculates the Nominal Entitlements of Authorized Claimants. All Nominal Entitlements shall be recorded in Canadian currency.

FINAL DISTRIBUTION

9. Each Authorized Claimant's actual compensation shall be the portion of the Net Settlement Amount equivalent to the ratio of his/her/its Nominal Entitlement to the total Nominal Entitlements of all Authorized Claimants multiplied by the Net Settlement Amount, as calculated by the Administrator.

10. Compensation shall be paid to Authorized Claimants in Canadian currency.

SCHEDULE "C"

PLAN OF NOTICE

Capitalized terms used in this Plan of Notice have the meanings ascribed to them in the Settlement Agreement.

PART 1 -- NOTICE OF CERTIFICATION AND SETTLEMENT APPROVAL MOTION

The First Notice will be disseminated as follows:

Internet Publication

The First Notice will be posted, in both English and French, on (i) www.classaction.ca; (ii) the website of the Administrator.

Newspaper and Newswire Publication

Publication of the First Notice, which notice will be at least a 1/4 page in size, will occur at least thirty (30) days prior to the Approval Motion. Such publication will be made in English in the business/legal section of the national edition of the *National Post*, the *Globe & Mail* and the *Times* (of London, UK) and in French in the business section of *La Presse*.

The English and French language versions of the First Notice will also be issued across *Marketwire*, a major business newswire in Canada.

Class Counsel

Class Counsel shall make a toll free number and email address available to the public that will enable Class Members to contact Class Counsel and obtain more information about the proposed settlement, and/or to request that a copy of the Settlement Agreement be sent to them directly. Additionally, the public may view or obtain copies of the Settlement Agreement from Class Counsel's website: www.classaction.ca.

PART 2 -- NOTICE OF CERTIFICATION AND APPROVAL OF SETTLEMENT

The Second Short Form Notice will be disseminated a follows:

Newspaper and Newswire Publication

Publication of the Second Short Form Notice, which notice will be at least a 1/4 page in size, will occur as soon as possible following the date the Approval Order becomes a Final Order, and, in any event, no later than fourteen (14) days following such date. Such publication will be made in the English language in the business/legal section of the national edition of the *National Post*, the *Globe and Mail*, and *The Times* (of London, UK) and in the French language in the business section of *La Presse*.

The English and French language versions of the Second Short Form Notice will also be issued across *Marketwire*, a major business newswire in Canada.

The Second Long Form Notice will be disseminated a follows:

Internet Publication

The Second Long Form Notice will be posted, in both the English and French languages, on (i) www.classaction.ca; and (ii) the website of the Administrator.

Individual Notice

Within thirty (30) days of the date the Approval Order becomes a Final Order, Class Counsel shall direct the Administrator to send the Second Long Form Notice, the Claim Form and the Opt-Out Form to all putative Class Members as follows:

1. The Administrator shall mail the Second Long Form Notice, the Claim Form and the Opt-Out Form to the persons identified as a result of the Defendants delivering a computerized list of the names and addresses of persons who purchased Shares during the Class Period in its possession to Class Counsel and the Administrator; and

2. The Administrator will send the Second Long Form Notice, the Claim Form and the Opt-Out Form to the brokerage firms in the Administrator's proprietary databases requesting that the brokerage firms either send a copy of the Second Long Form Notice, the Claim Form and the Opt-Out Form to all individuals and entities identified by the brokerage firms as being Class Members, or to send the names and addresses of all such individuals and entities to the Administrator who shall mail the Second Long Form Notice, the Claim Form and the Opt-Out Form to the individuals and entities so identified.

Class Counsel shall mail or email the Second Long Form Notice, the Claim Form and the Opt-Out Form to those persons who have contacted Class Counsel regarding this litigation and have provided Class Counsel with their contact information.

Class Counsel shall make a toll-free number and email address available to the public that will enable Class Members to obtain more information about the settlement, the claims process, and to request that a copy of the Second Long Form Notice, the Claim Form and the Opt-Out Form be sent to them directly. Class Counsel or the Administrator, as appropriate, will directly mail the Second Long Form Notice, the Claim Form and/or the Opt-Out Form to any Class Member who contacts Class Counsel or the Administrator's offices and requests same. Additionally, the public may view, or obtain copies of, the Settlement Agreement, the Second Long Form Notice, the Claim Form and the Opt-Out Form on Class Counsel's website: www.classaction.ca.

