Court File No. CV-18-00611219-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

FTI CONSULTING CANADA INC., in its capacity as Court-appointed monitor in proceedings pursuant to the Companies' Creditors Arrangement Act, RSC 1985, c. c-36

Plaintiff

-and-

ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP, EDWARD S. LAMPERT, SEARS HOLDINGS CORPORATION, WILLIAM R. HARKER and WILLIAM C. CROWLEY

Defendants

Court File No. CV-18-00611214-00CL

B E T W E E N:

SEARS CANADA INC., by its Court-appointed Litigation Trustee, J. Douglas Cunningham, Q.C.

Plaintiff

-and-

ESL INVESTMENTS INC., ESL PARTNERS LP, SPE I PARTNERS LP, SPE MASTER I LP, ESL INSTITUTIONAL PARTNERS LP, EDWARD LAMPERT, EPHRAIM J. BIRD, DOUGLAS CAMPBELL, WILLIAM CROWLEY, WILLIAM HARKER, R. RAJA KHANNA, JAMES MCBURNEY, DEBORAH ROSATI, DONALD ROSS and SEARS HOLDINGS CORPORATION

Defendants

Court File No. CV-18-00611217-00CL

B E T W E E N:

MORNEAU SHEPELL LTD., in its capacity as administrator of the Sears Canada Inc. Registered Retirement Plan

Plaintiff

-and-

ESL INVESTMENTS INC., ESL PARTNERS LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP, EDWARD S. LAMPERT, WILLIAM HARKER, WILLIAM CROWLEY, DONALD CAMPBELL ROSS, EPHRAIM J. BIRD, DEBORAH ROSATI, R. RAJA KHANNA, JAMES MCBURNEY, DOUGLAS CAMPBELL and SEARS HOLDINGS CORPORATION

Defendants

Court File No. CV-19-00617792-00CL

B E T W E E N :

1291079 ONTARIO LIMITED

Plaintiff

-and-

SEARS CANADA INC., SEARS HOLDINGS CORPORATION, ESL INVESTMENTS INC., WILLIAM C. CROWLEY, WILLIAM R. HARKER, DONALD CAMPBELL ROSS, EPHRAIM J. BIRD, DEBORAH E. ROSATI, R. RAJA KHANNA, JAMES MCBURNEY and DOUGLAS CAMPBELL

Defendants

Court File No. CV-17-11846-00CL

B E T W E E N :

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 SEARS CANADA INC., 9370-2751 QUÉBEC INC., 191020 CANADA INC., THE CUT INC., SEARS CONTACT SERVICES INC., INTIUM LOGISTICS SERVICES INC., 9845488 CANADA INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC. AND 3339611 CANADA INC.

PLAINTIFFS' BOOK OF AUTHORITIES
(SHC Settlement Approval and Bar Order returnable March 16, 2020)

March 10, 2020

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Matthew P. Gottlieb LSO#: 32268B
mgottlieb@lolg.ca
Tel: 416 644 5353
Andrew Winton LSO#: 54473I
awinton@lolg.ca
Tel: 416 644 5342
Philip Underwood LSO#: 73637W
punderwood@lolg.ca
Tel: 416 645 5078
Fax: 416 598 3730

Lawyers for Sears Canada Inc., by its Court-appointed Litigation Trustee, J. Douglas Cunningham, Q.C

BLAKE, CASSELS & GRAYDON LLP
199 Bay Street, Suite 4000
Commerce Court West
Toronto ON M5L 1A9

Michael Barrack LSO #21941W
michael.barrack@blakes.com
Tel: 416 863 5280
Kathryn Bush LSO #23636O
kathryn.bush@blakes.com
Tel: 416 863 2633
Kiran Patel LSO #58398H
kiran.patel@blakes.com
Tel: 416 863 2205
Fax: 416 863 2653

Lawyers for Morneau Shepell Ltd., in its capacity as administrator of the Sears Canada Inc. Registered Retirement Plan

NORTON ROSE FULBRIGHT CANADA LLP
222 Bay Street, Suite 3000, P.O. Box 53
Toronto ON M5K 1E7

Orestes Pasparakis LSO#: 36851T
orestes.pasparakis@nortonrosefulbright.com
Tel: 416 216 4815
Evan Cobb LSO#: 55787N
evan.cobb@nortonrosefulbright.com
Tel: 416 216 1929
Fahad Siddiqui LSO#: 67001A
fahad.siddiqui@nortonrosefulbright.com
Tel: 416 216 2424
Fax: 416 216 3930

Lawyers for FTI Consulting Canada Inc., in its capacity as Court-appointed monitor

SOTOS LLP
180 Dundas St W Suite 1200,
Toronto, ON M5G 1Z8

David Sterns LSO #36274J
dsterns@sotosllp.com
Tel: 416 977 0007
Fax: 416 977 0717

-and-

BLANEY McMURTRY LLP
Suite 1500 – 2 Queen Street East
Toronto ON M5C 3G5

Lou Brzezinski LSO #19794M
lbrzezinski@blaney.com
Tel: 416 539 1221
Fax 416 539 5437

Lawyers for 1291079 Ontario Limited

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ALLIANZ GLOBAL RISKS US INSURANCE COMPANY, TRANS STATES HOLDING, INC., TRANS STATES AIRLINES, LLC, XL SPECIALITY INSURANCE COMPANY, GENERAL SECURITY INDEMNITY COMPANY OF AZ, AXA CORPORATE SOLUTIONS ASSURANCE, NATIONAL FIRE & MARINE INSURANCE COMPANY, IRONSHORE SPECIALITY INSURANCE COMPANY, STARNET INSURANCE COMPANY, LLOYD'S SYNDICATE 2488, LLOYD'S SYNDICATE 5000, LLOYD'S SYNDICATE 1400, LLOYD'S SYNDICATE 5555, LLOYD'S SYNDICATE 1183, GREAT LAKES REINSURANCE (UK) PLC, ARCH INSURANCE COMPANY, ISOSCELES INSURANCE LTD,. AND CHARTIS INSURANCE UK LIMITED (Plaintiffs) and THE ATTORNEY GENERAL OF CANADA, OTTAWA INTERNATIONAL AIRPORT AUTHORITY AND NAV CANADA (Defendants) and PHILIP NASSER EFTEKHARI AND ALLAN WAYNE BURCH (Third Parties)

Calum MacLeod J.

Heard: July 13, 2017
Judgment: July 21, 2017
Docket: 12-54674

Counsel: T. Tremblay, for Plaintiffs and Third Parties
S. Johnston, for Attorney General Of Canada
D. Pankratz, for Ottawa International Airport Authority
R. Fenn, for NAV Canada

Subject: Civil Practice and Procedure; Public; Torts
Related Abridgment Classifications
Civil practice and procedure
XVI Disposition without trial
XVI.7 Settlement
XVI.7.d Effect
XVI.7.d.ii Miscellaneous
Headnote
Civil practice and procedure --- Disposition without trial — Settlement — Effect — Miscellaneous
On non-settling parties — Certain aircraft were damaged when they could not be kept on paved portion of runway at particular airport while landing in rain — Aircraft owner and various insurers brought action against former and current airport owners and air traffic controller (ATC) for damages for negligence — Crossclaims for contribution and indemnity were filed, and third party proceedings were brought against two pilots — Aircraft owners and insurers reached conditional settlement in nature of Pierringer agreement with airport owners — Claim against ATC would continue but be limited to ATC's proportionate share of fault, if any, with no contribution or indemnity being available to it from airport owners or pilots — Aircraft owners and insurers brought motion for order removing airport owners as defendants and dismissing crossclaims and third party claim — Motion granted on terms — Terms included airport owners preserving documents and cooperating with remaining parties in relation

to witnesses, and ATC being entitled to prove at trial proportion of liability attributable to airport owners, aircraft owners, and pilots — Given public policy grounds for encouraging settlement and clear authority from court of appeal that indemnity could not be claimed by ATC if aircraft owners and insurers limited their claim in manner proposed, court had jurisdiction to dismiss crossclaims for contribution and indemnity — Orders should not be granted unconditionally if doing so prejudiced rights of non-settling defendant — Court should not impose terms unnecessarily and should attempt not to undermine settlement by imposing terms that eliminate benefit of settling.

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R. 77.06(1) — considered

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R. 77.07(4) — referred to

MOTION by aircraft owners and insurers for order removing airport owners as defendants and dismissing crossclaims and third party claim in order to implement Pierringer agreement.

***Calum MacLeod J.*:**

Introduction

1 This decision also applies in action 13-58703 which is a parallel action raising the same issues. The motion before the court seeks certain orders necessary to implement a *Pierringer* agreement. [1] The issue is whether or not the court may impose a litigation bar on the non settling defendant and on what terms.

2 As set out below, I have concluded there is jurisdiction to dismiss the crossclaims and third party claims in order to implement the *Pierrenger* agreement but it is appropriate to do so on terms which minimize prejudice to the non-settling defendant. This does not require all of the terms sought by NAV Canada. The terms imposed should be sufficient to protect the party who is a stranger to the settlement agreement but the court should attempt to craft terms that do not undo the benefit of settling. It is in the public interest and in the interest of justice to support settlement and streamlining of litigation generally and multi-party litigation in particular.

Background

3 These actions arise out of separate incidents involving Embrauer 145 aircraft owned by Trans States Airlines LLC flying into the Ottawa International Airport for United Express / United Airlines. The incidents took place between 2004 and 2011 and involved damage to the aircraft sustained when the aircraft could not be kept on the paved portion of the runway while landing in the rain. [2]

4 The plaintiffs are the owners of the aircraft and a consortium of insurers. The defendants are properly named in the title of the proceedings but in essence they are Transport Canada (the regulator and one time owner and operator of the airport), the airport authority (the current operator of the airport) and NAV Canada (now responsible for air traffic control). Although the federal government no longer directly operates the airport or the air traffic control system, the history and timing of divestment creates potentially complex liability issues to the extent that the plaintiffs allege liability for design of the runways (as but one example).

5 This litigation has been underway for a considerable period of time and the actions have been in case management since 2014. Over the course of the last year it appears a settlement was reached between the plaintiffs and two of the defendants. The plaintiffs now seek to amend their claim to remove Transport Canada and the airport as defendants. They propose to continue with a much more focused claim against NAV Canada (the non-settling defendant) limited to its proportionate share of fault, if any. That is to say they would abandon any claim for joint liability and seek to hold NAV Canada liable only for the share of damages actually caused by its negligence (assuming any such fault is proven).

6 The agreement also requires the plaintiff to ensure that none of the settling defendants are exposed to claims for contribution by a non-settling defendant. To implement this aspect of the settlement, the plaintiff seeks to have the court dismiss all of the crossclaims and the third party claims "with prejudice". In other words NAV Canada would not be permitted to seek contribution and indemnity from any of its co-defendants or from the pilots. Finally, the settling defendants wish to be let out of the litigation. Part of the incentive for settling includes bringing the litigation to a halt and ending the necessity of incurring further costs.

The Issue

7 NAV Canada has no objection to facing a narrower claim for its proportionate share of damages and in fact it has no objection to dismissal of the crossclaims providing the court grants the dismissal on terms. Specifically it wishes to retain rights of discovery against settling defendants. Even though they would no longer be parties, NAV Canada wants their evidence to

be available in the same manner as it would be if they remained parties and it also wants its right to cross-claim preserved in the case of non-compliance.

8 The issue then is whether the court can force the non-settling defendant to abandon claims against the settling defendants without its consent. Assuming the court has that authority is it reasonable to impose the order on terms other than those agreed to by the remaining defendant? And is it appropriate to impose terms over the objection of the settling parties at the risk of imperilling the settlement?

Analysis

Public Policy Supports* Pierringer *Agreements in Multi-party Litigation

9 There is no doubt that there is an overriding public interest in favour of settlement. It is sound judicial policy which contributes to the administration of justice. [3] *Pierringer* agreements have been recognized as an important tool in settling multi-party litigation. As described by the Supreme Court it is an important tool without which it is very difficult to conclude a settlement with only some of the defendants and with which it is possible to substantially streamline the litigation.

> In the United States, Pierringer Agreements were found to significantly attenuate the obstacles in the way of negotiating settlements in multi-party litigation. Under a Pierringer Agreement, the plaintiff's claim was only "extinguished" against those defendants with whom it settled; the claims against the non-settling defendants continued. The settling defendants, meanwhile, were assured that they could not be subject to a contribution claim from the non-settling defendants, who would be accountable only for their own share of liability at trial. [4]

10 This is a motion to implement a Pierenger agreement. This is not a case in which the agreement itself requires court approval but approval is required to amend the statement of claim, to allow the settling defendants out of the action and to stay or dismiss the crossclaims. The controversial aspect of this is the request for a "bar order" which would prevent the non-settling defendant from making any claim against any other party if it is found liable.

11 There is a public policy in favour of supporting settlements. *Pierringer* agreements should be approved and supported if possible because there are benefits to the parties involved in the litigation but also systemic benefits to the justice system as a whole. Of course the implementation of the agreement must also be fair to the non-settling defendant which is left to face the litigation alone. I will return to this shortly.

The jurisdiction to bar or stay claims for indemnity

12 I must first consider the question of jurisdiction to compel the non-settling defendant to accept dismissal of its claim for indemnity and contribution. In this case the question is really whether I can grant the order on terms other than the terms on which NAV Canada is prepared to consent to the order. It is only if the court has the jurisdiction to impose the order in the first place that it also has the jurisdiction to determine what terms to impose (if any).

13 In our jurisprudence there are numerous examples of the court approving *Pierringer* agreements and imposing a bar order. This is a common feature in the resolution of class proceedings. The seminal case is *Ontario New Home Warranty Program v. Chevron Chemical Co.* [5] ("*ONHWP*") in which Justice Winkler (as he then was) conducted an extensive analysis of the reasons for a bar order and concluded that the court could impose it when approving a settlement. Importantly however, Justice Winkler found jurisdiction to grant the order in s. 12 and 13 of the *Class Proceedings Act* [6] . Section 13 in particular arms the court in a class proceeding with authority to stay any related actions. In addition, the class proceedings regime requires certification and court approval of any settlement. It is inherent in the class proceedings process that the court has the right to control, prune and shape complex litigation and of course there are numerous requirements for notice and opting out. Bar orders are also found in insolvency proceedings. [7] In the latter case termination of litigation rights is a fundamental insolvency tool. It is another matter to foreclose litigation in the absence of statutory authority.

14 Jurisdiction in *ONHWP* was anchored by specific statutory provisions that are not present here and Justice Winkler emphasised the principle that jurisdiction cannot be conferred by agreement or convenience. Still the court went on to consider whether the proposed bar interfered with the substantive rights of the non-settling defendant and concluded it did not. This analysis is instructive in relation to the liability, rights and protections afforded by the *Negligence Act.* [8] It was the conclusion of the court that the provisions of s. 1, 2 and 5 of the Act could not be invoked if the plaintiff did not assert joint liability and the settling defendants surrendered their rights to claim indemnity from the non-settling defendant.

15 In those circumstances the non-settling defendant could never be found liable for more than its share of the damages and could never face a claim for contribution or indemnity by other tort-feasors. The non-settling defendant could never have a claim for contribution against the other tort-feasors because it would be impossible for it to have to pay any share of the damages caused by another tort-feasor's negligence. In effect the court ruled that the *Pierrenger* agreement took the case out of the *Negligence Act* by providing the non-settling defendant with the very same protections the Act provided. [9]

16 If I permit the pleading amendments proposed by the plaintiff and dismiss the action against the settling defendants as well as the cross-claims asserted by them, it becomes self-evident that cross claims against the co-defendants based on the *Negligence Act* or common law principles of indemnity cannot succeed. The court could then dismiss the cross-claims of the non-settling defendant as being untenable pleas. This is precisely what occurred in *Taylor v. Canada (Attorney General)* in which the Court of Appeal upheld the motion judge's decision to dismiss the third party claims because the right of indemnity does not exist "unless the defendant is called upon to pay more than its fair share of the loss". [10]

17 Dismissing cross claims for indemnity based on the *Negligence Act* or general common law principles which are no longer tenable is not precisely the same thing as imposing a wide ranging or complete "bar-order". A right of indemnity arising if a tort-feasor is called upon to pay more than its fair share of a judgment would be foreclosed by the proposed pleading amendment but that argument would not apply to any contractual or statutory rights of indemnity that are not based on apportionment of fault. In the case at bar, however, no other form of indemnity right is pleaded or asserted. In fact, the non-settling defendant does not oppose dismissal of the crossclaims provided the terms are fair.

18 Several rules would permit dismissal of a crossclaim that is no longer tenable and while no particular rule is relied upon by the moving parties, all parties are aware that is the relief being sought. In addition, it is within the power of the court in the exercise of its case management function to permit an informal motion if it is just to do so and in my view a case management judge also has the authority to stay portions of a proceeding that serve no purpose. [11] As decided by the court in *ONWHP* the pruning of a claim that cannot succeed because it has no basis in law can be regarded as procedural and does not affect the substantive rights of the party. There is no substantive right to advance a claim that no longer has a legal basis.

19 I conclude that given the public policy grounds for encouraging settlement and the clear authority from the Court of Appeal that indemnity cannot be claimed by the defendant if the plaintiffs limit their claim in the manner proposed, the court would have the jurisdiction to dismiss the crossclaims for contribution and indemnity. As pleaded they will become untenable when the plaintiffs' claim is narrowed and it would be unjust to permit them to continue only to claim costs. [12] In any event at this point it is highly unlikely given the manner in which this action has proceeded that there are any costs attributable solely to the crossclaims.

Justification for terms to protect the remaining defendant

20 Having satisfied myself that I can make the orders, I can of course do so on terms. [13] I recognize that the settling parties have not agreed to any terms and if I grant the relief only on terms that are unacceptable to them, it may imperil the settlement. That concern does not justify granting the orders unconditionally if doing so prejudices the rights of the non-settling defendant.

21 If I conclude that justice requires the orders only be granted on terms then it will be up to the settling defendants to determine if they are prepared to live with the terms. Having regard to the public policy identified above, the court should

not impose terms unnecessarily and should attempt not to undermine the settlement by imposing terms which eliminate the benefit of settling.

22 What the settling parties achieve through the *Pierringer* agreement is a limit on their exposure to liability and certainty regarding their contribution to the damages but they also hope to end the need to incur further costs as a party to the litigation. Of course they cannot extract themselves entirely from the litigation because they are in possession and control of relevant documents and they have personnel who will be necessary witnesses at the trial but it would undermine one of the benefits of settling if they continue to have the same obligations as a party.

23 I was referred to a 1994 article written by Peter Knapp, an American law professor.[14] Extracts from this article were referred to by the Supreme Court of Canada in *Sable Offshore*, *supra*. It is an interesting read because it deals with the development, rationale and difficulties encountered with such agreements in several American states. Amongst other things the article underscores for the reader that tort litigation in the United States takes place in a myriad of jurisdictions in which negligence law may be both procedurally and substantively different from our own. In particular at least when the article was written, not all states had an equivalent to the *Negligence Act* and some states had legislation which responded in some manner to the existence of *Pierringer* agreements. So caution is needed before automatically importing features of tort litigation found in other jurisdictions. Proportionate share settlements have been found useful in Canada and the term "*Pierringer*" has become widespread and useful shorthand. That does not mean that all features of the original prototype should automatically apply. Each agreement must be evaluated in context.

24 With that caveat, and also recognizing that the article is now 20 years old, Professor Knapp's analysis remains instructive. For example he raises interesting questions about the effect of *Pierringer* agreements and releases in cases of vicarious liability, agency and intentional tortfeasors. To date Canadian courts have had little experience wrestling with these issues. For purpose of this motion, pages 43 — 56 of the article are particularly useful because they discuss the impact of these agreements on the trial, on discovery and on preservation of evidence. He makes the important point that even though the plaintiff has the burden of proving fault against the non-settling defendant who remains in the litigation, the "plaintiff no longer has any incentive to prove the settling defendant's fault" and that at least at a practical level, the "*Pierringer* settlement transfers to the remaining defendant the burden to prove the settling defendant's fault."

25 Here Nav Canada was originally one of three co-defendants all interested in proving that there was no negligence on the part of the defendants and all interested in showing that all blame lay with the plaintiff airline or the third party pilots. Now NAV Canada stands alone and while it may still hope to convince the court there was no fault on its part, it may also have to demonstrate that if there was fault, the largest component of that fault lies with one of its former co-defendants. This is a significant change to the litigation landscape.

26 The non-settling defendant faces procedural prejudice when it is the sole remaining defendant. Although its liability for damages will be limited to its proportionate share, it will now be faced with defending the allegation it is 100% at fault and in asserting its defence it may well be faced with proving the fault of the other former defendants even though they are non-parties. In fact it will be in the interests of NAV Canada to assert that all fault (if any) lies with one or both of its former co-defendants if it does not lie with the pilots or the airline.

27 The evidence shows that at a time when the three co-defendants appeared to have common cause, they pleaded relatively broadly and they agreed amongst themselves that they would not conduct discoveries of each other at least at that time. It was not in the interest of any of them to help the plaintiff by pointing fingers at each other. As of December of 2016 when the *Pierrenger* agreement was revealed to NAV Canada this situation changed. It is now very much in NAV Canada's interest to point the finger elsewhere. Conversely it may be faced with witnesses who would previously have been witnesses called by one of the other defendants who will now be witnesses for the plaintiff. That is unknown at this point.

28 NAV Canada is not a party to the agreement. In implementing the agreement, it is unfair not to recognize that there were originally three defendants and it is important to recognize the evidentiary difficulties that may potentially arise when the court

is asked to assign fault to a party that will no longer be present. Some of this must be left to the trial judge. The question is whether any other terms are necessary at this stage in the proceeding.

What terms are required?

29 I agree that all of the documents produced in the litigation and all of the discovery transcripts should continue to be available to NAV Canada. It will be for the trial judge to determine precisely how these may be used by whom considering that they were produced or examined at a time when there were other parties in the litigation. I do not see how I can rule in advance on the manner in which the trial will be conducted. At this point it is unclear who if anyone may seek to call the witness so it would not be appropriate to rule in advance on whether or not transcripts may be read in. The transcripts will remain useful because they stand as a summary of what the witness will likely say if called and can be used to refresh memory or to impeach the witness in appropriate cases.

30 I also acknowledge the very real possibility that NAV Canada may have to seek discovery of the former co-defendants if they have information that has not already been elicited during their discovery by the plaintiff or cannot be obtained voluntarily. I do not agree it is appropriate to give leave in advance of the need being identified. It is not necessary to provide NAV Canada with open ended authority.

31 *Noonan v. Alpha-Vico* [15] was a case decided by me when I was a master and it was cited by both parties. Although that case was decided in 2010 it contains a useful analysis of proportionate share settlements and their impact on the litigation. I will note in passing that the case was partly concerned with disclosure of the terms of the *Pierringer* agreement and at the time there were two schools of thought about whether the executed agreement was privileged and the amount of the settlement had to be disclosed to the non-settling party. The Supreme Court has since resolved both of those questions in *Sable Offshore* and the answer now is that the agreement is covered by settlement privilege. The fact of the agreement and certain features of the agreement must be disclosed to the court and to the non-settling defendant but the amount of the settlement need not be. [16] That is a different conclusion than the one I reached in *Noonan* and to that extent the case has been overruled by later jurisprudence. In the case at bar, the settling parties have disclosed all of the terms of their agreement except for the amount. This is the correct approach.

32 They have also prepared a proposed amended pleading. Since it is an amended pleading and not a fresh pleading, it is readily apparent that there were originally co-defendants and what the allegations were against those defendants. I also think that is appropriate as it will show the trier of fact that the litigation has changed since it was begun.

33 The other aspect of *Noonan* was the request by the defendant to conduct discovery of the former defendants. In deciding not to grant that request, I analyzed much of the same jurisprudence cited to me by the parties today. [17] I concluded that "Ontario courts have generally not imposed a term requiring the settling party to produce documents or submit for discovery but have left it open for the non-settling defendants to obtain that relief under the ordinary rules of civil procedure." [18] Those mechanisms are motions under Rule 30.10 and 31.10 and if such motions are brought, the court will have to consider the unique circumstances in which NAV Canada finds itself as the result of the *Pierringer* agreement.

34 In *Noonan* the defendants had actually been sued in separate actions and there were no crossclaims. In fact the first action had been quietly settled and there had been no discoveries. Nevertheless it appeared consistent with the weight of authority and with the Ontario discovery regime to require the defendant to bring a motion if and when it required access to evidence or documents and could not obtain that information through non coercive processes. In the case at bar NAV Canada is in a much better position than was Alpha-Vico. It has affidavits of documents from its former co-defendants. It attended all of the discoveries. There do not appear to be outstanding undertakings.

35 This does not mean that terms are inappropriate. Certain orders are appropriate with respect to the preservation of evidence and the use that can be made of it prior to trial. It is reasonable to require the settling-defendants to take steps to make their evidence available should it be necessary. It will not do for those defendants to be treated as if they are complete strangers to

the litigation and were never involved. By reason of their involvement in the litigation to date they may well have relevant information in useful and accessible form. That information may be necessary and useful to the remaining parties and to the court. In keeping with the principle I enunciated earlier, the terms I am imposing will be only those necessary to ensure the protection of NAV Canada's rights and will not undermine the benefits of settlement.

36 The plaintiffs as well as NAV Canada are now in possession of copies of all documents produced by the settling defendants. There should be a mechanism to avoid the need for each party to include those documents in new affidavits of documents. More importantly there should be a mechanism for identifying which party intends to make use of those documents and to avoid a chaotic situation and effective trial planning there should be a mechanism to determine which witnesses from the settling defendants will be called at trial and by which party. This mechanism however is likely to be found in discovery planning, case management and trial management rather than trying to anticipate all possible scenarios in an order.

