# TAB 29

2009 CarswellOnt 6169,

2009 CarswellOnt 6169

Fraser Papers Inc., Re

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36. AS AMENDED

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO FRASER PAPERS INC., FPS CANADA INC., FRASER PAPERS HOLDINGS INC., FRASER TIMBER LTD., FRASER PAPERS LIMITED and FRASER N.H.LLC (collectively, the "Applicants" or "Fraser Papers")

Ontario Superior Court of Justice [Commercial List]

Pepall J.

Judgment: September 17, 2009
Docket: CV-09-8241-OOCL



Counsel: M. Barrack, D.J. Miller for Applicants

R. Chadwick, C. Costa for Monitor

D. Wray, J. Kugler for Communications, Energy and Paper Workers Union of Canada

D. Wray, J. Kugler (Agent) for Pink Larkin

C. Sinclair for United Steelworkers

T. McRae, S. Levitt for Steering Committee of Fraser Papers' Salaried Retirees Committee

M.P. Gottlieb, S. Campbell for Committee for Salaried Employees and Retirees

M. Sims for Her Majesty the Queen in Right of the Province of New Brunswick as represented by the Minister of Business of New Brunswick

Chriss Burr for CIT Business Credit Canada Inc.

D. Chernos for Brookfield Asset Management Inc.

Subject: Insolvency; Civil Practice and Procedure

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous.

**Cases considered by *Pepall J.*:**

*Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12, 2000 CarswellAlta 623 (Alta. Q.B.) — considered

*Nortel Networks Corp., Re* (2009), 53 C.B.R. (5th) 196, 75 C.C.P.B. 206, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) — referred to

*Stelco Inc., Re* (2005), 2005 CarswellOnt 6818, 204 O.A.C. 205, 78 O.R. (3d) 241, 261 D.L.R. (4th) 368, 11 B.L.R. (4th) 185, 15 C.B.R. (5th) 307 (Ont. C.A.) — referred to

**Statutes considered:**

*Bankruptcy Code*, 11 U.S.C. 1982

Generally — referred to

Chapter 15 — referred to

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — referred to

*Employee Retirement Income Security Act, 1974*, 29 U.S.C.

Generally — referred to

**Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

Generally — referred to

***Pepall J.*:**

**Relief Requested**

1 There are four motions before me that request the appointment of representatives and representative counsel for various groups of unrepresented current and former employees and other beneficiaries of the pension plans and other retirement and benefit plans of the Applicants ("Fraser Papers"). With the exception of the motion of the United Steel, Paper, Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union (the "USW"), all motions include a request that Fraser Papers pay the fees and disbursements of representative counsel.

2 The motions are brought by the following moving parties:

(a) the USW who seeks to represent its former members. It already represents its current members.

(b) the Communications Energy and Paperworkers Union of Canada (the "CEP") who also seeks to represent its former members. It too already represents its current members.

(c) the Steering Committee of Fraser Papers' Salaried Retirees Committee who request that Nelligan O'Brian Payne LLP and Shibley Righton LLP ("Nelligan/Shibley") be appointed to act for all non-unionized retirees and their successors.

(d) the Committee of Salaried Employees and Retirees who request that Davies Ward Phillips & Vineberg LLP ("Davies") be appointed to act for all unrepresented employees, be they active or retired, and their successors.

3 A third union, the CMAW, did not bring a motion but Mr. Wray, counsel for the CEP, acted as agent for CMAW's counsel, Pink Larkin on these motions. He advised that the CMAW will represent its current members but not its retirees who are approximately 25 in number.[FN1] These retirees therefore would only be encompassed by the Davies proposed retainer.

**Discussion**

4 The Applicants employ approximately 2,500 personnel. They are located in Canada and the U.S. A substantial majority is unionized. Of the 2,500, 1,729 employees participate in five defined benefit pension plans. In addition, 3,246 retirees receive benefits from these plans. Fraser Papers maintains certain other plans and benefits including supplementary employee retirement programmes ("SERPs").

5 On June 18, 2009, the Applicants obtained an Initial Order pursuant to the provisions of the *CCAA*. On July 13, 2009, the U.S. Bankruptcy Court for the District of Delaware designated these proceedings as foreign main proceedings pursuant to Chapter 15 of the U.S. Bankruptcy Code.

6 Fraser Papers is insolvent and is under significant financial pressure. Absent the DIP financing, a restructuring would be impossible. The Applicants have not generated positive cash flow from operations for three years. Their largest unsecured claims relate to the pension plans and the SERPs. Their accrued pension benefit obligations in these plans and the SERPs exceed the value of the plan assets by approximately USD $171.5 million as at December 31, 2008.

7 Representative counsel should be appointed in this case and I have jurisdiction to do so. Section 11 of the *CCAA* and the Rules of Civil Procedure provide the Court with broad jurisdiction in this regard. No one challenges either of these propositions. The employees and retirees not otherwise represented are a vulnerable group who require assistance in the restructuring process and it is beneficial that representative counsel be appointed. The balance of con-

venience favours the granting of such an order and it is in the interests of justice to do so. The real issues are who should be appointed and whether Fraser Papers should fund the proposed representation.

***(A) USW and CEP Motions***

8 Dealing firstly with the motions brought by the unions, the USW is the exclusive bargaining agent for the unionized employees of the Applicants working in Madawaska, Maine and Berlin- Gorham, New Hampshire. Personnel at these facilities participate in a defined benefit pension plan and a defined contribution pension plan. The U.S. law applicable to pension plans is the *Employee Retirement Income Security Act of 1974* ("ERISA")[FN2]. The evidence filed by the USW suggests that a labour organization that negotiated a pension plan has a role in legal proceedings involving termination of that plan. If voluntary, consent of the union is required and if involuntary, an order of the bankruptcy court under the appropriate provisions of U.S. bankruptcy law is necessary. The USW has extensive experience representing the rights of employees and retirees in these sorts of proceedings. It is also noteworthy that, although the collective agreements between the USW and the Applicants do not provide for retiree health and life insurance benefits, the U.S. Bankruptcy Code provides that a labour organization is deemed to be the authorized representative of retirees, surviving spouses, and dependents receiving benefits pursuant to its collective bargaining agreements, unless the union opts not to serve as the authorized representative or the bankruptcy court determines that different representation is appropriate.

9 In my view, the USW should be appointed as the representative for its former members who are retired subject to a retiree's ability to opt out of such representation should he or she so desire. The union already has a relationship with the USW retirees. It also has the means with which to communicate quickly with its members and former members. It is familiar with the relevant collective agreements and plans and has experience and a presence in both Canada and the U.S. De facto, the USW is already the representative of the USW retirees pursuant to the law in the U.S. Lastly, the Monitor and the Applicants support the USW's request to be appointed as representative counsel for its former members. As mentioned, the USW does not seek funding.

10 Although CEP plays no role in Fraser Papers' U.S. operations, with that exception, for similar reasons and in the interests of consistency, the CEP should be appointed as the representative for its former members who are retirees subject to the aforementioned opt out provision. The Monitor and the Applicants are supportive of this position. Counsel for the CEP indicated that while it is unclear as a matter of law that the union is bound to represent former members in circumstances such as those facing Fraser Papers, the CEP would represent them with or without funding. Given Fraser Papers' insolvency, it seems to me that funding by the Applicants should only be provided for the benefit of those who otherwise would have no legal representation. The request for funding by CEP is refused.

***(b) Nelligan/Shibley and Davies***

11 Turning to the requests of the Steering Committee of Fraser Papers Salaried Retirees

Committee which favours the appointment of Nelligan/Shibley and the Committee for Salaried Employees and Retirees which favours Davies, firstly commonality of interest should be considered. In *Nortel Networks Corp., Re*[FN3], Morawetz J. applied the Court of Appeal's decision in *Stelco Inc., Re*[FN4] and the decision of *Canadian Airlines Corp., Re*[FN5] to enumerate the following principles applicable to an assessment of commonality of interest:

> 1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test.
>
> 2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
>
> 3. The commonality of interests are to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations if possible.
>
> 4. In placing a broad and purposive interpretation on the CCAA, the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
>
> 5. Absent bad faith, the motivations of creditors to approve or disapprove [of the plan] are irrelevant.
>
> 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.

12 Once commonality of interest has been established, other factors to be considered in the selection of representative counsel include: the proposed breadth of representation; evidence of a mandate to act; legal expertise; jurisdiction of practice; the need for facility in both official languages; and estimated costs.

13 Davies is proposing to represent all unrepresented employees, former employees and their successors. In my view, there is a commonality of interest amongst the members of this group. In essence, they engage unsecured obligations. Arguably those proposed to be represented by the unions could also be included, and indeed absent a change of position by the CMAW, former members of the CMAW will be. That said, for the reasons outlined above, I am satisfied in this case that it is desirable to have the unions act for their members and former members if so willing. Indeed, no one took an opposing position.

14 I am not persuaded that there is a need for separate representation as advocated by the Committee supporting the Nelligan/Shibley retainer. Appointing only Davies avoids excessive fragmentation and duplication and minimizes costs. In addition, no one will be excluded unless he or she so desires. Davies is also the only counsel whose retainer would extend to the CMAW retirees.

15 Davies has already received a broad mandate in that it has close to 700 retainers from employees in each facet of Fraser Papers' operations and from all current and former employee groups. It has the necessary legal expertise and has offices in Toronto, Montreal and New York. It also has the necessary language capability.

16 In contrast, Nelligan/Shibley is only proposing to represent retirees. It has a mandate of approximately 211 retirees. Clearly it has the requisite legal and language expertise but does not have the benefit associated with having offices in as many relevant jurisdictions. One may reasonably conclude from the evidence before me that the proposed fee structure would be less than that advanced by Davies although the scope of the retainer is more limited. Davies' appointment is not diminished because initially they were identified by the Applicants as appropriate counsel unlike Nelligan/Shibley whose group grew organically to use its counsel's terminology. Nor am I persuaded that Davies will be enfeebled as a result of the composition of the Steering Committee or due to past unrelated retainers by Brookfield Asset Management Inc. The Monitor supports the appointment of Davies as do the Applicants and the DIP lenders.

17 In the event that a real as opposed to a hypothetical or speculative conflict arises at some point in the future, parties may seek directions from the Court. As with the unions, the order appointing Davies will allow anyone to opt out of the representation.

18 Unlike the unions, absent funding, Davies would not be expected to serve as representative counsel. Accordingly, funding is ordered to be provided by Fraser Papers. Again, the funding request is supported by the Monitor, the Applicants and the DIP lenders.

19 The objective of my order is to help those who are otherwise unrepresented but to do so in an efficient and cost effective manner and without imposing an undue burden on insolvent entities struggling to restructure. It seems to me that in the future, parties should make every effort to keep the costs associated with contested representation motions in insolvency proceedings to a minimum. In addition, as I indicated in open court, while a successful moving party may expect to recover a good portion of the legal fees associated with such a motion, there is an element of business development involved in these motions which in my view is a cost of doing business and should not be visited upon the insolvent Applicants. I will leave it to the Monitor to address what an appropriate reduction would be and this no doubt will be addressed very briefly in a subsequent Monitor's report.

**Summary**

20 In summary, the USW, CEP and Davies representation requests are granted. Only the Davies funding request is granted. The motion relating to Nelligan/ Shibley is dismissed. Counsel submitted proposed orders without prejudice to the Applicants to make submissions. Counsel should confer on the appropriate form of orders and then a representative may attend before me at a 9:30 appointment to have them approved and signed.

FN1 This is contrary to the contents of paragraph 24 of the Monitor's 4th Report but, being more recent, I accept counsel's oral representation as being accurate.

FN2 29 U.S.C.

FN3 (Ont. S.C.J. [Commercial List]).

FN4 (2005), 15 C.B.R. (5th) 307 (Ont. C.A.)

FN5 (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.).

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# TAB 30

2010 CarswellOnt 1344, 2010 ONSC 1328, 65 C.B.R. (5th) 152

2010 CarswellOnt 1344, 2010 ONSC 1328, 65 C.B.R. (5th) 152

Canwest Publishing Inc./Publications Canwest Inc., Re

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

Ontario Superior Court of Justice [Commercial List]

Pepall J.

Judgment: March 5, 2010
Docket: CV-10-8533-00CL



Counsel: Lyndon Barnes, Alex Cobb for Canwest LP Entities

Maria Konyukhova for Monitor, FTI Consulting Canada Inc.

Hilary Clarke for Bank of Nova Scotia, Administrative Agent for Senior Secured Lenders' Syndicate

Janice Payne, Thomas McRae for Canwest Salaried Employees and Retirees (CSER) Group

M.A. Church for Communications, Energy and Paperworkers' Union

Anthony F. Dale for CAW-Canada

Deborah McPhail for Financial Services Commission of Ontario

Subject: Insolvency; Civil Practice and Procedure

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

In January 2010 LP Entities obtained order pursuant to Companies' Creditors Arrangement Act staying all proceedings and claims against them — Order permitted, but did not require, payments to employees and pension plans — There were approximately 45 non-unionized employees who were still owed termination and severance payments, as well as accrual of pensionable service — There were further nine employees who were, or would be, entitled pursuant to executive pension plan to pension benefits in excess of those under main pension plan — Moving parties sought order permitting them to represent those employees, for appointment of counsel, and for funding of counsel — Respondents did not object to appointment representatives or counsel, but opposed funding of counsel — Motion granted — All four proposed representatives had claims against LP Entities that were representative of claims that would be advanced by former employees — Individuals at issue were unsecured creditors whose recovery expectations might be non-existent, however they found themselves facing legal proceedings of significant complexity — Evidence was that members of group had little means to pursue representation and were unable to afford proper legal representation at this time — Employees were vulnerable group and there was no other counsel available to represent their interests — Canadian courts did not typically appoint unsecured creditors committees — It would be of considerable benefit to have representatives and representative counsel who could represent interests of salaried employees and retirees — There were three possible sources of funding: LP Entities, Monitors, or senior secured lenders — Court had power to compel senior secured lenders to fund or alternatively to compel LP Administrative Agent to consent to funding — Source of funding other than salaried employees themselves should be identified now — Funding would be prospective in nature and would not extend to investigation of or claims against directors — Counsel were directed to communicate with one another to ascertain how best to structure funding and report back to court by certain date.

**Statutes considered:**

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Generally — referred to

*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

MOTION by group of employees for funding for appointment of representatives, appointment of counsel, and funding of counsel.

***Pepall J.*:**

**Reasons for Decision**

***Relief Requested***

1 Russell Mills, Blair MacKenzie, Rejean Saumure and Les Bale (the "Representatives") seek to be appointed as representatives on behalf of former salaried employees and retirees of Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., Canwest (Canada) and Canwest Limited Partnership and the Canwest Global Canadian Newspaper Entities (collectively the "LP Entities") or any person claiming an interest under or on behalf of such salaried employees or retirees including beneficiaries and surviving spouses ( "the Salaried Employees and Retirees"). They also seek an order that Nelligan O'Brien Payne LLP and Shibley Righton LLP be appointed in these proceedings to represent the Salaried Employees and Retirees for all matters relating to claims against the LP Entities and any issues affecting them in the proceedings. Amongst other things, it is proposed that all reasonable legal, actuarial and financial expert and advisory fees be paid by the LP Entities.

2 On February 22, 2010, I granted an order on consent of the LP Entities authorizing the Communications, Energy and Paperworker's Union of Canada ("CEP") to continue to represent its current members and to represent former members of bargaining units represented by the union including pensioners, retirees, deferred vested participants and surviving spouses and dependants employed or formerly employed by the LP Entities. That order only extended to unionized members or former members. The within motion focused on non-unionized former employees and retirees although Ms. Payne for the moving parties indicated that the moving parties would be content to include other non-unionized employees as well. There is no overlap between the order granted to CEP and the order requested by the Salaried Employees and Retirees.

***Facts***

3 On January 8, 2010 the LP Entities obtained an order pursuant to the *Companies' Creditors Arrangement Act* ("CCAA") staying all proceedings and claims against the LP Entities. The order permits but does not require the LP Entities to make payments to employee and retirement benefit plans.

4 There are approximately 66 employees, 45 of whom were non-unionized, whose employment with the LP Entities terminated prior to the Initial Order but who were still owed termination and severance payments. As of the date of the Initial Order, the LP Entities ceased making those payments to those former employees. As many of these former employees were owed termination payments as part of a salary continuance scheme whereby they would continue to accrue pensionable service during a notice period, after the Initial Order, those former employees stopped accruing pensionable service. The Representatives seek an order authorizing them to act for the 45 individuals and for the aforementioned law firms to be appointed as representative counsel.

5 Additionally, seven retirees and two current employees are (or would be) eligible for a pension benefit from Southam Executive Retirement Arrangements ("SERA"). SERA is a non-

registered pension plan used to provide supplemental pension benefits to former executives of the LP Entities and their predecessors. These benefits are in excess of those earned under the Canwest Southam Publications Inc. Retirement Plan which benefits are capped as a result of certain provisions of the *Income Tax Act*. As of the date of the Initial Order, the SERA payments ceased also. This impacts beneficiaries and spouses who are eligible for a joint survivorship option. The aggregate benefit obligation related to SERA is approximately $14.4 million. The Representatives also seek to act for these seven retirees and for the aforementioned law firms to be appointed as representative counsel.

6 Since January 8, 2010, the LP Entities have being pursuing the sale and investor solicitation process ("SISP") contemplated by the Initial Order. Throughout the course of the CCAA proceedings, the LP Entities have continued to pay:

(a) salaries, commissions, bonuses and outstanding employee expenses;

(b) current services and special payments in respect of the active registered pension plan; and

(c) post-employment and post-retirement benefits to former employees who were represented by a union when they were employed by the LP Entities.

7 The LP Entities intend to continue to pay these employee related obligations throughout the course of the CCAA proceedings. Pursuant to the Support Agreement with the LP Secured Lenders, AcquireCo. will assume all of the employee related obligations including existing pension plans (other than supplemental pension plans such as SERA), existing post-retirement and post-employment benefit plans and unpaid severance obligations stayed during the CCAA proceeding. This assumption by AcquireCo. is subject to the LP Secured Lenders' right, acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities.

8 All four proposed Representatives have claims against the LP Entities that are representative of the claims that would be advanced by former employees, namely pension benefits and compensation for involuntary terminations. In addition to the claims against the LP Entities, the proposed Representatives may have claims against the directors of the LP Entities that are currently impacted by the CCAA proceedings.

9 No issue is taken with the proposed Representatives nor with the experience and competence of the proposed law firms, namely Nelligan O'Brien Payne LLP and Shibley Righton LLP, both of whom have jointly acted as court appointed representatives for continuing employees in the Nortel Networks Limited case.