SCHEDULE "D"

NOTICE OF CERTIFICATION AND SETTLEMENT APPROVAL IN REDLINE COMMUNICATIONS GROUP INC. SECURITIES LITIGATION

This notice is to all individuals and entities (other than Excluded Persons, as defined below), who purchased common stock of Redline Communications Group Inc., and Redline Communications, Inc., (the "Company" or "RDL") traded on the AIM during the period from December 06, 2006 to and including January 2, 2009 and on the TSX on October 25, 2007 to March 15, 2010 ("Class Period") and who held some or all of those shares on March 15, 2010.

READ THIS NOTICE CAREFULLY AS IT MAY AFFECT YOUR LEGAL RIGHTS.

COURT APPROVAL OF THE CLASS ACTION SETTLEMENT

In 2010, a class action was commenced in the Ontario Superior Court of Justice (the "Court") against Redline (TSX. RDL) and certain of its current or former officers and directors, as well as KPMG LLP (the "Defendants"). By order issued on ● the Court certified the class action and approved the Settlement Agreement dated September 6, 2011 (the "Settlement"). The Settlement is a compromise of disputed claims and is not an admission of liability, wrongdoing or fault on the part of any of the Defendants, all of whom have denied, and continue to deny, the allegations against them.

On ● the Court issued an order certifying the class action and approving the Settlement. The Court also awarded Class Counsel legal fees, expenses and applicable taxes in the amount of $● ("Class Counsel Fees"). Class Counsel were retained on a contingent basis such that they were only to be paid if they were successful in the litigation. Class Counsel Fees will be deducted from the Settlement Amount before it is distributed to Class Members. Expenses incurred or payable relating to approval, notification, implementation and administration of the Settlement ("Administration Expenses"), will also be paid from the Settlement Amount before it is distributed to Class Members.

A complete copy of the Settlement Agreement is available on the website of Class Counsel: www.classaction.ca.

ADMINISTRATOR

The Court has appointed NPT RicePoint Class Action Services ("NPT") as the Administrator of this Settlement Agreement. The Administrator will, among other things: (i) receive and process the Claim Forms and requests to opt out; (ii) make determinations of Class Members' eligibility for compensation pursuant to the Plan of Allocation; (iii) communicate with Class Members regarding their eligibility for compensation; and (iv) manage and distribute the Settlement Amount. The Administrator can be contacted at:

Telephone: **1-866-432-5534**

Mailing Address: **Redline Communications**
Claims Administrator

P.O. Box 3355
London, ON N6A 4K3

Website: **www.nptricepoint.com**

CLASS MEMBERS' ENTITLEMENT TO COMPENSATION

Class Members will be eligible for compensation pursuant to the Settlement Agreement if they sustained a Net Loss on their Class Period transactions and if they timely submit a complete Claim Form, including any supporting documentation with the Administrator. To be eligible for compensation under the Settlement Agreement, Class Members must submit their Claim Form postmarked no later than ●, (the "Claims Bar Deadline").

"Excluded Persons" are not permitted to participate in the Settlement and include the Defendants, RDL's past or present parents, subsidiaries, affiliates, officers, directors, legal representatives, heirs, predecessors, successors and assigns, and any member of the individual Defendants' families and any entity in which any of them has or had a legal or *de facto* controlling interest.

The remainder of the Settlement Amount, after deduction of Class Counsel Fees and Administration Expenses (the "Net Settlement Amount") will be distributed to Class Members in accordance with the Plan of Allocation, which, in general terms, provides that:

(a) in order to be eligible to receive compensation pursuant to the settlement, a Class Member must submit a Claim Form, including trading information that demonstrates that the Class Member sustained a Net Loss on their Class Period transactions, to the Administrator by the deadline for submission of claims (an "Authorized Claimant");

(b) Each Authorized Claimant's *nominal* entitlement to compensation will be determined by application of the formulae outlined in the Plan of Allocation which take into account: (i) the number and the price of RDL's securities purchased by the Class Member during the Class Period ("Eligible Shares"); (ii) when the Class Member sold the RDL securities purchased during the Class Period and the price at which such securities were sold; and (iii) whether the Class Member continues to hold some or all of their RDL securities purchased during the Class Period.