Terms of the Order

37 Having regard to the issues identified above and having reviewed the various orders proposed by the parties I am prepared to make the following orders.

a. An order permitting amendment of the amended statement of claim in the form proposed to remove all allegations against the settling defendants and to confine the claim against the remaining defendant NAV Canada to its proportionate share of the damages if any. As set out in the proposed pleading, the plaintiffs will waive any right to recover from NAV Canada any portion of the loss or damages attributable to any fault attributed to the settling defendants.

b. An order that NAV Canada is entitled to prove at trial the proportion of liability attributable to Transport Canada, the airport authority or the airlines and pilots.

c. An order that the plaintiffs are only entitled to recover from NAV Canada the several apportionment of fault and liability of NAV Canada, if any, and not for any portion of damages attributable to the fault of any other person or entity.

d. An order as proposed by the plaintiff dismissing the action and all crossclaims against and between the settling defendants with prejudice and without costs.

e. An order dismissing crossclaims by the settling defendants against the non-settling defendant with prejudice and without costs and barring any subsequent claim for indemnity against NAV Canada arising out of the claims made in this litigation.

f. An order as proposed by the plaintiffs dismissing the third party claims against the pilots with prejudice and without costs.

g. An order that the former defendants The Attorney General of Canada and the Ottawa International Airport Authority preserve all documents listed in their affidavits of documents and any other documents subsequently produced for use in this litigation.

h. An order that the former defendants The Attorney General of Canada and the Ottawa International Airport Authority advise the plaintiffs and the remaining defendant of the contact information for the witnesses who were deposed at the discovery, whether they continue to be employed by the former defendant, and whether they may be contacted directly or only through counsel. They shall update that information on request.

i. An order that The Attorney General of Canada and the Ottawa International Airport Authority co-operate with the plaintiffs and the defendants by providing contact information for any other employees or former employees who may be required as witnesses upon request.

j. An order permitting the remaining parties to use the affidavits of documents, documentary production and discovery transcripts relating to the former parties for purposes of this litigation subject to direction by the trial judge.

k. An order confirming that the defendant NAV Canada may if necessary bring motions seeking production and discovery orders against the settling defendants having regard to the fact that they were defendants but are now non-parties.

l. An order requiring the plaintiffs to amend and serve the amended amended statement of claim on NAV Canada within 21 days and permitting NAV Canada 30 days following receipt to deliver an amended Statement of Defence.

m. An order that NAV Canada may not add any other party (including any of the parties released from the action) by way of third party claim or other form of claim for indemnity without leave of the court.

n. An order providing that immediately after the exchange of amended pleadings, counsel are to meet and confer with a view to updating a discovery and production plan including agreement if possible concerning the admissibility and use of discoveries previously conducted and documents previously produced.

o. An order that the action will continue under case management. I will be seized of the matter as the case management judge pursuant to Rule 77.06 (1) and will hear any further motions subject to Rule 77.07 (3).

38 If counsel cannot agree on the form of the order or orders or if the parties to the *Pierringer* agreement no longer wish to proceed with the agreement upon reviewing these terms, I may be spoken to for further direction.

39 I may also be spoken to regarding costs if counsel are not able to agree on costs.

Motion granted on terms.

Footnotes

1 Named after the American case of *Pierringer v. Hoger*, 124 N.W.2d 106 (U.S. Wis. S.C. 1963), the utility of such agreements was expressly accepted by the Supreme Court of Canada in *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623 (S.C.C.)

2 The factual background is set out in more detail at [*Allianz Global Risks US Insurance Co. v. Canada (Attorney General)*] 2014 ONSC 4198 (Ont. S.C.J.) and 2016 ONSC 29 (Ont. S.C.J.)

3 See *Sable Offshore*, *supra* @ para. 11

4 *Ibid*, @ para. 23

5 (1999), 46 O.R. (3d) 130 (Ont. S.C.J.)

6 *Class Proceedings Act, 1992*, S.O. 1992, c. 6

7 *Hollinger Inc., Re*, 2012 ONSC 5107 (Ont. S.C.J.)

8 RSO 1990, c. N.1

9 *Ontario New Home Warranty Program v. Chevron Chemical Co.*, *supra* @ para.s 51 -

10 *Taylor v. Canada (Attorney General)*, 2009 ONCA 487, 95 O.R. (3d) 561 (Ont. C.A.)

11 See for example Rule 77.07 (4) and Rule 50.13 (6)

12 See *Packard v. Fitzgibbon*, 2017 ONSC 566 (Ont. S.C.J.), a recent decision of Justice Mew

13 Rule 37.13 (1)

14 *Keeping the Pierringer Promise: Fair Settlements and Fair Trials*, (1994) 20 William Mitchell Law Review 1, (1994) *Faculty Scholarship*, Paper 25 Available at: *http://open.mitchellhamline.edu/wmlr/vol20/iss1/1*

15 2010 ONSC 2720 (Ont. S.C.J.)

16 See *Sable Offshore* at paras 18 — 25. The amount must be disclosed to the court after judgment in order to ensure the plaintiff is not over compensated. See *Laudon v. Roberts*, 2009 ONCA 383 (Ont. C.A.)

17 See *Noonan*, *supra*, paras 33 - 43

18 *Supra*, para. 42

para. 52

2019 ONCA 181
Ontario Court of Appeal

Endean v. St. Joseph's General Hospital

2019 CarswellOnt 3301, 2019 ONCA 181, 305 A.C.W.S. (3d) 405, 54 C.C.L.T. (4th) 183

Paulette M. Endean, Frank William Endean and Debbie Endean (Plaintiffs / Appellants / Respondents by way of cross-appeal) and St. Joseph's General Hospital (Defendant / Respondent / Appellant by way of cross-appeal)

Janet Hearsey by her Litigation Guardian Leslie Hearsey and Leslie Hearsey (Plaintiffs / Appellants / Respondents by way of cross-appeal) and St. Joseph's General Hospital (Defendant / Respondent / Appellant by way of cross-appeal)

Stephen Karam, Estate Trustee of the Estate of Andrew Karam (Plaintiff / Appellant / Respondent by way of cross-appeal) and St. Joseph's General Hospital (Defendant / Respondent / Appellant by way of cross-appeal)

Sherry Lind, Gino Deamicis, Lorraine Lind by her Litigation Administrator Crystal Lind, Lauri Lind, Crystal Lind, Donald Deamicis and Daniel Deamicis (Plaintiffs / Appellants / Respondents by way of cross-appeal) and St. Joseph's General Hospital (Defendant / Respondent / Appellant by way of cross-appeal)

Paul Rouleau, K. van Rensburg, B. Zarnett JJ.A.

Heard: January 9, 2019
Judgment: March 8, 2019
Docket: CA C63751

Proceedings: reversing in part *Endean v. St. Joseph's General Hospital* (2017), 2017 ONSC 2632, 2017 CarswellOnt 7433, F. Bruce Fitzpatrick J. (Ont. S.C.J.); additional reasons at *Endean et al. v. St. Joseph's General Hospital* (2017), 2017 CarswellOnt 20606, 2017 ONSC 7190, Fitzpatrick J. (Ont. S.C.J.); and affirming *Endean et al. v. St. Joseph's General Hospital* (2017), 2017 CarswellOnt 20606, 2017 ONSC 7190, Fitzpatrick J. (Ont. S.C.J.); additional reasons to *Endean v. St. Joseph's General Hospital* (2017), 2017 ONSC 2632, 2017 CarswellOnt 7433, F. Bruce Fitzpatrick J. (Ont. S.C.J.)

Counsel: Brian Moher, Monica Zamfir, for Appellants / Respondents by way of cross-appeal
Stephen Wojciechowski, Dawne Latta, for Respondent / Appellant by way of cross-appeal

Subject: Civil Practice and Procedure; Contracts; Public; Torts
Related Abridgment Classifications
Civil practice and procedure
VII Limitation of actions
VII.4 Actions in contract or debt
VII.4.a Statutory limitation periods
VII.4.a.iii When statute commences to run
VII.4.a.iii.C Miscellaneous
Civil practice and procedure

XXIV Costs
XXIV.10 Costs of particular proceedings
XXIV.10.k Jury trial
Health law
V Malpractice
V.2 Negligence
V.2.a Types of malpractice
V.2.a.xiii Apportionment of liability
Health law
V Malpractice
V.2 Negligence
V.2.b Duty of care

Headnote

Civil practice and procedure --- Limitation of actions — Actions in contract or debt — Statutory limitation periods — When statute commences to run — Miscellaneous

Plaintiffs were four patients of defendant hospital, who received jaw surgery in mid 1980's from oral surgeons practicing at hospital, and device had to be implanted in patients' heads as part of surgery — Device was defective and broke down over time, causing injuries to plaintiffs' skulls, and patients had to reattend hospital between 1987 and 1996 to have devices removed — Actions were commenced by patients in 1996 and 1997, and defendants claimed that actions of patients were statute-barred, as they were commenced two years after last treatment — Patients brought action against hospital in negligence, with result that actions of patients E, K, and L were dismissed as statute-barred under Public Hospitals Act, and action of patient H was allowed in part — Patients appealed on basis that trial judge erred in dismissing actions as statute-barred, and hospital cross-appealed on basis that H's action should also have been dismissed as statute-barred — Appeal allowed in part on other grounds; cross-appeal dismissed — Trial judge did not err in applying limitation period under Act or in rejecting argument of fraudulent concealment — Negligent act by hospital before patient received care or treatment, which became actionable only because it enabled treatment at hospital that caused injury, was negligence in care or treatment of patient within meaning of Act's limitation provision — Fact that hospital contacted surgeons to ensure they knew about issue with implants and had been in touch with distributer and advised that it already had names of surgeons for further communication was not consistent with concealment in sense required by doctrine of fraudulent concealment — Hospital's argument that tomogram procedure that H had done was not "treatment" under Act was rejected — Nothing in Act's limitation provision supported distinction between diagnostic procedure and treatment that hospital sought to make.

Health law --- Malpractice — Negligence — Duty of care

Plaintiffs were four patients of defendant hospital, who received jaw surgery in mid 1980's from oral surgeons practicing at hospital, and device had to be implanted in patients' heads as part of surgery — Device was defective and broke down over time, causing injuries to plaintiffs' skulls, and patients had to reattend hospital between 1987 and 1996 to have devices removed — Actions were commenced by patients in 1996 and 1997, and defendants claimed that actions of patients were statute-barred, as they were commenced two years after last treatment — Trial judge accepted evidence from hospital CEO that recall of patients was to be initiated only by oral surgeons, and expert evidence that there was no precedent for any hospital in Canada self-initiating recall of patients — Patients brought action against hospital in negligence, with result that actions of patients E, K, and L were dismissed as statute-barred under Public Hospitals Act, and action of patient H was allowed in part — Patients appealed on basis that trial judge erred in rejecting argument that hospital was liable for breaching duty to recall patients once it was advised of problems with implant — Appeal allowed in part on other grounds — Trial judge did not err in rejecting argument that hospital had duty to recall patients — Trial judge's findings that it was reasonable for hospital to assume that distributer and oral surgeons would deal with issue and that there was no basis to elevate hospital to oversight role over surgeons, were entitled to deference.

Health law --- Malpractice — Negligence — Types of malpractice — Apportionment of liability

Plaintiffs were four patients of defendant hospital, who received jaw surgery in mid 1980's from oral surgeons practicing at hospital, and device had to be implanted in patients' heads as part of surgery — Device was defective and broke down over time, causing injuries to plaintiffs' skulls, and patients had to reattend hospital between 1987 and 1996 to have devices removed

— Actions were commenced by patients in 1996 and 1997, and defendants claimed that actions of patients were statute-barred, as they were commenced two years after last treatment — Patients brought action against hospital in negligence, with result that actions of patients E, K, and L were dismissed as statute-barred under Public Hospitals Act, and action of patient H was allowed in part — Trial judge apportioned 50 per cent of liability to manufacturer of device, 25 per cent of liability to distributer of device, 20 per cent of liability to surgeons, and 5 per cent of liability to hospital — Patients appealed on basis that trial judge erred in apportioning fault to manufacturer and distributer, resulting in hospital being restricted to only 5 per cent of damages to be assessed — Appeal allowed in part — Liability was reapportioned as 20 per cent liability to hospital and 80 per cent liability to surgeons — Trial judge erred in law by relying on decision in caselaw as authority to apportion fault to non-parties manufacturer and distributer — Approach used in caselaw was context specific and context was not present in current case.

Civil practice and procedure --- Costs — Costs of particular proceedings — Jury trial

Plaintiffs were three separate patients of defendant doctors who brought medical malpractice action in 1996 or 1997, in regard of treatment which commenced in 1988 — Action was dismissed as statute-barred at joint trial, and doctors sought costs of actions — Doctors indicated they had made offer to settle, which was more favourable to patients than trial result — Patients claimed that they should receive costs as result of misconduct of doctors in litigation or, in alternative, patients claimed there should be no costs due to their financial situations — Patients were ordered to pay $186,440.93, $174,803.72, and $179,359.44 in fees and disbursements to doctors — Hospital cross-appealed on basis that trial judge erred in failing to include HST in costs award made in its favour — Cross-appeal dismissed — There was no error in principle in trial judge's award of costs — Trial judge had not limited himself to mechanical calculation of costs dependent on inclusion or lack of inclusion of any specific item — Trial judge had stepped back to determine whether amounts he calculated were reasonable given magnitude of matter and other relevant considerations.

Table of Authorities

Cases considered by *B. Zarnett J.A.*:

Athey v. Leonati (1996), [1997] 1 W.W.R. 97, 140 D.L.R. (4th) 235, 81 B.C.A.C. 243, 132 W.A.C. 243, 31 C.C.L.T. (2d) 113, 203 N.R. 36, [1996] 3 S.C.R. 458, 1996 CarswellBC 2295, 1996 CarswellBC 2296 (S.C.C.) — referred to

Fenton v. North York Hydro-Electric Commission (1996), 33 M.P.L.R. (2d) 39, 136 D.L.R. (4th) 178, 48 C.P.C. (3d) 372, 29 O.R. (3d) 481, 92 O.A.C. 53, 1996 CarswellOnt 2017 (Ont. C.A.) — referred to

Fiorelli v. St. Mary's General Hospital (1995), 1995 CarswellOnt 3945 (Ont. C.A.) — considered

Guerin v. R. (1984), [1984] 6 W.W.R. 481, *(*sub nom. *Guerin v. Canada)* [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321, *(*sub nom. *Guerin v. Canada)* 55 N.R. 161, [1985] 1 C.N.L.R. 120, 20 E.T.R. 6, 36 R.P.R. 1, 59 B.C.L.R. 301, 1984 CarswellNat 813, 1984 CarswellNat 693 (S.C.C.) — considered

Hay v. Canadian Red Cross Society (2004), 2004 CarswellOnt 2766, [2004] O.T.C. 598 (Ont. S.C.J.) — referred to

M. (J.) v. Bradley (2004), 2004 CarswellOnt 2243, 240 D.L.R. (4th) 435, 47 C.P.C. (5th) 234, 187 O.A.C. 201, *(*sub nom. *M. (J.) v. B. (W.))* 71 O.R. (3d) 171 (Ont. C.A.) — referred to

Martin v. Listowel Memorial Hospital (2000), 2000 CarswellOnt 3839, 192 D.L.R. (4th) 250, 48 C.P.C. (4th) 195, 51 O.R. (3d) 384, 138 O.A.C. 77, [2001] 2 W.W.R. 384 (Ont. C.A.) — referred to

Peixeiro v. Haberman (1997), 1997 CarswellOnt 2928, 1997 CarswellOnt 2929, 151 D.L.R. (4th) 429, 103 O.A.C. 161, 30 M.V.R. (3d) 41, [1997] 3 S.C.R. 549, 12 C.P.C. (4th) 255, 46 C.C.L.I. (2d) 147, 217 N.R. 371 (S.C.C.) — considered

Pierringer v. Hoger (1963), 124 N.W.2d 106, 21 Wis. 2d 182 (U.S. Wis. S.C.) — considered

Pittman Estate v. Bain (1994), 19 C.C.L.T. (2d) 1, 112 D.L.R. (4th) 257, 1994 CarswellOnt 928 (Ont. Gen. Div.) — considered

Purtell v. Royal Ottawa Hospital (2005), 2005 CarswellOnt 3033 (Ont. S.C.J.) — referred to

Purtell v. Royal Ottawa Hospital (2007), 2007 ONCA 367, 2007 CarswellOnt 3076 (Ont. C.A.) — referred to

Purtell v. Royal Ottawa Hospital (2007), 2007 CarswellOnt 7437, 2007 CarswellOnt 7438, 383 N.R. 382 (note), 248 O.A.C. 396 (note) (S.C.C.) — referred to

Sable Offshore Energy Inc. v. Ameron International Corp. (2013), 2013 SCC 37, 2013 CarswellNS 428, 2013 CarswellNS 429, 359 D.L.R. (4th) 381, 37 C.P.C. (7th) 225, 22 C.L.R. (4th) 1, 446 N.R. 35, 1052 A.P.R. 1, 332 N.B.R. (2d) 1, [2013] 2 S.C.R. 623 (S.C.C.) — referred to

Taylor v. Canada (Attorney General) (2009), 2009 ONCA 487, 2009 CarswellOnt 3443, 95 O.R. (3d) 561, (sub nom. *Taylor v. Canada (Minister of Health))* 309 D.L.R. (4th) 400, (sub nom. *Taylor v. Canada (Minister of Health))* 264 O.A.C. 229 (Ont. C.A.) — considered

Von Cramm Estate v. Riverside Hospital of Ottawa (1986), 56 O.R. (2d) 700, (sub nom. *Von Cramm v. Riverside Hospital of Ottawa)* 32 D.L.R. (4th) 314, (sub nom. *Von Cramm v. Riverside Hospital of Ottawa)* 17 O.A.C. 218, (sub nom. *Von Cramm v. Riverside Hospital of Ottawa)* 12 C.P.C. (2d) 164, (sub nom. *Von Cramm v. Riverside Hospital of Ottawa)* 25 E.T.R. 75, 1986 CarswellOnt 429 (Ont. C.A.) — referred to

Zeppa v. Woodbridge Heating & Air-Conditioning Ltd. (2019), 2019 ONCA 47, 2019 CarswellOnt 1342 (Ont. C.A.) — considered

Statutes considered:

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B

Generally — referred to

Negligence Act, R.S.O. 1990, c. N.1

Generally — referred to

s. 1 — considered

Public Hospitals Act, R.S.O. 1980, c. 410

Generally — referred to

s. 28 — considered

Public Hospitals Act, R.S.O. 1990, c. P.40

Generally — referred to

s. 31 — considered

Real Property Limitations Act, R.S.O. 1990, c. L.15

Generally — referred to

APPEAL by patients and CROSS-APPEAL by hospital from judgment reported at *Endean v. St. Joseph's General Hospital* (2017), 2017 ONSC 2632, 2017 CarswellOnt 7433 (Ont. S.C.J.), dismissing three actions as being statute barred and allowing fourth action in part; CROSS-APPEAL by hospital from judgment reported at *Endean et al. v. St. Joseph's General Hospital* (2017), 2017 ONSC 7190, 2017 CarswellOnt 20606 (Ont. S.C.J.), awarding costs in favour of hospital.

***B. Zarnett J.A.*:**

Introduction

1 The appellants Paulette Endean, Janet Hearsey, Andrew Karam and Sherry Lind each had surgery at the respondent St. Joseph's General Hospital ("the hospital") in the mid 1980's. Each was implanted with a Vitek Proplast Teflon Interpositional implant ("the implant"), a device designed to replace a meniscus inside the temporomandibular joint (TMJ). The TMJ is a complex load bearing joint located between the skull and jaw which is central to, among other things, a person's ability to talk, chew, swallow, and yawn.

2 The implant caused injury to each of these individuals. It delaminated inside the TMJ, leaving particulate residue which, over time, caused degenerative bone loss. All four individuals had perforations in their skull in the area of their TMJ.

3 In 1996 and 1997, the appellants commenced actions against the hospital and the oral surgeons who actually did the implant surgery and follow up care ("the Endean, Karam, Lind, and Hearsey Actions"). The hospital and the oral surgeons cross-claimed against one another in all four actions.

4 In 2013, the appellants reached settlements with the oral surgeons. A Pierringer Order was made in each action, which affected the way the actions would continue against the hospital. The Pierringer Orders dismissed the actions against the oral surgeons and the cross-claims between the hospital and the oral surgeons. They provided that each of the appellants' claims

"are restricted such that [the appellants] will only claim those damages, if any, arising from the actions or omissions of the Defendant Hospital."

5 The Pierringer Orders required the statement of claim in each action to be amended to limit the claim against the hospital to its several liability or proportionate share of joint liability to the appellants. The appellants' recovery would be limited to the damages, costs and interest attributable to the hospital's several liability, or proportionate share of joint liability, as may be proven at trial. And the Pierringer Orders required the appellants to acknowledge, in their amended pleadings, that the court at trial had the authority to adjudicate upon the apportionment of fault among all defendants who had been named in each action, i.e., the hospital and the oral surgeons. The Pierringer Orders made specific provision for the obtaining and use of evidence by and about the oral surgeons at a trial between the appellants and the hospital.

6 In 2016, the actions came to trial together. The parties agreed at the outset to bifurcate the trial, dealing first with the issue of liability.

7 The trial judge:

a) Dismissed the Endean, Karam, and Lind Actions on the basis that each had been commenced beyond the two year limitation period in the *Public Hospitals Act* ("the *PHA*"), R.S.O. 1980 c. 410, s. 28 and R.S.O. 1990, c. P.40, s. 31;

b) Held that the Hearsey Action was not barred by the *PHA* limitation period, because Ms. Hearsey had received a follow up treatment at the hospital within two years of the commencement of her action;

c) Found that the hospital was negligent in acquiring the implants and the oral surgeons were negligent in failing to take due care when assessing the viability of the implant and in the manner they followed up with patients after becoming aware of problems. He apportioned fault between them as follows: 5% of the fault to the hospital, 20% of the fault to the oral surgeons. He also apportioned 50% of the fault to the manufacturer of the implant, Vitek Inc., for making a defective product, and 25% of the fault to the distributor of the implant, Instrumentarium, who purchased it from the manufacturer and sold it to the hospital without due enquiry as to whether it was an approved product. Neither the manufacturer nor the distributor were ever parties to the actions and both were bankrupt;

d) Granted judgment in the Hearsey Action against the hospital for 5% of the damages that were to be assessed in the second phase of the trial; and

e) Granted costs in favour of the hospital in each of the Endean, Karam and Lind Actions.

8 The appellants appeal, raising the following grounds:

a) The trial judge erred in dismissing the Endean, Karam and Lind Actions on the basis of the *PHA* limitation period. They raise two points under this issue. First, they say that the two year limitation period in the *PHA* did not apply, because the limitation period related only to actions for negligence in the admission, care, treatment or discharge of a patient. The trial judge, they argue, situated the negligence of the hospital in its purchase of the implant, which should have been subject to the six year limitation period in the former *Limitations Act*, R.S.O. 1990, c. L.15. Second, they argue that even if the *PHA* applied, the trial judge should have found that the limitation period was extended under the doctrine of fraudulent concealment.

b) The trial judge erred in rejecting their argument that the hospital was liable for breaching a duty to recall patients once it was advised of problems with the implant. They say that if this theory of liability were accepted, it would affect the apportionment of liability and the limitation period.

c) The trial judge erred in apportioning fault to the manufacturer and the distributor, and thus restricting recovery in the Hearsey Action (and the other actions if they were improperly dismissed) to only 5% of the damages to be assessed.

9 The hospital cross-appeals. It argues that the Hearsey Action should also have been dismissed on the basis of the *PHA* limitation period. What the trial judge relied upon to bring the action within time was not "treatment", but simply a diagnostic test. Second, it argues that the trial judge erred in failing to include HST in the cost awards made in its favour in the Endean, Lind, and Karam Actions.

10 For the reasons that follow I would allow the appeal in part. I would not disturb the trial judge's finding that the Endean, Karam, and Lind Actions were barred by the *PHA* limitation period. In my view, the trial judge did not err in applying that limitation period or in rejecting the argument of fraudulent concealment. Nor did the trial judge err in rejecting the argument that the hospital breached a duty to recall. The trial judge did err, however, in apportioning fault to the manufacturer and distributor and reducing the recovery of the appellants in the Hearsey Action as a result of that apportionment. I would vary the judgment in the Hearsey action as described below.

11 I would dismiss the cross-appeal. Contrary to the assertions of the hospital, in the circumstances of this case Ms. Hearsey's follow up appointment should not be ignored in determining when her treatment ceased and thus when the *PHA* limitation period commenced to run. Nor is there an error in principle in the trial judge's award of costs.

Analysis

12 In light of the nature of the grounds of appeal the facts relevant to determining the issues (other than those in the outline above) are set out in relation to each issue discussed below.

(1) The Limitation Period Issues

The Approach of the Trial Judge

13 Because of the dates the actions were commenced, the argument about limitation periods concerns provisions which are not currently in force but were at the relevant times.

14 The *PHA* limitation period applied by the trial judge provided as follows:

> Any action against a hospital or any nurse or person employed therein for damages for injury caused by negligence in the admission, care, treatment or discharge of a patient shall be brought within two years after the patient is discharged from or ceases to receive treatment at the hospital and not afterwards.
>
> (Between 1985 and 1990 this was s. 28 of the *PHA*, R.S.O. 1980, c. 410. From 1990 forward, this was s. 31 of the *PHA*, R.S.O. 1990, c. P.40. The limitation period provision was repealed in 2004, as a result of the enactment of the *Limitations Act, 2002*, S.O. 2002, c. 24.)

15 The trial judge rejected the appellants' argument the *PHA* limitation period is subject to a discoverability principle. Thus, it was irrelevant that the appellants had no idea anything was wrong with them until 1994 at the earliest and commenced their actions within two years of knowing the implant had failed and caused them damage. For the non-applicability of the discoverability principle to the *PHA*, the trial judge relied upon: *Von Cramm Estate v. Riverside Hospital of Ottawa* (1986), 32 D.L.R. (4th) 314, 17 O.A.C. 218 (Ont. C.A.); *Hay v. Canadian Red Cross Society*, [2004] O.J. No. 2887 (Ont. S.C.J.); and *Purtell v. Royal Ottawa Hospital*, [2005] O.J. No. 2965 (Ont. S.C.J.), aff'd 2007 ONCA 367 (Ont. C.A.), leave to appeal denied, [2007] S.C.C.A. No. 362 (S.C.C.).

16 In *Von Cramm*, Cory J.A. (as he then was) made it clear that the discoverability principle did not apply to the *PHA*. He noted the harshness of applying a limitation period in a situation where, as was the case in *Von Cramm* and is the case here, a plaintiff could not have known or reasonably known of the negligence of the hospital until after any limitation period had expired. But that result was the product of the clear wording of the *PHA*. The limitation provision was enacted to protect public institutions. Any amelioration of the harshness of it expiring before a cause of action was discoverable was required to come from the Legislature, not the courts: see p. 318.

17 Although *Von Cramm* was decided before *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 (S.C.C.), in my view the trial judge was correct to find that the discoverability principle did not apply to the *PHA*. *Peixeiro* approved the application of the discoverability principle to limitation provisions which, properly interpreted, turned in some way on the injured person's knowledge for their commencement: see pp. 562-566. But the courts in both *Hay* and *Purtell* held that *Peixeiro* did not make the discoverability principle applicable to the *PHA*, because its limitation period runs from a fixed event unrelated to either the plaintiff's knowledge or the basis of the cause of action: see *Hay*, at paras. 14-16, and *Purtell*, at paras. 36-37. In this court, the appellants did not challenge the conclusion that the discoverability principle was inapplicable to the *PHA*.