10 Funding by the LP Entities in respect of the representation requested would violate the Support Agreement dated January 8, 2010 between the LP Entities and the LP Administrative

Agent. Specifically, section 5.1(j) of the Support Agreement states:

> The LP Entities shall not pay any of the legal, financial or other advisors to any other Person, except as expressly contemplated by the Initial Order or with the consent in writing from the Administrative Agent acting in consultation with the Steering Committee.

11 The LP Administrative Agent does not consent to the funding request at this time.

12 On October 6, 2009, the CMI Entities applied for protection pursuant to the provisions of the CCAA. In that restructuring, the CMI Entities themselves moved to appoint and fund a law firm as representative counsel for former employees and retirees. That order was granted.

13 Counsel were urged by me to ascertain whether there was any possibility of resolving this issue. Some time was spent attempting to do so, however, I was subsequently advised that those efforts were unsuccessful.

***Issues***

14 The issues on this motion are as follows:

(1) Should the Representatives be appointed?

(2) Should Nelligan O'Brien Payne LLP and Shibley Righton LLP be appointed as representative counsel?

(3) If so, should the request for funding be granted?

***Positions of Parties***

15 In brief, the moving parties submit that representative counsel should be appointed where vulnerable creditors have little means to pursue a claim in a complex CCAA proceeding; there is a social benefit to be derived from assisting vulnerable creditors; and a benefit would be provided to the overall CCAA process by introducing efficiency for all parties involved. The moving parties submit that all of these principles have been met in this case.

16 The LP Entities oppose the relief requested on the grounds that it is premature. The amounts outstanding to the representative group are prefiling unsecured obligations. Unless a superior offer is received in the SISP that is currently underway, the LP Entities will implement a support transaction with the LP Secured Lenders that does not contemplate any recoveries for unsecured creditors. As such, there is no current need to carry out a claims process. Although a superior offer may materialize in the SISP, the outcome of the SISP is currently unknown.

17 Furthermore, the LP Entities oppose the funding request. The fees will deplete the re-

sources of the Estate without any possible corresponding benefit and the Support Agreement with the LP Secured Lenders does not authorize any such payment.

18 The LP Senior Lenders support the position of the LP Entities.

19 In its third report, the Monitor noted that pursuant to the Support Agreement, the LP Entities are not permitted to pay any of the legal, financial or other advisors absent consent in writing from the LP Administrative Agent which has not been forthcoming. Accordingly, funding of the fees requested would be in contravention of the Support Agreement with the LP Secured Lenders. For those reasons, the Monitor supported the LP Entities refusal to fund.

***Discussion***

20 No one challenged the court's jurisdiction to make a representation order and such orders have been granted in large CCAA proceedings. Examples include Nortel Networks Corp., Fraser Papers Inc., and Canwest Global Communications Corp. (with respect to the television side of the enterprise). Indeed, a human resources manager at the Ottawa Citizen advised one of the Representatives, Mr. Saumure, that as part of the CCAA process, it was normal practice for the court to appoint a law firm to represent former employees as a group.

21 Factors that have been considered by courts in granting these orders include:

- the vulnerability and resources of the group sought to be represented;
- any benefit to the companies under CCAA protection;
- any social benefit to be derived from representation of the group;
- the facilitation of the administration of the proceedings and efficiency;
- the avoidance of a multiplicity of legal retainers;
- the balance of convenience and whether it is fair and just including to the creditors of the Estate;
- whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
- the position of other stakeholders and the Monitor.

22 The evidence before me consists of affidavits from three of the four proposed Representatives and a partner with the Nelligan O'Brien Payne LLP law firm, the Monitor's Third Report,

and a compendium containing an affidavit of an investment manager for noteholders filed on an earlier occasion in these CCAA proceedings. This evidence addresses most of the aforementioned factors.

23 The primary objection to the relief requested is prematurity. This is reflected in correspondence sent by counsel for the LP Entities to counsel for the Senior Lenders' Administrative Agent. Those opposing the relief requested submit that the moving parties can keep an eye on the Monitor's website and depend on notice to be given by the Monitor in the event that unsecured creditors have any entitlement. Counsel for the LP Entities submitted that counsel for the proposed representatives should reapply to court at the appropriate time and that I should dismiss the motion without prejudice to the moving parties to bring it back on.

24 In my view, this watch and wait suggestion is unhelpful to the needs of the Salaried Employees and Retirees and to the interests of the Applicants. I accept that the individuals in issue may be unsecured creditors whose recovery expectation may prove to be non-existent and that ultimately there may be no claims process for them. I also accept that some of them were in the executive ranks of the LP Entities and continue to benefit from payment of some pension benefits. That said, these are all individuals who find themselves in uncertain times facing legal proceedings of significant complexity. The evidence is also to the effect that members of the group have little means to pursue representation and are unable to afford proper legal representation at this time. The Monitor already has very extensive responsibilities as reflected in paragraph 30 and following of the Initial Order and the CCAA itself and it is unrealistic to expect that it can be fully responsive to the needs and demands of all of these many individuals and do so in an efficient and timely manner. Desirably in my view, Canadian courts have not typically appointed an Unsecured Creditors Committee to address the needs of unsecured creditors in large restructurings. It would be of considerable benefit to both the Applicants and the Salaried Employees and Retirees to have Representatives and representative counsel who could interact with the Applicants and represent the interests of the Salaried Employees and Retirees. In that regard, I accept their evidence that they are a vulnerable group and there is no other counsel available to represent their interests. Furthermore, a multiplicity of legal retainers is to be discouraged. In my view, it is a false economy to watch and wait. Indeed the time taken by counsel preparing for and arguing this motion is just one such example. The appointment of the Representatives and representative counsel would facilitate the administration of the proceedings and information flow and provide for efficiency.

25 The second basis for objection is that the LP Entities are not permitted to pay any of the legal, financial or other advisors to any other person except as expressly contemplated by the Initial Order or with consent in writing from the LP Administrative Agent acting in consultation with the Steering Committee. Funding by the LP Entities would be in contravention of the Support Agreement entered into by the LP Entities and the LP Senior Secured Lenders. It was for this reason that the Monitor stated in its Report that it supported the LP Entities' refusal to fund.

26 I accept the evidence before me on the inability of the Salaried Employees and Retirees

to afford legal counsel at this time. There are in these circumstances three possible sources of funding: the LP Entities; the Monitor pursuant to paragraph 31 (i) of the Initial Order although quere whether this is in keeping with the intention underlying that provision; or the LP Senior Secured Lenders. It seems to me that having exercised the degree of control that they have, it is certainly arguable that relying on inherent jurisdiction, the court has the power to compel the Senior Secured Lenders to fund or alternatively compel the LP Administrative Agent to consent to funding. By executing agreements such as the Support Agreement, parties cannot oust the jurisdiction of the court.

27 In my view, a source of funding other than the Salaried Employees and Retirees themselves should be identified now. In the CMI Entities' CCAA proceeding, funding was made available for Representative Counsel although I acknowledge that the circumstances here are somewhat different. Staged payments commencing with the sum of $25,000 may be more appropriate. Funding would be prospective in nature and would not extend to investigation of or claims against directors.

28 Counsel are to communicate with one another to ascertain how best to structure the funding and report to me if necessary at a 9:30 appointment on March 22, 2010. If everything is resolved, only the Monitor need report at that time and may do so by e-mail. If not resolved, I propose to make the structuring order on March 22, 2010 on a nunc pro tunc basis. Ottawa counsel may participate by telephone but should alert the Commercial List Office of their proposed mode of participation.

*Motion granted.*

END OF DOCUMENT

# TAB 31

2009 CarswellOnt 9398

Canwest Global Communications Corp., Re

In The Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, C-36. As Amended

In the Matter of a Proposed Plan of Compromise or Arrangement of Canwest Global Communications Corp. and the Other Applicants listed on Schedule "A"

Ontario Superior Court of Justice [Commercial List]

Pepall J.

Judgment: October 27, 2009
Docket: CV-09-8396-00CL



Counsel: Lyndon Barnes, Shawn Irving, for Applicants

Alan Merskey, for Special Committee of the Board of Directors

David Byers, Maria Konyukhova, for Monitor, FTI Consulting Canada Inc.

Benjamin Zarnett, for Ad Hoc Committee of Noteholders

Hilary Clarke, for Bank of Nova Scotia

Steve Weisz, for CIT Business Credit Canada Inc.

Hugh O'Reilly, Amanda Darrach, for CHCH Retirees

Douglas Wray, Jesse Kugler, for Communications, Energy and Paperworkers Union of Canada

Deborah McPhail, for FSCO

Subject: Civil Practice and Procedure; Insolvency

Bankruptcy and insolvency --- Practice and procedure in courts — Miscellaneous.

**Statutes considered:**

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

s. 11 — referred to

**Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

R. 10 — referred to

***Pepall J.*:**

**Relief Requested**

1 The CMI Entities seek an order appointing David Cremasco, Rose Stricker and Lawrence Schnurr as representatives of certain retirees ("Retirees"). The Retirees are all former employees of the CMI Entities (or their predecessors) or their surviving spouses who receive or are entitled to receive a pension from a pension plan sponsored by a CMI Entity or who, prior to October 6, 2009, were entitled to receive non-pension benefits from a CMI Entity. The proposed order would encompass former members of the Communications, Energy and Paper-workers Union of Canada ("CEP") who arc entitled to benefits under the Global Communications Limited Retirement Plan for CH Employees (the "CH Employees Plan") but not otherwise. They are referred to as the CH Employees. Put differently, the proposed representatives do not plan to represent former unionized employees (or their surviving spouses) who were represented by CEP when they were active employees other than those who were entitled to benefits under the CH Employees Plan, namely the CH Employees. The CMI Entities also request an order appointing the law firm of Cavalluzzo Hayes Shilton McIntyre & Cornish LLP as representative counsel for the Retirees. It is proposed that the CMI Entities provide funding for this representation.

2 The CEP seeks an order appointing it and the law firm of CaleyWray to represent current and former members of the CEP who are employed or who were formerly employed by the CMI Entities[FN1] but not including the aforementioned CH Employees. It also requests funding by the CMI Entities and a charge over their property for this representation. It further requests that the claims bar date established in my order of October 14,2009 be extended from November 19, 2009.

**Brief Outline of Facts**

3 Since the date of the Initial Order, the CMI Entities have paid and intend to continue to pay:

(a) salaries, commissions, bonuses and outstanding employee expenses;

(b) current service and special payments with respect to the active defined benefit pension plans; and

(c) post-employment and post-retirement benefit payments to former employees who were represented by a union when they were employed by the CMI Entities.

4 That said, certain former employees are affected by the CMI Entities' discontinuance or proposed discontinuance of employee related obligations and it is intended that they be assisted by the granting of the order requested by the CMI Entities. Approximately 81 former non-unionized employees have been advised that the CMI Entities propose to cease making all post-employment and post-retirement benefit payments in relation to claims incurred after November 13,2009. There are also 2 out of IS beneficiaries of the Canwest Global Communications Corp. and Related Companies Retirement Compensation Arrangement Plan who will not have received the entire present value of their entitlement under that plan.

5 In addition, the CMI Entities purported to terminate the CH Employees Plan when they sold CHCH TV effective August 31, 2009. 120 former employees or spouses received a pension or were entitled to receive a deferred vested pension under this plan. OSFI has directed CMI to prepare without delay a valuation report for the CH Employees Plan effective as of December 31, 2008 to establish additional amounts to accrue from January 1, 2009 which may need to be funded through special payments. The CMI Entities anticipate that the valuation will identify an unfunded liability. Currently, special payments are not contemplated in the cash flow projections for that unfunded liability and a shortfall is anticipated to exist on the filing of the termination report for the plan.

6 Some former employees of CHCH TV have established a committee representing union and non-unionized former employees. Committee members include the proposed representatives. Rose Stricker is a non-unionized deferred vested member of the CH Plan. David Cremasco is a formerly unionized retiree with entitlement to post-retirement benefits and Lawrence Schnurr is a formerly salaried employee with entitlement to post-retirement benefits. If appointed, they will seek to form a broader committee with a member from each of the major population centres in which the Retirees reside and with at least one additional formerly unionized member.

7 Cavalluzzo LLP acts for about 100 retired participants in the CH Employees Plan, 30 to 40 of whom were not previously represented by a union and 60 to 70 of whom were. Other than those 100, most other Retirees are not represented by counsel in this CCAA proceeding.

8 The CMI Entities request that Cavalluzzo LLP be appointed as representative counsel to assist the Retirees.

9 CEP represents 1000 bargaining unit employees employed by the Applicants. It intends to facilitate and advance the claims of both its current members and its former members (but not including the CH Employees). CEP states that as a result of the current economic crisis, it has had to incur significant costs in representing its current and former members in CCAA proceedings. This is particularly so given the union's strong presence in the forestry and media industries and the degree to which they have been impacted by the state of the economy. CEP states mat the costs have been substantial and have adversely affected its financial position. CEP states that its ability to provide effective representation in these proceedings is dependent

on receipt of funding. In the past 6 months, CEP has spent about $250,000 on legal costs in connection with different CCAA proceedings. Furthermore, former members do not pay union dues and their representation, although part of the union's internal mandate, creates costs that are outside CEP's cost structure. In addition, over the past 12 months, CEP has lost approximately 12,000 members due to economic conditions. This obviously has a negative impact on union revenues. Faced with these conditions, CEP seeks funding.

10 CEP requests that CaleyWray be appointed as representative counsel. It also requests a charge or security over the property of the CMI Entities to cover the costs of CEP and its counsel although it did not press this point on learning that no such charge is proposed for the Cavaluzzo representation order.

11 Lastly, CEP requests that the claims bar date be extended to provide it with additional time to identify, value and process claims.

**Issues**

12 The issues to consider are:

(a) Should the representatives and Cavalluzzo LLP be appointed to represent the interests of the Retirees and should Cavalluzzo LLP be provided with funding for such representation?

(b) Should CEP and Caley Wray be appointed on behalf of CEP's current and former members (not including the CH Employees) and provided with funding and a charge over the property of the CMI Entities for such representation?

(c) Should the claims bar date be extended as requested by CEP?

**Discussion**

***(a) Cavalluzzo LLP***

13 No one opposes the motion of the CMI Entities. The Monitor and the Ad Hoc Committee of 8% Noteholders support the request and others are unopposed to the relief requested. CIT has agreed to a variation of the cash flow in this regard as well.

14 Dealing firstly with the representation component of the order, in my view, the order requested should be granted. I have jurisdiction under Rule 10 of the Rules of Civil Procedure and section 11 of the CCAA. The balance of convenience favours the granting of the order and it is in the interests of justice to do so. The Retirees are a particularly vulnerable group and without professional and legal resources, they are likely at risk of being unable to understand and protect their interests in the restructuring. Clearly there is a social benefit associated with them being represented. The appointment of a single representative counsel will facilitate the administration of the proceedings and provide for efficiency. Cavalluzzo LLP is experienced in this area, has a considerable reputation, and is fully qualified to act.

15 As for funding, the CMI Entities propose that, subject to fee arrangements agreed to

by the CMI Entities and Cavalluzzo LLP, reasonable legal, actuarial and financial expert and advisory fees and other incidental fees and disbursements be paid by the CMI Entities on a monthly basis. Funding for such representation should be provided by the CMI Entities. I am satisfied that the moving parties have established that such an order is beneficial. I accept the evidence before me to the effect that most individual Retirees likely do not have the means to obtain actuarial and/or benefit experts and would benefit from the assistance offered by representative counsel and its pension expert. Absent such an order, there would likely be a multiplicity of lawyers acting for various Retirees, stress and inconvenience for those who could ill afford such representation, no representation for some, and the disorganization and inefficiency associated with multiple representation of substantially similar interests. A single counsel diminishes the likelihood of "overlawyering" and funding of such representation is a recognition of that desirable objective. It is fair and just to grant such an order.

***(b) CEP and CaleyWray***

16 CEP requests a separate representation order for all current and former CEP members other than the CH Employees and an order that CaleyWray be appointed as representative counsel funded by the CMI Entities.

17 Again, there is no issue that CaleyWray is experienced and well equipped to act for these individuals. Similarly, the union may appropriately represent its members and former members.

18 CEP intends to facilitate and advance the interests of both its members and former members. It is of the view mat it has no conflict of interest as all of the aforementioned may ultimately have unsecured claims. It clearly already represents its current members and plans to represent its former members. In that sense, they are not vulnerable. I do not see the need for a representation order particularly with respect to current members. To the extent, if any, that it is necessary to do so, and given that no one opposes the request, it and CaleyWray are authorized to represent CEP's current and former members (but not including the CH Employees).

19 As for funding, as I indicated in the *Fraser Papers* case, it should only be provided for the benefit of those former employees who otherwise would have no legal representation. Here, CEP intends to represent its current and former members (except for the CH Employees). But for this desire and subject to the agreement of Cavalluzzo LLP to act, there is no principled reason for separate representation. It arises by choice not out of necessity. Furthermore, this is an insolvency. Absent a clear and compelling reason such as the existence of an obvious conflict of interest, the general rule should be that funding by applicant debtors should only be available for one representative counsel. Even if one disagrees with that proposition, in this case, the CMI Entities have paid and intend to continue to pay, amongst other things, salaries, current service and special payments with respect to the defined benefit pension plans and post-employment and post-retirement benefit payments. Based on the materials before me, there are approximately 9 CEP members who were recently terminated and who have been advised that they will no longer receive salary continuance. In essence, the evidentiary support that might merit a funding request is absent. As noted in the factum of the CMI

Entities, if they should change their position with respect to employee related obligations, the need for funding could be addressed at that time. I am also not persuaded that funding should be granted to pay for CEP's costs for outstanding grievances. No one else including the Monitor supports the requested order and I do not believe that it should be granted.

20 As mentioned, no charge is being requested or granted with respect to the Cavalluzzo representation order and none should be given here. In addition, the Term Sheet as described in the materials restricts the granting of a charge absent the agreement of others including the Ad Hoc Committee.

***(c) Claims Bar Extension***

21 The last issue to consider is whether the claims bar date contained in my order of October 14, 2009, should be extended as requested by CEP. Based on the evidence before me, I am not persuaded that such an extension is necessary at this time.

**Conclusion**

22 In conclusion, the CMI Entities' motion is granted except that the third and last sentences of paragraph 2 are to be subject to any further or other order. The CEP motion is dismissed although authorization to represent current and former members (excluding the CH Employees) is granted.