(c) Each Authorized Claimant's *actual* compensation shall be the portion of the Net Settlement Amount equivalent to the ratio of their Nominal Entitlement to the total Nominal Entitlements of all Authorized Claimants multiplied by the Net Settlement Amount.

Any disputes arising from decisions of the Administrator may be appealed to the Court.

REQUESTING EXCLUSION FROM THE CLASS

All individuals and entities that fall within the definition of the Class will automatically be considered Class Members unless and until they exclude themselves from the Class ("opt out"). This means that Class Members will not be able to bring or maintain any other claim or legal proceeding against the Defendants, or any other person released by the Settlement Agreement, in relation to the matters alleged in the class action.

If you do not want to be bound by the Settlement Agreement you must opt out. Please note, however, that by opting out you will also be barred from making a claim and receiving compensation from the Settlement Amount.

If you wish to opt out, you may do so by communicating all of the following information to the Administrator in writing: (i) your name, mailing address, and telephone number; (ii) the number of RDL common shares you purchased during the Class Period and held as of March 15, 2010, along with documents evidencing those transactions such as brokerage statements and/or trade confirmations; (iii) if you are filing the opt-out request on behalf of someone else, evidence that you are authorized to file documentation on behalf of the individual or entity on whose behalf you are filing the request; and (iv) a clear statement that you intend to opt out.

If you wish to opt out, you must submit your request and the required supporting information and documentation, listed above, to the Administrator, at the above-noted address, no later than ●.

IMPORTANT DEADLINES

Opt-Out Deadline: ●

Claims Bar Deadline: ●

Request to opt out and/or Claim Forms will not be accepted after their respective deadlines. As a result, it is necessary that you act without delay.

CLASS COUNSEL

The law firm of *Siskinds* *LLP* are counsel to the Plaintiff in the class proceeding, and can be reached by telephone, toll free, at 1-800-461-6166 ext. 2380.

INTERPRETATION

If there is a conflict between the provisions of this notice and the Settlement Agreement, the terms of the Settlement Agreement will prevail.

DISTRIBUTION OF THIS NOTICE HAS BEEN AUTHORIZED
BY THE ONTARIO SUPERIOR COURT OF JUSTICE

SCHEDULE "E"

NOTICE OF CERTIFICATION AND SETTLEMENT APPROVAL IN REDLINE SECURITIES LITIGATION

This notice is to all individuals and entities (other than Excluded Persons, as defined below), who purchased common stock of Redline Communications Group Inc., and Redline Communications, Inc. (the "Company" or "RDL") traded on the AIM during the period from December 06, 2006 to and including January 2, 2009 and on the TSX on October 25, 2007 to March 15, 2010 ("Class Period") and who held some or all of those shares on March 15, 2010.

READ THIS NOTICE CAREFULLY AS IT MAY AFFECT YOUR LEGAL RIGHTS.

Please note: This is a summary notice, produced for publication purposes, announcing Court approval of the settlement reached in this litigation. A Second Long Form Notice, with full details of the settlement is available on Class Counsel's website: www.classaction.ca, or the Administrator's website: www.nptricepoint.com.

COURT APPROVAL OF THE CLASS ACTION SETTLEMENT

In 2010, a class action was commenced in the Ontario Superior Court of Justice (the "Court") against Redline (TSX: RDL) and certain of its current or former officers and directors, as well as KPMG LLP (the "Defendants"). By order issued on ● the Court certified the class action and approved the Settlement Agreement dated September 6, 2011 (the "Settlement"). The Settlement is a compromise of disputed claims and is not an admission of liability, wrongdoing or fault on the part of any of the Defendants, all of whom have denied, and continue to deny, the allegations against them.

The Settlement provides that the Defendants will pay $3,600,000 (the "Settlement Amount") in full and final settlement of the claims of Class Members, including legal fees, disbursements, taxes and administration expenses in return for releases and a dismissal of the class action. The Defendants, RDL's past or present parents, subsidiaries, affiliates, officers, directors, legal representatives, heirs, predecessors, successors and assigns, and any member of the individual Defendants' families and any entity in which any of them has or had a legal or *de facto* controlling interest ("Excluded Persons") are not permitted to participate in the Settlement.