18 The trial judge then considered when a person ceases to receive "care" or "treatment" for the purpose of determining when the *PHA* limitation period commenced. The trial judge held that the appellants' treatment or care ceased upon their being discharged on the last occasion each attended for a TMJ implant issue. He reasoned that where a later treatment in a hospital can be connected to the one about which negligence is alleged, the time limit runs from the date of the latest treatment, following *Fiorelli v. St. Mary's General Hospital*, [1995] O.J. No. 631 (Ont. C.A.).

19 The trial judge made the following findings on the limitation issue:

> a. Ms. Lind received "care" and "treatment" from the hospital on June 17, 1985, June 5, 1986 and November 26, 1991. This included the placement and removal of the implant, and the removal of certain debris from the TMJ that had been at the site of the implant. Although there was evidence that she had attended at the hospital on a number of occasions thereafter, the trial judge made a factual finding that these attendances related to other issues, not the implant or care or treatment of its effects. These findings are not challenged on appeal. Accordingly, the trial judge used November 26, 1991 as the date Ms. Lind ceased to receive care or treatment from the hospital, and thus as the date the *PHA* limitation period began to run. He held that her claim became statute barred on November 27, 1993. The Lind Action, commenced on August 20, 1996, was thus out of time.
>
> b. Ms. Endean attended the hospital only once, for her implant surgery, on October 8, 1985. The removal of the implant was done elsewhere and there were no other treatments at the hospital related to the implant or its effects. Accordingly, the trial judge held that October 8, 1985 was the commencement of the *PHA* limitation period, and it expired on October 9, 1987. The Endean Action, commenced July 11, 1997, was thus out of time.
>
> c. Mr. Karam attended the hospital only once, for his implant surgery, on November 21, 1985. The removal of the implant was done elsewhere and there were no other treatments at the hospital related to the implant or its effects. The trial judge found that November 21, 1985 was the commencement of the *PHA* limitation period, which expired on November 22, 1987. The Karam Action, commenced on March 14, 1997, was therefore out of time.
>
> d. Ms. Hearsey had her implant surgery on March 5, 1986, but attended the hospital for a follow up radiological procedure - a tomogram - on June 9, 1994. The trial judge found the tomogram was related to the failure of the implant, and thus was related to the original treatment she received in 1986. Although no negligence was alleged against the hospital for the way it conducted the tomogram, it was done as a result of the original implant and therefore was clearly connected to the negligence alleged. The trial judge held the tomogram was "treatment", and therefore the *PHA* limitation period commenced on June 9, 1994 and did not expire until June 10, 1996. The Hearsey Action, commenced on March 21, 1996, was thus in time.

20 The trial judge considered and rejected the argument that the limitation period should be extended by operation of the doctrine of fraudulent concealment. He observed that the issue was raised late and not referred to in the appellants' pleadings. But he went on to state that:

> [M]ost importantly, I am not persuaded that the evidence at this trial has proven, or even suggested, that the Hospital was an unscrupulous defendant or that the acts or even failings of any of its employees or directors or agents came anywhere close to what any reasonable person could describe as constituting "fraud" or a "fraudulent concealment".

The Limitation Period Appeal regarding the Endean, Karam and Lind Actions

21 The appellants attack the trial judge's limitation period conclusions that led him to dismiss the Endean, Karam and Lind Actions on two bases.

22 First, they argue that the *PHA* limitation period does not apply to the wrong found to have been committed by the hospital; they contend it was not negligence in the care, treatment or discharge of the appellants. They argue that the *PHA* limitation period, a provision that restricts rights of action, must be strictly interpreted: *Fenton v. North York Hydro-Electric Commission* (1996), 29 O.R. (3d) 481, 92 O.A.C. 53 (Ont. C.A.), at pp. 11-12. The trial judge found the only negligence of the hospital was its decision to purchase the implants, at a time when they were not approved for sale or use in Canada, without enquiring whether they had received any such approval. For example, the trial judge stated "I agree with the argument of counsel for the plaintiffs that a reasonable person would think 'maybe we should check to see if the device is approved' before it was acquired." The appellants argue that if one gives the *PHA* a strict reading, the hospital's decision to purchase the implants was not negligence in the treatment or care of a patient, but negligence in a purchasing decision, made before the surgeries of the appellants were even contemplated. That negligence, they argue, would be subject to the limitation period in the former *Limitations Act*, and its overlay of discoverability.

23 The difficulty with this argument is that the negligence of the hospital in purchasing the implants was not actionable by any of the appellants on its own. It was only actionable because the implants were made available for use by oral surgeons for surgeries performed on Ms. Endean, Ms. Hearsey, Mr. Karam and Ms. Lind at the hospital. The appellants had a claim for negligence against the hospital only because each became a patient of the hospital, receiving treatment and care (that is, a surgical procedure), using devices that had been negligently acquired by the hospital for just such a use.

24 The trial judge's findings are illustrative of the integral connection between the purchase of the implants, the appellants' care and treatment, the appellants' injuries and the negligence of the hospital. The trial judge found that:

> Given that the device at issue would be placed in a person's body potentially for life and given that there was a government regulatory regime in place allowing or not allowing distribution of a device by manufacturers, failing to inquire about the use of the device is evidence of negligence.

And he found that the negligence in the purchase caused damage to the appellants exactly because "[b]ut for the acquisition of the device, the oral surgeons could not have done the procedure, at least not at [the respondent] Hospital."

25 In my view, giving the *PHA* the strict reading contemplated by cases like *Fenton* does not alter the conclusion that the *PHA* limitation provision applies here. A negligent act by a hospital before a patient receives care or treatment, which becomes actionable only because it enables a treatment at the hospital that causes injury, is negligence in the care or treatment of the patient within the meaning of the *PHA* limitation provision.

26 Accordingly, I would not give effect to this ground of appeal.

27 Second, the appellants argue that the trial judge erred in rejecting their argument of fraudulent concealment. They point to the hospital having become aware of problems with the implants five years before the appellants. The trial judge's error, they say, flowed from his having approached the issue as though what was required was conduct that was "fraudulent" in the common law sense.

28 I agree with the appellants that the doctrine of fraudulent concealment does not require common law fraud. As the Supreme Court of Canada said in *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.), at p. 390:

> [W]here there has been a fraudulent concealment of the existence of a cause of action, the limitation period will not start to run until the plaintiff discovers the fraud, or until the time when, with reasonable diligence, he ought to have discovered it. The fraudulent concealment necessary to toll or suspend the operation of the statute need not amount to deceit or common law fraud.

29 I also agree with the appellants that the doctrine of fraudulent concealment could apply to the *PHA* limitation period. In this court's decision in *Zeppa v. Woodbridge Heating & Air-Conditioning Ltd.*, 2019 ONCA 47 (Ont. C.A.), the majority held that the doctrine of fraudulent concealment has no room to operate where the provisions of the *Limitations Act, 2002*, which are subject to a codified discoverability test, apply: see para. 71. But, at para. 64, the majority did not question the applicability of the doctrine of fraudulent concealment to other statutes:

> This court has held that the principle of fraudulent concealment is available in cases involving limitation periods contained in statutes other than the (*Limitations Act, 2002*) including: s. 38(3) of the *Trustee Act*, R.S.O. 1990, c. T.23: *Giroux Estate*; *Roulston v. McKenny*, 2017 ONCA 9, 135 O.R. (3d) 632; the limitation period under the *Real Property Limitations Act*, R.S.O. 1990, c. L.15: *Anderson v. McWatt*, 2015 ONSC 3784, at para. 77, appeal dismissed 2016 ONCA 553; and the limitation period created by s. 82(2) of the former *Employment Standards Act*, R.S.O. 1990, c. E.14: *Halloran v. Ontario (Employment Standards Act Referee)* (2002), 217 D.L.R. (4th) 327 (C.A.), at para. 35.

30 However, I disagree with the appellants that the doctrine applies in the circumstances of this case. In *Zeppa*, the majority adopted the following description of the doctrine at para. 62:

> A succinct, but comprehensive, summary of the elements of the principle is found in the decision of Perell J. in *Colin v. Tan*, 2016 ONSC 1187, 81 C.P.C. (7th) 130 at paras. 44-47:
>
> > Fraudulent concealment will suspend a limitation period until the plaintiff can reasonably discover his or her cause of action.
> >
> > The constituent elements of fraudulent concealment are threefold: (1) the defendant and plaintiff have a special relationship with one another; (2) given the special or confidential nature of the relationship, the defendant's conduct is unconscionable; and (3) the defendant conceals the plaintiff's right of action either actively or the right of action is concealed by the manner of the wrongdoing. Fraudulent concealment includes conduct that having regard to some special relationship between the parties) concerned is unconscionable. For fraudulent concealment, the defendant must hide, secret, cloak, camouflage, disguise, cover-up the conduct or identity of the wrongdoing. [Emphasis added.]

31 The trial judge's findings of fact preclude any conclusion that the hospital was hiding, secreting, cloaking, camouflaging, disguising or covering up anything. The appellants point to the hospital's receipt of a notification in May, 1990 from the Emergency Care Research Institute ("ECRI") that indicated that the implant can contribute to progressive bone degeneration, should not be used anymore, existing stocks of the implant should be returned to the manufacturer, and persons who had received the implant required monitoring and follow up. They also point to the hospital, in August of 1990, having received correspondence from the distributor recalling the implants and asking for the names of oral surgeons who had patients with the implants, so that safety information could be provided by the distributor to the oral surgeons.

32 The facts found by the trial judge, which are referred to in the section below on the duty to recall, show that the hospital contacted the oral surgeons to ensure they knew about the issue with the implants. The hospital was advised that the oral surgeons were aware of the issue, and the hospital had the reasonable expectation that any follow up with patients would be done by the oral surgeons. The hospital was also in touch with the distributor and was advised that it already had the names of the oral surgeons for further communication. Those facts are not consistent with the hospital hiding, secreting, cloaking, camouflaging, disguising or covering up anything. In other words, they are not consistent with concealment in the sense required by the doctrine.

33 Accordingly I would reject this ground of appeal.

The Limitation Period Cross-Appeal regarding the Hearsey Action

34 By cross-appeal, the hospital argues that the trial judge erred in not dismissing the Hearsey Action as barred by the *PHA* limitation period. It argues that the diagnostic procedure that Ms. Hearsey had in 1994, the tomogram, was not "treatment". In

the hospital's view, the trial judge erred in using it to determine the start date of the limitation period for the Hearsey Action. The hospital concedes, per *Fiorelli*, that it is the most recent treatment that is the operative commencement of the limitation period, as long as it has a connection to the care or treatment in which the negligence is alleged to have occurred. The hospital also concedes that the tomogram was connected to the implant surgery. Its point is that a diagnostic procedure is not treatment.

35 I would reject this argument. Nothing in the *PHA* limitation provision supports the distinction between a diagnostic procedure and treatment the hospital seeks to make, especially if one reads the provision so as to minimize the extent to which it interferes with rights of action, as cases such as *Fenton* require. Treatment is a term that encompasses investigation necessary to determine a future course of care and treatment, as well as investigation to monitor the effect of previous care and treatment. The tomogram in these circumstances was treatment.

36 Accordingly, I would not give effect to this ground of the cross-appeal.

(2) The Duty to Recall

37 The appellants argue that the trial judge failed to give effect to the correct duty of care. Although he criticized the oral surgeons for their delay in calling back patients after becoming aware of implant problems, the appellants say the trial judge should have recognized that when the hospital received the 1990 ECRI warning and the August 1990 letter from the distributor, it owed a duty of care to "contain the risks". In oral argument, this was sometimes called a "duty to warn", but before the trial judge, in their factum in this court, and in the substance of their oral argument before this court, it was articulated as more than a simple duty to give the appellants some sort of warning or notification. Rather, it was framed as an obligation on the part of the hospital to notify the appellants of the need for follow up care and to provide that follow up care — independently of anything the oral surgeons were doing. The trial judge properly described the contended for duty as a duty to recall the patients.

38 In my view, on the facts he found, the trial judge did not err in rejecting this theory of liability.

39 The trial judge found that upon receiving the 1990 ECRI warning and the distributor's letter, the hospital contacted the oral surgeons to ensure both that they did not book any further implant surgeries and to confirm that they knew about the warning. He found that the oral surgeons advised the hospital that they were aware of the warning, and he found that the oral surgeons were aware of the problems with the implant by 1990. He also found that the hospital had contacted the distributor and confirmed in 1991 that the distributor was aware of and had been directly in touch with the oral surgeons — one of the requests in the distributor's letter.

40 The appellants were the patients of the oral surgeons. The trial judge accepted the evidence of the CEO of the hospital that a recall of patients was something to be initiated only by the oral surgeons, given their medical training, ability to order tests, and ability to treat patients. The trial judge also accepted expert evidence that there was no precedent for any hospital in Canada self-initiating a recall of patients. He accepted evidence that the hospital could not order an oral surgeon to do any procedure on a patient or call people in for treatment; nor could it write orders for tests or book patients for treatment absent a physician's approval. He held that it was reasonable for the hospital to assume that the distributor and the oral surgeons, who had knowledge superior to that of the hospital about the implant and about what to do for patients if the implant failed, would deal appropriately with the issue. He concluded that there was no basis to elevate the hospital to an oversight role over the oral surgeons. These findings are entitled to deference. In light of them, the appellants' proposition that a duty to recall existed and was breached by the hospital must be rejected.

41 In my view, the trial judge also did not err in determining that the decision in *Pittman Estate v. Bain* (1994), 112 D.L.R. (4th) 257 (Ont. Gen. Div.) did not assist the appellants. *Pittman* held that a hospital that undertakes a program to notify patients of a problem must do so without negligence. That proposition is not applicable here, given that the hospital did not undertake any notification program. On the trial judge's findings of fact, nothing in *Pittman* requires a different conclusion to the one he reached.

42 Accordingly I would reject this ground of appeal.

(3) Apportionment

43 The appellants argue that the trial judge erred by apportioning 75% of the liability to two non-parties. This limited the recovery of the appellants whose claims were not barred by a limitation period - that is, the Hearsey appellants - to 5% of their assessed damages. The manufacturer, who the trial judge found to be 50% at fault, and the distributor, held to be 25% at fault, were never parties to the action, were never the subject of third party proceedings by the hospital, and were both bankrupt. As such, the appellants say that apportionment of fault to them in a way that reduced the appellants' recovery from the hospital was improper.

44 The hospital supports the trial judge's approach.

45 There were two planks to the hospital's argument, (a) the Pierringer Order and the resulting amended statement of claim; and (b) this court's decision in *Taylor v. Canada (Attorney General)*, 2009 ONCA 487, 95 O.R. (3d) 561 (Ont. C.A.). In my view, neither supports the trial judge's approach.

46 In order to understand why I reject the hospital's argument, it is important to review some principles which set the background for consideration of both the Pierringer Order and the consequential amendment to the statement of claim, and the decision in *Taylor*.

Concurrent Liability and Pierringer Orders

47 At law, where more than one wrongdoer has caused or contributed to the plaintiff's injury, they are each liable to compensate the plaintiff in full, subject only to the rule that the plaintiff cannot recover more than 100% of their damages: see *Athey v. Leonati*, [1996] 3 S.C.R. 458 (S.C.C.), at para. 25. In practical terms, this means the plaintiff can recover 100% of their losses from any defendant who caused or contributed to the particular injury regardless of the degree of fault of that defendant, and regardless of whether others, parties or non-parties, were also at fault.

48 Pursuant to s. 1 of the *Negligence Act*, R.S.O. 1990, c. N.1, wrongdoers have a right of contribution from each other. In other words, although each remains jointly and severally liable to pay the plaintiff 100% of the plaintiff's damages, each can exercise the statutory right to have fault apportioned among the wrongdoers so that each wrongdoer will indemnify the others in accordance with the share of fault apportioned to them. Thus, if a defendant found 50% at fault pays the plaintiff 100% of their damages, that defendant can recover the 50% overpayment from the other wrongdoer(s) to whom the other 50% of fault was apportioned: see *Martin v. Listowel Memorial Hospital* (2000), 192 D.L.R. (4th) 250, 138 O.A.C. 77 (Ont. C.A.), at paras. 34-35.

49 It is important, however, to note that the right of indemnity is not something which affects the plaintiff. The entire risk that a wrongdoer, liable to pay 100% of the plaintiff's damages while not 100% at fault, will be able to actually recover indemnity from another wrongdoer, is on that first wrongdoer — not the plaintiff. If the second wrongdoer is not pursued by cross-claim, third party action or separate action, or if the second wrongdoer pursued is not creditworthy or insured, the first wrongdoer will still have to pay 100% of the plaintiff's damages and recover no indemnity: see *Taylor*, at paras. 18-20.

50 Before the Pierringer Order in the Hearsey Action, the hospital and oral surgeons were defendants and had cross-claimed against each other. The hospital and the oral surgeons were each at risk to the Hearsey appellants, if found at fault to any degree, of having to pay 100% of any damages. But, each had the right to recover from the other for the latter's proportionate share of any fault. So if, for example, the hospital paid the plaintiff more than its proportionate share, the hospital's out of pocket expense, assuming the oral surgeons were creditworthy, would be reduced by obtaining indemnity from the oral surgeons for their proportionate share of fault, and vice versa.

51 In addition, before the Pierringer Order in the Hearsey Action the hospital and the oral surgeons had no proceeding pending to claim indemnity from the manufacturer or distributor for their proportionate share of any fault, and they had no practical means of collecting any indemnity even if they had claimed it, as each of the manufacturer and distributor was bankrupt. So if,

for example, the hospital paid 100% of the damages of the Hearsey appellants, as it would be liable to do no matter the degree of fault attributed to it, it could recover nothing from either the manufacturer or the distributor.

52 This brings us to the Pierringer Order in the Hearsey Action. Named after *Pierringer v. Hoger*, 124 N.W.2d 106, 21 Wis. 2d 182 (U.S. Wis. S.C. 1963), the purpose of a Pierringer Order is to facilitate a settlement between a plaintiff and a defendant who wishes to settle (a settling defendant), while maintaining a level playing field for the remaining (non-settling) defendant against whom the plaintiff wishes to proceed to trial: see *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623 (S.C.C.), at paras. 6, 23-26. It does this by certain essential provisions:

> (1) The settling defendant settles with the plaintiff;
>
> (2) The plaintiff discontinues its claim [against] the settling defendant;
>
> (3) The plaintiff continues its action against the non-settling [defendant] but limits its claim to the non-settling defendant's several liability (a 'bar order');
>
> (4) The settling defendant agrees to co-operate with the plaintiff by making documents and witnesses available for the action against the non-settling defendant;
>
> (5) The settling defendant agrees not to seek contribution and indemnity from the non-settling defendant; and
>
> (6) The plaintiff agrees to indemnify the settling defendant against any claims over by the non-settling defendants.
>
> *Handley Estate v. DTE Industries Limited*, 2018 ONCA 324, 421 D.L.R. (4th) 636, at para. 39, citing Paul M. Perell & John W. Morden, The Law of Civil Procedure in Ontario, 3d ed. (Toronto: LexisNexis Canada, 2017), at p. 762.

53 These essential provisions of a Pierringer Order are informed by the discussion of liability above. The non-settling defendant will have cross-claimed against a settling defendant because it wants to recover the settling defendant's share of fault from it as indemnity, should the non-settling defendant have to pay more than its proportionate share of the plaintiff's damages. The non-settling defendant's need to do so disappears under a Pierringer Order, because it requires the plaintiff to effectively put the non-settling defendant in the same economic position as if it paid the plaintiff in full and recovered any indemnity from the settling defendant. It does this by requiring the plaintiff to reduce its recovery from the non-settling defendant by the percentage of fault to be attributed to the settling defendant, and thus by the amount the non-settling defendant would have been able to recover from the settling defendant as indemnity: see *M. (J.) v. Bradley* (2004), 71 O.R. (3d) 171, 187 O.A.C. 201 (Ont. C.A.), at paras. 30-31.

54 To use an example, suppose defendants A and B were each creditworthy and cross-claimed against each other for indemnity. Suppose each is found liable at trial and fault was apportioned 50% to each. The plaintiff makes A pay 100% of the damages. But A recovers from B, on a cross-claim, for B's 50% proportionate liability as indemnity. At the end of the day, A's net payment is only 50%, commensurate with A's liability.

55 Now suppose the plaintiff settled with B before trial. In the Pierringer Order situation, the plaintiff reduces their recovery from A (who did not settle) by the amount it is determined that B is at fault. At trial, A and B are each found to be 50% at fault. The plaintiff reduces their claim against A by the amount of fault attributed to B. A's net payment is the same 50%.

The Pierringer Order in the Hearsey Action Did Not Authorize Reduction of Recovery Due to Fault of Persons Other Than the Oral Surgeons

56 The Pierringer Order in the Hearsey Action is similar to the example above in so far as the hospital and the oral surgeons were concerned. For ease of reference, that Pierringer Order is attached as 'Schedule A' to these reasons. The hospital's cross-claim against the oral surgeons in the Hearsey Action had been made so that the hospital could obtain indemnity from the oral surgeons if it was obliged to pay the plaintiff's full damages. To the extent fault was attributed to the oral surgeons, the hospital could recover indemnity from them and thus reduce its net out of pocket expenditure. The Pierringer Order dismissed the cross-

claim of the hospital against the oral surgeons. It did not prejudice the hospital by doing so, as it required the Hearsey appellants to reduce their claim against the hospital by the amount of fault that would be apportioned at trial to the oral surgeons, and it provided procedures whereby that determination could be made at trial. If that was all the Pierringer Order in the Hearsey Action did, it would meet the objectives generally ascribed to a Pierringer Order discussed above.

57 However, the effect the hospital argues for goes much further. According to the hospital, the effect of the Pierringer Order was to also reduce the Hearsey appellants' recovery from the hospital by the amount of fault the trial judge might attribute to the manufacturer and the distributor. These were entities against whom the hospital had not claimed indemnity under the *Negligence Act*, and from whom the hospital had no practical ability to recover indemnity even if claimed. The Pierringer Order, if so interpreted, would do more than maintain a level playing field for the hospital compared to its pre-Order position. The effect of the interpretation the hospital seeks is to put the hospital in a *better* position than it was in before the Pierringer Order. Before the Pierringer Order, the hospital was at risk, if found at fault to any degree, to pay all of the Hearsey appellants' damages without the ability to obtain indemnity from the manufacturer and distributor. This risk was on the hospital, regardless of the degrees of fault of the concurrent tortfeasors. As interpreted by the hospital, the Pierringer Order would free the hospital of that risk. The hospital would be placed in as good a position as it would have been had it claimed indemnity from the manufacturer and distributor and had the manufacturer and distributor been creditworthy and able to pay indemnity, rather than being bankrupt. No reason why this should be the case was suggested.

58 The Pierringer Order's language, including that incorporated into the amended statement of claim, does not, taken as a whole, support this broader interpretation. Paragraph 5 of the Pierringer Order provides that the "Plaintiffs will only claim from the Defendant Hospital those damages, if any, arising from the actions or omissions of the Defendant Hospital", and refers to the "Defendant Hospital's several liability, or proportionate share of joint liability, as may be proven against it at trial". But that must be read in light of the context and the other provisions of the Pierringer Order, which demonstrate that this was only intended to ensure the Hearsey appellants' claim and recovery from the hospital did not include anything for the fault that may be attributed to the oral surgeons.

59 The Pierringer Order was made in the context of an action that included the oral surgeons and the hospital as defendants — no one else. It was made in the context of a settlement by the appellants with the oral surgeons against whom the hospital had cross-claimed. It dismissed the hospital's cross-claim against the oral surgeons. It expressly provided that the court at trial may apportion fault among "all *Defendants named in the Statement of Claim*" (emphasis added), which meant only the hospital and the oral surgeons. It did not refer to apportionment of fault to anyone else. And it provided procedures, including for the obtaining and use of evidence from and about the oral surgeons, clearly aimed at assisting the parties to present their cases on what fault should be apportioned to the oral surgeons. It provided no similar procedures regarding the fault of any other entities.

60 We were not referred to evidence that any of the appellants had made an agreement, as a result of settlements with the manufacturer or distributor, that claims the appellants might pursue against the hospital, would be reduced by the percentage fault that would be attributed to the manufacturer or distributor.

61 In his reasons, the trial judge referred to the manufacturer having gone bankrupt shortly after it ceased to make the implant in 1988. No reference is made to any settlement with the manufacturer or recovery from it, let alone to the terms on which that may have occurred.

62 The trial judge also referred to a settlement between the distributor on the one hand, and the appellants and many others who received the implant on the other. The record included a settlement agreement of class actions against the distributor. Accepting that the appellants were members of the class and may have benefitted from that settlement, my review of that agreement does not reveal any term whereby the appellants would reduce their claims against persons who were not parties to the class actions, such as the hospital, by the distributor's percentage fault. Rather, the settlement agreement provides:

> Except as otherwise provided herein, nothing in this Settlement Agreement shall prejudice or in any way interfere with the rights of the Settlement Class Members to pursue all of their other rights and remedies against persons and/or entities other than the Defendant and Released Parties. Nevertheless, Settlement Class Members further agree that in the event the

> Settlement Class Member commences or continues litigation or pursues a claim or-makes a claim against any person or entity arising from, arising out of, or connected directly or indirectly with the distribution and insertion of a Vitek Proplast TMJ implant, including all claims for non-pecuniary, punitive, aggravated, and consequential damages, then the Settlement Class Member expressly agrees not to include in respect of any such claim any right to recover from such person or entity any such amounts as have been paid under the terms of this Settlement Agreement to the Settlement Class Member or Settlement Class Members.

63 This provision requires the appellants to reduce their claims against the hospital to take into account the amount they *recovered* from the distributor under the class action settlement. If applicable, this credit would occur in the damages phase of the trial. It does not require or justify, on the question of apportionment, reducing the appellants' recovery by the distributor's percentage fault, as the trial judge did.

64 In my view, taken as a whole against the evidentiary background, the Pierringer Order and the amended statement of claim in the Hearsey Action do not require the appellants to reduce their claims against the hospital by the percentage fault of the manufacturer and the distributor, and thus improve the position of the hospital.

The Trial Judge Erred in Relying on Taylor

65 The trial judge relied on this court's decision in *Taylor* as authority to apportion fault to non-parties. He stated that *Taylor* "...expressly determined that a court can apportion fault to a person who is not a party to an action." But the issue is not whether a court may do so, but under what circumstances a court should do so. The circumstances in *Taylor* were substantially different than those in the case at bar.