***Pepall J.*:**

On a last unrelated issue, I would like counsel to give some thought to the following suggestion. For future time sensitive motions brought by the CMI Entities, it would be helpful in situations where interested parties do not have time to file a factum if, before the return date, those opposing filed with the court a 1 to 2 page memo *(maximum)* outlining their respective positions. Interested parties are not obliged to do so but the court would consider this to be of assistance.

FN1 In its materials, CEP uses the term "Applicants" but for consistency, I have used the term "CMI Entities".

END OF DOCUMENT

# TAB 32

2005 CarswellOnt 6648, 17 C.B.R. (5th) 275

2005 CarswellOnt 6648, 17 C.B.R. (5th) 275

Grace Canada Inc., Re

IN THE MATTER OF S. 18.6 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF GRACE CANADA INC.

Ontario Superior Court of Justice [Commercial List]

Farley J.

Heard: November 14, 2005
Judgment: November 14, 2005
Docket: 01-CL-4081



Counsel: D. Tay, O. Pasparakis, J. Stam for Plaintiffs, Grace Canada Inc.

E. Merchant for Merv Nordick, Ernest Spencer

K. Ferbers for Raven Thundersky

Ian Dick for Attorney General of Canada

Michel Bélanger, Jean-Philippe Lincourt, Matt Moloci for Association Des Consommatuers Pour La Qualité Dans La Construction, Jean-Charles Dextras, Viviane Brosseau, Léotine Roberge-Turgeon

Subject: Insolvency; Civil Practice and Procedure

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Quebec plaintiffs in their putative class proceedings worked out arrangement with federal Crown — As result, Quebec plaintiffs were not proceeding with their request to lift stay and other ancil-

lary relief — Saskatchewan plaintiffs were not opposed to Grace relief — Stay was extended to April 1, 2006, and included proceedings against federal Crown related to Grace proceedings in class actions — Modified preliminary injunction granted on January 22, 2002, by US Bankruptcy Court was recognized pending further order of Canadian court — There had been recognition in US Bankruptcy Court that Canadian proceedings would be governed by Canadian substantive law.

**Cases considered by *Farley J.*:**

*Babcock & Wilcox Canada Ltd., Re* (2000), 2000 CarswellOnt 704, 5 B.L.R. (3d) 75, 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) — considered

*Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339, 1992 CarswellOnt 185 (Ont. Gen. Div.) — referred to

*Canada Systems Group (EST) Ltd. v. Allen-Dale Mutual Insurance Co.* (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287, 1982 CarswellOnt 461 (Ont. H.C.) — referred to

*Canada Systems Group (EST) Ltd. v. Allen-Dale Mutual Insurance Co.* (1983), 41 O.R. (2d) 135, 33 C.P.C. 210, 145 D.L.R. (3d) 266, 1983 CarswellOnt 397 (Ont. Div. Ct.) — referred to

*Eagle River International Ltd., Re* (2001), (sub nom. *Sam Lévy & Associés Inc. v. Azco Mining Inc.)* 2001 SCC 92, 2001 CarswellQue 2725, 2001 CarswellQue 2726, 30 C.B.R. (4th) 105, (sub nom. *Sam Lévy & Associates Inc. v. Azco Mining Inc.)* 207 D.L.R. (4th) 385, (sub nom. *Lévy (Sam) & Associés Inc. v. Azco Mining Inc.)* 280 N.R. 155, (sub nom. *Sam Lévy & Associés Inc. v. Azco Mining Inc.)* [2001] 3 S.C.R. 978 (S.C.C.) — considered

*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

*Noma Co., Re* (2004), 2004 CarswellOnt 5033 (Ont. S.C.J. [Commercial List]) — referred to

**Statutes considered by *Farley J.*:**

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Generally — referred to

DETERMINATION of motions regarding stay of proceedings and related matters.

***Farley J.*:**

1 This endorsement applies to the 3 motions of Grace, the Quebec class proceeding and the Manitoba class proceeding.

2 The Quebec plaintiffs in their putative class proceedings have worked out an arrangement with the Federal Government. As a result they are not proceeding with their request to lift the stay and other ancillary relief, but without prejudice to it or similar relief being sought if the insolvency/CCAA recognition proceedings get bogged down. The Grace relief was then supported by the Quebec plaintiffs.

3 The "Sask" plaintiffs (represented by the Merchant firm were not opposed to the Grace relief.

4 The Manitoba plaintiffs represented by the Atkins firm took the position that the Grace relief was all right so long as it did not apply to their proceedings except that judgment would not be enforced without leave of this court.

5 It would seem to me that the various class proceedings would benefit from cooperation and coordination — using the 3Cs of the Commercial List (communication, cooperation and common sense). Otherwise they will be faced with the practical problem of fighting amongst themselves as to a turf war and running the risk of being divided and therefore susceptible to being conquered.

6 The stay is extended to April 1, 2006 and includes proceedings against the Federal Crown related to the Grace proceedings in these class actions. As well the Modified Preliminary Injunction granted on January 22, 2002 by the US Bankruptcy Court is recognized pending further order of this Court.

7 The foregoing does not prevent any of the parties entering into consensual resolutions with the Federal Crown.

8 I note that the Grace interests represented before me today indicated that it was their goal to emerge from their insolvency proceedings as soon as reasonably possible but under the guidelines that there be justice for all affected persons.

9 I also note that there has been recognition in the US Bankruptcy Court that Canadian proceedings will be governed by Canadian substantive law.

10 The foregoing relief granted is pursuant to the principles set out in *Babcock & Wilcox Canada Ltd., Re* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) and is in furtherance of the long standing respect for comity extended by the courts of this country for the courts of the US and vice versa.

11 It would seem to me that the insolvency adjudicative proceedings would, at least under

presently anticipated circumstances, result in a more effective efficient process than would a full-blown class action proceeding.

12 I concur with the views of the US court in *Maryland Casualty* re respect to the necessity/desirability of a stay against the Federal Crown as a "3rd party" given the interrelated aspects of the claims against the Crown and Grace. There would in my mind be a considerable risk of record taint if the action against the Crown were allowed to proceed on its own without direct Grace evidence and counsel. See also *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.); *Canada Systems Group (EST) Ltd. v. Allen-Dale Mutual Insurance Co.* (1982), 137 D.L.R. (3d) 287 (Ont. H.C.), aff'd (1983), 145 D.L.R. (3d) 266 (Ont. Div. Ct.); *Noma Co., Re*, [2004] O.J. No. 4914(Ont. S.C.J. [Commercial List]); *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

13 The stay does not affect the ability of the plaintiffs from coming back to court if they feel that there is foot dragging or other elements of prejudice.

14 I note that the Federal Crown may accept service of the Sask claim without that being an infringement of the stay now imposed (and previously requested). This is without prejudice to the Crown moving for relief on, say, a limitations point.

15 What the Manitoba plaintiffs are in essence requesting is that they obtain a leg up on all other Canadian plaintiffs (and US plaintiffs) and that there be by this court somewhat of a quasi-certification, although indicating that the actual certification would be dealt with by the Manitoba court.

16 This would result in a lack of single control in insolvency proceedings which was cautioned against in *Eagle River International Ltd., Re*, [2001] 3 S.C.R. 978 (S.C.C.). It would also fragment and possibly destabilize the other proceedings by other affected persons (including those claiming for personal injury including serious personal injury). In saying that I in no way wish to or intend to be taken as minimizing the terrible tragedy which has befallen the Thundersky/Bruce family.

17 I look forward to seeing that continued timely progress is being made with respect to this insolvency proceeding including the effective efficient way of dealing with personal injury and property damage claims. The information officer should ensure that this court and affected parties including these class action plaintiffs are kept abreast of proposed material developments and their outcome. That is the report on the regular time period basis should be the minimum.

18 The motion of the Manitoba plaintiffs is dismissed, but without prejudice to similar or other relief being sought in the future based on a change in circumstances.

*Order accordingly.*

2005 CarswellOnt 6648, 17 C.B.R. (5th) 275

END OF DOCUMENT

# TAB 33

*Case Name:*

# Arclin Canada Ltd. (Re)

**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 Compromise or Arrangement of Arclin Canada Ltd./Arclin Canada Ltee., Arclin Management Holdings Inc., Arclin Holdings GP I Inc., Arclin Holdings GP II Inc., Arclin Holdings III Inc. and Arclin Holdings IV Inc., Applicants**

[2009] O.J. No. 4260

59 C.B.R. (5th) 165

2009 CarswellOnt 6161

Court File No. CV-09-8290-00CL

Ontario Superior Court of Justice

**A. Hoy J.**

Heard: October 13, 2009.
Judgment: October 14, 2009.

(18 paras.)

*Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Application by Arclin Canada for approval of key employee retention program agreements with its Chief Executive Officer and its Chief Financial Officer and for sealing order with respect to agreements allowed -- Monitor recommended approval of agreement -- Key employees were essential to successful restructuring of the Arclin group and could not be readily replaced -- Court placed substantial weight on Monitor's strong recommendation to approve agreement -- Sealing order only made for seven days -- Arclin and Monitor to clarify the significant prejudice to Arclin if the sealing did not continue.*

Application by Arclin Canada for approval of key employee retention program agreements with its Chief Executive Officer and its Chief Financial Officer and for a sealing order with respect to such agreements. The applicant had obtained protection from its creditors under the Companies' Credi-

tors Arrangement Act. Its US affiliates had commenced reorganization under the US bankruptcy laws. Both key employees had been approached about other opportunities for long-term and stable employment and both had indicated that they would take advantage of those opportunities if the agreement was not approved. The Monitor and Arclin confirmed that the costs of the agreement would be borne by Arclin. The board of directors of Arclin had approved the agreement. The Monitor recommended approval of the agreement and the First Lien Lenders supported the agreement.

HELD: Application allowed. The court placed substantial weight on the strong recommendation of the Monitor that the agreement be approved. All parties agreed that the employees in question were essential to the successful restructuring of the Arclin group and could not be readily replaced, given their intimate knowledge of Arclin's affairs, and that it would be a lengthy and costly process to do so. Key employee retention programs were controversial. The CCAA process should be open and transparent to the greatest extent possible. An order was granted sealing the agreement only for seven days to permit Arclin and the Monitor to clarify the significant prejudice to Arclin and the Canadian participants in the CCAA process that they submitted might result if the sealing did not continue.

**Statutes, Regulations and Rules Cited:**

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36,

**Counsel:**

Steven J. Weisz and Jackie Moher, for the Applicants.

David Bish, for the Monitor, Ernst & Young Inc.

Marc Wasserman, for UBS, agent for the First Lien Lenders and the DIP Lenders.

Kevin P. McElcheran, for the Official Committee of Unsecured Creditors.

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## ENDORSEMENT

1 **A. HOY J.**:-- Arclin Canada Ltd./Arclin Canada Ltee. ("Arclin") and related companies obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S., 1985, c. C-36 (the "CCAA") on July 27, 2009. Arclin's U.S. affiliates have commenced reorganization proceedings under Chapter 11 of Title 11 of the United States Code (the "U.S. Code") before the United States Bankruptcy Court for the District of Delaware (the "U.S. Court").

2 Arclin now seeks approval of key employee retention program agreements with its Chief Executive Officer, Claudio D'Ambrosio, and its Chief Financial Officer, Scott Maynard (collectively, the "KERP") and seeks a sealing order with respect to such agreements. Mr. D'Ambrosio and Mr. Maynard also fill those roles in respect of Arclin's U.S. affiliates. They are paid by Arclin, and their services are provided to the U.S. affiliates under a management agreement. The Monitor and Arclin confirmed that the costs of the KERP will be borne by Arclin and that the KERP cannot result in increased charges under the management agreement without the approval of the U.S. Court.

**3** The board of directors of Arclin has approved the KERP. The Monitor recommends approval of the KERP, and the First Lien Lenders (which I understand are owed in excess of $200 million) and the DIP Lender support the KERP. Counsel for the First Lien Lenders and the DIP Lender was involved in the negotiation of the KERP. The KERP has been contemplated since the time of the initial order, and is referenced in the Monitor's report filed at that time and reflected in cash flows filed with the Court.

**4** Canadian counsel for the Official Committee of Unsecured Creditors (the "UCC"), which represents unsecured creditors of Arclin's U.S. based affiliates in the Chapter 11 proceeding, appeared at the hearing, initially to oppose the KERP. In the course of the hearing, counsel for the UCC advised that the UCC, like Arclin, the Monitor and the First Lien Lenders, was in fact of the view that a retention arrangement with Mr. D'Ambrosio and Mr. Maynard was critical. The UCC's real objection is one of process: it was not provided with the amounts payable under the KERP in advance of the hearing, and was therefore not in a position to evaluate the reasonableness of the terms. Arrangements were made during the hearing for the UCC to be provided with the KERP, through the U.S. estate, in order to ensure confidentiality. Given the payments provided for in the KERP, the level of payments that counsel for the UCC advised that the UCC was concerned about, and the fact that unless the U.S. bankruptcy court approves an increase in the management fee Arclin will bear the cost of the KERP, I am of the view that the UCC will be, as I am, satisfied as to the reasonableness of the KERP.

**5** Arclin, the Monitor, the First Lien Lenders and the DIP Lender all argued that the UCC did not have standing to make objections on this motion. Counsel for the UCC sought an adjournment in relation to the standing issue. All, however, wished the motion to proceed, given the importance of implementing the KERP promptly. It was specifically agreed that the fact that counsel for the UCC was permitted to make submissions today was without prejudice to the parties' ability to argue on any subsequent motion in this matter that the UCC does not have standing. In support of this argument, the Monitor advised the court that at present Arclin is owed approximately $87 million by its U.S. affiliates; Arclin is a creditor of the U.S. affiliates, not the other way around. Also, as noted above, the KERP is without cost to the U.S. affiliates unless approved by the U.S. Court.

**6** Arclin and the Monitor also submit, and I note, that the UCC was served with notice of this motion a week ago, and that counsel for the UCC only asked today to see a copy of the KERP.

**7** The evidence before me is that: both Mr. D'Ambrosio and Mr. Maynard have been approached about other opportunities for long-term and stable employment and both have indicated that they will take advantage of those opportunities if the KERP is not approved; Mr. D'Ambrosio and Mr. Maynard cannot be readily or easily replaced, given their intimate knowledge of Arclin's affairs, and it would be a lengthy and costly process to do so; and Mr. D'Ambrosio and Mr. Maynard have taken on a significant volume of additional responsibilities in connection with the CCAA proceedings.

**8** The amounts payable under the KERP are insignificant in relation to the total debt outstanding. They appear to me reasonable in relation to what I was advised were Mr. D'Ambrosio's and Mr. Maynard's current compensation arrangements.

**9** The Monitor confirmed in court that the alternative employment opportunities available to Mr. D'Ambrosio and Mr. Maynard, referred to in the evidence, are comparable opportunities.

**10** I have specifically considered that the KERP will funded by Arclin, yet its U.S. affiliates will also derive a benefit from it. Counsel for the UCC pointed out that the U.S. Code contains rigorous conditions that must be met before a key employee retention agreement can be approved for an insolvent company, and submits that, on the evidence before this Court, it appears that those conditions would not be met in this case. As Leitch, R.S.J. pointed out in *Textron Financial Canada Ltd. v. Beta Ltee/Brands Ltd.* (2007), 36 C.B.R. (5th) 296 (S.C.J.), Canada has not adopted equivalent legislative principles.

**11** I place substantial weight on the strong recommendation of the Monitor that the KERP be approved.

**12** I am advised that the "goal" of the restructuring is to swap debt for equity. I understand that the First Lien Lenders are the primary economic stakeholders. They, as noted above, support this motion. They have confidence in Mr. D'Ambrosio and Mr. Maynard.

**13** All parties agree that Mr. D'Ambrosio and Mr. Maynard are essential to the successful restructuring of the Arclin group.

**14** I am satisfied that, in these circumstances, the KERP should be approved.

**15** I understood counsel for Arclin to submit that a sealing order is important to ensure: (1) that other employees are not able to point to the terms offered to Mr. D'Ambrosio and Mr. Maynard to attempt to secure retention arrangements, and thereby jeopardize the restructuring; and (2) that third parties desirous of engaging the services of Mr. D'Ambrosio and Mr. Maynard not know what terms they have to "better" in order to woo them away from Arclin. I further understood counsel to submit that Arclin is a private company, and that sealing orders in respect of key employment retention arrangements are customary. The Monitor simply submits in its report that disclosure may cause significant prejudice to Arclin and the other Canadian participants in the CCAA proceeding.

**16** Neither Arclin nor the Monitor has indicated that there are other employees that it considers essential to the current operations and the successful restructuring of the Arclin group. I assume that all truly key employees would have been identified at this time. It appears to me that the KERP does not provide that its terms are confidential and restrict Mr. D'Ambrosio and Mr. Maynard from disclosing its terms.

**17** Key employee retention programs are controversial. The CCAA process should be open and transparent to the greatest extent possible.

**18** I am prepared to provide for sealing of the KERP for a short period of time only - seven days, subject to such short extension as may be necessary in light of counsels' schedules - to permit Arclin and the Monitor to clarify the significant prejudice to Arclin and the Canadian participants in the CCAA process that they submit may result if the sealing does not continue.

A. HOY J.

cp/e/qlrpv/qljxr/qlaxw/qlced

# TAB 34

# Currie v. McDonald's Restaurants of Canada Ltd. et al. [Indexed as: Currie v. McDonald's Restaurants of Canada Ltd.]

74 O.R. (3d) 321

[2005] O.J. No. 506

Dockets: C41264, C41289 and C41361

Court of Appeal for Ontario,

**Sharpe, Armstrong and Blair JJ.A.**

February 16, 2005

*Conflict of laws -- Foreign judgments -- Class proceedings -- Plaintiff bringing proposed class action in Ontario for damages arising out of alleged wrongdoing by defendants in relation to promotional games offered to customers -- Judgment in Illinois class action arising out of alleged wrongdoing not barring plaintiff's action in Ontario -- Ontario courts should not recognize and enforce Illinois judgment against plaintiff and proposed Canadian class members, despite existence of real and substantial connection linking cause of action to Illinois, as inadequate notice was given to non-resident class members -- Right to opt out being of vital importance to jurisdiction of foreign court in international class action litigation -- Right to opt out must be made clear and plain to non-resident class members -- Notice being written in obscure and technical language and reaching only small proportion of class members in Canada -- Inadequate notice violating rules of natural justice.*

McDonald's sponsored a number of promotional contests at its restaurants in North America, retaining the services of S Inc. to organize and operate the contests. A senior employee of S Inc. and others were subsequently indicted for embezzling prizes allocated to the contests. A class action in Illinois (the "B action") on behalf of an American and international class of McDonald's customers, including the customers of McDonald's Canada, was settled. The Illinois court directed that notice of the class action be given to Canadian class members by means of an advertisement in Maclean's magazine. The settlement agreement provided that the settlement was binding on all class members who did not opt out of the class by the specified date. The releases covered all claims relating to McDonald's promotional games under common law or statute. The plaintiff did not participate in the B action. He brought a proposed class action in Ontario against McDonald's, McDonald's Canada and S Inc. alleging wrongdoing in relation to the McDonald's promotional contests. Another

proposed class action was commenced by P, who had intervened in the B proceedings to object to the settlement of that action. The defendants moved to dismiss or stay the actions on the ground that the claims had been finally disposed of in the B action. The motion judge dismissed the P action on the basis that, by appearing in the Illinois court to object to the settlement, P had attorned to the jurisdiction of the Illinois court and that the B judgment should be recognized and enforced against him. The motion judge refused to stay or dismiss the plaintiff's action, holding that the plaintiff was not bound by the B judgment or by P's attornment despite the fact that the claims were identical and that the plaintiff and P were both represented by the same law firm. The motion judge found that the Illinois court had jurisdiction over the non-resident, non-attorning plaintiff class members but that the notice given in that action to the Canadian members of the plaintiff class was so inadequate as to violate the rules of natural justice. The defendants appealed the refusal to stay or dismiss the plaintiff's action.