ADMINISTRATION OF THE SETTLEMENT AGREEMENT

The Court has appointed NPT Rice Point Class Action Services ("NPT") as the Administrator of this Settlement Agreement. NPT will oversee the claims and opt-out processes (described below) and will distribute the Settlement Amount.

Those Class Members who wish to receive compensation from the Settlement Amount must mail or otherwise submit a completed Claim Form and any supporting documentation to the Administrator, no later than ●, ("Claims Bar Deadline") at the following address: Redline Communications, Claims Administrator, P.O. Box 3355, London, ON, N6A 4K3.

The Class Members who do not opt out (as discussed below) and who file a valid claim will be paid a *pro rata* share of the balance of the settlement amount after payment of fees, expenses, and taxes.

All Class Members will be bound by the terms of the Settlement Agreement unless they "opt out". This means that Class Members will not be able to bring or maintain any other claim or legal proceeding against the Defendants, or any other person released by the Settlement Agreement, in relation to the matters alleged in the class action unless they opt out. If you do not want to be bound by the Settlement Agreement you must opt out. Please note however, that by opting out you will also be barred from making a claim and receiving compensation from the Settlement Amount.

If you wish to opt out you must submit a request to opt out which states the name of the person wishing to opt-out, the number of shares of RDL purchased during the Class Period and held as of March 15, 2010 by the person opting out and stating clearly the person's intention to opt-out of the Settlement, along with documents evidencing those purchases, as set out in the Second Long Form Notice, to the Administrator, no later than ●, (the "Opt-Out Deadline").

For further information regarding the terms of the Settlement Agreement, the Plan of Allocation, filing a claim and/or opting out, or to obtain a Claim Form or request to opt out, visit the Administrator's website: www.nptricepoint.com or contact the Administrator by calling **1-866-432-5534**.

The law firm of *Siskinds* ^{LLP} is counsel to the Plaintiff in the class proceeding, and can be reached by telephone, toll free, at 1-800-461-6166 ext. 2380.

[November ●, 2011]

PUBLICATION OF THIS NOTICE HAS BEEN AUTHORIZED
BY THE ONTARIO SUPERIOR COURT OF JUSTICE

SCHEDULE "F"

REDLINE SECURITIES LITIGATION
Ontario Superior Court of Justice, Court File No. 2198/10 CP

REDLINE SECURITIES LITIGATION OPT-OUT FORM

Must be Postmarked
No Later Than
_____ __, 201_

I, the undersigned, request to be excluded from the Settlement in the above-referenced matter.

By completing this form, I understand that I will not be eligible to participate in the Redline Securities Litigation Settlement. I will be barred from submitting a Proof of Claim and Release Form and receiving compensation from the Settlement Fund.

I acknowledge and agree that the Settlement Administrator may disclose all information relating to my opt-out request to the Courts and Counsel in this matter.

Last Name | First Name

Address

City | State | Postal Code

Account Number

Social Insurance Number — — or Business Number —

Or other unique tax identifier

Telephone Number (Work) — — Telephone Number (Home) — —

Total number of Redline common shares held as of December 6, 2006:

Total number of Redline common shares held as of October 24, 2007:

Total number of Redline common shares held as of March 30, 2010:

You must also accompany your Opt-Out form with brokerage statements, or other transaction records, listing all of your purchases and sales of Redline common shares between December 6, 2006 through March 30, 2010, inclusive.

Signature: _____ Date Signed: _____

Type or print your name here: _____ Capacity of Person(s) Signing, *e.g.*, Beneficial Purchaser or Acquirer, Executor or Administrator

This completed and signed request for exclusion must be sent to the Settlement Administrator at:

REDLINE SECURITIES LITIGATION SETTLEMENT
Claims Administrator
P.O. Box 3355
London, ON N6A 4K3

SCHEDULE "G"