66 *Taylor* concerned an attempt, by a defendant to a class action, to add third parties from whom the defendant wished to claim contribution and indemnity on the basis that their fault had contributed to each class member's injury. In other words, due to the risk it could be made to pay 100 percent of the damages it wished to seek indemnity from the third parties for their proportion of fault. The plaintiff, however, made it clear by an amendment to the claim that the exposure of the defendant was limited to damages for which it could have no right of contribution, because all that was claimed were the damages that would be apportioned to the defendant given its relative degree of fault: see paras. 4 and 11. This was done specifically "to preclude the defendant's attempt to assert a third party claim" and with the intention that "[t]he possibility of third party claims will be obviated": paras 9 and 10. Thus in *Taylor* the plaintiff amended her statement of claim to specifically state that she was not suing the defendant for anything other than the defendant's proportionate share of fault, in circumstances that made it clear she was prepared to reduce the claim by the proportion of fault that would be attributed to the proposed third parties.

67 It was in that context that the court in *Taylor* held that fault could be apportioned at trial to the proposed third parties even though they were non-parties. This was essential to the court's holding that the third party claim was unnecessary. To protect the defendant, the reductions in the plaintiff's claim due to the fault of the proposed third parties would have to be calculated by determining their degree of fault. As the court in *Taylor* noted, considerations of encouraging settlements with non-parties or of simply allowing a plaintiff to streamline litigation by obviating third party claims, favoured an interpretation of the court's powers to apportion fault that is broad enough to permit apportionment to non-parties: see paras. 26 to 28.

68 The circumstances in *Taylor* were not present in the case at bar in so far as the manufacturer and distributor are concerned. As discussed in the section above, the settlement with the oral surgeons which gave rise to the Pierringer Order contemplated an apportionment of fault to, and a corresponding reduction of the claim for the fault of, the oral surgeons, not the manufacturer and distributor. The class action settlement with the distributor also does not contemplate such an apportionment and reduction. Nor did the appellants evince an intention to streamline the litigation by indicating they would reduce their claim for the fault of the distributor and manufacturer, as the plaintiff did in *Taylor*.

69 *Taylor* does not stand for a proposition that is so broad that it would entitle the court in any case to apportion fault to non-parties, and reduce the plaintiff's recovery by that apportioned share of fault. That would be inconsistent with what the Supreme Court of Canada said in *Athey* and with s. 1 of the *Negligence Act*: namely, the general rule is that a wrongdoer is liable for

100 percent of a plaintiff's injuries and wrongdoers are liable to contribute *between themselves* in accordance with their relative shares of fault. The approach in *Taylor* was context specific. And that context is not present here.

70 Accordingly, it was an error of law for the trial judge to apply *Taylor* as he did.

Conclusion on Apportionment

71 The appellants argued that if we agreed there was an error in the apportionment of fault to the manufacturer and distributor and the reduction of the appellants' recovery as a result, we should remit that matter back to the trial judge. The hospital argued that if we found such an error, fault should be reapportioned 20% to the hospital and 80% to the oral surgeons. In other words, the relative assessment of fault as between the hospital and oral surgeons found by the trial judge should be maintained. The trial judge found the oral surgeons four times more at fault than the hospital.

72 I agree with the result proposed by the hospital. As discussed above, the underlying theory of contribution and indemnity is that a wrongdoer should be able to recover indemnity from another when the first has paid the plaintiff more than its proportionate share, assessed by their relative degrees of fault. Both the hospital and the oral surgeons were at risk before the Pierringer Order that one or the other would have to pay all of the appellants' damages. They each had cross-claimed for indemnity from the other. And they were both in the same situation vis-à-vis the manufacturer and distributor — they had no claim or ability to recover indemnity from them regardless of their degree of fault.

73 The Pierringer Order was designed to protect the hospital from paying more than its proportionate share to the same degree as its prior cross-claim for indemnity against the oral surgeons. Given the findings of the trial judge, the hospital would be paying more than its proportionate share if it paid more of the total damages than its relative share of fault compared to the fault of the oral surgeons: namely, more than one fifth of the total fault attributed to the hospital and the oral surgeons combined. The judgment in the Hearsey Action should therefore be varied to reflect this.

(4) The Costs Cross-Appeal

74 I would not give effect to the hospital's cross-appeal on costs. The hospital argues that an amount for HST is not included in the costs awards which the trial judge made after dismissing the Endean, Karam, and Lind Actions. In my view, the trial judge did not limit himself to a mechanical calculation of costs dependent on the inclusion or lack of inclusion of any specific item. In his reasons on costs, he "stepped back" to determine whether the amounts he calculated were reasonable given the magnitude of the matter and other relevant considerations: see para. 72. He was satisfied the amounts he awarded were reasonable. There is no error in principle justifying appellate intervention.

Conclusion

75 Accordingly, I would dismiss the appeals in the Endean, Lind and Karam Actions. I would allow the appeal in the Hearsey Action and vary para. 1 of the judgment in that action by replacing 5% with 20%. I would dismiss the hospital's cross-appeal.

76 The Hearsey appellants should have their costs of the appeal and cross-appeal fixed at $20,000 inclusive of HST and disbursements.

77 Success was divided between the hospital and the Endean, Karam and Lind appellants. I would not award any costs in the appeals or the cross-appeals in those actions.

***Paul Rouleau J.A.*:**

I agree.

***K. van Rensburg J.A.*:**

I agree.

Schedule A

Court File No. 96-0342A

ONTARIO SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	DAY, THE 2{nd} DAY
	)	
JUSTICE JOHN WILKINS	)	OF JUNE, 2013

BETWEEN:

JANET HEARSEY and LESLIE HEARSEY

Plaintiffs

-and-

DR, W.W. DOWHOS, ST. JOSEPH'S GENERAL HOSPITAL and THE ROYAL COLLEGE OF DENTAL SURGEONS OF ONTARIO

Defendants

-and-

ATTORNEY GENERAL OF CANADA

Third Party

ORDER

THIS MOTION made by the Defendant Dr. W. W. Dowhos (the "Moving Defendant") for an Order dismissing the Main Action against him, as well as the Crossclaims and Third Party Claims, was heard this day at the 361 University Avenue, Toronto, Ontario.

ON READING the Affidavits of Tim Farrell, a solicitor for the Moving Defendant, and of David Steeves, a solicitor for the Plaintiffs, and on being advised of the Consent of the Plaintiffs, Defendants and Third Party to the requested Order, and on being advised that the action was discontinued as against the Defendant the Royal College of Dental Surgeons of Ontario on or about October 16, 1996, and on being advised that Dr. W.W. Dowhos passed away on or about February 24, 2011, and that Carole Dowhos is the Estate Trustee for the Estate of Dr. W.W. Dowhos, and on hearing submissions of counsel for the Moving Defendant:

1. *THIS COURT ORDERS* that this proceeding continue with the Estate of Dr. W.W. Dowhos, deceased, by its Estate Trustee Carole Dowhos as a Defendant, and that the Title of Proceeding be amended accordingly in all documents issued, served or filed after the date of this Order.

2. *THIS COURT ORDERS* that the Main Action be dismissed as against the Moving Defendant, without costs.

3. *THIS COURT ORDERS* that the Moving Defendant's Crossclaim against St. Joseph's General Hospital (the "Defendant Hospital") and the Defendant Hospital's Crossclaim against the Moving Defendant are hereby dismissed without costs.

4. *THIS COURT ORDERS* that all claims for contribution and/or indemnity or any other relief over by the Defendant Hospital or by any other person, whether as yet asserted or still unasserted, as against the Moving Defendant, and/or Daniel Tomlak, and/or Eric Orpana in relation to the claims made in the Main Action, are hereby barred, prohibited and enjoined forever.

5. *THIS COURT ORDERS* that the Plaintiffs' claims are restricted such that the Plaintiffs will only claim from the Defendant Hospital those damages, if any, arising from the actions or omissions of the Defendant Hospital, and that, to effect this, the Statement of Claim shall be amended to include the following paragraphs:

1. The Plaintiffs limit their claims against the Defendant Hospital to the damages, costs and interest attributable only to the Defendant Hospital's several liability Or proportionate share of joint liability to the Plaintiffs, such that the Plaintiffs' recovery shall be limited to the damages, costs and interest attributable to the Defendant Hospital's several liability, or proportionate share of joint liability, as may be proven against it at trial.

2. That the Plaintiffs acknowledge that the court at any trial of this action shall have the full authority to adjudicate upon the apportionment of fault, if any, among all Defendants named in this Statement of Claim.

6. *THIS COURTS ORDERS* that the following procedures will be observed upon the continuation of the Action as between the Plaintiffs and the Defendant Hospital:

(a) For the purpose of a trial of this Action, despite the dismissal of the Crossclaims, the Defendant Hospital will be deemed to be adverse in interest to the Moving Defendant, Daniel Tomlak and/or Eric Orpana, and may cross-examine any of these three at trial despite calling them as witnesses;

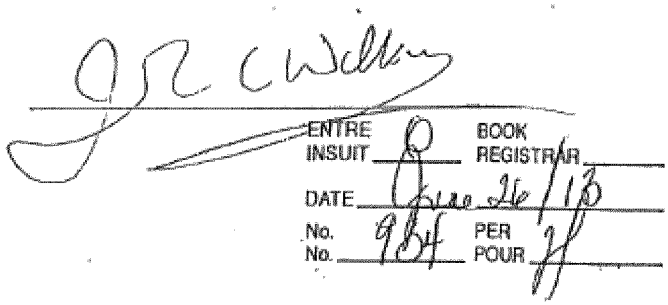
(b) The Defendant Hospital shall be entitled to serve a Request to Admit upon the Moving Defendant prior to the trial of this Action and shall be entitled to file the Response (including any deemed admissions) at the Trial of this Action;

(c) The Moving Defendant. Daniel Tomlak and/or Eric Orpana, shall provide an undertaking to attend at the trial of this Action as a fact-witness if the Defendant Hospital summonses them or one of them or serves a Notice of Intention to Call thorn or one of them and the Defendant Hospital will compensate the witness in accordance with the applicable tariffs; and

(d) All Discovery evidence provided by the Moving Defendant including all Transcripts of the examinations of discovery conducted of the Moving Defendant in any file, action or proceeding which relates to the Vitek TMJ Implant litigation shall be available for use at the Trial in this Action.

(e) For the purposes of service of the Requests to Admit or Summonses on the Moving Defendant, Daniel Tomlak and/or Eric Orpana, service will be directed to their lawyers, Blaney McMurtry LLP, Toronto, ON, unless otherwise advised.

7. *THIS COURT FURTHER ORDERS* that all Third Party Claims be dismissed without costs.



Graphic 1

Appeal allowed in part; cross-appeal dismissed.

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paras. 37-41

2002 CarswellOnt 3472
Ontario Superior Court of Justice

Gariepy v. Shell Oil Co.

2002 CarswellOnt 3472, [2002] O.J. No. 4022, 117 A.C.W.S. (3d) 690, 21 C.L.R. (3d) 98, 26 C.P.C. (5th) 358

Michael Gariepy, Lyne Marion, Wayne McGowan, Paul Berthelot and Dale Elliott, Plaintiffs and Shell Oil Company, E.I. Du Pont De Nemours and Company and Hoechst Celanese Corporation, Defendants

Nordheimer J.

Heard: October 11, 2002
Judgment: October 22, 2002
Docket: London 30781/99, Toronto 99-CT-030781CP

Counsel: *Michael A. Eizenga*, *Dawn M. Sullivan*, for Plaintiffs
David W. Kent, for Defendant, Shell Oil Company
Jeffrey S. Leon, *Laura F. Cooper*, for Defendant, E.I. Du Pont De Nemours & Co.
J.D. Timothy Pinos, *Glenn M. Zakaib*, for Defendant, Hoechst Celanese Corp.

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.b Certification
V.2.b.i Plaintiff's class proceeding
V.2.b.i.H Miscellaneous
Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.d Orders, awards and related procedures
V.2.d.i Order on common issues and individual issues
Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.e Costs, fees and disbursements
V.2.e.iv Court approval of agreement for payment of fees and disbursements
Civil practice and procedure
XVI Disposition without trial
XVI.7 Settlement
XVI.7.a General principles
Headnote
Practice --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — General
Defendants S Co., D Co. and H Corp. manufactured material used in plumbing and heating systems in homes — Pipes and fittings made from material developed leaks — Homeowners commenced action for negligent design, failure to warn, misrepresentation and breach of warranty — Proposed representative plaintiffs brought motion for certification of action under Class Proceedings

Act and for approval of D Co.'s settlement offer — Motion granted in part — Class proceeding certified — Identifiable class and common issues existed — Certification in settlement context provided preferable procedure for resolution of matter — Settlement agreement provided efficient plan to expeditiously and inexpensively resolve claims of class member against D Co. in summary fashion — Class Proceedings Act, 1992, S.O. 1992, c. 6.

Practice --- Disposition without trial — Settlement — General

Defendants S Co., D Co. and H Corp. manufactured material used in plumbing and heating systems in homes — Pipes and fittings made from material developed leaks — Homeowners commenced action for negligent design, failure to warn, misrepresentation and breach of warranty — Proposed representative plaintiffs brought motion for certification of action under Class Proceedings Act and for approval of D Co.'s settlement offer — Motion granted in part — As action was complicated and likelihood of success was uncertain, settlement provided measure of certainty — Factual basis for claims was extensively investigated prior to settlement, and despite fact that discovery had not yet been conducted, voluminous litigation materials from United States were available to class counsel — Prosecution of claims would involve significant future expense and time — Terms and conditions of settlement were balanced and proper for proposed resolution — Settlement was reached after prolonged arm's length negotiations involving experienced class counsel on both sides — Class Proceedings Act, 1992, S.O. 1992, c. 6.

Practice --- Parties — Representative or class proceedings under class proceedings legislation — Orders, awards and related procedures — Order on common issues and individual issues

Defendants S Co., D Co. and H Corp. manufactured material used in plumbing and heating systems in homes — Pipes and fittings made from material developed leaks — Homeowners commenced action for negligent design, failure to warn, misrepresentation and breach of warranty — Proposed representative plaintiffs brought motion for certification of action under Class Proceedings Act and for approval of D Co.'s settlement offer — Motion granted in part — Settlement approved — Bar order was granted which limited D Co.'s exposure to further claims arising from subject matter of action — Bar only applied to persons who were part of proposed settlement class at time of settlement and did not operate with respect to claims by individual plaintiffs who opted out of settlement — Liability of S Co. and H Corp. was not capped, as impact of settlement on remaining claims to be determined by trial judge — Class Proceedings Act, 1992, S.O. 1992, c. 6.

Practice --- Parties — Representative or class proceedings under class proceedings legislation — Costs, fees and disbursements — Court approval of agreement for payment of fees and disbursements

Defendants S Co., D Co. and H Corp. manufactured material used in plumbing and heating systems in homes — Pipes and fittings made from material developed leaks — Homeowners commenced action for negligent design, failure to warn, misrepresentation and breach of warranty — Proposed representative plaintiffs brought motion for certification of action under Class Proceedings Act and for approval of D Co.'s settlement offer — Motion granted in part — Proposed settlement of all-inclusive class counsel fees of $4.5 million was not approved — Issue arose regarding jurisdiction of court to approve fees for solicitors outside province — Approval of lump sum fee to be divided by class counsel was not correct approach and counsel ought to have determined what fees were owned to each group for comparison against contribution to overall prosecution of litigation — Class Proceedings Act, 1992, S.O. 1992, c. 6.

Table of Authorities

Cases considered by *Nordheimer J.*:

Dabbs v. Sun Life Assurance Co. of Canada, 1998 CarswellOnt 5823 (Ont. Gen. Div.) — followed

Knowles v. Wyeth-Ayerst Canada Inc., 2001 CarswellOnt 2550, 16 C.P.C. (5th) 343 (Ont. S.C.J.) — considered

Nucorp Energy Securities Litigation, Re (1987), 661 F. Supp. 1403 (U.S. S.D. Cal.) — considered

Ontario New Home Warranty Program v. Chevron Chemical Co., 1999 CarswellOnt 1851, 46 O.R. (3d) 130, 37 C.P.C. (4th) 175 (Ont. S.C.J.) — followed

Sparling v. Southam Inc., 41 B.L.R. 22, 66 O.R. (2d) 225, 1988 CarswellOnt 121 (Ont. H.C.) — considered

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — referred to

s. 5 — referred to

s. 29(2) — referred to

s. 32(2) — considered

s. 32(4) — referred to

MOTION by plaintiff homeowners to certify action in negligence as class proceeding and to approve settlement under *Class Proceedings Act*.

***Nordheimer J.*:**

1 Three representative plaintiffs (Paul Berthelot, Dale Elliott and Ross Baptist) move to certify this action as a class proceeding and to approve a settlement under the *Class Proceedings Act, 1992*, S.O. 1992, c.6 with respect to the plaintiffs' claims against the defendant, E.I. Du Pont De Nemours and Company. For the purposes of this motion, Ross Baptist was added as a representative plaintiff.

2 This case is somewhat unusual because the motion to grant certification and approve the settlement follows my decision on July 9, 2002 in which I denied certification of this action as a class proceeding with respect to the plaintiffs' claims against the other two defendants. That decision is currently under appeal.

3 The claims asserted in this action arise out of alleged defects in two products, polybutylene plumbing pipe and acetal insert fittings. The plaintiffs allege that fittings made from acetal resin, supplied by the defendants, Hoechst Celanese Corporation and E.I. Du Pont De Nemours and Company, and pipe made from polybutylene resin, supplied by the defendant, Shell Oil Company, are unsuitable for use in potable water plumbing systems. The plaintiffs allege that if such fittings and piping are used in potable water plumbing systems, they will fail prematurely leading to leaks and damages consequent on such leaks. The plaintiffs assert causes of action including negligent design, failure to warn, misrepresentation and breach of warranty.

4 In the proposed settlement, DuPont agrees to make payments to Canadian homeowners with polybutylene plumbing and heating systems from a fund of up to $30 million. The terms and conditions are set out in a settlement agreement entered into between Class Counsel and DuPont on February 13, 2002 and amended on March 15, 2002. Pursuant to the proposed settlement, settlement class members will be deemed to have released DuPont from all claims against it arising from polybutylene plumbing and heating systems, but will retain their rights to pursue their claims against the non-settling defendants, Shell and Celanese. On the basis of "bar order" language agreed upon by Class Counsel and DuPont, cross-claims, third party claims and all claims for contribution and indemnity are to be barred against DuPont. As a consequence of the bar order, settlement class members will be restricted to making "several" claims only against Shell and Celanese.

5 The proposed settlement was reached after Class Counsel had conducted a significant amount of investigation. As part of the investigation, Class Counsel retained expert witnesses, interviewed dozens of installers and plumbers, examined the plumbing in many structures, arranged for scientific analysis on failed plumbing parts and interviewed hundreds of other witnesses and class members throughout Canada. In addition, Class Counsel reviewed hundreds of documents that were produced in the course of litigation which has been ongoing for many years in the United States over these issues.

6 Class counsel say that these investigations and research, including the plaintiffs' involvement earlier in these proceedings regarding motions brought by the defendants disputing the jurisdiction of this court, as well as the plaintiffs' preparation for the substantive litigation, enabled them to negotiate a Settlement Agreement that they are confident is fair, reasonable and in the best interests of the class. It is not disputed that the parties entered into the proposed settlement after months of arm's length negotiations. It should also be noted that the negotiation of the fees to be paid to Class Counsel took place after the other terms of the proposed settlement had already been agreed upon by Class Counsel and DuPont.

7 Class counsel advise that the settlement discussions were guided by many factors including: discussions with homeowners with PB plumbing and/or heating systems, an analysis of the facts and law applicable to the claims of the settlement class, a consideration of the burdens and expense of litigation, including the risks and uncertainties associated with certification, trials

and appeals, a consideration of a fair and cost-effective method of resolving the claims of the settlement class and a consideration of other settlements in Canada and the United States.

8 While it is the plaintiffs' position that this litigation has merit, in evaluating settlement options, Class Counsel have understandably assessed the risks associated with the litigation. Those risks include various risks that are necessarily associated with this type of litigation including procedural risks related to certification, risks associated with complex scientific evidence and the assertion of some novel causes of action. In addition, there is the ever present reality that even if the plaintiffs are successful on each and every material issue in the litigation, appeals by the defendants could significantly delay a resolution for many years. In this case, the procedural risks relative to certification are obvious given my decision, at first instance, to deny certification against the other two defendants.

9 There are companion proposed class proceedings ongoing in British Columbia and Quebec. This proposed settlement applies to all three actions and requires the approval of the courts in all three Provinces. Hearings seeking approval of the proposed settlement are scheduled to take place in British Columbia on November 7, 2002 and in Quebec on November 19, 2002.

10 The proposed definition of the settlement class, subject to certain exclusions as set out in the Settlement Agreement, is as follows:

> All persons and entities (1) who own or who previously owned or will own any improvements to real property to structures in Ontario and any of the Canadian provinces or territories other than British Columbia or Quebec, in which there is or was during the time of such ownership, a polybutylene plumbing system with acetal insert fittings, and/or (2) who own or who previously owned or will own any improvements to real property or structures in Ontario and any of the Canadian provinces or territories other than British Columbia, in which there is or was during the time of such ownership a polybutylene heating system with acetal insert fittings.

11 The settlement class will consist of the following subclasses:

> (i) All persons and entities resident in Ontario, or with a right to recover in Ontario, as a result of ownership of a unit with a polybutylene plumbing system with acetal insert fittings in Ontario;
>
> (ii) All persons and entities resident in provinces and territories other than Ontario, Quebec or British Columbia, or with a right to recover in provinces or territories other than Ontario, Quebec or British Columbia, as a result of ownership of a unit with a polybutylene plumbing system with acetal insert fittings in provinces or territories other than Ontario, Quebec or British Columbia; and
>
> (iii) All persons and entities resident in provinces or territories other than British Columbia, or with a right to recover in provinces or territories other than British Columbia, as a result of ownership of a unit with a polybutylene heating system with acetal insert fittings in provinces or territories other than British Columbia.

12 Reduced to its basics, therefore, a person is a member of the settlement class if they own, have owned, or will own property that contains or has contained a polybutylene plumbing or heating system with acetal insert fittings. Polybutylene pipe is identifiable because it is usually grey plastic. Insert fittings are distinguishable from non-insert fittings by their mechanical structure (i.e. the fitting is inserted into the inside of the pipe). Acetal insert fittings are usually grey plastic and held in place with a metal crimp ring on the outside of the pipe. The fittings may carry the following markings: bow, Q, SG, W or A/I.

13 A website has been set up as part of the settlement process. It contains photographs of components of polybutylene plumbing and heating systems which were posted in conjunction with the notice of the proposed settlement. Copies of the photographs can also be obtained through a toll-free number. In addition, if the settlement is approved, inspectors will be available, if necessary, to assist in determining if a property has a polybutylene plumbing or heating system.

14 Pursuant to the proposed settlement, DuPont has agreed to the following:

(a) DuPont will pay 25% of the reasonable cost of a replumb of a polybutylene plumbing system with acetal insert fittings provided that such replumb has been completed within 15 years of the installation of the unit's polybutylene plumbing system;

(b) DuPont will pay 25% of the actual cost of repair of physical damage to tangible property caused by a leak in a polybutylene plumbing system with acetal insert fittings occurring within 15 years of its installation (to the extent not reimbursed by insurance), provided a replumb of the property unit has been completed;

(c) DuPont will pay $200 of the cost of repair of a polybutylene heating system with acetal insert fittings, provided that all acetal insert fittings in such system are replaced within 15 years of installation of the unit's polybutylene heating system; and

(d) DuPont will pay the expenses of maintaining a claims processing facility to administer the settlement.

15 It is proposed under the settlement that no property owner with the subject plumbing and/or heating will be excluded due to limitations issues. Provided a Settlement Class member's replumb of a polybutylene plumbing system or replacement of a polybutylene heating system occurs within one year from the date of notice of final Court approval, DuPont will make payments to those Settlement Class Members even if the polybutylene plumbing and heating systems were installed more than 15 years before the settlement.

16 Other features of the proposed settlement are that it does not require class members to:

(a) distinguish between acetal insert fittings manufactured with Delrin versus those manufactured with Celcon;

(b) establish any liability against DuPont or any other entity; or

(c) establish any failure or leak in the polybutylene plumbing or heating system.

17 DuPont has also agreed to:

(a) Pay solicitors' fees and expenses to Class Counsel of $4.5 million, subject to Court approval, which fees and expenses are in addition to the other funding; and

(b) Fund a notice campaign informing prospective Class Members of the approval of the settlement, the claims process and their opt out rights.

18 DuPont and Class Counsel have agreed that settlement class members will be deemed to have released all claims against DuPont arising from their polybutylene plumbing and heating systems but will retain their claims against the non-settling defendants, Shell and Celanese. Settlement class members will also be deemed to have assigned to DuPont all claims against any entity that manufactured component parts of the systems, except for their rights against Shell and Celanese, and to have waived subrogation against DuPont for future losses to the extent allowed by applicable insurance policies.

19 Crossclaims, third party claims, and all claims for contribution and indemnity are to be barred against DuPont, on the basis of the following language proposed jointly by Class Counsel and DuPont:

THIS COURT ORDERS that all claims for contribution, indemnity, or other claims over, whether asserted or unasserted or asserted in a representative capacity, inclusive of interest, GST and costs, relating to polybutylene plumbing and heating systems, including (but not limited to) all claims for or in respect of the subject matter of the Class Actions, by any Non-Settling Defendant or any other person or party, against the Settling Defendant, are barred, prohibited and enjoined in accordance with the following terms:

(a) The Plaintiffs shall not make joint and several claims against the Non-Settling Defendants but shall restrict their claims to several claims against each of the Non-Settling Defendants such that the Plaintiffs shall be entitled to receive only those damages proven to have been caused solely by each of the Non-Settling Defendants;

(b) The Non-Settling Defendants may obtain an Order providing for discovery from the Settling Defendant as deemed appropriate by the Court; and

(c) Except as otherwise provided herein, nothing in this Judgment shall prejudice or in any way interfere with the rights of the Settlement Class Members to pursue all of their other rights and remedies against the Non-Settling Defendants.

20 Notice of the hearing to approve the settlement was placed in Canadian newspapers and other media in accordance with the Plan of Notice approved by the Courts of British Columbia, Ontario and Quebec. The notice was also posted on a website, and made available at a specified toll-free number. The notice required that any objections to the proposed settlement were to be received by Class Counsel on or before September 20, 2002. No objections were, in fact, received.

21 Under the proposed settlement, there is a claims administration process. It has been designed such that class members can prepare their claims easily and then have those claims processed fairly and efficiently. The Canadian Polybutylene Claims Facility ("CPCF") is managed by the UAB Group Ltd., which is a company related to the claims administrator for one of the settlements of polybutylene litigation which has occurred in the United States. Claims have been managed in that settlement for years, and the CPCF will use a similar process.

22 The CPCF will provide information regarding the settlement and manage the process for opting out or making a claim through the website, the toll-free number and direct mail. All communications will be available in English and French. The CPCF will preserve all claim information, documentation and polybutylene system components received in the event they are required in any further proceedings involving these or other parties.