Held, the appeal should be dismissed.

Rules with respect to the recognition and enforcement of foreign judgments should take into account certain unique features of class action proceedings. Before enforcing a foreign class action judgment against Ontario residents, the [page322] court should ensure that the foreign court had a proper basis for the assertion of jurisdiction and that the interests of Ontario residents were adequately protected. The principal connecting factors linking the cause of action asserted in the plaintiff's proposed class action to Illinois were that the alleged wrong occurred in the United States and Illinois is the site of McDonald's head office. That factor was a real and substantial connection in favour of Illinois jurisdiction. On the other hand, the principles of order and fairness required that careful attention be paid to the situation of ordinary McDonald's customers whose rights were at stake. These non-resident class members would have no reason to expect that any legal claim they might wish to assert against McDonald's Canada as a result of visiting the restaurant in Ontario would be adjudicated in the United States. The consumer transactions giving rise to the claims took place entirely within Ontario. The consumers were residents of Canada and McDonald's Canada is a corporation that conducts its business in Canada. Damages from the alleged wrong were suffered in Ontario. The plaintiff class members did nothing that could provide a basis for the assertion of Illinois jurisdiction, while McDonald's Canada invited the jurisdiction of the courts of Ontario by carrying on business here. Given the substantial connection between the alleged wrong and Illinois, and given the small stake of each individual class member, the principles of order and fairness could be satisfied if the interests of the non-resident class members were adequately represented and if it were clearly brought home to them that their rights could be affected in the foreign proceedings if they failed to take appropriate steps to be removed from t hose proceedings. The right to opt out is of vital importance to the jurisdiction of the foreign court in international class action litigation. There was no basis for interfering with the motion judge's finding that the notice given to the non-resident class members was inadequate. As the unnamed plaintiffs were not afforded adequate notice of the B proceedings, the Ontario courts should not recognize and enforce the B judgment against the plaintiff and the non-attorning Canadian class members he sought to represent. Accordingly, the plaintiff and the unnamed members of the class he sought to represent were not bound by the B judgment.

It was open to the motion judge to conclude that the wording of the notice was so technical and obscure that the ordinary class member would have difficulty understanding the implications of the proposed settlement on their legal rights in Canada or that they had the right to opt out. Moreover, the mode of notice was inadequate, as the notice was published in a publication that is not ordinarily

used in English Canada for these purposes and there was evidence that the notice reached only a small proportion of the members of the plaintiff class. While the motion judge apparently did not assess the adequacy of the Canadian notice against the standard mandated by Ontario law for Ontario class actions, this did not amount to an error. The adequacy of the notice had to be assessed in terms of what is required in an international class action involving the assertion of jurisdiction against non-residents. While Ontario's domestic standard may have some bearing upon that issue, it is not conclusive, particularly in light of the importance of notice to jurisdiction. The motion judge was entitled to look, as he did, to the standard the American court applied to its own residents. The motion judge did not err in holding that the notice to the Canadian class members did not satisfy the requirements of natural justice.

The plaintiff was not precluded by the doctrines of res judicata or abuse of process from prosecuting his claim in Ontario. The action was not an attempt to avoid the effect of an adverse ruling against P. The plaintiff took no part in the B proceedings and McDonald's Canada was not named as a defendant in that action. The plaintiff's allegations specifically related to Canadian patrons were [page323] made by P in objecting to the settlement, but they did not form part of the claim advanced by B. The plaintiff and P were not privies. There was no evidence that the plaintiff was even aware of the proceedings in the United States until shortly before his own action was commenced. It would be inappropriate to analyze the issue on the basis that the law firm which represented both P and the plaintiff was the real litigant, or that the link provided by the law firm to both P and the plaintiff was sufficient to make them privies.

Beals v. Saldanha, [2003] 3 S.C.R. 416, [2003] S.C.J. No. 77, 234 D.L.R. (4th) 1, 314 N.R. 209, 113 C.R.R. (2d) 189, 2003 SCC 72, 39 B.L.R. (3d) 1, 39 C.P.C. (5th) 1; Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, [1990] S.C.J. No. 135, 52 B.C.L.R. (2d) 160, 76 D.L.R. (4th) 256, 122 N.R. 81, [1991] 2 W.W.R. 217, 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, consd

Other cases referred to

Adams v. Cape Industries plc., [1990] Ch. 433 (C.A.); Bank of Montreal v. Mitchell, [1997] O.J. No. 2848, 151 D.L.R. (4th) 574 (C.A.), affg [1997] O.J. No. 602, 143 D.L.R. (4th) 697 (Gen. Div.); Banque Nationale de Paris (Canada) v. Canadian Imperial Bank of Commerce (2001), 52 O.R. (3d) 161, [2001] O.J. No. 53, 195 D.L.R. (4th) 308, 2 C.P.C. (5th) 1 (C.A.); Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2), [1967] A.C. 853, [1966] 2 All E.R. 536; Carom v. Bre-X Minerals Ltd. (2000), 51 O.R. (3d) 236, [2000] O.J. No. 4014, 196 D.L.R. (4th) 344, 1 C.P.C. (4th) 62, 11 B.L.R. (3d) 1 (C.A.), revg (1999), 46 O.R. (3d) 315n, [1999] O.J. No. 5114, 6 B.L.R. (3d) 82, 1 C.P.C. (5th) 82 (Div. Ct.), affg (1999), 44 O.R. (3d) 173, [1999] O.J. No. 1662, 46 B.L.R. (2d) 247, 35 C.P.C. (4th) 43 (S.C.J.) (sub nom. 3218520 Canada Inc. v. Bre-X Minerals Ltd.); Chadha v. Bayer Inc., [1999] O.J. No. 3621, 43 C.P.C. (4th) 91 (S.C.J.); Hunt v. T & N plc, [1993] 4 S.C.R. 289, [1993] S.C.J. No. 125, 85 B.C.L.R. (2d) 1, 109 D.L.R. (4th) 16, [1994] 1 W.W.R. 129, 21 C.P.C. (3d) 269; Mondor v. Fisherman, [2002] O.J. No. 1855, [2002] O.T.C. 317, 26 B.L.R. (3d) 281, 22 C.P.C. (5th) 346 (S.C.J.) (sub nom. Royal Trust Corp. of Canada v. Fisherman, YBM Magnex International Inc. v. Bogatin, Deloitte & Touche v. YBM Magnex International, Inc., CC&L Dedicated Enterprises Fund (Trustee of) v. Fisherman); Muscutt v. Courcelles (2002), 60 O.R. (3d) 20, [2002] O.J. No. 2128, 213 D.L.R. (4th) 577, 13 C.C.L.T. (3d) 161, 26 C.P.C. (5th) 206 (C.A.), supp. reasons [2002] O.J. No. 2734, 213 D.L.R. (4th) 661, 13 C.C.L.T. (3d) 238, 26 C.P.C. (5th) 203 (C.A.); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S. Ct. 2965 (1985); Robertson v.

Thomson Corp. (1999), 43 O.R. (3d) 161, [1999] O.J. No. 280, 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, [1999] O.J. No. 908, 43 C.P.C. (4th) 166 (Gen. Div.); Shaw v. BCE Inc., [2004] O.J. No. 3109, 49 B.L.R. (3d) 1, 189 O.A.C. 9, affg [2004] O.J. No. 5481, O.T.C. 28, 42 B.L.R. (3d) 107 (S.C.J.); Tolofson v. Jensen, [1994] 3 S.C.R. 1022, [1994] S.C.J. No. 110, 100 B.C.L.R. (2d) 1, 120 D.L.R. (4th) 289, 175 N.R. 161, [1995] 1 W.W.R. 609, 22 C.C.L.T. (2d) 173, 32 C.P.C. (3d) 141, 7 M.V.R. (3d) 202; Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd., [2003] O.J. No. 868, 223 D.L.R. (4th) 445, 23 C.P.R. (4th) 454, 30 C.P.C. (5th) 107 (C.A.), affg [2002] O.J. No. 1400, 212 D.L.R. (4th) 563, 18 C.P.R. (4th) 267, 20 C.P.C. (5th) 65 (Div. Ct.), affg [2001] O.J. No. 237, 11 C.P.R. (4th) 230, 6 C.P.C. (5th) 245 (S.C.J.); Webb v. K-Mart Canada Ltd. (1999), 45 O.R. (3d) 389, [1999] O.J. No. 2268, 45 C.C.E.L. (2d) 165, 99 C.L.L.C. 210-038, 36 C.P.C. (4th) 99 (S.C.J.), supp. reasons (1999), 45 O.R. (3d) 425, [1999] O.J. No. 3285, 46 C.C.E.L. (2d) 293, 43 C.P.C. (4th) 26 (S.C.J.); Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63, 94 Alta. L.R. (2d) 1, 201 D.L.R. (4th) 385, 272 N.R. 135, [2002] 1 W.W.R. 1, 2001 SCC 46, 8 C.P.C. (5th) 1 (sub nom. Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere); Wilson v. Servier Canada Inc. (2000), 50 O.R. (3d) 219, [2000] O.J. No. 3392, 49 C.P.C. (4th) 233, 24 C.P.C. (5th) 175 (S.C.J.); [page324] Wilson v. Servier Canada Inc., [2002] O.J. No. 3856, 220 D.L.R. (4th) 191, 23 C.P.C. (5th) 1 (C.A.), quashing (2002), 59 O.R. (3d) 656, [2002] O.J. No. 2032, 213 D.L.R. (4th) 751 (S.C.J.)

Statutes referred to

Class Actions Act, S.N.L. 2001, c. C-18.1, ss. 7(2), 17(2)-(5)

Class Actions Act, S.S. 2001, c. C-12.01, ss. 8(2), 18(2)

Class Proceedings Act, 1992, S.O. 1992, c.6, ss. 17, 20

Class Proceedings Act, C.C.S.M. c. C130, s. 6(3)

Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 16(2)

Class Proceedings Act, R.S.O. 1990, c. 6, ss. 17, 20

Class Proceedings Act, S.A. 2003, c. C-16.5, ss. 7(1),(3), 17(1)(b)

Authorities referred to

Bassett, D.L., "U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction" (2003) 72 Fordham L. Rev. 41

Dixon, J.C.L., "The Res Judicata Effect in England of a U.S. Class Action Settlement" (1997) 46 I.C.L.Q. 134

Monaghan, H.P., "Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members" (1998) 98 Columbia L. Rev. 1148

APPEAL from the judgment of Cullity J. of the Superior Court of Justice, reported at [2004] O.J. No. 83, 45 C.P.C. (5th) 304 (S.C.J.), dismissing a motion to stay or dismiss an action.

Ronald Slaght, Q.C. for McDonald's Restaurants of Canada Limited.

Joel Richler and J.A. Prestage, for McDonald's Corporation.

Glenn Zakaib, for Simon Marketing Inc.

Chris G. Paliare, Martin Doane and John Phillips, for Greg Currie.

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The judgment of the court was delivered by

[1] **SHARPE J.A.**:-- The plaintiff Greg Currie brings a proposed class action alleging wrongdoing in relation to promotional games offered to customers of McDonald's Restaurants of Canada Ltd. ("McDonald's Canada"). He is met with an Illinois judgment approving the settlement of a class action brought on behalf of an American and international class of McDonald's customers, including the customers of McDonald's Canada (the "Boland judgment"). The Illinois court directed that notice of the class action to Canadian class members be given by means of an advertisement in Maclean's magazine. Currie did not participate in the Illinois proceedings but Preston Parsons, the named plaintiff in another Ontario class proceeding, represented by the same law firm and purporting to represent the same class, appeared in the Illinois court to challenge the settlement. [page325]

[2] The central issue on this appeal is whether the Boland judgment is binding so as to preclude Currie's proposed class action in Ontario.

Facts

[3] I adopt the following summary of the essential facts from the reasons of the motion judge [at para. 5].

> 1. In the period between January 1, 1995 and December 31, 2001 -- and earlier -- McDonald's sponsored numerous promotional games, or contests, of chance -- or chance and skill -- at its restaurants in North America. Some, but not all, of these were made available in the Canadian restaurants. Prizes of different kinds and amounts were to be awarded. Participation in the games was, to a large extent, tied to the purchase of food at the restaurants. Simon Marketing Inc. -- a corporation based in California that provided businesses with marketing services involving the provision and operation of promotional games -- was retained for that purpose by McDonald's.
> 2. On August 21, 2001, Jerome Jacobson -- a senior employee of Simon Marketing -- and a number of other individuals were indicted for embezzling prizes allocated to McDonald's games.
> 3. The proceedings in Boland were commenced on the following day. The class-action complaint alleged that Jacobson had directed prizes to specific individuals and claimed damages against McDonald's and Simon Marketing Inc. for consumer fraud and unjust enrichment. The plaintiffs sued on behalf of themselves and "all customers of McDonald's who paid money for McDonald's food products in order to receive a subject contest game piece for subject contest promotions between 1995 and the present".

4. Settlement discussions in the Boland action were conducted from October 2001 and culminated in a settlement agreement between the plaintiffs and McDonald's on April 19, 2002.

5. The settlement agreement provided that the parties would apply to the Circuit Court of Cook County, Illinois for preliminary certification of the proceedings as a class action and for preliminary approval of the settlement as "fair, reasonable and adequate to the class and to members of the public". Further orders were to be requested to approve the terms of a notice to class members -- and the manner in which it was to be disseminated -- to provide class members with an opportunity to opt out of the class and the settlement by a date to be specified and to make the settlement -- and the releases to be provided to McDonald's and its subsidiaries -- binding on those who did not do so. The terms of the releases were broad. They covered all claims -- referred to in the settlement agreement as "Released Claims" -- relating to McDonald's promotional games under common law or statute, and specifically for breach of the consumer protection laws of any jurisdiction, contract, unjust enrichmen fraud, negligent misrepresentation, breach of fiduciary duty, strict liability and unfair or deceptive trade practices. The Released Claims would have covered each of the claims subsequently pleaded in the Parsons and Currie actions even though not all of the material facts on which they were [page326] based had been pleaded in Boland. The original Complaint was amended to extend the class to persons who had participated, or attempted to participate, in promotional games sponsored by McDonald's since 1979.

6. On May 8, 2002, the application for the above orders was heard by Judge Stephen Schiller in Chicago and, on June 6, 2002, he granted the preliminary relief requested with some modifications to the proposed notice to class members. August 28, 2002 was designated as the final date for members to opt out and a final fairness hearing was to be held on September 17, 2002.

7. The manner in which notice was to be given to customers in Canada was specifically addressed at the preliminary hearing on May 8, 2002, and the order of the court provided for the approved form of notice to be published in each of three French-language newspapers in Quebec on July 15, 2002 and in Maclean's magazine on July 15 and July 22 as well as in two US publications that had circulation in Canada.

8. Jacobson had pleaded guilty to the criminal charges and, at the trial of his alleged conspirators, he gave evidence on August 19, 2002 that McDonald's had instructed Simon Marketing Inc. that the "random" selection of winners of "high value" prizes was to be manipulated to ensure that no such prizes would be awarded to contestants in Canada. No such allegation had been -- or was ever -- made in the Boland action.

9. After a US attorney had notified the firm of Paliare Roland in Toronto, the firm placed information about the US proceedings on its website and was subsequently contacted by the plaintiff, Preston Parsons. The Parsons action was commenced by statement of claim on September 13, 2002. As I

have indicated, the causes of action that were pleaded were based on allegations that reflected those made by Jacobson, to which I have just referred, as well as those in the Complaint filed in Boland.

10. On September 16, 2002, a group of Canadians, including Mr. Parsons, moved for leave to intervene in the Boland proceedings to object to the settlement of that action. The documents filed in the court in Illinois named Paliare Roland as solicitors for Mr. Parsons although members of the firm did not -- and could not -- represent him in proceedings in that jurisdiction.
11. At the Final Fairness Hearing on September 17, 2002, submissions were made by a US attorney on behalf of the Canadian objectors. The hearing was adjourned to October 10, 2002 to permit written submissions. It continued on that date after written submissions of the objectors and responding submissions on behalf of the plaintiffs in Boland had been filed.
12. The Currie action was commenced on October 28, 2002 with Paliare Roland as solicitors of record.
13. On January 3, 2003, Judge Schiller released his decision dismissing the objections of the Canadian objectors. The terms of the settlement were given final approval and the certification order was made final. On April 8, 2003, the formal order of the court was entered containing, [page327] among other things, the release of McDonald's and its subsidiaries by the members of the class and a declaration that all members of the class who had not opted out were bound by the terms of the order.
14. An appeal by Mr. Parsons from the decision of Schiller J. was dismissed on July 31, 2003 on the ground that the order of the learned judge was not then a final order as the question of costs had not been dealt with.

Judicial proceedings

[4] The appellants moved to dismiss or stay both the Parsons and Currie actions on the ground that the claims asserted in both actions had been finally disposed of in the Boland action.

[5] The motion judge dismissed the Parsons action on the basis that by appearing in the Illinois court to object to the settlement, Parsons had attorned to the jurisdiction of the Illinois court and that the Boland judgment should be recognized and enforced against him and the other Canadian objectors who appeared to contest the Boland settlement.