REDLINE COMMUNICATIONS SECURITIES LITIGATION

Ontario Superior Court of Justice, Court File No. 2198/10 CP

PROOF OF CLAIM AND RELEASE

I. GENERAL INSTRUCTIONS

1. **To recover as a member of the Class based on your claims in the action entitled *Nor-Dor Developments Limited & Deborah Bozh v. Redline Communications Group Inc., et al*, Court File No. 2198/10 CP, you must complete and, on page 4 hereof, sign this Proof of Claim and Release ("Proof of Claim").** If you fail to file a properly addressed (as set forth in paragraph 4 below) Proof of Claim, your claim may be rejected and you may be precluded from any recovery from the settlement fund created in connection with the proposed settlement of the Litigation.
2. A separate proof of claim must be filed for each account in which common shares of Redline Communications Group, Inc. and Redline Communications, Inc., ("RDL") were held.
3. Submission of this Proof of Claim, however, does not assure that you will share in the proceeds of settlement in the Litigation.
4. **MAIL YOUR COMPLETED AND SIGNED PROOF OF CLAIM AND RELEASE POSTMARKED ON OR BEFORE _____, 2012, ADDRESSED TO THE CLAIMS ADMINISTRATOR:**

Redline Securities Litigation
Claims Administrator
P.O. Box 3355
London, ON N6A 4K3

If you are NOT a member of the Class, as defined in the Settlement Agreement dated September 6, 2011 (the "Settlement Agreement"), DO NOT submit a Proof of Claim form.

If you are a member of the Class, you are bound by the terms of any judgment entered in the Litigation, WHETHER OR NOT YOU SUBMIT A PROOF OF CLAIM FORM, unless you have already opted-out of the Class.

II. DEFINITIONS

1. "Class" or "Class Members" means all persons, other than Excluded Persons and Opt-Out Parties, who acquired Eligible Shares.
2. "Class Period" means the period from December 06, 2006 up to and including March 15, 2010.
3. "Defendants" means Redline Communications Group Inc., Redline Communications, Inc., Thomas Hearne, Nancy Orr, Majed Sifri, Mahesh Vaidya, Philippe De Gaspe Beaubien III, Timothy Dibble, Mihnea Moldoveanu, David Andrews and KPMG LLP, the defendants in the Action.
4. "Excluded Persons" means the Defendants and Redline's past or present subsidiaries, officers, directors, affiliates, legal representatives, heirs, predecessors, successors and assigns, and any member of the Individual Defendants' families and any entity in which any of them has or had a legal or de facto controlling interest.
5. "Opt-Out Party" means any person who would otherwise be a Class Member who opts out of the Class.
6. "Released Claims" (or Released Claim in the singular) means any and all manner of claims, demands, actions, suits, causes of action, whether class, individual or otherwise in nature, whether personal or subrogated, damages whenever incurred, and liabilities of any nature whatsoever, including interest, costs, expenses, Administration Expenses, penalties, Class Counsel Fees and lawyers' fees, known or unknown, suspected or unsuspected, in law, under statute or in equity, that Releasors, or any of them, whether directly, indirectly, derivatively, or in any other capacity, ever had, now have, or hereafter can, shall, or may have as against the Releasees, relating in any way to the purchase, sale, pricing, marketing or distributing of Eligible Shares during the Class Period, or to any representations made by the Releasees during the Class Period to anyone concerning Redline, its operations or the Eligible Shares, or relating to any conduct alleged (or which could have been alleged) in the Action, including, without limitation, any such claims which have been asserted, would have been asserted or could have been asserted as a result of the purchase of Eligible Shares in the Class Period.
7. "Releasees" means the Defendants, their insurers (including, but not limited to, the Insurer), their respective past and present affiliates, subsidiaries and associated partnerships (including, but not limited to, KPMG International and its member firms), and all of their respective past and present directors, officers, partners, employees, trustees, servants, consultants, underwriters, advisors, lawyers, representatives, successors, assigns and their heirs, executors, administrators, successors and assigns.

8. "Releasors" means, jointly and severally, the Plaintiffs, the Class Members (excluding Opt-Out Parties), including any person having a legal and/or beneficial interest in the Eligible Shares purchased or acquired by these Class Members, and their respective past and present directors, officers, employees, agents, trustees, servants, consultants, underwriters, advisors, representatives, heirs, executors, attorneys, administrators, guardians, estate trustees, successors and assigns, as the case may be.