23 It is submitted that there are other benefits which accrue to the Settlement Class members from the proposed settlement. For instance, no settlement class member will be required to hire his or her own lawyer, be cross-examined, attend at examinations for discovery, or appear at a trial. Thus it is said that the Settlement Agreement generates efficiencies not only for the settlement class as a whole, but also for each of the settlement class members individually.

24 I earlier mentioned that no objections have been received to the proposed settlement. Since notice of this hearing was published, Class Counsel advise that they have communicated with hundreds of potential class members throughout Canada. In addition, the CPCF has received over 350 phone calls and over 3,470 "hits" on their website from potential class members. It is reported that the response from potential Settlement Class members has been overwhelmingly positive. Further, the three proposed representative plaintiffs have reviewed the Settlement Agreement and discussed its terms with Class Counsel. All three representative plaintiffs agree with the proposed settlement and have instructed Class Counsel to seek its approval.

25 The Notice Plan provides for comprehensive coverage of the settlement, if approved. The notice program will involve publication in two national newspapers, 52 other newspapers in ten provinces and two territories, two national magazines and two provincial magazines. A press release will be distributed through the Canadian wire service. In addition, a website and dedicated toll-free telephone number have been established. The costs associated with the Notice Plan will be paid by DuPont pursuant to the terms of the Settlement Agreement.

26 Any class member who is not satisfied with the terms of the settlement, and wishes to individually pursue his or her claim against DuPont, may opt out of the settlement. The proposed opt out period is 90 days following the first publication of Notice of court approval of the Settlement Agreement. A person can opt out by completing an opt out form which they will return to the CPCF by mail on or before the deadline. The opt out procedure is clearly described in the Notice.

Analysis

Should the action be certified as a class proceeding?

27 The first issue is whether this action should be certified as a class proceeding for the purposes of the proposed settlement. The requirements for certification in a settlement context are the same as they are in a litigation context and are set out in section 5 of the *Class Proceedings Act, 1992*. However, their application need not, in my view, be as rigorously applied in the settlement context as they should be in the litigation context, principally because the underlying concerns over the manageability of the ongoing proceeding are removed.

28 In my earlier decision on certification, I found that there were properly pleaded causes of action and that conclusion remains true on this motion. In my earlier decision, I found, in essence, that there was an identifiable class regarding the plumbing pipe but not with respect to the inserts. The problem with the latter was the fact that visual inspection cannot necessarily determine whether a fitting is made of Celcon (Celanese's product) or Delrin (DuPont's product) or some other plastic material. That issue is eliminated in the proposed settlement as DuPont is prepared to reimburse settlement class members regardless of the actual manufacturer of the fitting. It is not necessary, therefore, for the settlement class members to identify the specific product in order to participate in the proposed settlement.

29 It is necessary for the insert to be an acetal insert for someone to qualify for participation in the settlement, but, as I earlier noted, pictures of acetal inserts will be provided to allow for that identification to take place. Counsel point out that insert fittings are easily distinguishable from non-insert fittings (such as compression fittings) by their mechanical structure (i.e. they go inside of the pipe rather than outside). Acetal fittings are also distinguishable from non-acetal fittings (e.g. copper) by the appearance of the material. The CPCF can also provide assistance to Settlement Class members if necessary.

30 I am satisfied, therefore, that there is an identifiable class.

31 The plaintiffs propose that the settlement class be certified on the basis of the following common issue:

> What claims does the DuPont Settlement Class have against DuPont USA arising from their ownership of real property or structures containing polybutylene plumbing or heating systems with acetal insert fittings?

I am satisfied that this constitutes a common issue for settlement purposes.

32 The Settlement Agreement provides a workable plan for the resolution of this common issue. DuPont has agreed to settle all claims against it on a nationwide basis with property owners who have, or had, polybutylene plumbing and/or heating systems with acetal insert fittings. Settlement Class members will not be required to establish any liability against DuPont or any other entity, nor will they be required to establish any failure or leak in the polybutylene plumbing or heating system. Furthermore, no Settlement Class member will be excluded due to the age of their plumbing and/or heating system so any problems surrounding limitations issues are avoided.

33 I am also satisfied that certification in this settlement context provides the preferable procedure for the resolution of this matter. The Settlement Agreement provides an efficient plan to expeditiously and inexpensively resolve the claims of the Settlement Class members against DuPont. The Settlement Agreement allows the Settlement Class members to resolve their claims against DuPont in a summary fashion.

34 Dale Elliott and Paul Berthelot are Ontario homeowners with polybutylene pipe and acetal insert fittings in their plumbing systems. They are proposed representatives of the Ontario plumbing sub-class. Ross Baptist is an Alberta homeowner with polybutylene pipe and acetal insert fittings in his plumbing and heating systems. He is the proposed representative of the extra-provincial plumbing and heating sub-classes. These three individuals constitute proper representative plaintiffs for the settlement class.

35 I am satisfied therefore that the action should be certified as a class proceeding for the purposes of settlement.

Should the settlement be approved?

36 By virtue of section 29(2) of the Act, class action settlements must be approved by the Court to be binding. Before turning to my consideration of the settlement itself, I wish to address an issue that arose in the approval hearing and that is the right, if any, of the non-settling defendants to make submissions regarding the adequacy of the settlement. In this regard I am not dealing with the issue of the proposed bar order. I will deal with that later as a separate issue and one on which there was no dispute that the non-settling defendants have a direct interest and a clear right to make submissions.

37 Counsel for Shell did not attempt to make any submissions beyond its concerns respecting the bar order but counsel for Celanese did. Celanese insists that it has the right to make such submissions on the basis that it is a party to the proceeding and therefore entitled to participate in all steps in the proceeding. In the alternative, Celanese submits that it has the right to make such submissions because it has a direct interest in the settlement. I do not accept that either of these grounds gives Celanese the right to make such submissions. Just because Celanese is a named party in the action does not, in and of itself, give Celanese the right to make submissions on a settlement between the plaintiff and another defendant. In any interlocutory proceeding, the right to make submissions is directly related to whether the party is affected by the relief being sought. By way of example, if the plaintiff and one defendant were disputing the propriety of questions asked at that defendant's examination for discovery, a co-defendant would not automatically have the right to make submissions on that motion. The co-defendant would have to show that its interests would be impacted by the decision on the questions before it would have the right to make submissions. Similarly, if there was a dispute as to whether a statement of claim disclosed a cause of action against one defendant, other defendants would not have the right to make submissions on that issue.

38 Aside from the bar order, I do not see how Celanese is affected by the fact that the plaintiffs and DuPont wish to resolve the issues that are outstanding between them. I appreciate that the proposed settlement impacts on products made by Celanese because DuPont is prepared to contribute to replumbs which involve either company's products. That fact, however, does not adversely affect Celanese. On the contrary, it may benefit Celanese insofar as settlement class members will have to account for any monies they receive from DuPont respecting problems which are, in fact, those of Celanese's making. Further, and as will become clearer when I deal with the bar order, the bar order, if approved, would further benefit Celanese by requiring settlement class members to make only several, as opposed to joint and several, claims against the non-settling defendants.

39 I also do not accept that Celanese has a direct interest in the settlement. Again putting aside the bar order, Celanese asserts it has a direct interest because the settlement may cause relevant evidence to be destroyed. In particular, Celanese complains that if a Settlement Class member undertakes a replumb and then continues with a claim against Celanese, evidence of the original installation and original parts may be lost. While this is, of course, true, I fail to see how that reality adversely affects Celanese. If evidence is lost or destroyed, it is a matter that redounds to the detriment of the plaintiffs not Celanese. If the plaintiff cannot adequately prove his or her case because the original parts are no longer available, or the particulars of the original installation cannot be established, the plaintiff is the one that suffers the consequences. In any event, the proposed settlement contains terms directed to this issue. It may be that those terms need to be strengthened or expanded. In that limited aspect, it may be that Celanese has some right to make input but that concern alone cannot justify the broad right of participation in this process for which Celanese contends.

40 Ultimately, the court can and must control its own process. The court ought to be wary of allowing parties, who are clearly adverse in interest to the plaintiffs, to weigh in on matters such as the settlement of claims involving other parties in the guise of "protecting" the plaintiff class. In my view, except for those narrow instances to which I have referred where the interests of non-settling defendants are clearly engaged, non-settling defendants have no general right to involve themselves in the approval of a settlement to which they are not parties. I find this to be the case whether the non-settling defendants are, or are not, named parties in the proceeding where the settlement is sought to be approved. The non-settling defendants here suggest that the approach is different where the non-settling defendants are actual parties to the litigation in which the settlement is reached. They contend that Mr. Justice Cumming so held in *Knowles v. Wyeth-Ayerst Canada Inc.* (2001), 16 C.P.C. (5th) 343 (Ont. S.C.J.). In my view, a fair reading of Mr. Justice Cumming's decision does not lead to that conclusion. While Mr. Justice Cumming did point out that the fact that Servier was not a party in that case raised further obstacles to its right to make submissions on the settlement, I cannot find anything in his decision which suggests that he would have been anymore favourably disposed towards Servier's participation had it, in fact, been a party to the proceeding.

41 Simply put, non-settling defendants have no standing to make submissions, as Celanese sought to do here, against the approval of the settlement on the basis that the settlement class members were not receiving enough under the settlement or that the settlement class members were unlikely to take up the settlement in sufficient numbers. If the court has any concerns in those respects regarding a proposed settlement, then the answer is for the court to appoint independent counsel to review the settlement and advise on such issues. To conclude otherwise would permit non-settling defendants to take on a role which fits neither comfortably nor properly on their shoulders given that the non-settling defendants' fundamental position is, after all, that the plaintiffs have no legitimate claim to advance in the first place.

42 In determining whether to approve a settlement the Court will consider whether the settlement is fair, reasonable and in the best interests of the class as a whole. In the leading case on class action settlements, *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Ont. Gen. Div.) Mr. Justice Sharpe approved the following list of considerations for the approval of a proposed settlement:

1. Likelihood of recovery, or likelihood of success

2. Amount and nature of discovery evidence

3. Settlement terms and conditions

4. Recommendation and experience of counsel

5. Future expense and likely duration of litigation

6. Recommendation of neutral parties if any

7. Number of objectors and nature of objections

8. The presence of good faith and the absence of collusion

43 Mr. Justice Sharpe also found helpful, as do I, the following judgment of Callaghan A.C.J.H.C. in *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (Ont. H.C.), at pp. 230-231:

> In approaching this matter, I believe it should be observed at the outset that the courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system.
>
> In deciding whether or not to approve a proposed settlement under s. 235(2) of the Act, the court must be satisfied that the proposal is fair and reasonable to all shareholders. In considering these matters, the court must recognize that settlements are by their very nature compromises, which need not and usually do not satisfy every single concern of all parties affected. Acceptable settlements may fall within a broad range of upper and lower limits.
>
> In cases such as this, it is not the court's function to substitute its judgment for that of the parties who negotiate the settlement. Nor is it the court's function to litigate the merits of the action. I would also state that it is not the function of the court [to] simply rubber-stamp the proposal.
>
> The court must consider the nature of the claims that were advanced in the action, the nature of the defences to those claims that were advanced in the pleadings, and the benefits accruing and lost to the parties as a result of the settlement.

44 It is not the function of the court in reviewing a settlement to reopen the settlement or to attempt to re-negotiate it in the hope of improving its terms. Simply put, the court must decide either to approve the settlement or to reject it. Similarly, in deciding whether to approve the settlement, the court must be wary of second-guessing the parties in terms of the settlement that they have reached. Just because the court might have approached the resolution from a different perspective, or might have

reached a resolution on a different basis, is not a reason to reject the proposed settlement unless the court is of the view that the settlement is inadequate or unfair or unreasonable.

45 In this particular case, I questioned the absence of any provision in the settlement which would allow members of the settlement class to be reimbursed for repairs alone without the requirement of undertaking a replumb. One of the reasons for not including such a provision was the parties' wish to have finality and not to be faced with a series of claims by the same Settlement Class member. While that issue could have been addressed in another way, for the court to insist on such a provision as part of the approval of the settlement would be to engage in the "arm chair quarterbacking" of the settlement which the court ought not to do. I also note that if any member of the proposed settlement class finds the absence of that, or any other, provision troublesome, he or she may opt out of the settlement.

46 Matching the proposed settlement against the factors from *Dabbs*, I would make the following observations:

> (a) This is a complicated action. The likelihood of recovery, or likelihood of success, is very much uncertain as, indeed, is the issue of whether certification itself is appropriate. This settlement provides a measure of certainty in the result for those members of the Settlement Class who wish to partake of it.
>
> (b) While there has yet to be any discovery in this case, voluminous materials are available to class counsel because of the many years of litigation that have occurred in the United States. The factual basis for the claims are therefore very well known nothwithstanding that this action itself has only just begun.
>
> (c) I find the settlement terms and conditions to be balanced and proper for the resolution as proposed.
>
> (d) The settlement is recommended by Class Counsel who are very experienced in the area of class proceedings.
>
> (e) The prosecution of these claims will involve significant future expense and the litigation itself will likely take a considerable period of time to get to trial.
>
> (f) While there are no recommendations from neutral parties, I would note in this regard that similar types of settlements have been approved in the United States.
>
> (g) There are no objectors to the proposed settlement.
>
> (h) The settlement was reached after prolonged arm's length negotiations involving very experienced counsel on both sides.

47 For all of these reasons, therefore, I am satisfied that the settlement is fair and reasonable and one which ought to be approved subject to the resolution of two remaining issues - the proposed bar order and the proposed fees payable to Class Counsel.

The proposed bar order

48 The jurisdiction of the court to grant a "bar order" and the considerations in so doing are extensively canvassed by Mr. Justice Winkler in *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (Ont. S.C.J.). I do not intend to repeat that analysis. Rather I shall simply express my agreement with it and with its conclusion that the court does have the jurisdiction to grant such orders in appropriate cases.

49 The bar order sought here is very much like the one that was before Winkler J. Subject to some specific concerns raised, I believe that it is an appropriate order to grant in this case. The practical reality is that no single defendant would agree to a settlement in this type of litigation without such a provision. This point was aptly made in *Nucorp Energy Securities Litigation, Re*, 661 F. Supp. 1403 (U.S. S.D. Cal. 1987) where District Court Judge Irving said, at p. 1404, that without the ability to obtain a bar order:

> ...partial settlement of any federal securities case before trial is, as a practical matter, impossible. Any single defendant who refuses to settle, for whatever reason, forces all other defendants to trial. Anyone foolish enough to settle without barring contribution is courting disaster. They are allowing the total damages from which their ultimate share will be derived to be determined in a trial where they are not even represented.

50 I now turn to the specific concerns raised regarding this proposed bar order. Those concerns are best expressed by Shell in its factum as follows:

> (a) its application is overbroad, as it will apply to claims which do not originate in proceedings governed by the settlement;
>
> (b) it fails to expressly cap the non-settling defendants' exposure to the Settlement Class, and;
>
> (c) it fails to provide any particular discovery rights in favour of the non-settling defendants against DuPont.

51 I accept the first concern as legitimate. However, I believe that this results from imperfection in the language used in the bar order as opposed to any attempt to be overly inclusive in its scope. The intention of the bar order is to preclude claims arising from the subject matter of the action. In other words, it is to be restricted to matters that are, or could have been, raised as part of that action. The bar order is not intended to, nor should it, go beyond those matters. Further, it should be made clear that the bar order does not operate with respect to any claims by anyone who opts out of the settlement, that is, the bar order applies only to the claims of the settlement class members.

52 There is also a concern in this regard that the terms of the settlement appear to bind future owners of polybutylene systems. The court has no ability to bind individuals who are not currently before it. The only people who can be bound are those that are currently covered by the class and those who may become subject to it during the opt out period. Again, counsel for the plaintiffs say that is all that was intended.

53 The second concern is not one which I believe should be addressed in the bar order. In essence the non-settling defendants want the court, as part of the bar order, to stipulate that the any recovery by each and every settlement class member has henceforth been reduced to 75% of what they would otherwise recover against the non-settling defendants. Put another way, the non-settling defendants want this court to rule that, regardless of whether any given settlement class member takes advantage of the settlement, they will be deemed to have received the benefits of the settlement.

54 I do not consider that to be a fair result. There may be any number of reasons why a settlement class member may not want to avail himself or herself of the settlement. One principal reason may be that the person does not wish to engage in a full replumb. In my view, the settlement class members should be free to make those choices. It is always open, at the trial of any of these claims, to the non-settling defendants to submit to the trial judge that a reduction in damages ought to be made as a consequence of this settlement, if it is ultimately approved and implemented. The plaintiffs can make their submissions as to whether that is appropriate in any given case. I do not believe that I should be foreclosing such submissions at this time. In this respect, this case is different than *Ontario New Home Warranty Program v. Chevron Chemical Co.*, *supra*, where it appears that there was an overall repair cost to which all defendants had arguably contributed and therefore had varying degrees of possible liability. The settlement payments in that case had to be accounted for against the overall damages figure. Here, there may be cases where the ultimate liability is solely that of one of the non-settling defendants. If the particular plaintiff in such a case has not received any benefit from this settlement, and if the decision not to take the benefits of this settlement was properly made by that plaintiff, then I do not see any reason why that plaintiff's damages should be impacted by the existence of this settlement. The bottom line is that there is the distinct possibility of very different factual situations arising with respect to the non-settling defendants and, therefore, the appropriate impact of the settlement on the claims remaining against them ought to be dealt with by the trial judge.

55 The third concern regarding discovery is also not one that should be dealt with at this time except to provide, as the current proposed bar order does, that the non-settling defendants retain their rights to seek discovery from DuPont if they can satisfy the court that such discovery is necessary. The non-settling defendants seek to alter the bar order so as to make DuPont

subject to an obligation to submit to documentary and oral discovery (including a positive obligation to deliver an affidavit of documents) unless DuPont can convince the court to order otherwise. I believe that suggestion places the onus on the wrong party. In light of the fact that the remaining claims can only be advanced if they are several claims against the non-settling defendants, it is not clear at this stage that information which DuPont has will have any relevance to those claims. Instead of placing the onus on DuPont in these circumstances to have to prove that it has no relevant information (in a situation where DuPont will not be involved in the claim and therefore will have a limited ability to demonstrate that fact), I consider it fairer to place the onus on the non-settling defendants to establish that such relevant information is in the possession of DuPont and that it ought to be produced.

56 Contrary to the submissions of the non-settling defendants, I do not read Mr. Justice Winkler's decision in *Ontario New Home Warranty Program v. Chevron Chemical Co.*, *supra*, as having granted the type of order which the non-settling defendants seek here. Rather, I read his decision as simply outlining the types of information that the non-settling defendants might be able to obtain "on motion to this court". If Mr. Justice Winkler had determined that such information had to be supplied by the settling defendants, then I fail to see why he would have included the proviso that a motion had to be brought to obtain it.

Summary

57 In the end result, I grant provisional approval to the proposed settlement, subject to the following concerns being addressed through amendments to the language of the settlement terms:

> (i) the settlement must include only those claims that are, or could have been, advanced in the action;
>
> (ii) the settlement must only apply to persons who are part of the proposed settlement class as at the time of the settlement, i.e., it does not apply to future owners of homes which may contain such systems;
>
> (iii) the only persons covered by the settlement are those who do not opt out of the settlement;
>
> (iv) the plan administrator will preserve all product received and will maintain and preserve all records created through the implementation of the settlement, and;
>
> (v) a proper caution or warning will be given to all settlement class members about the need to document existing installations prior to undertaking a replumb and to preserve all products removed as a consequence of the replumb.

58 I leave it to counsel to work out the necessary amendments to the terms of the settlement to ensure that these concerns are addressed. Once that has taken place, a further hearing should be held to make the approval of the settlement final.

Approval of the fees for class counsel

59 I turn to the final issue and that is the approval of the fees which DuPont has agreed to pay Class Counsel as part of the settlement. I am able to separate my consideration of this aspect of the overall settlement from my approval of the basic settlement itself due to the fact that Mr. Eizenga advised me that he was prepared to separate the approval of the settlement proper from the approval of the fees so that the settlement could proceed. In other words, counsel were prepared to "take their chances" on the fees issue in order to allow the settlement itself to move forward. I wish to commend plaintiff's counsel for the manifest fairness they demonstrate in taking that position.

60 Class Counsel's fees were resolved through a process of negotiations between the parties. Ultimately it was agreed that DuPont would pay fees and disbursements to Class Counsel in the total amount of $4.5 million inclusive of taxes. This amount includes the anticipated costs associated with the continued work required of Class Counsel as the implementation of the settlement proceeds. It bears repeating that the amount of the fees which DuPont has agreed to pay is over and above the amount set aside to address the claims of settlement class members.

61 Class Counsel, at some earlier point, entered into retainer agreements with the representative plaintiffs which provide that Class Counsel would pay all expenses associated with the litigation and would only be paid legal fees and be reimbursed

for disbursements and taxes in the event of success in the litigation. The agreements provided for payment on the basis of a contingency fee of 30% of the first $10 million, or any part thereof, of damages awarded, 20% of the second $10 million or any part thereof, and 10% of all additional amounts, plus disbursements and taxes. These retainer agreements have not, as yet, been approved by the court as required by section 32(2) of the *Class Proceedings Act, 1992* which states:

> An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.

If the court does not approve the retainer agreements, then the court is to determine the amount owing to the solicitors for fees and disbursements under section 32(4) of the Act. Co-counsel in British Columbia and Quebec were retained under comparable contingency terms.

62 In support of their request for approval of the amount to be paid under the settlement for fees and disbursements, Class Counsel point to the fact that the value of the Settlement Agreement would give rise, under the retainer agreements, to Class Counsel being entitled to legal fees of $6,050,000 plus disbursements and taxes. The $4,500,000 inclusive of disbursements and taxes which DuPont has agreed to pay is clearly below that amount. In fact, after taxes and disbursements, the fees that will be paid are $3,023,956 which is almost exactly one-half of the amount provided for in the retainer agreements.

63 Class Counsel also point to the fact that significant time has been expended by them in pursuing this litigation. To date, I am told that the time invested in the file by all co-counsel is approximately $3,098,928 including taxes valued at regular hourly rates. Further, Class Counsel funded all of the disbursements associated with advancing the claims and did not apply to the Class Proceedings Fund for assistance. I am told that disbursements in excess of $1,279,507 inclusive of taxes have been incurred to date.

64 Class Counsel also note that considerable work remains to be done by them respecting the settlement including:

(a) responding to questions from class members regarding the Settlement Agreement;

(b) assisting class members with the completion and submission of their claims;

(c) assisting class members with the appeals process where necessary;

(d) monitoring the quality of service of the CPCF;

(e) involvement in any other matters which may arise as the Settlement Agreement is implemented.

65 Finally, Class Counsel offer certain comparatives to justify the fees to be received. They say that the fees and disbursements and taxes to be paid amount to 14.75% of the total value of the settlement. Once disbursements and taxes are paid, the legal fees remaining will amount to only 9.5% of the total value of the settlement. Class Counsel are required to pay all disbursements before applying settlement monies to fees. In this case, as I noted above, after the payment of all disbursements and applicable taxes, approximately $3,023,956 of the $4,500,000 will remain to pay fees. This equates to a multiplier of approximately 1.04 on the total time expended to date on the litigation by Class Counsel (including co-counsel).

66 I raised with counsel at the hearing a few concerns. First, I questioned my jurisdiction to approve fees for solicitors outside the Province of Ontario. In other words, I am uncertain on what basis I would necessarily approve the fees of lawyers from British Columbia, Quebec and the United States. For one thing, assuming that I can claim some knowledge, as part of my experience in fixing the costs of proceedings generally in this court, regarding the prevailing rates for lawyers in Ontario as well as some general idea of the amount of time that certain matters consume in the process of being litigated in Ontario, I am clearly without that level of knowledge when it comes to other jurisdictions. I also question why this court is being asked to pass on the fees to be received by lawyers in British Columbia and Quebec when the courts of those Provinces must also give their approval to the settlement.

67 Second, even assuming that I should approve the fees of all counsel involved, I am being asked in this case to approve a lump sum or block fee which the various lawyers involved will subsequently divide up among themselves. I am not convinced that that is the appropriate approach. It seems to me that counsel ought to have decided already what each group of counsel involved is going to receive from the total fees so that I can, in turn, measure the amount which each counsel group is to receive against their contribution to the overall prosecution of the litigation.

68 Third, I also questioned the appropriateness of using time spent on the certification motion as a justification for the reasonableness of the fees to be received. DuPont did not participate in the certification motion. The certification motion only involved the non-settling defendants and it was unsuccessful - at least it was before me. Certification has not been argued in the other Provinces. I question whether the time spent in a losing endeavour can provide a justification for the fees arising from a separate settlement. I will leave that concern at this time, however, as I intend to return to the whole issue of the approval of the fees at a later date.

69 As may be apparent, I am not prepared to approve the fees sought at this time. I am therefore going to adjourn the motion insofar as it seeks the approval of the fees. That aspect of the motion may be brought back before me once counsel have addressed at least the second concern by agreeing on the distribution that is to be made among themselves of the fees which are sought to be approved. Before bringing the matter back, however, counsel ought to consider how to address the first concern. In that regard, counsel may wish to consider whether it is more appropriate to ask each of the courts, before whom approval must be sought, to only approve the fees for the lawyers in their specific Province. That route, however, raises other issues including which court should approve the fees being paid to U.S. counsel and what happens to any "surplus" created if a court reduces the fees for a particular group of counsel. Another alternative which counsel may wish to consider is whether some form of joint hearing by all three courts has to be held to address these issues.

70 On a final point, I suggest that any issue about the costs arising from this motion be addressed when the matter is brought back before the court for the final approval of the settlement. I will leave it up to counsel to determine if that final approval should await the approval hearings in Quebec and British Columbia in case further issues arise with respect to the basic settlement.

Motion granted in part.

End of Document

para. 97

Most Negative Treatment: Application/Notice of Appeal
Most Recent Application/Notice of Appeal: Doug C. Thompson Ltd. operating as Thompson Fuels v. Wayne Allan Gendron, et al. | 2019 CarswellOnt 12672 | (S.C.C., Jun 11, 2019)

2019 ONCA 293
Ontario Court of Appeal

Gendron v. Doug C. Thompson Ltd. (Thompson Fuels)

2019 CarswellOnt 5504, 2019 ONCA 293, 24 C.E.L.R. (4th) 179,
304 A.C.W.S. (3d) 94, 34 C.P.C. (8th) 144, 56 C.C.L.T. (4th) 33

Wayne Allan Gendron (Plaintiff / Respondent) and Doug C. Thompson Ltd. operating as Thompson Fuels, Technical Standards and Safety Authority, and Les Reservoirs D'Acier de Granby Inc. (Defendants / Appellant / Respondent)

Wayne Allan Gendron (Plaintiff / Appellant) and Doug C. Thompson Ltd. operating as Thompson Fuels, Technical Standards and Safety Authority, and Les Reservoirs D'Acier de Granby Inc. (Defendants / Respondents)

C.W. Hourigan, B.W. Miller, David M. Paciocco JJ.A.