[6] The motion judge refused to stay or dismiss the Currie action. He found that Currie was not bound by the Boland judgment or by Parsons' attornment despite the fact that the claims were identical and that Parsons and Currie were both represented by the same law firm. The motion judge found that under the applicable conflict of law rules, the Illinois court had jurisdiction over the non-resident, non-attorning plaintiff class members. However, he further found that the notice given in that action to the Canadian members of the plaintiff class was so inadequate as to violate the rules of natural justice. The motion judge concluded, accordingly, that the Boland judgment should not be recognized and enforced so as to bind Currie and those he sought to represent in his proposed class action.

[7] McDonald's Corp., McDonald's Canada and Simon Marketing appeal the motion judge's refusal to dismiss or stay the Currie action. Parsons did not appeal the dismissal of his action.

Issues

[8] The following issues arise on this appeal.

(1) Should the Ontario courts recognize and enforce the Boland judgment against Currie and the non-attorning Canadian class members he seeks to represent?
(2) Did the notice to the Canadian class members satisfy the requirements of natural justice? [page328]
(3) Is Currie precluded by the doctrines of res judicata or abuse of process from prosecuting his claim in Ontario?

Analysis

1. Should the Ontario courts recognize and enforce the Boland judgment against Currie and the non-attorning Canadian class members he seeks to represent?

[9] It is common ground on this appeal that if the Boland judgment should be recognized in Ontario under the applicable conflict of laws principles, Currie and the members of the class he seeks to represent are bound by it and that Currie's proposed class action would be precluded. It is also common ground that the issue of whether the Ontario courts should recognize and enforce the Illinois judgment approving the settlement turns upon the application of the principles enunciated by the Supreme Court of Canada in Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, [1990] S.C.J. No. 135 and Beals v. Saldanha, [2003] 3 S.C.R. 416, [2003] S.C.J. No. 77.

[10] In Morguard, the Supreme Court of Canada identified the twin principles of "order and fairness" and "real and substantial connection" for the assessment of the propriety of conflict of laws jurisdiction. As La Forest J. explained at p. 1102 S.C.R., "order and justice militate in favour of the security of transactions", an interest fostered in the modern world of increased trans-border activity by freer recognition and enforcement of judgments from other jurisdictions. But embedded in the principles of order and fairness is also the notion of jurisdictional restraint. The interest of security of transactions gained by the party seeking enforcement must be balanced with the need for fairness to the party against whom enforcement is sought. As La Forest J. put it at p. 1103 S.C.R.: "it hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject-matter of the suit ... Thus, fairness to the [party against whom enforcement is sought] requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction."

[11] The "real and substantial connection" test serves to control the assertion of jurisdiction. It is described variously in Morguard, at pp. 1104-09, as a connection "between the subject-matter of the action and the territory where the action is brought", "between the jurisdiction and the wrongdoing", "between the damages suffered and the jurisdiction", "between the defendant and the [page329] forum province", "with the transaction or the parties", and "with the action". The real and substantial connection test is a flexible one, "a term not yet fully defined" (Tolofson v. Jensen, [1994] 3 S.C.R. 1022, [1994] S.C.J. No. 110, at p. 1049 S.C.R.), and there is no strict or rigid test to be applied (Hunt v. T&N plc, [1993] 4 S.C.R. 289, [1993] S.C.J. No. 125, at p. 325 S.C.R.).

[12] Morguard dealt with the recognition and enforcement of inter-provincial judgments. In Beals, those same principles were adapted and applied to international judgments. Writing for the

majority, at para. 37, Major J. described real and substantial connection as "the overriding factor in the determination of jurisdiction". He stated at para. 32:

> The "real and substantial connection" test requires that a significant connection exist between the cause of action and the foreign court. Furthermore, a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction. A fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction. The connection to the foreign jurisdiction must be a substantial one.

[13] The novel point raised on this appeal is the application of the real and substantial connection test and the principles of order and fairness to unnamed, non-resident plaintiffs in international class actions.

[14] Ontario residents frequently engage in cross-border activities that may become the subject of class action litigation in Ontario, in another province or in a foreign jurisdiction. Several Ontario trial courts have authorized national and international classes: Robertson v. Thomson Corp. (1999), 43 O.R. (3d) 161, [1999] O.J. No. 280 (Gen. Div.) (international class); Carom v. Bre-X Minerals Ltd. (1999), 44 O.R. (3d) 173, [1999] O.J. No. 1662 (S.C.J.) (national class) and Wilson v. Servier Canada Inc. (2000), 50 O.R. (3d) 219, [2000] O.J. No. 3392 (S.C.J.) (national class). In Mondor v. Fisherman, [2002] O.J. No. 1855, [2002] O.T.C. 317 (S.C.J.), Cumming J. approved a settlement in a class action where the class included American and other foreign plaintiffs. Legislation in several provinces specifically contemplates the inclusion of non-resident class members: Class Proceedings Act, S.A. 2003, c. C-16.5, ss. 7(1), (3) and 17(1)(b); Class P roceedings Act, R.S.B.C. 1996, c. 50, ss. [6(2)] and 16(2); Class Proceedings Act, C.C.S.M. c. C130, s. 6(3); Class Actions Act, S.N.L. 2001, c. C-18.1, ss. 7(2) and 17(2) - (5); Class Actions Act, S.S. 2001, c. C-12.01, ss. 8(2) and 18(2).

[15] There are strong policy reasons favouring the fair and efficient resolution of interprovincial and international class action litigation: [page330] Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd., [2001] O.J. No. 237, 6 C.P.C. (5th) 245 (S.C.J.), at para. 27, affd [2002] O.J. No. 1400, 20 C.P.C. (5th) 65 (Div. Ct.), affd [2003] O.J. No. 868, 30 C.P.C. (5th) 107 (C.A.); Wilson v. Servier Canada Inc., supra, at pp. 243-44 O.R. (S.C.J.); Wilson v. Servier Canada Inc. (2002), 59 O.R. (3d) 656, [2002] O.J. No. 2032 (S.C.J.), at pp. 664-70 O.R. Conflict of law rules should recognize, in appropriate cases, the importance of having claims finally resolved in one jurisdiction. In some cases, Ontario courts will render judgments affecting the rights of non-residents and in other cases, Ontario residents will be affected by class action proceedings elsewhere. Ontario expects its judgments to be recognized and enforced, provided its courts assert jurisdiction in a proper manner and comity requires that, in appropriate cases, Ontario law should give effect to foreign class action judgments.

[16] Recognition and enforcement rules should take into account certain unique features of class action proceedings. In this case, we must consider the situation of the unnamed, non-resident class plaintiff. In a traditional non-class action suit, there is no question as to the jurisdiction of the foreign court to bind the plaintiff. As the party initiating proceedings, the plaintiff will have invoked the jurisdiction of the foreign court and thereby will have attorned to the foreign court's jurisdiction.

The issue relating to recognition and enforcement that typically arises is whether the foreign judgment can be enforced against the defendant.

[17] Here, the tables are turned. It is the defendant who is seeking to enforce the judgment against the unnamed, non-resident plaintiffs. The settling defendants, plainly bound by the judgment, seek to enforce it as widely and as broadly as possible in order to preclude further litigation against them. Henry Paul Monaghan, "Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members" (1998) 98 Columbia L. Rev. 1148, at pp. 1155-56, warns of the need to guard against potential abuses by settling class action defendants who "welcome class action suits as a vehicle for limiting overall liability, sometimes at bargain-basement prices". Before enforcing a foreign class action judgment against Ontario residents, we should ensure that the foreign court had a proper basis for the assertion of jurisdiction and that the interests of Ontario residents were adequately protected.

[18] To determine whether the assumption of jurisdiction by the foreign court satisfies the real and substantial connection test and the principles of order and fairness, it is necessary to consider the situation from the perspective of the party against whom enforcement is sought. In many cases, the actions of the non-resident class member will assist in determining jurisdiction. [page331] Take, for example, the case of an Ontario resident who orders goods from a foreign mail order merchant or who buys securities on a foreign stock exchange. The Ontario resident has engaged in a cross-border transaction with a foreign entity. The cause of action arises at least in part in the foreign jurisdiction. It would not be unreasonable, from the perspective of the Ontario resident, to expect that legal claims arising from the transaction could be properly litigated in the foreign jurisdiction. Nor is it unreasonable, whether from the perspective of the foreign defendant or from that of the Ontario plaintiff, to ex pect that class action litigation in the foreign jurisdiction should dispose finally of the Ontario plaintiff's claim.

[19] In this case, however, the unnamed, non-resident class members have done nothing to invite or invoke Illinois jurisdiction. The respondents offer this analogy: would Ontario law recognize the jurisdiction of Illinois to entertain a suit by the appellants for a declaration of non-liability against the respondents? That is the legal and practical effect of the Illinois judgment so far as they are concerned. If a judgment of non-liability by the foreign court would be recognized and enforced in Ontario, so too should the courts of Ontario recognize and enforce the foreign class action settlement. However, if the foreign non-liability judgment would not be recognized and enforced, an Ontario court should hesitate to recognize and enforce the foreign class action settlement against the non-resident plaintiff.

[20] This analogy is of some assistance, but I am not persuaded that a model entirely based upon the position of the defendant in a traditional two-party lawsuit can adequately capture the legal dynamics and complexity of the situation of an unnamed plaintiff in modern cross-border class action litigation. The position of the class action plaintiff is not the same as that of a typical defendant. Rules for recognition and enforcement of class action judgments should reflect those differences. The class action plaintiff is not hauled before a foreign court and required to defend him or herself upon pain of default judgment. As stated by Rehnquist J. in the leading American decision, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S. Ct. 2965 (1985), at p. 809, "[un]like a defendant in a civil suit, a class-action plaintiff is not required to fend for himself". Class action regimes typically impose upon the court a duty to ensure that the interests of the plaintiff class members are adequately re presented and protected. This is a factor favouring recognition and enforcement against

unnamed class members: see John C.L. Dixon, "The Res Judicata Effect in England of a U.S. Class Action Settlement" (1997) 46 I.C.L.Q. 134, at pp. 136, 150-51. [page332]

[21] On the other hand, I accept the respondent's basic point that it would be wrong simply to approach the issue of jurisdiction by asking whether the Illinois court would have jurisdiction over the respondents at the suit of Canadian plaintiffs. The court must have regard to the rights and interests of unnamed plaintiffs who did not participate in the Boland proceedings. The question of jurisdiction should be viewed from the perspective of the Ontario client of a McDonald's Canada restaurant, participating in a promotional prize giveaway presented by McDonald's Canada, who has done nothing to invoke or submit to the jurisdiction of the Illinois court.

[22] The principal connecting factors linking the cause of action asserted in Currie's proposed class action to the state of Illinois are that the alleged wrong occurred in the United States and Illinois is the site of McDonald's head office. The alleged wrongful conduct, manipulating the "random" selection of winners of "high value" prizes to ensure that no such prizes would be awarded to contestants in Canada, occurred in the United States. This factor is a "real and substantial connection" in favour of Illinois jurisdiction. While constitutional arrangements may put interprovincial suits on something of a different plain, as noted by Cumming J. in Wilson v. Servier Canada Inc. (2000), above at p. 241 O.R., Ontario courts have certified national class actions "if there is a real and substantial connection between the subject-matter of the action and Ontario" in the expectation that "other jurisdictions on the basis of comity should recognize the Ontario judgment".

[23] On the other hand, the principles of "order and fairness" require that careful attention be paid to the situation of ordinary McDonald's customers whose rights are at stake. These non-resident class members would have no reason to expect that any legal claim they may wish to assert against McDonald's Canada as result of visiting the restaurant in Ontario would be adjudicated in the United States. The consumer transactions giving rise to the claims took place entirely within Ontario. The consumers are residents of Canada and McDonald's Canada is a corporation that conducts its business in Canada. Damages from the alleged wrong were suffered in Ontario. The Currie plaintiffs themselves did nothing that could provide a basis for the assertion of Illinois jurisdiction, while McDonald's Canada invited the jurisdiction of the courts of Ontario by carrying on business here.

[24] The locus of the alleged wrong indicates a real and substantial connection with Illinois, but recognizing Illinois jurisdiction could be unfair to the ordinary McDonald's customer who would have no reason to suspect that his or her rights are at stake in a foreign lawsuit and who has no link to or nexus with the Boland action. [page333]

[25] To address the concern for fairness, it is helpful to consider the adequacy of the procedural rights afforded the unnamed non-resident class members in the Boland action. Before concluding that Ontario law should recognize the jurisdiction of the Illinois court to determine their legal rights, we should be satisfied that the procedures adopted in the Boland action were sufficiently attentive to the rights and interests of the unnamed non-resident class members. Respect for procedural rights, including the adequacy of representation, the adequacy of notice and the right to opt out, could fortify the connection with Illinois jurisdiction and alleviate concerns regarding unfairness. Given the substantial connection between the alleged wrong and Illinois, and given the small stake of each individual class member, it seems to me that the principles of order and fairness could be satisfied if the interests of the non-resident class members were adequately represented and if it were clearly brought home to them that their rights could be affected in the foreign proceedings if they failed to take appropriate steps to be removed from those proceedings.

[26] In the circumstances of this case, it is not necessary for me to consider the issue of adequacy of representation in detail. I note, however, that American commentators have raised the "race-to-the bottom" concern: see Monaghan, above. A sophisticated defendant may persuade plaintiffs' counsel to accept a sharply discounted recovery rate for non-resident (including Canadian or Ontario) plaintiffs. The foreign representative plaintiff's interests may conflict with those of the Ontario class, or not fully encapsulate the interests of the Ontario class. Recognition and enforcement rules must be attentive to these possibilities and retain sufficient flexibility to address concerns of this nature.

[27] On the other hand, provided the interests of non-resident class members were adequately represented, recognition and enforcement of foreign class proceedings would seem desirable. Recognition of the judgment would encourage the defendant to extend the benefits of the settlement to non-residents. Non-resident class members would receive a benefit without resorting to litigation and the defendant would buy peace from further litigation.

[28] The right to opt out is an important procedural protection afforded to unnamed class action plaintiffs. Taking appropriate steps to opt out and remove themselves from the action allows unnamed class action plaintiffs to preserve legal rights that would otherwise be determined or compromised in the class proceeding. Although she was not referring to inter-jurisdictional issues, in Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63, at para. 49, McLachlin C.J.C. identified the importance of notice as it relates to the right [page334] to opt out: "A judgment is binding on a class member only if the class member is notified of the suit and given an opportunity to exclude himself or herself from the proceeding." The right afforded to plaintiff class members to opt out has been found to provide some protection to out-of-province claimants who would prefer to litigate their claims elsewhere: Webb v. K-Mart Canada Ltd. (1999), 45 O.R. (3d) 389, [19

99] O.J. No. 2268 (S.C.J.), at p. 404 O.R. It is obvious, however, that if the right to opt out is to be meaningful, the unnamed plaintiff must know about it and that, in turn, implicates the adequacy of the notice afforded to the unnamed plaintiff.

[29] The respondent submits that recognition should be withheld absent an order requiring non-resident plaintiffs to opt in: see D.L. Bassett, "U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction" (2003) 72 Fordham L. Rev. 41. In some provinces (Alberta: Class Proceedings Act, S.A. 2003, c. C-16.5, s. 17(1)(b); British Columbia: Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 16(2); Saskatchewan: Class Actions Act, S.S. 2001, c. C-12.01, s. 18(2); Newfoundland and Labrador: Class Actions Act, S.N.L. 2001, c. C-18.1, s. 17(2)), legislation requires out of province plaintiffs opt in to class proceedings. There may well be cases where the nature of the rights and interests at stake would make such a requirement appropriate as a prerequisite to recognition and enforcement, but I do not accept the suggestion that unnamed plaintiffs should always be required to opt in as a prerequisite to recognition. In my view, the case at bar doe s not fall into the category where an "opt in" order should be required. Here, the interest of each individual plaintiff is nominal at best. An order requiring members of the plaintiff class to opt in would, as a practical matter, effectively negate meaningful class action relief.

[30] In my view, provided (a) there is a real and substantial connection linking the cause of action to the foreign jurisdiction, (b) the rights of non-resident class members are adequately represented, and (c) non-resident class members are accorded procedural fairness including adequate notice, it may be appropriate to attach jurisdictional consequences to an unnamed plaintiff's failure to opt out.

In those circumstances, failure to opt out may be regarded as a form of passive attornment sufficient to support the jurisdiction of the foreign court. I would add two qualifications: First, as stated by La Forest J. in Hunt v. T&N plc, supra, at p. 325 S.C.R., "the exact limits of what constitutes a reasonable assumption of jurisdiction" cannot be rigidly defined and "no test can perhaps ever be rigidly appliedö as ôno court has ever been able to anticipate" all possibilities. Second, it may be easier [page335] to justify the assumption of jurisdiction in interprovincial cases than in int ernational cases: see Muscutt v. Courcelles (2002), 60 O.R. (3d) 20, [2002] O.J. No. 2128 (C.A.), at paras. 95-100.

[31] The motion judge determined that the notice given to the non-resident class members was inadequate. He observed that traditional conflict of laws doctrine treats adequacy of notice as an element of natural justice that can be raised as a defence to enforcement, once the jurisdiction of the foreign court has been established. He did not find it necessary to decide, on the facts of this case, whether or not the notice issue had a bearing on jurisdiction. As I have already explained, it is my opinion that the notice issue does bear upon jurisdiction. I consider the motion judge's ruling on the adequacy of notice below and conclude that there is no basis upon which I would interfere with that ruling. I would apply it to the question of jurisdiction and hold that as the unnamed plaintiffs were not afforded adequate notice of the Boland proceedings, the Ontario courts should not recognize and enforce the Boland judgment against Currie and the non-attorning Canadian class members he seeks to represent.

[32] I would add this observation. Even if the Boland judgment is not accorded recognition and enforcement, it may still have some impact upon Currie's proposed class action in Ontario because of the principle against double recovery. As a result of the Boland judgment, certain benefits were conferred upon Canadian McDonald's patrons. If the Currie action succeeds on the merits, then the trial judge will likely take into account the benefits already received by the plaintiff class in order to determine the appropriate remedy and prevent over-compensation.

[33] Accordingly, I conclude that Currie and the unnamed members of the class he seeks to represent (excluding the Parsons group) are not bound by the Boland judgment.

2. Did the notice to the Canadian class members satisfy the requirements of natural justice?

[34] In the Boland action, the Illinois court ordered that notice be given in Canada by means of two advertisements in Maclean's magazine for English Canada and in La Presse, Le Journal de Québec and Le Journal de Montréal for Quebec. Notice was also published in three U.S. publications with circulation in Canada, People Magazine, USA Today and four copies of TV Guide.