III. CLAIMANT IDENTIFICATION

1. If you owned or acquired common shares of Redline and held the certificate(s) in your name, you were the beneficial purchaser as well as the record purchaser. If, however, the certificate(s) were registered in the name of a third party, such as a nominee or brokerage firm, you were the beneficial purchaser and the third party was the record purchaser.
2. Use Part I of this form entitled "Claimant Identification" to identify each purchaser or acquirer of record. In addition, if you were NOT the beneficial owner and are filing a claim on behalf of the beneficial owner, please complete the "Trustee/Asset Manager/Nominee/Record Owner's Name" field in Part I of the "Claimant Identification" section on the first page of the claim form. THIS CLAIM MUST BE FILED BY THE ACTUAL BENEFICIAL OWNER OR OWNERS, OR THE LEGAL REPRESENTATIVE OF SUCH OWNER OR OWNERS OF REDLINE COMMON SHARES UPON WHICH THIS CLAIM IS BASED.
3. All joint owners must sign this claim. Executors, administrators, guardians, conservators and trustees must complete and sign this claim on behalf of Persons represented by them and their authority must accompany this claim and their titles or capacities must be stated. The Social Insurance number, Business number or other unique tax identifier and telephone number of the beneficial owner may be used in verifying the claim. Failure to provide the foregoing information could delay verification of your claim or result in rejection of the claim.

IV. CLAIM FORM

1. You may file your Proof of Claim form with the Claims Administrator by submitting a claim by mail to the Claims Administrator (see address on first page of these instructions).
2. A separate Proof of Claim must be filed for each account in which common shares of Redline were held.
3. You must provide all of the requested information with respect to ***all*** of your purchases or acquisitions of Redline common stock which took place at any time between December 6, 2006 to March 15, 2010, inclusive (the "Class Period"). If traded on the Toronto Stock Exchange ("TSX"), you must also provide all of the requested information with respect to ***all*** of the Redline common stock you held at the close of trading on October 24, 2007 and March 30, 2010. If traded on the Alternative Investment Market ("AIM") of the London Stock Exchange, you must provide all of the requested information with respect to ***all*** of the Redline common stock you held at the close of trading on December 5, 2006, January 2, 2009, and March 30, 3010.
4. List each transaction in the Class Period separately and in chronological order, by trade date, beginning with the earliest. You must accurately provide the month, day and year of each sale you list.
5. Broker confirmations or other documentation of your transactions in common shares of Redline should be attached to your claim.
7. The above requests are designed to provide the minimum amount of information necessary to process most claims. The Claims Administrator may request additional information as required to efficiently and reliably calculate your losses. In some cases where the Claims Administrator cannot perform the calculation accurately or at a reasonable cost to the Class with the information provided, the Claims Administrator may conditionally accept the claim pending receipt of additional information.
8. NOTICE REGARDING ELECTRONIC FILES: Certain claimants with large numbers of transactions may request, or may be requested, to submit information regarding their transactions in an electronic aggregate file. If you wish to file an electronic file batch claim, you must contact the Claims Administrator at 1-866-432-5534 or redline@nptricepoint.com.

Official
Office
Use
Only

ONTARIO SUPERIOR COURT OF JUSTICE
Nor-Dor Developments v.
Redline Communications Group, Inc., et al.
Court File No. 2198/10 CP

PROOF OF CLAIM AND RELEASE

Please Type or Print in the Boxes Below
Do NOT use Red Ink, Pencil, or Staples

Must be Postmarked
No Later Than
_____ __, 201_

REDLINE

PART I: CLAIMANT IDENTIFICATION

Last Name | M.I. | First Name

Last Name (Co-Beneficial Owner) | First Name (Co-Beneficial Owner)

◯ RRSP ◯ RRIF ◯ RESP ◯ Trust ◯ Joint Tenancy ◯ Employee ◯ Individual ◯ Other_____ (specify)

Company Name (Beneficial Owner - If Claimant is not an Individual) or Custodian Name

Trustee/Asset Manager/Nominee/Record Owner's Name (if Different from Beneficial Owner Listed Above)

Account#/Fund# (Not Necessary for Individual Filers)

Social Insurance Number or Business Number — or Or other Unique Tax Identifier

Telephone Number (Work) — — Telephone Number (Home) — —

Email Address

MAILING INFORMATION

Address

Address

City | State | Zip Code —

Province | Postal Code | Country Name/Abbreviation

FOR CLAIMS PROCESSING ONLY	OB	CB	◯ ATP ◯ KE	◯ BE ◯ DR ◯ EM	◯ FL ◯ ME ◯ ND	◯ OP ◯ RE ◯ SH	/ /	FOR CLAIMS PROCESSING ONLY

PART II. SCHEDULE OF TRANSACTIONS IN REDLINE COMMON SHARES

TRADED ON THE TORONTO SHARES EXCHANGE "TSX"