Heard: February 5, 2019
Judgment: April 12, 2019
Docket: CA C64188, C64191

Proceedings: varying *Gendron v. Thompson Fuels* (2017), 2017 ONSC 4009, 2017 CarswellOnt 10909, 12 C.E.L.R. (4th) 237, R.E. Charney J. (Ont. S.C.J.); additional reasons at *Gendron v. Thompson Fuels* (2017), 17 C.P.C. (8th) 142, 2017 CarswellOnt 17923, 2017 ONSC 6856, R.E. Charney J. (Ont. S.C.J.); and additional reasons at *Gendron v. Thompson Fuels* (2018), 18 C.E.L.R. (4th) 178, 21 C.P.C. (8th) 321, 2018 CarswellOnt 4970, 2018 ONSC 2079, R.E. Charney J. (Ont. S.C.J.)

Counsel: Albert Wallrap, Daniel Cook, for Appellant, Thompson Fuels
Adam Grant, Michelle Legault, for Respondent, Technical Standards and Safety Authority
Martin Forget, Eric J. de Man, for Respondent, Wayne Allan Gendron

Subject: Civil Practice and Procedure; Environmental
Related Abridgment Classifications
Environmental law
II Liability for environmental harm
II.4 Negligence
Environmental law
III Statutory protection of environment
III.2 Approvals, licences and orders
III.2.e Liability
Remedies
I Damages
I.14 Valuation of damages
I.14.h Set-off
Headnote
Environmental law --- Liability for environmental harm — Negligence

Plaintiff home owner discovered furnace oil leaking from one of twinned basement fuel tanks after delivery by defendant fuel supplier — Plaintiff collected leaking oil for day before complaining to supplier, which led to report to administrative authority and ultimately discovery that hundreds of litres of oil leaked into soil, through drainage system and into lake — Remediation of spilled oil, which included demolition of plaintiff's house, cost almost $2 million — Plaintiff's action against supplier, administrative authority, and oil tank manufacturer was allowed in part — Trial judge found exclusion clause in supplier's service agreement did not apply to failure to perform obligations imposed by regulation as strict statutory duty on fuel distributors to conduct comprehensive inspection could not be contracted out of — Trial judge found authority's inspection and order did not fall below standard of care and, in any event, whether authority performed public function to protect safety and environment effectively or not did not establish private law duty to property owner where spill occurred — Trial judge found manufacturer was not negligent and met any duty to warn about risks of corrosion associated with improper installation of tanks — Trial judge found majority of responsibility for loss lay with plaintiff's series of actions that contributed to leak and increased damages — Trial judge found plaintiff was negligent in installation of tank, failure to maintain tank, and failure to promptly report leak and negligently introduced water into incident tank which could not have been foreseen by supplier undertaking strict monitoring for water contamination — Trial judge found supplier was negligent in failing to conduct legally required comprehensive inspection, shared responsibility with plaintiff for arrangement with single shut-off valve where each tank should have had one, and failed to tag out oil tank or test for water — Trial judge found plaintiff, who did not rely on supplier's expertise but believed he could handle things on his own, was 60 per cent at fault while supplier was 40 per cent at fault — Trial judge found remediation activities, including off-site activities and demolition of house, were not unnecessary — Trial judge found supplier did not establish that replacement cost of house qualified as betterment — Trial judge found damages for excavating, hauling and disposing of soil would be reduced by 50 per cent due to plaintiff's failure to prove that all excavated soil was contaminated — Plaintiff and defendants appealed — Plaintiff's appeal dismissed; T Ltd.'s appeal allowed in part — Leaking tank had been tested — Although there was no fuel gauge on leaking tank, there was opening at top of tank that could have been used to test for water — Industry standard applicable at relevant time required water testing of indoor tanks — Negligence was present in non-compliance with shut-off valve requirements, which caused or contributed to oil leak — Ample evidence to establish that T Ltd. frequently and flagrantly breached Regulation and thereby breached standard of care — Contract properly interpreted regarding exclusion clause — Open to trial judge to find that no comprehensive inspection occurred and T Ltd. failed to meet its regulatory obligation — No evidence tendered regarding standard of care of prudent inspector or reasonable time period for compliance with order — Contributory negligence and effect of settlement between parties were properly considered.

Environmental law --- Statutory protection of environment — Approvals, licences and orders — Liability

Furnace oil leaked from plaintiff home owner's fuel tank after delivery by defendant fuel supplier, contaminating soil and flowing through drainage system into lake — After plaintiff's insurance coverage was exhausted, Ministry of Environment ordered city to complete remediation — City issued order against plaintiff under Environmental Protection Act, requiring payment of portion of such remediation costs — Plaintiff's appeal to Environmental Review Tribunal was dismissed and he was ordered to pay more than $300,000 of city's costs — Plaintiff's action against defendants including supplier, seeking contribution and indemnity for such costs, was allowed in part — Trial judge found two year limitation period began to run when city issued its order under s. 100.1 of Act and not when appeal process had run its course — Trial judge found plaintiff's claim for contribution and indemnity against supplier arising from municipal order was properly pled in pleading within limitation period — Trial judge found plaintiff could only claim contribution and indemnity under Act against those persons falling within legislative definitions of "owner" and "person having control" of pollutant — Trial judge found plaintiff was sole owner of pollutant as ownership passed on delivery of fuel, regardless of when payment was processed by supplier — Trial judge found supplier had charge, management and control of oil while it was being delivered but not once oil was in tank — Trial judge found as supplier lost control of oil upon delivery, it did not have control "immediately" before first discharge and so claim for contribution and indemnity under Act could not succeed — Plaintiff and defendants appealed — Plaintiff's appeal dismissed; T Ltd.'s appeal allowed in part — Reasons were sound — Trial judge meticulously considered both evidence and legal issues — Reasons were logically coherent, thoughtful, and clearly stated and were 79 pages — Credibility findings were proper — Plaintiff became "owner" of oil upon delivery, rather than when payment for oil was processed, and so claim for contribution and indemnity under s. 100.1 of Environmental Protection Act failed.

Remedies --- Damages — Valuation of damages — Set-off

Home furnace fuel oil tank developed leak, which damaged plaintiff's home and adjacent environment including lake across from his house — Plaintiff's total damages were $2,161,570, judgment was granted in favour of plaintiff against defendant T Ltd., and liability was apportioned 60 percent to plaintiff and 40 percent to T Ltd. — City issued orders against plaintiff, T Ltd. and defendant authority pursuant to s. 100.1(1) of Environmental Protection Act requiring them to pay $471,691.44 to city for costs and expenses it incurred in cleaning up spill — Environmental review tribunal allowed plaintiff's appeal in part, and reduced order to $313,005.08 — Plaintiff was unsuccessful in claim for contribution and indemnity against defendants respecting s. 101.1 order — Plaintiff entered into settlement agreement with defendant manufacturer of oil tank — Defendant's motion for relief, including determination that it had right of set-off so its liability for damages would be reduced by amount paid by manufacturer to plaintiff was granted in part — Trial judge found double recovery by plaintiff should be avoided, which was not straightforward where plaintiff was found to be contributorily negligent — Trial judge found court was bound by methodology used by Court of Appeal, which inferred that principle of avoiding double recovery was based on damages caused by defendant without reference to plaintiff's contributory negligence — Trial judge found provided plaintiff did not recover more than total loss caused by defendant, without reference to plaintiff's contributory negligence, there was no double recovery — Trial judge found provided settlement proceeds were less than 60 percent of assessed loss, they were not credited to T Ltd., but any settlement proceeds above that amount were set-off against damages to be paid by T Ltd. — Plaintiff and defendants appealed — Plaintiff's appeal dismissed; T Ltd.'s appeal allowed in part — Apportionment of damages reached by trial judge was appropriate — By compensating plaintiff for repayment of line of credit, trial judge acted improperly — Plaintiff was placed in better position than he was in before, as prior to leak he owned home that was encumbered with line of credit, and currently he owned home of essentially same value that was not encumbered by line of credit — Damages reduced to deduct payment of line of credit.

Table of Authorities

Cases considered by *C.W. Hourigan J.A.*:

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Appleyard v. Earl (2009), 2009 CarswellOnt 5159, 90 C.L.R. (3d) 49 (Ont. S.C.J.) — considered

Ashcroft v. Dhaliwal (2008), 2008 BCCA 352, 2008 CarswellBC 1926, 59 C.C.L.T. (3d) 1, 59 C.P.C. (6th) 222, [2008] 11 W.W.R. 579, 83 B.C.L.R. (4th) 279, 298 D.L.R. (4th) 509, 259 B.C.A.C. 176, 436 W.A.C. 176 (B.C. C.A.) — referred to

Austin v. Raymark Industries, Inc. (1988), 841 F.2d 1184 (U.S. C.A. 1st Cir.) — considered

Bartels v. City of Williston (1979), 276 N.W.2d 113 (U.S. N.Da. S.C.) — referred to

Bedard (Next Friend of) v. Martyn (2010), 2010 ABCA 3, 2010 CarswellAlta 1, [2010] 3 W.W.R. 441, 17 Alta. L.R. (5th) 225, 81 C.P.C. (6th) 213, (sub nom. *Bedard v. Martyn)* 469 A.R. 322, (sub nom. *Bedard v. Martyn)* 470 W.A.C. 322, 316 D.L.R. (4th) 181 (Alta. C.A.) — considered

Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd. (1997), 1997 CarswellNfld 207, 1997 CarswellNfld 208, 153 D.L.R. (4th) 385, 221 N.R. 1, 158 Nfld. & P.E.I.R. 269, 490 A.P.R. 269, [1997] 3 S.C.R. 1210, 48 C.C.L.I. (2d) 1, 37 B.L.R. (2d) 1, 40 C.C.L.T. (2d) 235, 1999 A.M.C. 108 (S.C.C.) — referred to

Braun Estate v. Zenair Ltd. (1998), 1998 CarswellOnt 4479 (Ont. C.A.) — referred to

Brown v. Davis & McCauley Fuels Ltd. (2010), 2010 ONSC 4674, 2010 CarswellOnt 11123 (Ont. S.C.J.) — considered

Bruff-Murphy v. Gunawardena (2017), 2017 ONCA 502, 2017 CarswellOnt 9169, 7 C.P.C. (8th) 1, 14 M.V.R. (7th) 173, 414 D.L.R. (4th) 65, 138 O.R. (3d) 584 (Ont. C.A.) — distinguished

Canadian Natural Resources Limited v. Wood Group Mustang (Canada) Inc. (IMV Projects Inc.) (2018), 2018 ABCA 305, 2018 CarswellAlta 2079, 76 Alta. L.R. (6th) 1, [2018] 12 W.W.R. 626 (Alta. C.A.) — considered

Dovbush v. Mouzitchka (2016), 2016 ONCA 381, 2016 CarswellOnt 7937, 399 D.L.R. (4th) 69, 131 O.R. (3d) 474, 349 O.A.C. 383 (Ont. C.A.) — referred to

Hamilton v. Open Window Bakery Ltd. (2003), 2004 SCC 9, 2003 CarswellOnt 5591, 2003 CarswellOnt 5592, 40 B.L.R. (3d) 1, 235 D.L.R. (4th) 193, 316 N.R. 265, 184 O.A.C. 209, 2004 C.L.L.C. 210-025, 70 O.R. (3d) 255 (note), [2004] 1 S.C.R. 303, 70 O.R. (3d) 255, 2004 CSC 9 (S.C.C.) — referred to

Ingles v. Tutkaluk Construction Ltd. (2000), 2000 SCC 12, 2000 CarswellOnt 447, 2000 CarswellOnt 448, 46 O.R. (3d) 736 (headnote only), 183 D.L.R. (4th) 193, 8 M.P.L.R. (3d) 1, 49 C.C.L.T. (2d) 1, 251 N.R. 63, 1 C.L.R. (3d) 1, 130 O.A.C. 201, [2000] 1 S.C.R. 298, 46 O.R. (3d) 736 (note), 46 O.R. (3d) 736, 2000 CSC 12 (S.C.C.) — considered

Laudon v. Roberts (2009), 2009 ONCA 383, 2009 CarswellOnt 2377, 77 M.V.R. (5th) 165, 249 O.A.C. 72, 66 C.C.L.T. (3d) 207, 308 D.L.R. (4th) 422 (Ont. C.A.) — followed

McDermott Inc. v. AmClyde (1994), 114 S.Ct. 1461, 511 U.S. 202 (U.S. Sup. Ct.) — referred to

McDonough v. Van Eerden (1986), 650 F.Supp. 78 (U.S. Dist. Ct. E.D. Wis.) — referred to

Midwest Properties Ltd. v. Thordarson (2015), 2015 ONCA 819, 2015 CarswellOnt 18029, 96 C.E.L.R. (3d) 1, 24 C.C.L.T. (4th) 283, 128 O.R. (3d) 81, 392 D.L.R. (4th) 387, 341 O.A.C. 168 (Ont. C.A.) — considered

Pierringer v. Hoger (1963), 124 N.W.2d 106, 21 Wis. 2d 182 (U.S. Wis. S.C.) — considered

R. v. Sheppard (2002), 2002 SCC 26, 2002 CarswellNfld 74, 2002 CarswellNfld 75, 162 C.C.C. (3d) 298, 210 D.L.R. (4th) 608, 50 C.R. (5th) 68, 284 N.R. 342, 211 Nfld. & P.E.I.R. 50, 633 A.P.R. 50, [2002] 1 S.C.R. 869 (S.C.C.) — referred to

Rambaum v. Swisher (1989), 435 N.W.2d 19 (U.S. Minn. S.C.) — referred to

Ratych v. Bloomer (1990), 30 C.C.E.L. 161, [1990] 1 S.C.R. 940, 69 D.L.R. (4th) 25, 107 N.R. 335, 39 O.A.C. 103, 3 C.C.L.T. (2d) 1, 1990 CarswellOnt 644, 73 O.R. (2d) 448 (note), [1990] R.R.A. 651, 1990 CarswellOnt 995 (S.C.C.) — considered

Shantz v. Richview Inc. (1980), 311 N.W.2d 155 (U.S. Minn. S.C.) — referred to

Snushall v. Fulsang (2005), 2005 CarswellOnt 4578, 258 D.L.R. (4th) 425, 25 M.V.R. (5th) 180, 202 O.A.C. 297, 36 C.C.L.T. (3d) 63, 78 O.R. (3d) 142 (Ont. C.A.) — referred to

Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways) (2010), 2010 SCC 4, 2010 CarswellBC 296, 2010 CarswellBC 297, 100 B.C.L.R. (4th) 201, [2010] 3 W.W.R. 387, 86 C.L.R. (3d) 163, 65 B.L.R. (4th) 1, 397 N.R. 331, 315 D.L.R. (4th) 385, 281 B.C.A.C. 245, 475 W.A.C. 245, [2010] 1 S.C.R. 69 (S.C.C.) — considered

Treaty Group Inc. v. Drake International Inc. (2005), 2005 CarswellOnt 7057, 2006 C.L.L.C. 210-009, 36 C.C.L.T. (3d) 265, 15 B.L.R. (4th) 83, [2005] O.T.C. 1044 (Ont. S.C.J.) — referred to

Treaty Group Inc. v. Drake International Inc. (2007), 2007 ONCA 450, 2007 CarswellOnt 4018, 86 O.R. (3d) 366, 51 C.C.L.T. (3d) 5, (sub nom. *Leather Treaty v. Drake International Inc.)* 2007 C.L.L.C. 210-051, 227 O.A.C. 72 (Ont. C.A.) — referred to

Unigard Insurance Co. v. Insurance Co. of North America (1994), 516 N.W.2d 762, 184 Wis. 2d 78 (U.S. Wis. Ct. App.) — considered

Statutes considered:

Environmental Protection Act, R.S.O. 1990, c. E.19

Generally — referred to

s. 2 — considered

s. 92(1) — considered

s. 93 — considered

s. 100.1 [en. 2005, c. 12, s. 1(21)] — considered

s. 100.1(1) [en. 2005, c. 12, s. 1(21)] — considered

s. 100.1(6) [en. 2005, c. 12, s. 1(21)] — considered

Sale of Goods Act, R.S.O. 1990, c. S.1

s. 19, Rule 5 — considered

Technical Standards and Safety Act, 2000, S.O. 2000, c. 16

Generally — referred to

Rules considered:

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

R. 59.06(1) — referred to

Regulations considered:

Technical Standards and Safety Act, 2000, S.O. 2000, c. 16

Fuel Oil, O. Reg. 213/01

Generally — referred to

APPEALS from plaintiff and defendant T Ltd. from judgments reported at *Gendron v. Thompson Fuels* (2017), 2017 ONSC 4009, 2017 CarswellOnt 10909, 12 C.E.L.R. (4th) 237 (Ont. S.C.J.), *Gendron v. Thompson Fuels* (2017), 2017 ONSC 6856, 2017 CarswellOnt 17923, 17 C.P.C. (8th) 142 (Ont. S.C.J.), and *Gendron v. Thompson Fuels* (2018), 2018 ONSC 2079, 2018 CarswellOnt 4970, 18 C.E.L.R. (4th) 178, 21 C.P.C. (8th) 321 (Ont. S.C.J.), regarding action arising out of furnace oil leak.

***C.W. Hourigan J.A.*:**

I. Overview

1 On December 18, 2008, Thompson Fuels delivered 700 litres of fuel oil to two oil tanks located in the basement of a home owned by Wayne Gendron. Almost immediately oil began to leak from one of the tanks. Mr. Gendron discovered the leak approximately one hour after the oil was delivered and spent the night collecting it in Tupperware containers. He thought he had collected all of the leaking oil. He was incorrect.

2 Hundreds of litres of oil leaked and drained through a crack between the basement wall and the floor. From there, it drained under Mr. Gendron's house, where some of it remained and soaked into the soil. The rest of the oil made its way through a drainage system under the house and into the city's culvert, which carried it into nearby Sturgeon Lake.

3 Over the next several months, a massive remediation project was undertaken as a consequence of the leak. Nearly $2 million was spent on remediating both the contaminated land in the surrounding area and the damage to Sturgeon Lake. Mr. Gendron's house was demolished as part of the effort to remove contaminated soil.

4 Mr. Gendron sued in negligence against Thompson Fuels, his fuel supplier and service technician, the Technical Standards and Safety Authority (the "TSSA"), which is the administrative authority responsible for regulation and enforcement of fuels in Ontario, and Les Reservoirs D'Acier de Granby Inc. ("Granby"), the manufacturer of the oil tanks.

5 Granby settled with Mr. Gendron shortly after the trial began, signing a *Pierringer* agreement that, in return for Granby's settlement, released Granby from the action and removed the risk that co-defendants might have to pay Granby's share of damages if Granby could not do so. At the conclusion of a 27-day trial, the trial judge found that Thompson Fuels was negligent but that the TSSA was not. He also found that Mr. Gendron had been contributorily negligent and apportioned liability as follows: Mr. Gendron 60% at fault and Thompson Fuels 40% at fault. Thompson Fuels was ordered to pay Mr. Gendron $864,628 in damages and $465,000 in costs. Costs of the trial were also awarded to the TSSA in the amount of $150,000.

6 In a post-trial ruling on several motions, the trial judge held that Thompson Fuels did not have a right of set-off against the amount paid by Granby to Mr. Gendron under the *Pierringer* agreement. A second costs award arising out of the post-trial ruling was also made.

7 Thompson Fuels and Mr. Gendron have initiated separate appeals. Thompson Fuels has appealed from the trial decision, the post-trial ruling, and the costs awards. Mr. Gendron and the TSSA are respondents to this appeal. Mr. Gendron has appealed from the trial decision only. Thompson Fuels and the TSSA are respondents to that appeal. Granby has taken no part in the appellate proceedings. The two appeals were heard together.

8 These reasons explain why I would not substantively interfere with the decision of the trial judge. This was a complex case filled with complicated issues of liability, statutory interpretation, and damages. The trial judge provided thoughtful, detailed, and considered reasons supporting his judgment. They are a model of clarity and are substantively correct, except for a small adjustment I would make to the amount of damages awarded. I would otherwise dismiss both appeals.

II. Facts

9 In 2000, a furnace supplied by an underground outdoor oil tank heated Mr. Gendron's home. In the summer of 2000, Mr. Gendron, with the assistance of two casual labourers, removed the underground storage tank. In November 2000, Mr. Gendron purchased two new Granby aboveground indoor tanks.

10 Installation of oil tanks by a qualified oil burner technician ("OBT") was both the law and industry practice and standard in 2000. Only a person holding an OBT certificate was authorized to install aboveground oil tanks. Mr. Gendron did not have a qualified OBT install his oil tanks. Instead, he and a friend installed the tanks side-by-side in his basement even though they were not licenced to do so.

11 The oil tanks were installed very close to the exterior wall of the basement, approximately one half inch or less at various points due to irregularities in the insulation. The sides of the two tanks were also very close together, approximately one inch apart. These conditions made proper inspection of the tanks virtually impossible.

12 The two oil tanks were "twinned", meaning that they were joined by a two-inch transfer pipe that had a T connection leading to the furnace. One tank would be filled and the oil would flow from that tank through the transfer pipe to the other tank, so that an equal amount of oil would end up in both tanks. Mr. Gendron did not install a shut-off valve for each oil tank.

13 In November 2001, Thompson Fuels became Mr. Gendron's fuel supplier. The back of the Customer Service Agreement signed by Mr. Gendron included terms excluding Thompson Fuels from liability for inspection and maintenance of the oil tanks and for injury or damage to any person or property resulting from the existence, operation, or non-operation of any oil-burning installation at the property.

14 On June 27, 2001, the Ontario government enacted *Fuel Oil*, O. Reg. 213/01 (the "Regulation"), which prohibited fuel oil distributors like Thompson Fuels from supplying fuel oil to a tank unless the distributor had inspected the furnace and fuel oil tanks and was satisfied that their installation and use complied with the Regulation. The Regulation further stipulated that if the state of repair, mode of operation, or operating environment of the oil tanks did not meet the requirements of the Regulation, this would constitute an "unacceptable condition". If the unacceptable condition posed an immediate hazard, the distributor would be obliged to immediately shut-off the system (referred to as "tagging-out") and cease supplying fuel oil to the tank. In absence of an immediate hazard, the tanks would have to be tagged out at the conclusion of a notice period not to exceed 90 days.

15 In 2001, the TSSA standards required that at least once per year all fuel oil tanks had to be inspected for leaks. The TSSA later announced in 2002 that distributors would have to conduct a "basic inspection" by May 1, 2004, and a "comprehensive inspection" by May 1, 2007.

16 On February 27, 2002, Thompson Fuels sent an OBT to Mr. Gendron's home to investigate a no-heat problem. That technician did not testify at trial. His invoice indicated that he was there for three hours, but it did not specify that any inspection took place. At trial, Thompson Fuels claimed a comprehensive inspection was performed on this visit, but was unable to locate an inspection report for that date despite the requirement to retain such a report.

17 Thompson Fuels conducted additional service calls at Mr. Gendron's home on October 25, 2006, January 22, 2007, February 19, 2007, and November 8, 2007. The invoices for those service calls all indicated that the last inspection occurred on February 27, 2002. Therefore, no inspections were conducted during those service calls. There was no evidence that testing for the presence of water in the tanks was ever performed by any of the Thompson Fuels OBTs who conducted the four service calls in 2006 and 2007.

18 At approximately 4:15 p.m. on December 18, 2008, Thompson Fuels delivered 700 litres of fuel oil to Mr. Gendron's home. As mentioned above, shortly thereafter one of the tanks began to leak. Mr. Gendron arrived home from work about one hour after the oil was delivered and smelled oil coming from his basement. He went downstairs and observed oil on the basement floor. He examined the tanks to find the source of the leak, but could not find any holes. In order to better examine the leaking tank he cut a hole in the wall on the far side of the tank. He saw that oil was leaking, apparently coming from the

end of the tank against the external insulated wall. However, he could not see the hole because the end of the tank was tight against the insulation. Mr. Gendron collected the leaking oil and filled seven jerry cans of 25 litres each.

19 The cause of the leak was internal corrosion, referred to as Microbiologically Influenced Corrosion ("MIC"), caused by the build-up of water and sludge inside the incident tank, which, combined with microbes, resulted in the production of sulphur and organic acids within the tank. These acids lead to corrosion from the inside, which resulted in perforation of the tank. The evidence showed that once corrosion begins it progresses at a rate of 2 — 10 mm per year. Mr. Gendron's leaking tank was only 2 mm thick, meaning that the perforation in the tank could possibly have taken one year or less.

20 Some of the water in the tank was the result of condensation. Mr. Gendron did not keep his tank full, which would increase the amount of condensation that accumulated in the tanks. However, condensation was not the only source for the accumulation of water in the leaking tank. There was evidence that Mr. Gendron likely introduced water and microbes into the leaking tank when he filled the tanks with less expensive stove oil, either because the water and microbes were in the stove oil or because they were in the jerry cans he used to fill the tanks.

21 Except for the small amount of oil on the basement floor (which he cleaned up with a rag), Mr. Gendron thought that he had succeeded in collecting all of the oil in the tanks by the early morning hours of December 19, 2008. He went to sleep and called Thompson Fuels at approximately 3:00 p.m. that afternoon. There was evidence that it would have taken approximately 6 hours for the first 500 litres of fuel oil to leak from the tank. During the first hour, 110 litres would have leaked out. As a result, most of the oil likely leaked out while Mr. Gendron was attempting to manage the leak using Tupperware containers.

22 When Mr. Gendron called Thompson Fuels, he did not call to report the leak, but to complain that Thompson Fuels had not delivered the full 700 litres of oil he had ordered. He believed that he had mopped up or collected all of the oil that had leaked from the tank, and this could not possibly have amounted to 700 litres. He was irate because he was being charged for 700 litres of furnace oil that he believed had not been delivered.

23 Thompson Fuels immediately sent a service technician to Mr. Gendron's house to inspect the leak. The technician calculated that approximately 600 litres of fuel oil had leaked. He advised Mr. Gendron that he was required to report the spill to the Ministry of Environment (the "MOE") Spills Action Centre. Mr. Gendron did not do so. Thompson Fuels called the Spills Action Centre to report the leak at 4:22 p.m. and advised them that the house fronted on to Sturgeon Lake. The Spills Action Centre called Mr. Gendron at 4:37 p.m. to ask about the leak. It told him that they would write a report to forward to the TSSA, but that they did not know when the TSSA would investigate.