[35] The respondents rely upon the evidence of Todd Hilsee, an individual with experience in developing notice programs for class actions. In Hilsee's opinion, the notice to Canadian members of the plaintiff class in Boland was inadequate. Relying on [page336] "net-reach" analysis, he asserts that the notice had reached only 29.9 per cent of Canadian adults who frequent burger restaurants. The notice approved in the United States, meanwhile, would have reached 72 per cent of American fast food patrons.

[36] In response to Hilsee's evidence, the appellants filed the affidavit of Wayne Pines, who prepared the Boland notice plan. He stated that Maclean's readership, in addition to circulation figures, should be considered, as should the impact of the notice in the U.S. publications with circulation in

Canada. Pines also swore that the notice to Canadians in Boland was more effective and broader than the notice approved in Chadha v. Bayer Inc., [1999] O.J. No. 3621, 43 C.P.C. (4th) 91 (S.C.J.).

[37] The motion judge made the following findings at para. 58 with respect to the adequacy of the notice in the Boland action:

> I am satisfied that it would be substantially unjust to find that the Canadian members of the putative class in Boland had received adequate notice of the proceedings and of their right to opt out. Quite apart from the form and contents of the notice -- Mr. Hilsee's reference to "wall to wall legalese" conveys no more than a hint of its eye-glazing opaqueness -- I believe that its dissemination in Canada was so woefully inadequate that the decision should be held to offend the rules of natural justice recognized in this court and, on that ground, to be not binding on the Canadian members of the putative class in Boland, other than those whom I have found to have submitted to the jurisdiction of the court in Illinois. It would not, in my judgment, be at all reasonable to consider publication in two issues of Maclean's magazine as adequate notice to unilingual English-speaking Canadians -- or, indeed, to French-speaking Canadians outside Quebec -- who were customers of McDonald's. Nor, as the question is governed by the laws of this jurisdiction, do I believe it would be helpful to speculate whether the decision of Schiller J. on the adequacy of the notice plan would have been the same if, at the preliminary hearing, he had been provided with the true circulation of Maclean's magazine or if the mistake in the initial declaration had been drawn to his attention at the final hearing.

[38] I am not persuaded that we should interfere with the motion judge's findings. They are essentially factual in nature and therefore entitled to deference on appeal to this court.

[39] It was open on the evidence for the motion judge to conclude that the wording of the notice was so technical and obscure that the ordinary class member would have difficulty understanding the implications of the proposed settlement on their legal rights in Canada or that they had the right to opt out. As I have already indicated, that right is of vital importance to the jurisdiction of the foreign court in international class action litigation. The right to opt out must be made clear and plain to the non-resident class members and I see no basis upon which to disagree with the motion judge's assessment of this notice.

[40] Nor would I interfere with the motion judge's finding that the mode of notice was inadequate. The appellants opted to publish [page337] the notice in a publication that is not ordinarily used in English-Canada for such purposes and there was evidence that this notice reached only a small proportion of the members of the plaintiff class. It was open on the evidence for the motion judge to conclude that such notice was inadequate.

[41] The appellants argue that the motion judge erred in law by applying a higher standard to the notice than would be applied in an Ontario class action. They point out that under Ontario law, there is no absolute requirement for effective notice in class actions and, where the stake of an individual class member is extremely low, notice requirements may be tailored accordingly. In the present case, the individual class member could assert no more than a mathematical chance to win a prize and given the low value of such a claim, Ontario law sets a very low standard. The Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 17 and 20 direct the Ontario courts making directions regarding

notice to consider, inter alia, the cost of notice, the size of the class and the nature of the relief sought. The Act specifically permits the court, having regard to these matters, to dispense with notice where appropriate (s. 17(2)). In consumer class actions involving large plaintiff classes asserting cla ims that are essentially insignificant on an individual basis, Canadian courts have approved notice arguably less effective than that approved in the case at bar: Chadha v. Bayer, above; Wilson v. Servier Canada Inc. (2002), above.

[42] I agree that the motion judge appears not to have assessed the adequacy of the Canadian notice against the standard mandated by Ontario law for Ontario class actions. I disagree, however, that he erred [in] so doing. In assessing the fairness of the foreign proceedings, "the courts of this country must have regard to fundamental principles of justice and not to the letter of the rules which, either in our system, or in the relevant foreign system, are designed to give effect to those principles" (Adams v. Cape Industries plc., [1990] Ch. 433 (C.A.), at p. 559. The adequacy of the notice had to be assessed in terms of what is required in an international class action involving the assertion of jurisdiction against non-residents. While Ontario's domestic standard may have some bearing upon that issue, I do not agree that it is conclusive, particularly in light of the importance of notice to the jurisdictional issues discussed above.

[43] In my view, the motion judge was entitled to look, as he did, to the standard the American court applied to its own residents. American and Canadian class members had similar if not identical interests at stake and there was no relevant basis upon which the Illinois court could have concluded that one standard [page338] of procedural fairness was appropriate for the American class and another for the Canadian. In the result, the Illinois court applied a different and lower standard in determining what notice should be given to the Canadian plaintiffs. I would not interfere with the motion judge's conclusion that there was a denial of natural justice. Natural justice surely requires that similarly situated litigants be accorded equal (although not necessarily identical) treatment.

3. Is Currie precluded by the doctrines of res judicata or abuse of process from prosecuting his claim in Ontario?

[44] The appellants argue that Currie should be bound by [the] Boland judgment on the basis that he is in the same interest as or a privy to Parsons. Parsons did not appeal the motion judge's finding that he attorned to the jurisdiction of the Illinois court; therefore, he is bound by it. The allegations in the Currie action are the same as those advanced by Parsons. The Currie action was brought as a protective measure to preserve the right to bring an action in Canada on behalf of the same class of plaintiffs in the event of an adverse ruling against Parsons in Illinois. The same law firm that represented Parsons commenced the Currie action after Parsons' appearance in the Illinois court.

[45] The appellants submit that the Currie action should be dismissed on the basis of res judicata or as an abuse of process. They argue that Currie makes essentially the same allegations as were made by Parsons and that the Currie action is nothing more than a deliberate attempt to avoid the effect of an adverse ruling against Parsons. Currie and Parsons are, the appellants submit, alter egos of each other, neither having any significant personal interest in their claims and both making the same allegations. The real plaintiff, and the only entity with a real stake in the claim, is the law firm that represents both Currie and Parsons. The appellants urge us to look to the practical realities of class actions. We are asked to focus on the centrality of the lawyers to a process in which the representative plaintiffs play what is at best a nominal role.

[46] I am not persuaded that res judicata applies here or that there are grounds for this court to interfere with the motion judge's refusal to apply the abuse of process doctrine. The parties are not the same -- Currie took no part in the Boland proceedings and McDonald's Canada was not named as a defendant in that action. Further, Currie's allegations specifically related to the Canadian patrons were made by Parsons in objecting to the [page339] settlement, but they did not form part of the claim advanced by the representative plaintiff in Boland.

[47] The appellants say that Currie and Parsons are privies, relying on the extended definition of privity identified by Farley J. in Bank of Montreal v. Mitchell, [1997] O.J. No. 602, 143 D.L.R. (4th) 697 (Gen. Div.), at p. 739 D.L.R., affd [1997] O.J. No. 2848, 151 D.L.R. (4th) 574 (C.A.) and applied in Banque Nationale de Paris (Canada) v. Canadian Imperial Bank of Commerce (2001), 52 O.R. (3d) 161, [2001] O.J. No. 53 (C.A.), at p. 171 O.R.:

> For privity of interest to exist there must be a sufficient degree of connection or identification between the two parties for it to be just and common sense to hold that a court decision involving the party litigant that it should be binding in a subsequent proceeding upon the non-litigant party in the original proceeding ... [W]here that non-litigant party has sufficient interest in those original proceedings to intervene but instead chooses to stand by and have a battle in which he has a practical and legal concern fought by someone else, it is appropriate to have the non-litigant abide by that previous decision . . .

[48] The motion judge rejected this submission. He found that there was no evidence that Currie deliberately stood by while the battle was being fought elsewhere. There was no evidence that Currie was even aware of the proceedings in the United States until shortly before his own action was commenced. Currie refused, on his counsel's advice, to provide any information that he had received from his counsel about the Boland and Parsons proceedings. The motion judge found, at para. 82, that even if he were to draw from Currie's refusal the adverse inference that the Currie [action] was tainted by Parsons' attornment, that still did not provide a basis for finding Currie to be a privy of Parsons or the Currie action to be an abuse of process. The motion judge found that protection of the interests of the putative class was a legitimate tactic (at para. 83):

> There is nothing to suggest that Mr. Currie's decision to commence the Currie action -- and any involvement of his solicitors in that decision -- was motivated by any consideration other than a desire to protect the interests of members of the putative class in the Parsons action who had not participated in the Boland proceedings. Such members could not then be compelled to participate in the Parsons action. I have found that Mr. Parsons had no authority to submit their rights to the jurisdiction of the court in Illinois and, in view of the inadequacy of the notice of the Boland proceedings given in Canada, I cannot assume that any of the members of the putative class in the Currie action, other than the objectors, were aware of the proceedings in Illinois or of the Parsons action. In these circumstances, I decline to find that they -- or Mr. Currie -- were privies of Mr. Parsons or that the commencement and continuation of the Currie action should be considered to be an abuse of process.

[49] I agree with the motion judge and I reject the submission of the appellants that we should analyze this issue on the basis [page340] that the law firm was the real litigant, or that the link pro-

vided by the law firm to both Parsons and Currie was sufficient to make them privies. No doubt from a purely financial perspective, the law firm had a greater stake in the outcome than Parsons, Currie or any individual member of the proposed class. However, the financial stake of the class as a whole exceeded that of the law firm. In any event, I am not persuaded that the legal rights of the parties are to be assessed on the basis of their lawyers' pecuniary interest in the outcome. The legal claims that are being advanced belong to Parsons, Currie and to the members of the proposed class, not to the law firm.

[50] Lawyers are not ordinarily considered to be in privity of interest with their clients: see Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2), [1967] A.C. 853, [1966] 2 All E.R. 536, at pp. 910 and 937 A.C. The propriety of the procedures taken in the presentation of legal claims should be assessed from the perspective of the clients' legal rights. The law firm's job was to protect the legal interests of its individual clients and the legal interests of the proposed class. Currie had no contact with Parsons; nor, it would seem, did he know anything about the Parsons action or the steps that Parsons was taking to pursue it in Ontario and in Illinois. The same can be said for the unnamed members of the class Currie proposes to represent. In that light, it is difficult to see how Currie or those unnamed class members can be said to be bound under the Bank of Montreal v. Mitchell principle because they have adopted a tactical "stand by" position, rather than participating in the Illino is proceedings.

[51] This case is distinguishable from Shaw v. BCE Inc., [2004] O.J. No. 5481, O.T.C. 28 (S.C.J.). In Shaw, Farley J. struck out the statement of claim in a proposed class proceeding only to be met with another claim, substantially similar to the one he struck out, advanced by another representative plaintiff represented by the same law firm. Farley J. found that the new statement of claim failed to disclose a cause of action and he struck it out on that basis. He added that, in any event, the representative plaintiff fell within the extended definition of privity from Bank of Montreal v. Mitchell. An appeal to this court was dismissed on the ground that the new statement of claim failed to disclose a cause of action: [2004] O.J. No. 3109, 189 O.A.C. 9. This court declined to comment on the res judicata issue. In Shaw, the case for application of res judicata was significantly stronger than in the present case. There had been a determination on the merits that the claim lacked validity and that the new claim did not differ in substance from the claim that had been struck out. The merits of significant aspects of the Parsons claim, those [page341] specifically pertaining to Canadian customers, have never been considered. In any event, as I have already found that the expanded Bank of Montreal v. Mitchell definition of privity does not apply here, and as Shaw rests on that same principle, Shaw has no application here.

Conclusion

[52] For these reasons, I would dismiss the appeal.

[53] If the parties are unable to agree as to the costs of this appeal, brief written submissions may be filed. Respondent's submissions to be delivered within ten days after the release of these reasons; appellants' submissions to be delivered five days thereafter.

Appeal dismissed.

# TAB 35

*Case Name:*

# Durling v. Sunrise Propane Energy Group Inc.

**PROCEEDING UNDER the Class Action Proceedings Act, 1992, S.O. 1992, C. 6**
**Between**
**James Durling, Jan Anthony Thomas, John Santoro, Giuseppina Santoro, Anna Manco, Francesco Manco and Cesare Manco, Plaintiffs, and**
**Sunrise Propane Energy Group Inc., 1367229 Ontario Inc., 1186728 Ontario Limited, 1369630 Ontario Inc., 1452049 Ontario Inc., Valery Belahov, Shay (Sean) Ben-Moshe, Leonid Belahov, Arie Belahov, 2094528 Ontario Inc., HGT Holdings Ltd., Teskey Construction Co. Ltd. and Teskey Concrete Co. Ltd., The Technical Standards and Safety Authority, Felipe de Leon, Ontario Hose Specialties Limited, Peraflex Hose Inc., Peraflex Hose Industries Inc., Dover Corporation, Dover Corporation (Canada) Limited Societe Dover (Canada) Limitee, Weldex Company Limited, Keddco Mfg. Ltd., Robert Parsons Equipment Trading Inc. and Pro-Par (1978) Inc., Defendants**

[2011] O.J. No. 5806

2011 ONSC 7506

Court File No. CV-08-363271-00CP

Ontario Superior Court of Justice

**C.J. Horkins J.**

Heard: October 27, 2011.
Judgment: December 16, 2011.

(78 paras.)

**Counsel:**

*Harvin Pitch, Ted Charney Michelle Kemper, Sharon Strosberg,* for the Plaintiffs.

*Robert J. Potts* and *Mirilyn R. Sharp,* for the defendants, Sunrise Propane Energy Group Inc., 1367229 Ontario Inc., 1186728 Ontario Limited, Valery Belahov, Shay (Sean) Ben-Moshe, Leonid Belahov aka Arie Belahov).

*Ward Branch,* for the defendant, 1452049 Ontario Inc.

*John A. Campion* and *Antonio DiDomenico,* for the defendants, 2094528 Ontario Inc., HGT Holdings Ltd., Teskey Construction Co. Ltd., and Teskey Concrete Co. Ltd.

*Rory Barnable,* for the defendant, The Technical Standards and Safety Authority.

*Paul Belanger,* for the defendants 1369630 Ontario Inc.
and Felipe De Leon.

*John Lea,* for the defendants, *Ontario Hose Specialties Limited.*

*Stuart Ghan,* for the defendants, *Peraflex hose Inc. and Peraflex Hose Industries Inc.*

*Linda Philips Smith,* for the defendants *Dover Corporation, Dover Corporation (Canada) Limited Societe Dover (Canada) Limitee.*

*Barry Yellin,* for the defendants Weldex Company Limited.

*Dana Eichler,* for the defendant Keddco MFG. Ltd.

*Brent Vallis,* for the defendants Robert Parsons Equipment Trading Inc. and Pro-Par (1978) Inc.

No one appearing for the Third Parties Westside Services and Flagro.

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**C.J. HORKINS J.:--**

**THE CLAIMS BAR PROPOSAL**

**1** This is a proceeding commenced under the *Class Proceedings Act* that arises out of explosions that occurred on August 10, 2008 at a propane facility located at 48 Murray Road and at 48, 54 and 62 Murray Road ("the propane facility"), in Toronto, Ontario.

**2** On October 24, 2011, the certification hearing in this action was set to proceed for five days. At the request of counsel, the commencement of the hearing was delayed until Thursday, October 27, 2011 because counsel were in the process of negotiating a consent certification order.

**3** On October 26, 2011, counsel provided the court with Minutes of Settlement. In essence, they agreed that the action should be certified subject to the court resolving two common issues that were in dispute and approving a claims bar.

**4** The Minutes of Settlement set out the usual terms for certification. In addition, the Minutes of Settlement include a novel provision that requires each class member to register with class counsel's on line registration system. Class members must register no later than six months from the date of the certification order. A class member who fails to register within the deadline "will be forever barred from participating in any future settlement or judgment and will be forever barred from bringing or continuing any action against the defendants and third parties relating to the explosion" subject to further order of the court ("the claims bar").

**5** A class member who fails to register within the six months may seek relief from the claims bar. The relief provision in paragraph 9 of the Minutes of Settlement states as follows:

> [T]he Court, in its discretion, may permit a Class Member (who does not register within the 6 month claims bar period and who does not opt out of the class proceeding within the 60 day opt out period) to be eligible to participate in a future settlement or judgment. The Defendants and Third Parties shall be permitted to ask the Court to only exercise its discretion to allow a Class Member (who does not register within the 6 month claims bar period and who does not opt out of the class proceeding within the 60 day opt out period) to be eligible to participate in a future settlement or judgment only if such Class Member satisfies the Court that (a) he or she did not receive notice of and was otherwise unaware of the 6 month claims bar deadline, and (b) he or she failed to register within the 6 month claims bar period due to extraordinary circumstances that were not the result of any failing on his or her part.

**6** Upon receipt of the Minutes of Settlement, I advised counsel that I had questions and concerns about the concept of a claims bar, the jurisdiction under the *Class Proceedings Act* to impose a claims bar, the lack of precedent and the unfairness to those who are barred.

**7** As well, I raised numerous concerns and questions about the above "relief" provision. On its face, this relief provision contemplates a barred class member having to go through a mini trial or some form of a hearing and being faced with resistance from the defendants and third parties. It is unclear how this process would be managed. Would sworn evidence be required or would the barred person simply file a request for relief? Would the defendants be able to cross-examine the barred class member? Would the barred class member require a lawyer, and if so, who would represent the barred class member? Would the barred class member have to incur the legal fees to seek relief? If denied, was there a right of appeal? Today, thousands of class members have not registered. Potentially, thousands will fail to register within the six months and thousands may seek relief from the claims bar. How would so many requests be managed?

**8** The certification hearing commenced on October 27, 2011. Submissions focused solely on the issue of the claims bar. It became apparent that settlement of the certification motion was conditional upon the court approving the claims bar. Without approval of the claims bar, the defendants stated that they would contest certification of this action. (I note that the defendants 2094528 Ontario Inc, HGT Holdings Ltd., Teskey Construction Co. Ltd and Teskey Concrete Co. Ltd. take no position on the issue of the claims bar). Oral submissions concerning the claims bar were made on October 27. Counsel then filed written submissions addressing the claims bar issue.

**9** In an attempt to address the concerns about the above "relief" provision, counsel proposed the following alternative protocol. There will be a second notice delivered to all residences in the affected area three months before the claims registration deadline. This notice will warn the recipient of the approaching deadline and invite them to attend a town hall meeting to have any questions answered.