A. Number of Redline common shares held at the close of trading on October 24, 2007: | | | | | | | | | | Proof Enclosed? ○ Y ○ N

B. Redline common shares in Canadian Dollars purchased or acquired between October 25, 2007 and March 15, 2010, inclusive:

PURCHASES

	Trade Date(s) of Purchases (List Chronologically)	Number of Redline common shares Purchased or Acquired	Total Purchase or Acquisition Price **(Canadian $)** Including commissions *Please round off to the nearest whole dollar*	Proof of Purchase Enclosed?
	M M / D D / Y Y Y Y			
1.	/ /	C$	. 00	○ Y ○ N
2.	/ /	C$	. 00	○ Y ○ N
3.	/ /	C$	. 00	○ Y ○ N
4.	/ /	C$	. 00	○ Y ○ N
5.	/ /	C$	. 00	○ Y ○ N
6.	/ /	C$	. 00	○ Y ○ N

C. Redline common shares in Canadian Dollars sold between October 25, 2007 and March 30, 2010, inclusive:

SALES

	Trade Date(s) of Sales (List Chronologically)	Number of Redline common shares Sold	Total Sales Price **(Canadian $)** Without deducting commissions *Please round off to the nearest whole dollar*	Proof of Sales Enclosed?
	M M / D D / Y Y Y Y			
1.	/ /	C$	. 00	○ Y ○ N
2.	/ /	C$	. 00	○ Y ○ N
3.	/ /	C$	. 00	○ Y ○ N
4.	/ /	C$	. 00	○ Y ○ N
5.	/ /	C$	. 00	○ Y ○ N
6.	/ /	C$	. 00	○ Y ○ N

D. Number of Redline common shares held at the close of trading on March 30, 2010: | | | | | | | | | | Proof Enclosed? ○ Y ○ N

If you require additional space, attach extra schedules in the same format as above. Sign and print your name on each additional page.

YOU MUST READ AND SIGN THE RELEASE ON PAGE 4. FAILURE TO SIGN THE RELEASE MAY RESULT IN A DELAY IN PROCESSING OR THE REJECTION OF YOUR CLAIM.

PART III. SCHEDULE OF TRANSACTIONS IN REDLINE COMMON SHARES TRADED ON THE LONDON SHARES EXCHANGE "AIM"

A. Number of Redline common shares held at the close of trading on December 5, 2006:

Proof Enclosed? ◯ Y ◯ N

B. Redline common shares in UK Pounds Sterling purchased or acquired between December 6, 2006 and January 2, 2009, inclusive:

PURCHASES

	Trade Date(s) of Purchases (List Chronologically)	Number of Redline common shares Purchased or Acquired	Total Purchase or Acquisition Price (GBP £) Including commissions *Please round off to the nearest whole pound*	Proof of Purchase Enclosed?
	M M / D D / Y Y Y Y			
1.	/ /		£ .00	◯ Y ◯ N
2.	/ /		£ .00	◯ Y ◯ N
3.	/ /		£ .00	◯ Y ◯ N
4.	/ /		£ .00	◯ Y ◯ N
5.	/ /		£ .00	◯ Y ◯ N
6.	/ /		£ .00	◯ Y ◯ N

C. Redline common shares in UK Pounds Sterling sold between December 6, 2006 and March 30, 2010, inclusive:

SALES

	Trade Date(s) of Sales (List Chronologically)	Number of Redline common shares Sold	Total Sales Price (GBP £) Without deducting commissions *Please round off to the nearest whole pound*	Proof of Sales Enclosed?
	M M / D D / Y Y Y Y			
1.	/ /		£ .00	◯ Y ◯ N
2.	/ /		£ .00	◯ Y ◯ N
3.	/ /		£ .00	◯ Y ◯ N
4.	/ /		£ .00	◯ Y ◯ N
5.	/ /		£ .00	◯ Y ◯ N
6.	/ /		£ .00	◯ Y ◯ N

D. Number of Redline common shares held at the close of trading on January 2, 2009:

Proof Enclosed? ◯ Y ◯ N

E. Number of Redline common shares held at the close of trading on March 30, 2010:

Proof Enclosed? ◯ Y ◯ N

If you require additional space, attach extra schedules in the same format as above. Sign and print your name on each additional page.