24 The report was sent to the TSSA technical desk and to the MOE. A fuel safety inspector first reviewed the report on December 22, 2008. After a visual inspection conducted the same day, the TSSA inspector estimated that approximately 450 litres of oil had leaked from the tank and had likely migrated through a gap where the concrete floor met the foundation wall. He looked around outside but did not see any oil and did not ask Mr. Gendron any questions about drainage on the property. Mr. Gendron did not inform him that there was a drainage pipe running around the foundation of the home that emptied into the city culvert.

25 The TSSA inspector prepared a TSSA Order on December 24, 2008. The order required Mr. Gendron to obtain a professional assessment report "that delineates the full extent of all petroleum impacts to both soil and groundwater" within 120 days. The order did not explicitly require Mr. Gendron to perform remediation.

26 Mr. Gendron reported the matter to his insurer on December 29, 2008. The insurer retained an independent adjuster and remediation contractor, DL Services ("DLS"). DLS noted that the furnace oil had entered the storm drain and culvert and from there entered Sturgeon Lake. On December 30, 2008, DLS notified the MOE that oil had entered Sturgeon Lake. The MOE ordered Mr. Gendron to undertake remediation. DLS carried out the remediation until May 6, 2009, when Mr. Gendron's off-site insurance coverage was exhausted. The cost of the off-site remediation ultimately reached $1,833,848.85.

27 DLS also carried out on-site remediation at Mr. Gendron's property. Based on the recommendation of a structural engineer that it would not be structurally sound to provide temporary support to Mr. Gendron's home during the excavation

of contaminated soil under the basement floor, the home was demolished on May 12, 2009. A total of 1,558.49 tonnes of contaminated soil was removed. On-site remediation lasted until July 20, 2009.

28 When Mr. Gendron's insurance coverage was exhausted, the MOE ordered the City of Kawartha Lakes ("the City") to complete the remediation. On June 15, 2010, the City used its powers under s. 100.1 of the *Environmental Protection Act*, R.S.O. 1990, c. E 19 (the "*EPA*") to order compensation from Mr. Gendron, the TSSA, and Thompson Fuels. The s. 100.1 order required them to pay $471,691.44 to the City for its costs and expenses incurred in cleaning up the leak.

29 Mr. Gendron, the TSSA, and Thompson Fuels each appealed the order to the Environmental Review Tribunal ("ERT"). The appeals by the TSSA and Thompson Fuels were withdrawn following a settlement with the City, and only the appeal by Mr. Gendron proceeded to hearing. On June 30, 2016, the ERT allowed Mr. Gendron's appeal in part and reduced the s. 100.1 order to $313,005.08.

30 Mr. Gendron sued Thompson Fuels on July 15, 2009. The claim was amended on November 9, 2010 to add the TSSA and Granby as defendants. He sought $2 million in damages and alleged that each defendant had acted negligently. On November 7, 2016, the trial judge heard a motion by Mr. Gendron to amend his claim to add a claim for $313,005.08 for contribution and indemnity against the defendants in accordance with s. 100.1(6) of the *EPA*. That provision permits a party that is the subject of a s. 100.1 order to claim contribution and indemnity against another person who could properly have been subject to a s. 100.1 order. The motion was granted.

III. Decisions Below

(i) Trial Judgment

31 The trial judge found that Thompson Fuels breached its duty of care by failing to perform a comprehensive inspection of Mr. Gendron's fuel oil tanks prior to May 1, 2007 and by failing to test the tanks for water during its service calls in 2006 and 2007. He also found that when Thompson Fuels performed its service calls in 2006 or 2007 it should have tagged-out Mr. Gendron's tanks because it was not possible to inspect the non-outlet end of the tanks, and this constituted a non-immediate hazard that had to be corrected before Thompson Fuels could deliver fuel. The trial judge rejected Thompson Fuels' argument that the exclusion clauses in the Customer Services Agreement signed by Mr. Gendron exclude liability on its part.

32 With respect to the TSSA's liability, the trial judge found that when the inspector conducted the inspection on December 22, 2008, he owed Mr. Gendron a *prima facie* duty of care to conduct the inspection with reasonable care. But the trial judge noted that he was provided no evidence of the standard of care required of a TSSA inspector. Therefore, he could not find that either the TSSA inspection or the subsequent delineation order fell below the standard of care. The trial judge also rejected Mr. Gendron's claim that the TSSA was negligent by breaching its duty under a Memorandum of Understanding between the TSSA and the MOE (the "MOU"), and by failing to advise Mr. Gendron to contact his insurer.

33 As noted, Granby settled with Mr. Gendron shortly after the trial began. Nevertheless, since Thompson Fuels was only to be held liable for its proportionate share of the damages, the trial judge assessed Granby's share of liability. On the basis of the industry standards that existed in Canada when Granby manufactured Mr. Gendron's tanks in 1999, the trial judge found that Granby was not negligent in the manufacture of the leaking tank and did not, at that time, know of the risk of corrosion. With respect to whether Granby had a duty to warn consumers about the risk of corrosion, the trial judge held that since Granby only sold to wholesalers, Granby would only have had a duty to warn fuel distributors and installers, which it did through education seminars and guidelines it published. He therefore dismissed the claim against Granby.

34 With respect to contributory negligence, the trial judge accepted that Mr. Gendron was negligent by reason of the improper installation of the fuel oil tanks, failure to maintain the tanks by having them inspected annually, improper introduction of water into the tanks, and failure to promptly report the leak.

35 On the issue of quantum of damages, the trial judge concluded that DLS had, by and large, acted reasonably and that its remediation actions were not unnecessary as the defendants claimed. There was one exception. DLS charged a 16% for

administration and overhead amounts on all of their costs. The trial judge held that for work performed by DLS, as opposed to an independent contractor, this amounted to double billing. He therefore reduced the damages payable by Thompson Fuels to reflect the 16% administrative fee added to work performed by DLS. He rejected the argument that DLS could have surgically removed the contaminated soil under the basement floor instead of demolishing Mr. Gendron's home, but did reduce the amount claimed for the replacement cost to rebuild the home from $545,244.25 to $476,594.25.

36 The trial judge accepted the argument that DLS failed to delineate fresh fuel oil from historical contamination or to properly delineate the extent of contamination when excavating the soil in and around the home. As a result, he found that an excessive amount of soil was excavated. Accordingly, he reduced the damages attributable to excavating, hauling, and disposing of this contaminated soil by 50%.

37 With regard to Mr. Gendron's s. 100.1(6) *EPA* claim for contribution and indemnity, the trial judge rejected the argument that the claim was statute-barred. However, he concluded that Mr. Gendron could not bring a s. 100.1 claim for contribution and indemnity against Thompson Fuels because it was not an owner or person having control of the pollutant within the meaning of s. 100.1(1) of the *EPA*.

(ii) Post-Trial Ruling

38 Following trial, the parties appeared before the trial judge to address three issues: (1) whether Thompson Fuels has a right of set-off so that its liability for damages would be reduced by the amount paid by Granby to Mr. Gendron pursuant to their partial settlement agreement; (2) Mr. Gendron's r. 59.06(1) motion to vary the judgment; and (3) Thompson Fuels' r. 59.06(1) motion to vary the judgment. Both r. 59.06(1) motions were dismissed.

39 With regard to the set off argument, the trial judge found that the result was dictated by this court's decision in *Laudon v. Roberts*, 2009 ONCA 383, 249 O.A.C. 72 (Ont. C.A.), and held there was no right of set off because Mr. Gendron would not receive double recovery.

IV. Issues

40 The issues raised in these appeals and my conclusion on each issue may be summarized as follows:

1. *Did the trial judge err in assessing Thompson Fuels' liability?*

The trial judge made a series of factual findings and findings of mixed fact and law that were open to him on the evidence. His reasons on the issue of Thompson Fuels' liability evince a proper understanding of the principles of negligence, including causation. He also properly exercised his gatekeeper function in admitting expert evidence. Finally, the trial judge correctly concluded that Thompson Fuels could not avoid liability on the basis of its standard form contract.

2. *Did the trial judge err in assessing the TSSA's liability?*

The trial judge was correct in concluding that the TSSA owed Mr. Gendron no private law duty of care, other than conducting an inspection with reasonable care. As the trial judge noted, neither Mr. Gendron nor Thompson Fuels tendered any expert evidence regarding the standard of care of a prudent TSSA inspector. In these circumstances, Mr. Gendron and Thompson Fuels failed to meet their onus to establish liability on the part of the TSSA.

3. *Did the trial judge err in finding Mr. Gendron contributorily negligent, or in assessing the extent of such negligence*?

The trial judge properly found that Mr. Gendron failed to take the steps of a reasonably prudent homeowner in the circumstances. The evidence does not support Thompson Fuels' argument that the trial judge should have found Mr. Gendron contributorily negligent for failing to disconnect a drain.

4. *Did the trial judge err in his apportionment of liability?*

The trial judge carefully considered the comparative blameworthiness of the parties and concluded that the majority of the responsibility for the loss was Mr. Gendron's. The apportionment of damages is a very fact specific exercise, which is entitled to significant deference. There is no basis for appellate interference with the trial judge's apportionment of liability.

5. *Did the trial judge err in his assessment of damages?*

The trial judge conducted a detailed analysis of the remediation costs both on and off of Mr. Gendron's property, mindful that damages should be awarded on the principle that best ensures that the environment is returned to its pre-contamination condition. The assessment of damages was correct, save for one adjustment. The trial judge erred in awarding damages to pay out a line of credit secured against the property. That was a betterment and cannot stand.

6. *Did the trial judge fail to provide adequate reasons?*

The trial judge wrote 79 pages of reasons wherein he meticulously considered both the evidence and the legal issues at play. His reasons are logically coherent, thoughtful, and clearly stated. There is no merit in this submission.

7. *Did the trial judge err in failing to reduce the amount awarded against Thompson Fuels by the amount of the Granby settlement?*

The trial judge correctly concluded that there was no double recovery until Mr. Gendron had been fully compensated for his loss. This decision is consistent with the policy objectives underlying *Pierringer* agreements.

8. *Did the trial judge err in dismissing the EPA, s. 100.1 claim for contribution and indemnity against Thompson Fuels?*

The trial judge properly rejected Mr. Gendron's argument that Thompson Fuels was the owner of the oil immediately before the leak or that it had charge, management or control of the oil immediately before the first discharge. Thus, a claim for contribution and indemnity under the *EPA* was unavailable.

9. *Did the trial judge err in his costs awards?*

There is no basis for appellate interference with the trial judge's costs award. In his costs endorsement the trial judge properly rejected the arguments that are once again advanced on appeal.

V. Analysis

(1) Thompson Fuels' Liability

41 Thompson Fuels takes issue with virtually every aspect of the trial judge's analysis of its liability. The grounds of appeal may be divided into two categories: (i) errors of fact or of mixed fact and law; and (ii) errors of law. These grounds of appeal are considered below.

(i) Errors of fact or of mixed fact and law

42 Thompson Fuels submits that the trial judge erred in making two purely factual findings. The first was that Mr. Gendron did not move the tanks. The second was and that a comprehensive inspection of the tanks did not occur.

43 The finding related to the movement of the tanks was fully supported by the evidence. The leaking tank was boxed in on four sides by the foundation wall, wood paneling wall, drywall, and the other tank. This tight configuration is inconsistent with the movement of the tanks as Thompson Fuels alleges and anchors the trial judge's finding in the evidence.

44 Thompson Fuels renews its submission from trial that a comprehensive inspection of the tanks was carried out when its OBT completed a "clean and service" at Mr. Gendron's house on February 27, 2002. This was another factual finding open

to the trial judge on the evidence. The OBT did not testify and Thompson Fuels failed to maintain a record of the alleged comprehensive inspection, as it was required to do.

45 Next, Thompson Fuels submits that given that Mr. Gendron stated that the fill pipe was always in the non-leaking tank, the water could not have entered it and caused the hole. Further, it argues that an OBT would test for water by removing the gauge and dipping for water and because the only fuel gauge was located on the non-leaking tank, the leaking tank would not have been tested.

46 There is no merit to these submissions. The evidence established that there was water in both tanks. Although there was no fuel gauge on the leaking tank, there was an opening at the top of that tank that could have been used to test for water.

47 Thompson Fuels further submits that the trial judge erred in finding that the industry standard applicable at the relevant time required water testing of indoor tanks. Paul Thompson, Thompson Fuels' owner, and Perry German, one of Thompson Fuels' OBTS, both gave evidence tending to support the opposite conclusion.

48 Notwithstanding the foregoing, there was evidence upon which the trial judge could conclude that water testing was the industry standard. It is clear that by the early 2000s the danger of water increasing the risk of internal corrosion was well known in the industry. Indeed, Granby's educational material from 2003-2004 described water as "the tank's #1 enemy". Another one of Thompson Fuels' OBTs, Geoff Richardson, testified that there was no difference between indoor tanks and outdoor tanks when testing for water, and that such tests were routine on deliveries and service calls. Thus, there is no basis to interfere with the trial judge's finding about the industry standard.

49 Thompson Fuels also submits that the trial judge erred in finding that the oil tanks were installed too close to the exterior walls, as the *Installation Code for Oil-Burning Equipment* (the *Code*) applicable at the time of installation did not require any clearance for tanks from exterior walls. When a later version of the *Code* imposed new clearance requirements, the existing tanks were grandfathered in. Leaving aside the regulatory requirements, however, the trial judge correctly found that the leaking tank was boxed in and could not be inspected. That finding was supported by photographs in evidence, which clearly show the tanks were too close to the wall, and by Mr. Gendron's testimony that he had to cut away drywall to view the source of the leak.

50 With respect to the issue of shut-off valves, Thompson Fuels makes two submissions. First, it argues that at the time of installation of Mr. Gendron's tanks, there was no express requirement in the applicable *Code* for two shut-off valves for a twinned tank system. However, while the requirement may not have been express, the *Code* provided that a shut-off valve was to be installed in the fuel line as near as practicable to the exit from the supply tank. This implies that if there were two tanks, each tank would require a shut-off valve. Therefore, there was a sufficient evidentiary basis to support the trial judge's finding that the leaking tank required a shut-off valve.

51 The second argument is that the trial judge erred in finding that the alleged non-compliance with the shut-off valve requirements caused or contributed to the oil leak where there was no evidence to support that finding. Further, Thompson Fuels argues that there was no evidence that a reasonable homeowner would know the potential function of a valve to stop oil flow between cross-connected tanks during a leak. However, the trial judge explicitly found that non-compliance with shut-off valve requirements did *not* cause the leak. He observed, nevertheless, that the non-compliance contributed to the extent of the damages, because it did not allow the non-incident tank to be shut off after the leak was discovered. That action would have prevented the oil inside the non-incident tank from leaking through the twinned incident tank. The trial judge' finding that Mr. Gendron (or professionals, if they had been called in time) could have used the valve for this purpose is entitled to deference.

(ii) Legal Errors

52 Thompson Fuels' first alleged legal error is that the trial judge failed to exercise his gatekeeper function with respect to the opinion evidence of Mr. Gendron's expert Robert Smith. However, there was no objection taken to Mr. Smith's qualifications at trial. In addition, there was nothing in his testimony that would reasonably require intervention by the trial judge, unlike the situation in *Bruff-Murphy v. Gunawardena*, 2017 ONCA 502, 138 O.R. (3d) 584 (Ont. C.A.) at paras. 63-67. Contrary to Thompson Fuels' position, the fact that Mr. Smith's opinion on whether a tank should be tagged out as a hazard was not

accepted in another recent case is of limited relevance to the determination of the issues in the present case: *Bruff-Murphy* at paras. 30 to 32.

53 Thompson Fuels next argues that the trial judge erred in failing to apply the "elements of negligence" and in not providing a proper causation analysis. Specifically, it submits that he did not explicitly assess the reasonableness of Thompson Fuels' actions. It further argues that a comprehensive inspection in or around February 2002 would not have discovered any non-compliance that would have caused or contributed to the leak.

54 I would not give effect to this ground of appeal. There was ample evidence to establish that Thompson Fuels frequently and flagrantly breached the Regulation and thereby breached the standard of care. Thompson Fuels delivered fuel oil on over 50 occasions when it was prohibited from doing so because there had been no comprehensive inspection. This is not merely "technical non-compliance", as it is argued. Nor is ignoring obvious violations and failing to tag out a tank in an unacceptable condition. Had Thompson Fuels conducted a comprehensive inspection in 2002 or at any point when the tanks should have been tagged out, it would have conducted a test for water. The trial judge found that, in the specific circumstances of this case, Thompson Fuels breached the standard of care by failing to test for water in either 2006 or 2007, because the water had accumulated over a lengthy period and would have been detected. It was the presence of water that ultimately caused the MIC. The trial judge's conclusion that these breaches caused the leak reveals no error.

55 The final alleged legal error is the failure of the trial judge to apply the contractual exclusion clause in the customer service agreement signed by Mr. Gendron. The exclusion reads as follows:

> Thompson Fuels is not responsible for the inspection and/or maintenance of any fuel oil tank located on the premises.
>
> Thompson Fuels shall not be liable for any injury or damage to any person or property resulting from the existence and operation or non operation of any oil burning installation at your premises. Further Thompson Fuels shall not be liable for any damage caused by furnace failure while your residence is vacant nor for any special or consequential damages resulting from the failure to perform its obligations under this contract.

56 The trial judge cited *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 (S.C.C.), at paras. 122-23, for the proper analytical approach to determining the enforceability of exclusion clauses:

> [122] The first issue, of course, is whether as a matter of interpretation the exclusion clause even *applies* to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (*Hunter*, at p. 462). This second issue has to do with contract formation, not breach.
>
> [123] If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts. [Emphasis in original.]

57 The trial judge proceeded to apply the *Tercon* analytical framework. He first determined that the exclusion clause was not engaged in the circumstances of the case. The clause purported to exclude liability for Thompson Fuels' failure to perform obligations imposed by the contract, but the obligation to perform an inspection prior to May 1, 2007 was imposed by the Regulation.

58 Further, analogizing to non-delegable duty cases, the trial judge held that under the third *Tercon* enquiry it would be contrary to public policy to allow a fuel distributor to use an exclusionary clause in a consumer contract to escape liability for failing to perform obligations imposed by law as a precondition to supplying fuel to that consumer. However, he noted that had

the comprehensive inspection been carried out as required by law, the exclusion clause might have operated to exclude liability for Thompson Fuels' negligence in the performance of its contractual obligations.

59 Thompson Fuels' argument on appeal is that the trial judge erred in finding that the comprehensive inspection was not completed. In addition, it submits that the exclusion clause was not contrary to public policy; rather, it was a legitimate effort to limit Thompson Fuels' liability as the *quid pro quo* for low-cost fuel delivery and "no heat" service. Further, the consequences of any non-compliance with regulatory obligations are distinct from liability in a tort action. Thompson Fuels submits that it is permissible to contract out of liability for a civil action and that this case is a civil action, not a regulatory proceeding.

60 For the reasons outlined above, I conclude that it was open to the trial judge to find that no comprehensive inspection had occurred. Accordingly, Thompson Fuels had failed to meet its regulatory obligation. That failure is the centrepiece of the case against Thompson Fuels. The trial judge correctly found that the exclusion clause does not expressly exclude liability for non-compliance under the Regulation. Exclusion clauses are to be strictly construed, and the burden is on the party relying on it to prove that it is applicable in a particular case: *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 (S.C.C.), at para. 28; *Braun Estate v. Zenair Ltd.*, [1998] O.J. No. 4841 (Ont. C.A.) at para. 10. There is nothing in the wording of the exclusion clause that references Thompson Fuels' regulatory obligations.

61 In addition, I agree with the trial judge's analysis of the third *Tercon* enquiry. Thompson Fuels' argument that the exclusionary clause applies because this is a civil action and not a regulatory proceeding is without merit. The trial judge found civil liability on the part of Thomson Fuel on the basis of repeated regulatory violations. The trial judge was correct to conclude that it would be contrary to public policy to permit a fuel distributor to escape its legal obligation to conduct a comprehensive inspection as a precondition for supplying fuel to a customer.

(2) TSSA Liability

62 There were two specific allegations of negligence made against the TSSA at trial. The first was that it failed to conduct an immediate and proper inspection of the site on December 22, 2008. The second was that the delineation order of December 24, 2008 was not adequate to address the urgency of the situation. In addition, it was alleged that the TSSA breached a general duty of care to Mr. Gendron in the circumstances.

63 Relying on *Ingles v. Tutkaluk Construction Ltd.*, 2000 SCC 12, [2000] 1 S.C.R. 298 (S.C.C.), the trial judge held that the TSSA inspector owed Mr. Gendron a *prima facie* duty of care to conduct his inspection with reasonable care. The trial judge noted that he was provided no evidence of the standard of care required of a TSSA inspector. Therefore, the trial judge concluded that he could not find that either the TSSA inspection or the subsequent delineation order issued on December 24, 2008 fell below the standard of care that would be expected of an ordinary, reasonable, and prudent inspector in the same circumstances.

64 The trial judge also found that causation had not been proven, noting that even if the 120-day deadline specified in the delineation order was negligent, Mr. Gendron failed to prove that such negligence caused or contributed to the damages because there was no evidence that a reasonable delineation order would have avoided or reduced the damages.

65 The trial judge then considered whether the TSSA owed Mr. Gendron any further private law duty of care. Specifically, he analyzed whether the TSSA owed any such duty pursuant to its mandating statute, the *Technical Standards and Safety Act 2000*, S.O. 2000, c. 16, or the MOU.

66 The trial judge found that the statutory role of the TSSA was the protection of public safety and the environment and that it was not geared to the protection of an individual property owner. Further, he found that the MOU did not impose on the TSSA a private law duty of care to Mr. Gendron, because it was an inter-agency agreement regarding their potentially overlapping responsibilities for the reporting, assessment, and management of oil spills. Finally, he found that the TSSA had no legal obligation to advise Mr. Gendron to call his insurer, as it owed him no duty of care in that regard.

67 On appeal, Thompson Fuels and Mr. Gendron make essentially the same arguments they unsuccessfully asserted at trial. They submit that the trial judge erred by not finding that the TSSA breached its duty of care to Mr. Gendron and the public to

reasonably inspect the property, monitor for any contamination escaping off site, issue an order for remediation as required, and ensure that Mr. Gendron took reasonable steps to protect the environment. I would not give effect to any of these arguments.

68 As noted above, there was no evidence tendered regarding the standard of care of a prudent TSSA inspector or the reasonable time period for compliance with an order. The failure to lead such evidence is fatal to the claims against the TSSA in this case. Therefore, the trial judge did not err in concluding that he could not find that the TSSA inspection or order fell below the standard of care.

69 I likewise see no error in the trial judge's conclusion that neither the *Technical Standards and Safety Act* nor the MOU imposed any private law duty of care. Nothing in the wording of the legislation or the MOU is indicative of any private law duty of care. The act outlines general public obligations to promote and protect public safety and the environment. Likewise, the MOU is an operational document designed to ensure that the TSSA and MOE work cooperatively and effectively in carrying out their mandates.

(3) Contributory Negligence

70 Both Mr. Gendron and Thompson Fuels submit that the trial judge erred in his analysis of contributory negligence. First, Mr. Gendron submits that given that Thompson Fuels did not raise any issue when servicing the tanks, it was reasonable for him to assume that their installation was compliant. I reject this argument. Mr. Gendron chose to install the tanks on his own without professional assistance as was required by law. The responsibility for the inadequacies with the installation cannot completely be foisted on Thompson Fuels.

71 Mr. Gendron also argues that the trial judge erred in finding that the use of jerry cans to fill the tanks with stove oil was negligent and fell below the standard of care of a reasonably prudent person. In my view, that finding was open to the trial judge on the evidence and was consistent with Mr. Gendron's general practice of finding ways of reducing costs without regard to the safety of his actions.

72 The trial judge also found that Mr. Gendron was negligent in failing to have the tanks regularly inspected. On appeal, Mr. Gendron argues that, because OBTs from Thompson Fuels attended for service calls on five occasions, he did not need to arrange for additional inspections. I find no error in the trial judge's finding that a reasonable person in the particular circumstances of this case would have obtained more thorough inspections of the tanks.

73 At trial, Thompson Fuels argued that Mr. Gendron was also negligent because he did not disconnect a "big O" drainage pipe that connected his house to the city culvert and did not bring it to the attention of any professional. On appeal, Thompson Fuels submits that the trial judge erred in rejecting this argument. The trial judge noted that there was no evidence that the drainage pipe was illegal or contrary to municipal standards. He also found that a reasonable person in Mr. Gendron's position would not be expected to know that the big O drain should be immediately disconnected. These were findings open to the trial judge on the evidence and I see no basis to interfere with them.

74 This leaves the issue of the trial judge's analysis of the mitigation efforts made by Mr. Gendron. This is a ground of appeal asserted both by Mr. Gendron and Thompson Fuels. The trial judge is criticised by Mr. Gendron for holding that he was contributorily negligent for failing to promptly report the leak. He submits that the trial judge failed to properly consider his efforts to mitigate the loss and his genuine belief that he was succeeding in collecting all of the leaking oil. Further, the trial judge is said to have erred in relying on ss. 92(1) and 2 of the *EPA* to find that Mr. Gendron was required to immediately report a leak to the Spills Action Centre, given that there was no evidence that he knew or ought to have known that the oil was escaping into the natural environment.

75 In contrast, Thompson Fuels submits that the trial judge erred in failing to find that Mr. Gendron's 12-day delay in starting the remediation process was a breach of the standard of care, arguing that if Mr. Gendron had acted reasonably and sought professional help right away, the leak would have been contained. Further, it submits that the trial judge erred by not addressing Mr. Gendron's failure to mitigate in breach of s. 93 of the *EPA*.

76 I would not give effect to these arguments. Mr. Gendron's conduct in response to the spill was fully considered by the trial judge. He properly found that Mr. Gendron failed to take the steps of a reasonably prudent homeowner in the circumstances. This finding was amply supported by the evidence, including his failure to contact the Spills Action Centre or Thompson Fuels' 24/7 emergency hotline. This was not a minor occurrence. These were large-capacity tanks that were leaking oil. It was not the time for a do-it-yourself solution. Homeowners have an obligation to protect the environment and must act prudently and responsibly. Mr. Gendron did not. The trial judge did not err in so finding.

77 It is difficult to understand the submission made by Thompson Fuels that the trial judge did not consider Mr. Gendron's delay in acting and his failure to mitigate. To the contrary, the trial judge accepted Thompson Fuel's submission, noting that "Mr. Gendron's delay in reporting the oil leak and obtaining professional help resulted in increased damages that could have been averted if he had reported the leak as soon as he discovered it, rather than trying to deal with it on his own." That is clearly a finding that Mr. Gendron failed to respond promptly or to mitigate and the trial judge would have been mindful of that finding in apportioning liability. There is no merit in Thompson Fuels' argument to the contrary.