**10** A class member who fails to register before the deadline expires is referred to as a "late filer". At this point, the claims bar is in effect and the late filer is not eligible to participate in a future settlement or judgment. A late filer can request relief from the claims bar only if the late filer completes a one page Late Registration Request, faxes, emails or mails this request to class counsel and

registers with the on line registration system within two months of filing the Late Registration Request. The Late Registration Request form will be available on class counsel's website.

**11** Class counsel must deliver a copy of any Late Registration Request Form to the defendants. The defendants may deliver a one page Response Form if they object to the inclusion of the late filer but must do so within 2 months of the final order on the common issues trial or the final order on settlement approval. If the defendants do not file a Response Form within the required time, the request for relief will be granted.

**12** Decisions on late filing will be deferred until after the common issues trial, approval of any settlement, or further order of the court. By deferring consideration of the Late Registration Request until after settlement or judgment, counsel hope that the issue may become moot. Depending upon the number and type of claims made by late filers, they suggest that "the issue of the management of late filed claims can be subject to further consideration of the parties if the claim is successful or a settlement negotiated."

**13** Lastly, it is proposed that a private referee be appointed to decide whether a Late Registration Request should be granted. The defendants will bear the cost of the referee and the referee will issue reasons for the decision, but these decisions will be one page or less. There will be no right of appeal from the referee's decision.

**14** For the reasons that follow, the claims bar is not approved.

## BACKGROUND EVIDENCE

**15** This decision reviews some of the evidence that was filed on the certification motion. The purpose of this review is to give context to my consideration of the claims bar.

**16** On August 10, 2008, at approximately 3:50 a.m., a series of explosions occurred at the propane facility. The explosions caused several massive fireballs to be released into the air from the propane facility and over the surrounding neighbourhood.

**17** Many of the representative plaintiffs and other class members reported that in the immediate aftermath of the explosions, they were exposed to scenes of a massive fireball, subsequent mushroom cloud, and utter chaos.

**18** The Toronto Police Department ordered a non-compulsory evacuation of everyone within 1.6 km of the propane facility. The evidence indicates that 6,386 people lived in the affected area.

**19** As a result of the explosions, it is alleged that the class members suffered damages. They were displaced from their homes, inhaled smoke and noxious substances, feared for their lives, sustained damage to their homes and contents, suffered business losses, suffered from personal injury, post-traumatic stress disorders and other mental illnesses, were absent from work and lost income, and incurred the out-of-pocket costs of replacing clothing and hotel/food expenses while they were displaced.

**20** Class counsel retained Dr. Brian Hoffman to provide an opinion on the effects of the explosions on the class members. Dr. Hoffman examined two proposed representative plaintiffs in the action and delivered reports that were specific to them. Dr. Hoffman also delivered a report which applied to all persons who may have been affected by the explosions, which is summarized as follows:

(a) the explosions occurred in the middle of the night when most people would be asleep in the safety of their homes;
(b) any person in the vicinity of the explosion would likely have suffered significant emotional symptoms of fear and anxiety in reaction to the explosions;
(c) the stressors experienced by people affected by the explosions were severe, multiple and prolonged;
(d) 100% of the people who lived near the propane facility and heard the explosions or saw the subsequent fires would have experienced significant anxiety, fearfulness, sleeplessness, bad dreams and ruminative thoughts that would interfere with their functioning in everyday living for some period of time after the event; and
(e) among other disorders described, individuals may develop an Adjustment Disorder within three months of a traumatic event with clinically significant symptoms of distress and significant impairment in social or occupational functioning. These symptoms typically last up to six months.

**21** Dr. Hoffman is of the opinion that the range of the severity of the psychiatric reactions to the explosions would be dependent on a number of factors. More severe reactions would likely depend on an accumulation of risk factors including the proximity to the explosions, the threat of personal and family harm, actual physical destruction of property and personal injury, displacement from the home, loss of personal possessions, actual or perceived financial loss and compromise, and duration and severity of individual emotional vulnerability whether identified or latent before the traumatic event. In addition, vulnerable residents with pre-existing psychiatric/emotional problems would be at a higher risk for severe response.

**22** Dr. Hoffman notes that similar serious traumatic events have yielded rates of Post-Traumatic Stress Disorder between 30% and 50% for persons exposed and Acute Stress Disorder is estimated to be at even higher rates.

**23** Dr. Hoffman is of the opinion that the common specific psychiatric disorders in such a traumatic event, among others are:

(1) Acute Stress Reaction (lasting 2 days to less than 4 weeks);
(2) Post Traumatic Stress Disorder (lasting more 4 weeks or more);
(3) Phobic Disorder;
(4) Adjustment Disorder with depression and/or anxiety; and
(5) Aggravation of a pre-existing psychiatric disorder;

**24** Dr. Hoffman notes that Acute Stress Disorder can be a diagnosable disorder, after a minimum of symptoms lasting at least two days and resolving within four weeks. He states that if the symptoms have not resolved, the patient goes on to meet criteria for Post-Traumatic Stress Disorder.

**25** He states that many of the people who lived near the explosions would have experienced significant anxiety, fearfulness, sleeplessness, bad dreams and nightmares and ruminative thoughts to a degree that would interfere with their functioning in everyday living and in other areas of their life for some days after this event.

**26** Counsel state that the inability to determine how many people suffered a recognized psychiatric illness and obtain evidence to quantify their damages, is hindering their ability to consider settlement. A claims bar will allow counsel to determine the exact number of class members and it will provide evidence about their losses.

## WEBSITE REGISTRATION

**27** The purpose of class counsel's website is to collect and record information from the class members about the damages that they suffered as a result of the explosions. The website is an interactive and intuitive registration system that records all aspects of the damages of the class members. For example, the website records the following information about the class members:

(1) particulars about physical and psychological injuries, including anecdotal evidence about how their everyday lives were impacted by the explosions;
(2) particulars about evacuation and displacement from homes;
(3) pecuniary losses, both insured and uninsured, including but not limited to property losses, income losses and other losses;
(4) non-pecuniary losses; and
(5) the class members' anecdotal evidence about any other aspect of the explosions and its effect upon them, including but not limited to the number of hours people put towards putting their lives back in order in lieu of hiring contractors or the number of days they spent living friends or relatives while they were displaced from their homes.

**28** To date, there has been considerable effort on the part of class counsel to notify class members about the website and encourage them to register. Class counsel have held town hall meetings and questionnaires have been sent to people living in the affected area. As a result, over 1,750 class members have registered their claims on the website. Based on the estimate of 6,386 people living in the affected area, approximately 73% of the class has not registered their claims on the website.

**29** The website reveals that among the people who have registered, 307 have consulted a doctor about physical and emotional injuries they suffered as a result of the explosions. The website database also contains information concerning property claims paid by some of their property insurers.

**30** It is impossible to know why some putative class members have registered and others have not. Arguably, different factors motivate people to take action and register. Some may wish to wait and see what happens in the class action. Some may want to see if the case is going to settle before sharing personal information. Some of those who have not registered may be keeping track of details of their claims. Some may be unaware of the request to register despite efforts of class counsel to notify them. Some may have language difficulties and may not understand the print information that has been circulated.

**31** Class counsel are concerned that the passage of time is working against the class members. For example, they argue that memories will fade as time passes and crucial information about the psychological damage may be lost forever if it is not recorded. However, this is not a concern unique to this action. Class counsel submit that many class members suffered psychological symptoms but may not have visited a doctor and therefore lack medical records.

**32** If this crucial information is not recorded now, some three years after the explosions, class counsel fear that it may be lost forever. This is because the trial of the common issues may not take

place for years and the trial of any individual issues will be delayed even longer. They argue that it is unlikely that class members will have a clear memory of their symptoms when the trial is finally reached. Class counsel submit that a claims bar will help to motivate the rest of the class to register on the website and preserve particulars about their claims.

**33** In an effort to collect more evidence about class members who claim emotional injury, the Minutes of Settlement state that class counsel will add the following three questions to the website registration:

(1) Did you or any person for whom you are registering, consult a health professional for the emotional injury?
(2) If the answer to question 11(a) is "yes", did you (or any person for whom you are registering) receive a diagnosis of the emotional injury?
(3) If the answer to question 11(b) is "yes", what was that diagnosis?

**34** The Minutes of Settlement require class counsel to report the answers provided by the class member. Class counsel are under no obligation to verify the information provided.

## ANALYSIS

### *Why is a Claims Bar Requested?*

**35** Class Counsel proposed the concept of the claims. All counsel argue that a claims bar is in the best interests of the class and will satisfy one of the goals of the *Class Proceedings Act*, namely, access to justice. This is because the claims bar will motivate class members to register their claims and this will assist in preserving evidence. Further, the claims bar will provide certainty about how many are in the class and the type of damages suffered. All counsel say this will foster settlement.

**36** Class counsel submit that in this case there are two complicating factors that increase the need for the claims bar. First, according to class counsel some of the defendants "may not have sufficient insurance coverage". Class counsel state that it is difficult to recommend a settlement within policy limits without knowing the aggregate value of the claims. Second, there are subrogated claims with a value of approximately $20 million that will be competing for their share of any settlement monies (subject to which has the priority in the event of insufficient monies). Class counsel state that they need to know the value of the uninsured claims when negotiating with the defendants.

**37** Not surprisingly the defendants support the claims bar. Each time a class member is barred, the defendants' exposure drops. Further, before pleadings are delivered, discovery of the representative plaintiffs is conducted and a settlement is ever reached, the claims bar allows the defendants to know exactly how many class members there are and offers them a form of discovery about each registered class member. They will have access to the information that the class member is required to register on line. It is hard to imagine a defendant in a class action that would not support a claims bar.

**38** Defence counsel state that the claims bar will encourage prompt consideration of settlement because it will remove the uncertainty about the nature and scope of the claims that often plagues a class proceeding. It will provide firm and objective details about the quantification of the claims particularly those involving personal and psychological injury.

**39** Defence counsel also state the claims bar is justified because of special circumstances that they say exist in this case. These special circumstances are summarized as follows:

* The case involves a clear recognizable one day event in a confined area.
* There has been extensive media attention about the explosions and the class action.
* There have been numerous efforts to notify putative class members to register their claims and many have done so including insurers who seek to recover subrogated losses.
* Putative class members have already had almost four years to register.
* The Minutes of Settlement provide for additional notice about the need to register and the resulting claims bar for those who do not. They are given a generous amount of time (6 months) to register and it is easy to do so.

**40** In my view, there is nothing special or unique about this case that justifies imposing a claims bar. Counsel seem to be suggesting that the circumstances of this case justify the claims bar despite prejudice to those who are barred, because this case is about an explosion that all putative class members know about and extensive efforts have been made to tell all putative class members to register their claims. In other words, if they do not register, it is safe to assume that they do not wish to be involved. I appreciate that this case is different from other class actions where the putative class member may not even know that a claim exists. However, the issue is not whether special circumstances exist to justify a claims bar. The issue is whether the *Class Proceedings Act* supports this bar. As explained below it does not.

***The Claims Bar is a form of Opting In***

**41** The *Class Proceedings Act* is not an "opt in" system and yet this is the practical effect of the claims bar. Upon certification, the *Class Proceedings Act* gives class members a choice: they opt out and can pursue individual claims or they pursue their claims as class members. Those who do not opt out are protected by the class action. The effect of the claims bar is to introduce a further step after the opt out period. Class members who have not registered must do so failing which they will be barred from pursuing any claim. In other words, even though they decided not to opt out and are class members, they must now elect to stay in the class action. In my view, this is a requirement that they "opt in" and is contrary to how the *Class Proceedings Act* works.

**42** The claims bar would fundamentally change the structure of the *Class Proceedings Act*. It takes away the class member's rights simply because he does not register on the website. As the proposed claims bar states, the barred class member is "forever barred from participating in any future settlement or judgment and will be forever barred from

bringing or continuing any action against the Defendants and Third Parties relating to the explosion".

***The Class Proceedings Act and the Rules do not support a Claims Bar***

*(i) The Class Proceedings Act*

**43** Counsel argue that there is support in the *Class Proceedings Act* for a claims bar because various sections require class members to act within a specified time frame, failing which some or all of their rights will be lost. There is simply no section in the *Class Proceedings Act* that contemplates a claims bar.

**44** Section 9 allows a time to be specified to opt out of a class. It does not extinguish the ability to pursue a claim.

**45** Counsel also point to the time limits for making claims under ss. 24 and 25, as support for the claims bar. For example, s. 24(7) of the *Class Proceedings Act* is titled "Time limits for making claims", and provides that "... the court shall set a reasonable time within which individual class members may make a claim under this section." Section 24(8) provides that "A class member who fails to make a claim within the time set under subsection (7) may not later make a claim under this section except with leave of the court."

**46** Section 25 of the *Class Proceedings Act* deals with the processing of individual issues after the court has determined the common issues in favour of the class. Section 25(4) states that "[t]he court shall set a reasonable time within which individual class members may make claims under this section" and s. 25(5) provides that "A class member who fails to make a claim within the time set under subsection (4) may not later make a claim under this section except with leave of the court."

**47** Counsel argue that requiring class members to register with class counsel's on line system before the 6 month claims registration deadline, is no different than the provisions in ss. 24 and 25 of the *Class Proceedings Act* except with respect to the timing. Under the *Class Proceedings Act*, class members must register their claims "after" the common issues are determined, whereas the Minutes of Settlement require Class Members to register their claims "before" the common issues are determined.

**48** The time limits in ss. 24 and 25 are distinguishable. They are time limits imposed at a point in the class proceeding when the actual relief of the class member is being adjudicated. Common issues have been adjudicated and a class member is required to participate in individual issues. It is reasonable and necessary at this end point in the class action to impose a time limit. In contrast, counsel seek to impose a claims bar at the beginning of the class action, before pleadings are closed and any discovery has taken place.

**49** Counsel argue that the *Class Proceedings Act* gives the court tremendous flexibility to ensure that the purposes of the Act are met. Section 12 states:

> The court, on the motion of a party or class member, may make any 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.

**50** Counsel urge me to use the power under s. 12 to impose the claims bar which they characterize as a "procedural mechanism that will ensure the fair and expeditious determination of this proceeding".

**51** Further, defence counsel argue that the benefit of a consent certification motion cannot be understated. In particular, counsel state that the consent to certification conserves judicial resources, improves the speed of justice and encourages the reasonable behavior of defendants on the certification motion. The Minutes of Settlement were the subject of intense negotiations among respected counsel and unless there is a substantive reason to reject the claims bar, counsel say that this approach to settlement of a certification motion should be encouraged.

**52** In my view, none of the above justifies the claims bar. First, I have identified in these reasons many substantive reasons to reject the claims bar. Second, reasonable behaviour of the defence should not have to be encouraged and certainly not at the expense of absent class members. Third, conserving judicial resources and speeding up justice, should not be at the expense of the absent class members.

**53** Counsel defend the fairness of the claims bar. They point to the fact that class counsel have already reached out to the class to explain the on line registration and have urged them to register. Further, additional notice will be given to the class members after certification clearly explaining the registration requirement and the claims bar for those who fail to comply. There will be another mail drop at each residence and place of business in the affected area, advertisements in English and Italian newspapers and a notice will be posted on class counsel's website. A claims bar may help to expedite the determination of the class proceeding because the defendants will know how many class members exist and will have details about their claims. This, they argue, may encourage settlement. Of course defendants in most, if not all class actions, would be interested in having this degree of certainty.

**54** However a claims bar in my view, will not "ensure the fair and expeditious determination of this proceeding." [Emphasis added.] It is not fair to bar a class member simply because they do not register their claims. This is a draconian penalty that finds no support in the *Class Proceedings Act.*

**55** A central goal of the *Class Proceedings Act* is to improve access to justice. Counsel argue that access to justice for those who register is improved because details of their claims will be documented. As well, counsel argue that certainty in class numbers and disclosure of evidence about the nature of their injuries will assist in promoting settlement. But this ignores the fact that the claims bar eliminates access to justice for any class member who does not register. While the proposal allows the barred class member to request relief from the bar, it is far from certain how this will be managed, what arguments the barred class members will face from the defendants, whether they will need legal representation and who will represent them. Counsel seek to place all of this on the "back burner" by delaying consideration of any Late Registration Requests. Even if a request for relief is successful, a class member should not have to go through the process of trying to get back into the class.

**56** If as suggested there is insufficient insurance monies to satisfy all claims, it is easy to see how this will become an issue if barred class members are seeking relief. If settlement monies have to be shared between class members who did register and those who seek to be let back in, tension and conflict between the two groups may develop.

**57** Section 12 of the CPA provides the court with broad discretion. As noted in *Bodnar v. Cash Store Inc.* 2011 BCCA 384 at para. 39, "[t]he objectives of that broad discretion lie in the court's obligation to protect the interests of absent class members, and the potential complexities of managing class actions." In *Fantl v. Transamerica Life Canada,* 2009 ONCA 377 at para. 39, Winkler C.J.O. affirmed that "[t]he existence of the absent class members, among other factors, is the reason that the court's supervisory jurisdiction is engaged from the inception of an intended class proceeding. It continues throughout the "stages" of the proceeding until a final disposition, including the implementation of the administration of a settlement or, where applicable, a resolution of all individual issues."

**58** The exercise of the court's discretion under s. 12 of the *Class Proceedings Act* must be fair to the class members. A claims bar will not ensure the "fair" determination of the class proceeding.

*(ii) The Rules of Civil Procedure*

**59** It is important to remember that the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194 apply to class actions. As stated in *Stern v. Imasco Ltd.,* [1999] O.J. No. 4235 (S.C.J.), at para. 27, "the discretion conferred by s. 12 of the CPA is intended to supplement the Rules by accommodating the special nature of class proceedings. However, s. 12 is not designed to circumvent the normative Rules."

**60** Requiring registration and collecting evidence that will be shared with the defence, all before the close of pleadings is a form of pre-discovery production. There is no such requirement in the *Rules*. Unless there is evidence "to suggest that the alleged 'class' nature of the claim calls for any departure from the discovery procedures set out in the Rules ... [a party] is not entitled to additional or accelerated rights of discovery under s. 12 of the CPA." (*Stern v. Imasco Ltd* at para. 29). No evidence exists in this case that justifies using such an extreme penalty that is a significant departure from the *Rules*.

**61** Under the *Rules of Civil Procedure*, if a plaintiff fails to serve an affidavit of documents, comply with a production request, attend a discovery and/or answer undertakings, there is no automatic penalty imposed that dismisses or bars the claim. To the contrary, the *Rules* are replete with examples of discretionary relief that the court typically offers a plaintiff.