YOU MUST READ AND SIGN THE RELEASE ON PAGE 4. FAILURE TO SIGN THE RELEASE MAY RESULT IN A DELAY IN PROCESSING OR THE REJECTION OF YOUR CLAIM.

PART IV. DECLARATION & RELEASE

I (We) declare under penalty of perjury that the information on this claim form is true, correct and complete to the best of my (our) knowledge, information and belief.

I (We) declare that I (we) have disclosed all of my (our) holdings and purchase and sales transactions in Redline common shares for the time periods identified in this claim form.

I (We) also declare that I (we) am (are) not an Excluded Person or Excluded Persons (as defined in the Notice).

I (We) and my (our) personal representatives, agents, heirs, executors, administrators, trustees, beneficiaries, current and former plan members and contributors, successors, assigns, and any person they represent in relation to Redline common shares purchased or otherwise acquired during the Class Period or in relation to the Released Claims (as defined in the Settlement Agreement), hereby release and forever discharge the Releasees (as defined in the Settlement Agreement), and acknowledge that I (we) will be barred and enjoined from suing, continuing to sue or being part of any other lawsuit against the Releasees relating to the Released Claims. Provided, however, that this release shall be of no force or effect unless and until the Effective Date (as defined in the Settlement Agreement) has occurred.

I (We) acknowledge and agree that the Claims Administrator may disclose all information relating to my (our) claim to the Courts and counsel to the parties in the Actions.

Executed this_____day of _____ in _____
(Month/Year) (City/Province/Country)

_____	_____
(Sign your name here)	(Sign your name here)
_____	_____
(Type or print your name here)	(Type or print your name here)
_____	_____
(Capacity of person(s) signing, *e.g.*, Beneficial Purchaser or Acquirer, Executor or Administrator)	(Capacity of person(s) signing, *e.g.*, Beneficial Purchaser or Acquirer, Executor or Administrator)
Proof of Authority to File Enclosed? ◯ Y ◯ N	Proof of Authority to File Enclosed? ◯ Y ◯ N

ACCURATE CLAIMS PROCESSING TAKES A SIGNIFICANT AMOUNT OF TIME.
THANK YOU FOR YOUR PATIENCE.

Reminder Checklist:

1. Please sign the above release and declaration.
2. Remember to attach supporting documentation, if available.
3. Do not send original shares certificates.
4. Keep a copy of your claim form and all supporting documentation for your records.
5. If you desire an acknowledgment of receipt of your claim form please send it Registered Mail, Return Receipt Requested.
6. If you move, please send the Claims Administrator your new address.

PART V. PRIVACY STATEMENT

All information provided by the Claimant is collected, used, and retained by the Claims Administrator and Class Counsel pursuant to the *Personal Information Protection and Electronic Documents Act* (PIPEDA) for the purposes of administering the Redline Inc. Settlement Agreement, including evaluating the Claimant's eligibility status under the Settlement Agreement. The information provided by the Claimant is strictly private and confidential and will not be disclosed without the express written consent of the Claimant, except in accordance with the Redline Inc. Settlement Agreement.

"Class Counsel" is defined as Siskinds LLP of London, Ontario.

The "Claims Administrator" is defined as NPT RicePoint Class Action Services Inc. of London, Ontario, and Gilardi & Co, LLC of San Rafael, California.

NOR-DOR DEVELOPMENTS LTD. v. REDLINE COMMUNICATIONS GROUP, et al. Court File No: 2198/10 CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at London

ORDER
(Certification and Settlement Approval)

Siskinds LLP
Barristers & Solicitors
680 Waterloo Street
P.O. Box 2520
London, ON N6A 3V8

Charles M. Wright (LSUC #: 36599Q)
Nicholas C. Baker (LSUC #: 59642T)
Tel: 519.660.7814
Fax: 519.660.7815

Lawyers for the Plaintiffs

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, RSC 1985, c. C-36, AS AMENDED, AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Court File No: CV-12-9667-00CL

The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, et al. v. Sino-Forest Corporation, et al.

Court File No.: CV-11-431153-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

BOOK OF AUTHORITIES
(NOTICE APPROVAL)

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Lawyers for the Plaintiffs