***There is No Precedent for the Claims Bar***

**62** The cases that counsel rely on as support for the claims bar do not assist. I will deal with each one separately.

**63** In *Ontario New Home Warranty Program v. Chevron Chemical Co.,* [1999] O.J. No. 2245, the parties brought a motion to approve a class action settlement with some but not all of the defendants. The plaintiffs and the settling defendants agreed that the settling defendants' proportionate liability would be fixed at 65%. The plaintiffs' action would continue against the non-settling defendants. The settling defendants agreed to abandon any claim for contribution and indemnity against the non-settling defendants. The plaintiffs agreed to seek damages against the non-settling defendants in the amount for which the non-settling defendants are severally liable.

**64** As a term of the settlement, the non-settling defendants were barred from making any further claims for contribution and indemnity against the settling defendants in respect of any damages awarded to the plaintiffs at trial. The non-settling defendants disputed the bar and argued that the court had no jurisdiction to bar their rights under the *Negligence Act,* R.S.O. 1990, c. N.1 to seek contribution and indemnity. In the end, the court accepted the bar and concluded that the rights of the non-settling defendants were not prejudiced.

**65** *Ontario New Home Warranty Program v. Chevron Chemical Co., supra,* is an example of the court utilizing the concept of a bar to assist in effecting a partial settlement. The bar that was imposed in this case did not bar a right of action and did not prejudice the rights of the non-settling defendants under the *Negligence Act*.

**66** As Winkler J. stated at para. 50 of this decision the "court has noted on multiple occasions that there is no jurisdiction conferred by the Class Proceedings Act to supplement or derogate from the

substantive rights of the parties. It is a procedural statute and, as such, neither its inherent objects nor its explicit provisions can be given effect in a manner which affects the substantive rights of either plaintiffs or defendants."

**67** In *Politzer v. 170498 Canada Inc.*, [2005] O.J. No. 5224 (S.C.J.) tenants in a residential building suffered damage when a water pipe in the building burst. An action under the *Class Proceedings Act* was commenced. Tenants whose damages were $10,000 or less had claims that fell within the exclusive jurisdiction of the Ontario Rental Housing Tribunal. At the certification hearing, Cullity J. limited the class membership to those who indicated their desire to participate in the proceeding to claim damage in excess of $10,000. He explained his reasons for doing so at para. 25 as follows:

> 25 Although, as far as tenants are concerned, this definition of the primary class would, in effect, substitute an opting-in process for the opting-out procedure contemplated by the CPA, I believe it is justified in the special circumstances of this case where, by statute, the court's jurisdiction depends on an exercise of choice, or judgment, by each tenant. ... however, a different interpretation of the decision was suggested.

**68** *Politzer v. 170498 Canada Inc.,supra,* does not justify imposing a claims bar in this case. In *Politzer,* it was necessary to impose what Cullity J. called an opt in provision because the court's jurisdiction depended on the individual electing to sue for more than $10,000. Unlike the proposed claims bar in this case, the opt in requirement in *Politzer* did not prejudice the rights of the tenants.

**69** Two final cases that counsel rely on are of no assistance. Both are brief decisions early in the development of class action law and neither considers the numerous questions and issues that are raised by the concept of a claims bar. In each case, the court allowed early registration or what was an opt in approach.

**70** *Campbell v. Flexwatt Corp.*, (1998) 62 B.C.L.R. (3d) 11 (B.C.S.C.) does not deal with the *Class Proceedings Act* in issue. In that case, a consent order required class members to register their claims and, if they failed to do so by the deadline, they were precluded from participating in the action. If the court issued reasons for agreeing to impose this consent bar, they were not provided by counsel in this case and there is no record of such a decision that I can locate. I was provided with brief reasons of the British Columbia court dealing with a motion to extend the registration deadline. The deadline was extended but the case offers no assistance in understanding the statutory authority and reasons for the initial consent order.

**71** In *Denis v. Bertrand & Frere Construction Co.,* [2002] O.J. No. 3419, a motion was brought on consent to add "additional class members". The judge had previously granted certification and had ordered that class members "join" the class action by a certain date. (The decision granting certification was not provided.) Four people who failed to "join" the class brought a motion to be allowed to "join" late. In brief reasons the court granted the relief. The case offers no assistance in understanding the statutory authority and reasons for the initial order directing that class members "join" the class.

**72** Two decisions of this court support my decision to reject the claims bar. In *Ramdath v. George Brown College of Applied Arts and Technology,* [2010] O.J. No. 1411, the defendant asked the court on a certification motion to bifurcate the proceedings in the event the action was certified. Specifically, the defendant wanted discovery and the trial of the individual issues to take place be-

fore the trial of the common issues. Strathy J. rejected this request and stated at para. 150 that the defendant was "really trying to turn this action into an opt-in class action by requiring each Class Member to come forward and establish his or her entitlement to claim prior to the resolution of the common issues." As Strathy J. so aptly noted at para. 150, this "proposal stands class actions on their head".

**73** The defendants seek to argue that *Ramdath* leaves the door open because Strathy J. states at para. 150 that "[i]t may be the case that, in exceptional circumstances, the court's jurisdiction under s. 12 of the C.P.A. would permit the determination of some or all individual issues before the common issues, but I have some difficulty in contemplating what those circumstances might be." This does not help counsel in this case. *Ramdath* deals with the ordering of the trial of the issues and not the barring of the right to claim.

**74** In *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910, on a motion for certification, the defendants asked the court for an order directing members of the class who wished to make claims, to identify themselves prior to a trial of the common issues. Cullity J. rejected the request because it would "in effect, convert the opting-out procedure under the CPA into an opting-in process" and he did not believe that the court had "the jurisdiction to make such an order under s. 12 of the CPA, or otherwise." (at para. 117). Counsel argue that there are three reasons why *Lambert v. Guidant Corp., supra,* is distinguishable.

**75** First, counsel state that the plaintiff in *Lambert* did not consent to the proposal whereas the plaintiffs in this action introduced the concept of the claims bar and continue to support it along with defence counsel. The consent of counsel does not eliminate the supervisory role of this court to protect absent class members. In fact, the consent of all counsel makes the issue more challenging because there is no one in the adversarial process speaking for the rights of those whose claims will be barred if they fail to register on time.

**76** Second, counsel state that there was no mention in *Lambert* of trying to facilitate an efficient and early resolution of the case (which is what they say the claims bar facilitates). Instead, it appeared that the primary motivation for the early registration scheme that the defendant proposed was to reduce the size of the class. While this may be a difference between the two cases, it is irrelevant to my consideration of whether s. 12 should be utilized to approve a tool that is unfair to those who are barred and fundamentally changes the structure of the *Class Proceedings Act*.

**77** Third, counsel argue that unlike this case, there were no special circumstances in the *Lambert* to justify the proposal. As I have already stated, there is nothing special or unique about this case that justifies imposing the claims bar.

## CONCLUSION

**78** In summary, the request to approve the claims bar is denied. The certification motion will proceed on May 14 to 18, 2012. Counsel will attend a case conference on January 13, 2012 at 10 a.m.

C.J. HORKINS J.

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# TAB 36

**CITATION:** Timminco Limited (Re), 2012 ONSC 2515
**COURT FILE NO.:** CV-12-9539-00CL
**DATE:** 20120427

**SUPERIOR COURT OF JUSTICE – ONTARIO**
**(COMMERCIAL LIST)**

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985 c. C-36, AS AMENDED**

**RE:** **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC., Applicants**

**BEFORE:** **MORAWETZ J.**

**COUNSEL:** **James C. Orr and N. Mizobuchi, for St. Clair Penneyfeather, Plaintiff in Class Proceeding, *Penneyfeather v. Timminco Limited et al* (Court File No: CV-09-378701-00CP)**

**P. O'Kelly and A. Taylor, for the Applicants**

**P. LeVay, for the Photon Defendants**

**A. Lockhart, for Wacker Chemie AG**

**K. D. Kraft, for Chubb Insurance Company of Canada**

**D. J. Bell, for John P. Walsh**

**A. Hatnay and James Harnum for Mercer Canada, Administrator of the Timminco Haley Plan**

**S. Weisz, for FTI Consulting Canada Inc., Monitor**

**HEARD:** **March 26, 2012**

## ENDORSEMENT

[1] St. Clair Penneyfeather, the Plaintiff in the *Penneyfeather v. Timminco Limited, et al* action, Court File No. CV-09-378701-00CP (the "Class Action"), brought this motion for an order lifting the stay of proceedings, as provided by the Initial Order of January 3, 2012 and extended by court order dated January 27, 2012, and permitting Mr. Penneyfeather to continue

the Class Action against Timminco Limited ("Timminco"), Dr. Heinz Schimmelbusch, Mr. Robert Dietrich, Mr. Rene Boisvert, Mr. Arthur R. Spector, Mr. Jack Messman, Mr. John C. Fox, Mr. Michael D. Winfield, Mr. Mickey M. Yaksich and Mr. John P. Walsh.

[2] The Class Action was commenced on May 14, 2009 and has been case managed by Perell J. The following steps have taken place in the litigation:

(a) a carriage motion;

(b) a motion to substitute the Representative Plaintiff;

(c) a motion to force disclosure of insurance policies;

(d) a motion for leave to appeal the result of the insurance motion which was heard by the Divisional Court and dismissed;

(e) settlement discussions;

(f) when settlement discussions were terminated, Perell J. declined an expedited leave hearing and instead declared any limitation period to be stayed;

(g) a motion for particulars; and

(h) a motion served but not heard to strike portions of the Statement of Claim.

[3] On February 16, 2012, the Court of Appeal for Ontario set aside the decision of Perell J. declaring that s. 28 of the *Class Proceedings Act* suspended the running of the three-year limitation period under s. 138.14 of the *Securities Act*.

[4] The Plaintiffs' counsel received instructions to seek leave to appeal the decision of the Court of Appeal for Ontario to the Supreme Court of Canada. The leave materials were required to be served and filed by April 16, 2012.

[5] On April 10, 2012, the following endorsement was released in respect of this motion:

> The portion of the motion dealing with lifting the stay for the Plaintiff to seek leave to appeal the recent decision of the Court of Appeal for Ontario to the Supreme Court of Canada on the limitation period issue was not opposed. This portion of the motion is granted and an order shall issue to give effect to the foregoing. The balance of the requested relief is under reserve.

[6] Counsel to Mr. Penneyfeather submits that, apart from the leave to appeal issues, there are steps that may occur before Perell J. as a result of the Court of Appeal ruling. Counsel references that the Defendants may bring motions for partial judgment and the Plaintiff could seek to have the court proceed with leave and certification with any order to be granted *nunc pro tunc* pursuant to s. 12 of the *Class Proceedings Act*.

[7] Counsel to Mr. Penneyfeather submits that the three principal objectives of the *Class Proceedings Act* are judicial economy, access to justice and behaviour modification. (See *Western Canadian Shopping Centres Inc. v. Dutton*, (2001) 2 S.C.R. 534 at paras. 27-29.), and under the *Securities Act*, the deterrent represented by private plaintiffs armed with a realistic remedy is important in ensuring compliance with continuous disclosure rules.

[8] Counsel submits that, in this situation, there is only one result that will not do violence to a primary legislative purpose and that is to lift the stay to permit the Class Action to proceed on the condition that any potential execution excludes Timminco's assets. Counsel further submits that, as a practical result, this would limit recovery in the Class Action to the proceeds of the insurance policies, or in the event that the insurers decline coverage because of fraud, to the personal assets of those officers and directors found responsible for the fraud.

[9] . Counsel to Mr. Penneyfeather takes the position that the requested outcome is consistent with the judicial principal that the CCAA is not meant as a refuge insulating insurers from providing appropriate indemnification. (See *Algoma Steel Corp. v. Royal Bank of Canada*, (1992) O.J. No. 889 at paras. 13-15 (C.A.) and *Re Carey Canada Inc.* (2006) O.J. No. 4905 at paras. 7, 16-17.)

[10] In this case, counsel contends that, when examining the relative prejudice to the parties, the examination strongly favours lifting the stay in the manner proposed since the insurance proceeds are not available to other creditors and there would be no financial unfairness caused by lifting the stay.

[11] The position put forward by Mr. Penneyfeather must be considered in the context of the CCAA proceedings. As stated in the affidavit of Ms. Konyukhova, the stay of proceedings was put in place in order to allow Timminco and Bécancour Silicon Inc. ("BSI" and, together with Timminco, the "Timminco Entities") to pursue a restructuring and sales process that is intended to maximize recovery for the stakeholders. The Timminco Entities continue to operate as a going concern, but with a substantially reduced management team. The Timminco Entities currently have only ten active employees, including Mr. Kalins, President, General Counsel and Corporate Secretary and three executive officers (the "Executive Team").

[12] Counsel to the Timminco Entities submits that, if Mr. Penneyfeather is permitted to pursue further steps in the Class Action, key members of the Executive Team will be required to spend significant amounts of their time dealing with the Class Action in the coming months, which they contend is a key time in the CCAA proceedings. Counsel contends that the executive team is currently focussing on the CCAA proceedings and the sales process.

[13] Counsel to the Timminco Entities points out that the Executive Team has been required to direct most of their time to restructuring efforts and the sales process. Currently, the "stalking horse" sales process will continue into June 2012 and I am satisfied that it will require intensive time commitments from management of the Timminco Entities.

[14] It is reasonable to assume that, by late June 2012, all parties will have a much better idea as to when the sales process will be complete.

[15] The stay of proceedings is one of the main tools available to achieve the purpose of the CCAA. The stay provides the Timminco Entities with a degree of time in which to attempt to arrange an acceptable restructuring plan or sale of assets in order to maximize recovery for stakeholders. The court's jurisdiction in granting a stay extends to both preserving the *status quo* and facilitating a restructuring. See *Re Stelco Inc.*, (2005) O.J. No. 1171 (C.A.) at para. 36.

[16] Further, the party seeking to lift a stay bears a heavy onus as the practical effect of lifting a stay is to create a scenario where one stakeholder is placed in a better position than other stakeholders, rather than treating stakeholders equally in accordance with their priorities. See *Canwest Global Communications Corp. (Re)*, [2011] O.J. No. 1590 (S.C.J.) at para. 27.

[17] Courts will consider a number of factors in assessing whether it is appropriate to lift a stay, but those factors can generally be grouped under three headings: (a) the relative prejudice to parties; (b) the balance of convenience; and (c) where relevant, the merits (*i.e.* if the matter has little chance of success, there may not be sound reasons for lifting the stay). See *Canwest Global Communications (Re), supra*, at para. 27.

[18] Counsel to the Timminco Entities submits that the relative prejudice to the parties and the balance of convenience clearly favours keeping the stay in place, rather than to allow the Plaintiff to proceed with the SCC leave application. As noted above, leave has been granted to allow the Plaintiff to proceed with the SCC leave application. Counsel to the Timminco Entities further submits that, while the merits are vigorously disputed by the Defendants in the context of a Class Action, the Timminco Entities will not ask this court to make any determinations based on the merits of the Plaintiff's claim.

[19] I can well recognize why Mr. Penneyfeather wishes to proceed. The objective of the Plaintiff in the Class Action is to access insurance proceeds that are not available to other creditors. However, the reality of the situation is that the operating side of Timminco is but a shadow of its former self. I accept the argument put forth by counsel to the Applicant that, if the Executive Team is required to spend significant amounts of time dealing with the Class Action in the coming months, it will detract from the ability of the Executive Team to focus on the sales process in the CCAA proceeding to the potential detriment of the Timminco Entities' other stakeholders. These are two competing interests. It seems to me, however, that the primary focus has to be on the sales process at this time. It is important that the Executive Team devote its energy to ensuring that the sales process is conducted in accordance with the timelines previously approved. A delay in the sales process may very well have a negative impact on the creditors of Timminco. Conversely, the time sensitivity of the Class Action has been, to a large extent, alleviated by the lifting of the stay so as to permit the leave application to the Supreme Court of Canada.

[20] It is also significant to recognize the submission of counsel on behalf of Mr. Walsh. Counsel to Mr. Walsh takes the position that Mr. Penneyfeather has nothing more than an "equity claim" as defined in the CCAA and, as such, his claim (both against the company and its directors who, in turn, would have an equity claim based on indemnity rights) would be subordinated to any creditor claims. Counsel further submits that of all the potential claims to require adjudication, presumably, equity claims would be the least pressing to be adjudicated and do not become relevant until all secured and unsecured claims have been paid in full.

[21] In my view, it is not necessary for me to comment on this submission, other than to observe that to the extent that the claim of Mr. Penneyfeather is intended to access certain insurance proceeds, it seems to me that the prosecution of such claim can be put on hold, for a period of time, so as to permit the Executive Team to concentrate on the sales process.

[22] Having considered the relative prejudice to the parties and the balance of convenience, I have concluded that it is premature to lift the stay at this time, with respect to the Timminco Entities, other than with respect to the leave application to the Supreme Court of Canada. It also follows, in my view, that the stay should be left in place with respect to the claim as against the directors and officers. Certain members of this group are involved in the Executive Team and, for the reasons stated above, I am satisfied that it is not appropriate to lift the stay as against them.

[23] With respect to the claim against Photon, as pointed out by their counsel, it makes no sense to lift the stay only as against Photon and leave it in place with respect to the Timminco Entities. As counsel submits, the Timminco Entities have an interest in both the legal issues and the factual issues that may be advanced if Mr. Penneyfeather proceeds as against Photon, as any such issues as are determined in Timminco's absence may cause unfairness to Timminco, particularly, if Mr. Penneyfeather later seeks to rely on those findings as against Timminco. I am in agreement with counsel's submission that to make such an order would be prejudicial to Timminco's business and property. In addition, I accept the submission that it would also be unfair to Photon to require it to answer Mr. Penneyfeather's allegations in the absence of Timminco as counsel has indicated that Photon will necessarily rely on documents and information produced by Timminco as part of its own defence.

[24] I am also in agreement with the submission that it would be wasteful of judicial resources to permit the class proceedings to proceed as against Photon but not Timminco as, in addition to the duplicative use of court time, there would be the possibility of inconsistent findings on similar or identical factual issues and legal issues. For these reasons, I have concluded that it is not appropriate to lift the stay as against Photon.

[25] In the result, the motion dealing with issues not covered by the April 10, 2012 endorsement is dismissed without prejudice to the rights of the Plaintiff to renew his request no sooner than 75 days after today's date.

MORAWETZ J.

**Date: April 27, 2012**

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

**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 COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION**

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT
TORONTO

**BOOK OF AUTHORITIES OF THE AD HOC COMMITTEE OF PURCHASERS OF THE APPLICANT'S SECURITIES, INCLUDING THE REPRESENTATIVE PLAINTIFFS IN THE ONTARIO CLASS ACTION**
**(Motion Returnable May 8, 2012)**

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