(4) Apportionment of Liability

78 Thompson Fuels submits that the portion of liability assigned to Mr. Gendron by the trial judge was too low, given that he was involved in repeated patterns of negligent conduct. It argues that the 60% liability assigned to Mr. Gendron shows that the trial judge failed to properly weigh the totality of Mr. Gendron's blameworthy conduct. In addition, Thompson Fuels submits that there are strong policy reasons to attribute fault to homeowners who fail to take reasonable steps to protect the environment and public safety.

79 Thompson Fuels argues that the decision in *Brown v. Davis & McCauley Fuels Ltd.*, 2010 ONSC 4674 (Ont. S.C.J.), is most analogous. There, the plaintiffs were found 90% contributorily negligent since they had discovered a slow leak but did not take any active measures to fix the leak or clean up the spill. Thompson Fuels submits that Mr. Gendron should be found wholly or at least 90% at fault.

80 Mr. Gendron also appeals the apportionment of liability. He submits that substantially more fault should be attributed to Thompson Fuels because it failed to comply with its statutory obligations. He also argues that Thompson Fuels' reliance on *Brown* is misguided because he had responded promptly to the leak. Mr. Gendron relies on *Appleyard v. Earl* (2009), 90 C.L.R. (3d) 49 (Ont. S.C.J.), where the service technician was held 70% liable and the homeowner 30% contributorily negligent. He submits that Thompson Fuels' liability should have been fixed at a minimum of 70%.

81 This was another issue that was carefully considered by the trial judge. He concluded that Mr. Gendron's contribution was not a minor inadvertent lapse, but a series of actions that contributed to the leak and increased the damages. Mr. Gendron was found to be negligent in the installation of the oil tank, his failure to maintain the tank, and his failure to promptly report the leak. More significantly, the trial judge found that Mr. Gendron negligently introduced water into the incident tank.

82 With respect to Thompson Fuels, the trial judge found that it was negligent in its failure to conduct the legally required comprehensive inspection. He found that Thompson Fuels shared with Mr. Gendron responsibility for the fact that there was only a single shut-off valve. Further, Thompson Fuels should have tagged-out the oil tank when it conducted its maintenance visits in 2006 and 2007, particularly because one end of the tank was not available for visual inspection. However, the trial judge went on to find that this was not a case in which the homeowner relied on the expertise of the distributor. He concluded that, "Mr. Gendron thought that he could handle things on his own and that he had matters 'under control'".

83 I see no error in the trial judge's apportionment analysis. He considered the comparative blameworthiness of the parties and concluded that the majority of the responsibility for the loss lay with Mr. Gendron. That was a finding that is entitled to considerable deference: *Ingles v. Tutkaluk Construction Ltd.*, 2000 SCC 12, [2000] 1 S.C.R. 298 (S.C.C.), at para. 57; *Treaty Group Inc. v. Drake International Inc.*, 2007 ONCA 450, 86 O.R. (3d) 366 (Ont. C.A.), at para. 29. Although a body of accumulated case law can provide broad guidance about the appropriate range of contributory negligence in a given factual context, the apportionment of liability remains a highly fact-specific exercise that is not an exact science: *Snushall v. Fulsang*

(2005), 78 O.R. (3d) 142 (Ont. C.A.), at para. 33; *Treaty Group Inc. v. Drake International Inc.* (2007), 15 B.L.R. (4th) 83 (Ont. C.A.), at para. 74. There is no basis for appellate interference with the trial judge's apportionment of liability.

(5) Damages

84 Thompson Fuels submits that the evidence at trial indicated that there was pre-existing contamination on Mr. Gendron's property from the old underground oil tank, the public roadway area, and the lake, the latter being due to a spill from the nearby marina. However, according to Thompson Fuels, DLS cleaned up the property to the "non-detect" standard, not to background levels of contamination, as required.

85 The trial judge conducted a detailed analysis of the remediation costs both on and off of Mr. Gendron's property. He did so mindful of the instruction from this court in *Midwest Properties Ltd. v. Thordarson*, 2015 ONCA 819, 128 O.R. (3d) 81 (Ont. C.A.), at para. 63 that damages should be awarded based on the principle that best ensures that the environment is returned to its pre-contamination condition. Trial judges should be careful not to award damages for remediating existing contamination. However, it is often difficult, if not impossible, to delineate between pre-existing and new contamination. Courts should not discourage proper remediation efforts.

86 The trial judge did not find that there was any pre-existing contamination outside Mr. Gendron's property. He did find, however, that DLS had to quickly respond to an emergency situation that required immediate efforts to remediate the lake. He was not persuaded that DLS's ensuing efforts were unreasonable or not reasonably related to the leak from Mr. Gendron's house. The trial judge's findings do not reveal a palpable and overriding error

87 By contrast, the trial judge found that there was evidence of excessive remediation on-site. For example, the evidence established that there was a reasonable possibility that oil from the old outdoor tank had contaminated the soil. DLS sampled soil near the house and at the outer excavation limits, but did not take samples in between. It did not prepare a forensic analysis to get a chemical "fingerprint" of the spill to ensure that it could identify the contaminant by source. In addition, in its preliminary Assessment Report, DLS admitted that chemicals found at low levels at certain boreholes had not been attributed to the subject leak. Given this evidence, the trial judge appropriately reduced the damages attributable to excavating, hauling, and disposing of the contaminated soil by 50 percent.

88 Thompson Fuels further submits that the rebuilding costs awarded for Mr. Gendron's home are unreasonable and result in betterment. Thompson Fuels argues that the original home was not compliant with the building code, while Mr. Gendron's new home is. It is submitted that the trial judge erred by not recognizing this as a betterment.

89 The trial judge noted that Mr. Gendron adduced detailed evidence regarding the estimated cost of rebuilding the house as close as possible to its condition prior to the leak. Thompson Fuels called no contradictory evidence. In particular, there was no evidence regarding the value of complying with building code requirements or on whether it is more expensive to build a home that meets the building code requirements than one that does not. Thus, the trial judge did not err in finding that no betterment had been established on this basis.

90 The second betterment issue relates to a line of credit that was secured against the home prior to the leak. As part of the estimate on the cost to replace the home, a figure was included to payout an existing line of credit. The trial judge impliedly accepted this as an appropriate component of the rebuilding estimate. On appeal, Mr. Gendron justifies this amount on the grounds that the lender had the right to request repayment as a result of the demolition of the house, and did so. He argues therefore that this cost flows from the leak and is thereby compensable.

91 I disagree. In calculating damages, the court was obliged to put Mr. Gendron in the position he would have been in but for the leak, less his contributory negligence. By compensating him for the repayment of the line of credit, the trial judge violated this controlling principle. As a consequence of awarding these damages, Mr. Gendron was placed in a better position than he was in before the leak. Prior to the leak he owned a home that was encumbered with a line of credit. As a result of the trial judge's decision, he now owns a home of essentially the same value that is not encumbered by a line of credit. This is an obvious betterment. The damages should be reduced to deduct the payment of the line of credit.

(6) Adequacy of Reasons

92 Thompson Fuels submits that the trial judge's reasons are inadequate. Trial judges are required to provide reasons that inform the parties, the appellate court, and the public the result of the case and how the judge reached his or her conclusion: *Dovbush v. Mouzitchka*, 2016 ONCA 381, 131 O.R. (3d) 474 (Ont. C.A.), at para. 22; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869 (S.C.C.), at para. 24.

93 It would appear, at least in this court, that inadequacy of reasons has become a boilerplate ground of appeal. When a legal or factual error is not readily apparent, often an allegation is made that the reasons are inadequate in order to add heft to what is otherwise a weak appeal. Minor omissions are seized upon as significant deficiencies in the judge's reasoning process. Appellants then argue that, try as they might, they just cannot understand what the judge was thinking or how he or she got to the result.

94 This case represents perhaps the high water mark of this unfortunate trend. After a 27-day trial with multiple issues, the trial judge wrote 79 pages of reasons. The number of pages is not necessarily a reflection of an adequate decision. But in this case, the trial judge meticulously considered both the evidence and the legal issues at play. His reasons are logically coherent, thoughtful, and clearly stated.

95 The specific complaints are entirely without merit. For example, the suggestion that trial judge did not consider Mr. Gendron's failure to mitigate is contradicted by the plain wording of his reasons. There is a difference between being unable to understand a trial judge's reasons and being wilfully blind as to their meaning. This is an example of the latter.

96 The other complaint is that Mr. Gendron's credibility and reliability were undermined at trial and the trial judge failed to provide adequate reasons because he did not expressly assess Mr. Gendron's credibility and reliability. A trial judge has the freedom to craft his or her reasons as he or she fits as long as they meet the practical imperatives mentioned above. This was not a trial were credibility played a significant role. The trial judge was not obliged to deal with every alleged inconsistency in Mr. Gendron's evidence. He was required to deal with the issues raised and make transparent and understandable findings. The trial judge did that and much more.

(7) Pierringer Agreement

97 A *Pierringer* agreement is used in multi-party litigation when one or more defendants, but not all of them, wish to settle with the plaintiff. These agreements permit a settling defendant to be released from a lawsuit under certain specific terms, leaving the remaining non-settling defendants to continue in the proceeding. Under the terms of a *Pierringer* agreement, a plaintiff may only seek recovery from the non-settling defendants on a several liability basis instead of a joint and several liability basis. The practical result is that settling defendants are no longer involved in the litigation and the remaining non-settling defendants are responsible only for the loss they actually caused.

98 In the present case, Mr. Gendron settled with Granby shortly after the start of trial and the parties entered into a *Pierringer* agreement. The trial judge properly considered whether Granby was liable for any part of the loss. He dismissed the claim against Granby in its entirety. That ruling has not been appealed.

99 Thompson Fuels submits that the trial judge erred by failing to reduce the amount awarded against it by the amount of the Granby settlement, or, alternatively, by failing to reduce the total damages by the settlement amount before applying the allocation of fault. It argues that Mr. Gendron will receive unfair compensation if he receives more than the damages awarded to him based upon the negligence of the defendants. According to Thompson Fuels, Mr. Gendron can only recover damages and interest in the total amount of $901,747, being 40% of total assessed damages, and any compensation above that amount is unfair.

100 Mr. Gendron takes the position that double recovery does not occur until he receives compensation in excess of his total loss, being $2,161,570. Until he receives more than what he has lost, Mr. Gendron argues, he cannot be considered to have been unfairly compensated.

101 In his ruling on post-trial motions, the trial judge noted that the application of the principle against double recovery is straightforward in cases in which no contributory negligence is attributed to the plaintiff. The trial judge considered a number of cases submitted by the parties, but none of them expressly considered the impact of a finding of contributory negligence on *Pierringer* agreements.

102 The trial judge relied on this court's decision in *Laudon*. In that case, the plaintiff entered into a modified "Mary Carter" agreement that had many of the features of a typical *Pierringer* agreement. The plaintiff had been injured in a boating accident and reached a settlement agreement with one defendant in the amount of $365,000. At trial, the jury awarded total damages of $312,021. The plaintiff was found to be 11% liable, the settling defendant 50%, and the non-settling defendant 39%. Thus, the plaintiff was awarded a net judgment of $277,698 (89% of $312,021) and the judgment against the non-settling defendant was $121,688 (39% of $312,021). The trial judge refused to deduct the amount paid to the plaintiff by the settling defendant, and ordered the non-settling defendant to pay the full $121,688.

103 This court allowed the appeal, finding that the trial judge had permitted double recovery. Critically for present purposes, the court deducted the settlement amount from the total damages award ($312,021), not the net damages award ($277,698): *Laudon*, at para. 55. However, the settlement amount in that case was so high that the distinction between these two approaches did not need to be considered. Under either approach there would be double recovery.

104 The trial judge considered himself bound by the methodology employed by this court in *Laudon*, which, in his words, "infers that the principle of avoiding double recovery is based on the damages caused by the defendant(s) without reference to the plaintiff's contributory negligence (if any)". He concluded his analysis by stating, "Provided a plaintiff does not recover more than the total loss caused by the defendant(s) (without reference to the plaintiff's contributory negligence) there is no double recovery." In the result, the trial judge declined to reduce the amount awarded at trial by the amount paid under the *Pierringer* agreement.

105 Subsequent to the trial judge's decision, the Alberta Court of Appeal released *Canadian Natural Resources Limited v. Wood Group Mustang (Canada) Inc. (IMV Projects Inc.)*, 2018 ABCA 305, 76 Alta. L.R. (6th) 1 (Alta. C.A.). That case involved a buried 32 km emulsion pipeline. Despite the fact that the pipeline had a life expectancy of 30 years, it failed after about three months of operation. In the litigation that ensued the plaintiff sued multiple parties and entered into *Pierringer* agreements with two of the defendants. At trial, the settling defendants were held to be partially responsible for the damages and it turned out that in both cases the plaintiff settled for less than it would have been entitled to had it proceeded to trial against those defendants. The trial judge awarded total damages of $45.425 million but found the plaintiff to be 50 percent contributorily negligent.

106 On appeal, the Alberta Court of Appeal considered several issues related to the *Pierringer* agreements. Justice Slatter, writing for the majority, provided detailed reasons why the court declined to depart from its earlier decision in *Bedard (Next Friend of) v. Martyn*, 2010 ABCA 3, 17 Alta. L.R. (5th) 225 (Alta. C.A.), where it held that a settling plaintiff must account to a non-settling defendant for any recovery in excess of its actual damages.

107 Justice Slatter then considered the question of whether, in determining if the settling plaintiff has been overcompensated, one measures the plaintiff's recovery against its total loss, or only against that portion of the loss that was not caused by its contributory negligence. His analysis of this issue was as follows:

> [149] The trial judge found that CNRL [the plaintiff] suffered damages of $45.425 million, but also found that CNRL was 50% contributorily negligent. As a result, CNRL was only able to recover one-half of its losses from the settling and non-settling defendants. CNRL argues that no issue of overcompensation under the *Pierringer* agreements arises until it has recovered all of its losses, including those for which it was contributorily negligent: *Gendron v Doug C. Thompson Ltd. (c.o.b. Thompson Fuels)*, 2017 ONSC 6856 (CanLII) at para. 45.
>
> [150] In principle, this argument has merit. CNRL's settlement with Shaw Pipe and Flint Field Services had as much to do with CNRL's responsibility for the damage, as it did with those defendants' responsibility. Any notional over settlement or under settlement with the settling defendants might relate to a miscalculation of CNRL's responsibility. If the notional

> over settlement was a result of an underestimation of CNRL's responsibility, that could not properly be characterized as any sort of double recovery. CNRL suffered the damage in question, and received compensation for that damage, but until it recovered 100% of its damages it would not be overcompensated so as to engage the rule in *Ratych v Bloomer*.
>
> [151] It would be ironic if the non-settling tortfeasor, IMV Projects, was entitled to credit for the "over settling" with the settling defendants, but the contributorily negligent tortfeasor, CNRL, was not. Likewise, if the plaintiff over settled against one defendant, but under settled against another, there would be no justification for giving the non-settling defendant any credit until the plaintiff was fully indemnified for its losses. *Sable Offshore* confirms that plaintiffs should be encouraged to settle multiparty claims, even if they are contributorily negligent. The settling but contributorily negligent plaintiff in a *Pierringer* arrangement should not have to give credit to the non-settling defendant until it is fully indemnified for its losses. [Emphasis in original.]

108 I agree with and adopt that analysis. In addition, I would add the following. The terms of a settlement agreement typically reflect many factors, including an assessment of potential liability and of the legal costs associated with proceeding to trial. A settlement amount could also include elements that are more difficult to quantify. For example, in the commercial context, costs associated with lost management time devoted to the trial or lost potential revenues if the plaintiff and the defendant contemplate a future business relationship may be significant factors. Thus, it is not always a simple matter to determine whether the plaintiff has been overcompensated by reason of a partial settlement. In any event, courts should encourage settlements and responsible plaintiffs who reach a settlement agreement should not be punished by reason of the fact that they appear to have reached a settlement for an amount greater than what the court ultimately awards.

109 *Pierringer* agreements have their origin in American jurisprudence, specifically the decision of the Supreme Court of Wisconsin in *Pierringer v. Hoger*, 124 N.W.2d 106 (U.S. Wis. S.C. 1963). It is helpful therefore to consider the U.S. case law.

110 The states of Minnesota and North Dakota have formally followed the Supreme Court of Wisconsin's lead: *Shantz v. Richview Inc.*, 311 N.W.2d 155 (U.S. Minn. S.C. 1980); *Bartels v. City of Williston*, 276 N.W.2d 113 (U.S. N.Da. S.C. 1979). Similar arrangements have been sanctioned by other courts in the United States in specific circumstances: see e.g. *McDermott Inc. v. AmClyde*, 511 U.S. 202 (U.S. Sup. Ct. 1994) (in federal admiralty cases). Without attempting to provide a comprehensive account of U.S. jurisprudence in this area, a review of American jurisprudence on the issue of set-off is enlightening.

111 The cases from these jurisdictions indicate that, although the liability of a non-settling defendant is limited to its proportionate share of fault, the non-settling defendant generally does not enjoy a further right of set-off against the amount of the settlement: *McDermott*, at p. 221; *Shantz*, at p. 156; *McDonough v. Van Eerden*, 650 F.Supp. 78 (U.S. Dist. Ct. E.D. Wis. 1986), 81. The courts specifically contemplate that a *Pierringer* agreement for more than the settling defendant's share of fault may result in a "windfall" for the plaintiff: *Rambaum v. Swisher*, 435 N.W.2d 19 (U.S. Minn. S.C. 1989), 23. That is not the law in Canada, but two of the policy considerations underlying this rule are instructive in this case.

112 First, the American courts recognize the benefits in encouraging settlements and protecting the bargain the plaintiff and settling defendant have reached. In *Unigard Insurance Co. v. Insurance Co. of North America*, 516 N.W.2d 762 (U.S. Wis. Ct. App. 1994), 766, the court observed that a settling defendant purchases an unspecified portion of the total liability, and takes the chance of paying too much or too little for its peace of mind. The First Circuit has commented that "*Pierringer* releases equitably distribute the risks of settlement among the parties", by imposing the risks on parties who bargained for those risks: *Austin v. Raymark Industries, Inc.*, 841 F.2d 1184 (U.S. C.A. 1st Cir. 1988), 1190-91. Several U.S. courts have accordingly considered it inequitable to allow the non-settling defendant to profit from the settlement agreement by obtaining a set-off: *Rambaum*, at p. 23; *Anunti v. Payette*, 268 N.W.2d 52 (U.S. Minn. S.C. 1978), 56. Courts have noted that allowing set-off would discourage settlement not only for plaintiffs but also for non-settling defendants, who would stand to gain the benefits of settlements at the end of trial. As the *Rambaum* court noted, allowing set-off would mean that "settling parties could no longer settle piecemeal" such that "the *Pierringer* would be effectively dismantled": at p. 23.

113 The second factor underlying the rule against set-off is that it is considered fair to the non-settling defendant. Depending on the apportionment of liability at trial, the *Pierringer* agreement may turn out to benefit the plaintiff or the settling defendant.

But the non-settling defendant will always be required to pay the proportion of damages precisely commensurate to its own fault. As a result, it should be no concern to the non-settling defendant how much the plaintiff received from the settling defendant: *Shantz* at p. 156.

114 Although the rule in Canada is different, Canadian courts have not been indifferent to these considerations. In *Ratych v. Bloomer*, [1990] 1 S.C.R. 940 (S.C.C.), for instance, the Supreme Court cautioned against double-recovery, but it allowed for insurance proceeds not to be set off on the principle that plaintiffs should not be deprived of bargained-for contractual benefits: at paras. 45, 53. In *Ashcroft v. Dhaliwal*, 2008 BCCA 352, 83 B.C.L.R. (4th) 279 (B.C. C.A.), at para. 28, the Court of Appeal for British Columbia noted the public interest in encouraging settlements but balanced it with the rule against double recovery. The *Bedard (Next Friend of)* court recognized "the element of unfairness" in a non-settling defendant reaping the benefits of the settlement, but considered that the Canadian policy against double-recovery was fair in a broader sense because it allowed the plaintiff to be fully compensated: at para. 16. In light of similar considerations, the court held in *Canadian Natural Resources Ltd.* that "The rule against overcompensation should be applied generously in favour of the settling plaintiff, by accepting that there is in fact no overcompensation until the plaintiff is fully indemnified": at para. 148.

115 I agree with the policy analysis described above about fairness to the non-settling defendant and encouragement of settlements. A *Pierringer* agreement is by its nature a contract to which the non-settling defendant is a stranger. Absent double compensation, a non-settling defendant should not be able to rely on the benefits of that agreement beyond the guarantee that it will not be required to pay more than its share of the liability. By taking this approach, a plaintiff who may have been contributorily negligent will be encouraged to attempt to settle.

116 For the foregoing reasons, I would dismiss this ground of appeal.

(8) Contribution and Indemnity

117 Mr. Gendron submits that the trial judge erred in not finding that Thompson Fuels was liable for its proportionate share of the $313,005.08 Mr. Gendron was ordered to pay pursuant to s. 100.1(1) of the *EPA*.

118 Section 100.1 of the *EPA* gives a municipality the right to issue orders against the "the owner of the pollutant or the person having control of the pollutant" within the meaning of the *EPA*. The trial judge rejected Mr. Gendron's argument that Thompson Fuels was the "owner" of the oil immediately before the leak. In his view, pursuant to s. 19, Rule 5 of the *Sale of Goods Act*, RSO 1990, c S.1, Mr. Gendron became the "owner" of the oil upon delivery, rather than when payment for the oil was processed approximately five hours after delivery.

119 Consequently, Gendron's s. 100.1 claim for contribution and indemnity could only succeed if Thompson Fuels had "the charge, management or control of a pollutant immediately before the first discharge". In the trial judge's view, the key phrase was "immediately before". He interpreted this phrase to mean that there can be no intervening act between "charge, management or control" and the discharge of the pollutant. In his view, Thompson Fuels lost control of the oil upon delivery, and therefore did not have control "immediately" before the first discharge. He therefore dismissed the claim for contribution and indemnity.

120 I agree with the trial judge's analysis. He properly applied the provisions of s. 100.1 to the facts of this case. Thompson Fuels could not be the owner of the fuel or have control of the fuel once it had delivered the fuel to its customer.

(9) Costs

121 Thompson Fuels seeks leave to appeal the award of costs against it. It submits that the trial judge failed to properly apply a reduction of costs for the allocation of fault, the impugned conduct of Mr. Gendron, and the partial settlement paid by Granby. The trial judge is also said to have erred by failing to consider the offers to settle before trial.

122 Costs awards are entitled to considerable deference. Appellate courts will set aside a costs award on appeal only if the trial judge has made an error in principle or if the costs award is plainly wrong: *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9, [2004] 1 S.C.R. 303 (S.C.C.), at para. 27.

123 This is not a case warranting interference by this court. The trial judge specifically considered the apportionment of fault and the negligence of Mr. Gendron. He rejected the submission that Mr. Gendron's costs should be apportioned on the same percentage basis as his liability. This decision was well within the trial judge's discretion in fixing costs and there is no basis for appellant interference. I would also reject the submission that there should be a reduction in Mr. Gendron's costs as a consequence of the Granby settlement for the same reasons detailed above considering the impact of the .*Pierringer* agreement.

124 The trial judge found that Thompson Fuels came nowhere close to beating its offer to settle for a $300,000 contribution to a $650,000 total settlement amount. Therefore, he decided that rule 49.10 for adjustment of costs in light of settlement offers did not apply. Having made a woefully inadequate offer to settle, Thompson Fuels cannot seriously contend that the trial judge erred in not reducing costs as a consequence of the offer.

VI. Disposition

125 For the foregoing reasons, I would dismiss the appeals save for a reduction in the damages equal to the amount paid in relation to Mr. Gendron's line of credit. As there has been divided success, I would not award costs for the appeals.

***B.W. Miller J.A.*:**

I agree.

***David M. Paciocco J.A.*:**

I agree.

Plaintiff's appeal dismissed; T Ltd.'s appeal allowed in part.

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para. 49

2013 ONSC 1078
Ontario Superior Court of Justice [Commercial List]

Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.

2013 CarswellOnt 3361, 2013 ONSC 1078, 100 C.B.R. (5th) 30, 227 A.C.W.S. (3d) 930, 37 C.P.C. (7th) 135

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

In the Matter of a Plan of Compromise or Arrangement of Sino-Forest Corporation, Applicant

The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, The Trustees of the International Union of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario, Sjunde Ap-Fonden, David Grant and Robert Wong, Plaintiffs and Sino-Forest Corporation, Ernst & Young LLP, BDO Limited (Formerly Known as BDO McCabe Lo Limited), Allen T.Y. Chan, W. Judson Martin, Kai Kit Poon, David J. Horsley, William E. Ardell, James P. Bowland, James M.E. Hyde, Edmund Mak, Simon Murray, Peter Wang, Garry J. West, Pöyry (Beijing) Consulting Company Limited, Credit Suisse Securities (Canada) In., TD Securities Inc., Dundee Securities Corporation, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lunch Canada Inc., Canaccord Financial Ltd., Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated (Successor by Merger to Banc of America Securities LLC), Defendants

Morawetz J.

Heard: February 4, 2013
Judgment: March 20, 2013
Docket: CV-12-9667-00CL, CV-11-431153-00CP

Counsel: Kenneth Rosenberg, Max Starnino, A. Dimitri Lascaris, Daniel Bach, Charles M. Wright, Jonathan Ptak, for Ad Hoc Committee of Purchasers including the Class Action Plaintiffs
Peter Griffin, Peter Osborne, Shara Roy, for Ernst & Young LLP, John Pirie and David Gadsden, for Pöyry (Beijing) Consulting Company Ltd.
Robert W. Staley for Sino-Forest Corporation
Won J. Kim, Michael C. Spencer, Megan B. McPhee for Objectors, Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndical National de Retraite Bâtirente Inc.
John Fabello Rebecca Wise, for Underwriters
Ken Dekker, Peter Greene for BDO Limited
Emily Cole, Joseph Marin for Allen Chan
James Doris for U.S. Class Action
Brandon Barnes for Kai Kit Poon
Robert Chadwick, Brendan O'Neill for Ad Hoc Committee of Noteholders
Derrick Tay, Cliff Prophet for Monitor, FTI Consulting Canada Inc.
Simon Bieber for David Horsley
James Grout for Ontario Securities Commission
Miles D. O'Reilly, Q.C. for Junior Objectors, Daniel Lam and Senthilvel Kanagaratnam

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial; Securities
Related Abridgment Classifications
Bankruptcy and insolvency

I Bankruptcy and insolvency jurisdiction
I.2 Jurisdiction of courts
I.2.b Jurisdiction of general courts
Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.a General principles
Civil practice and procedure
V Class and representative proceedings
V.2 Representative or class proceedings under class proceedings legislation
V.2.d Orders, awards and related procedures
V.2.d.iii Termination of proceedings

Headnote

Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Jurisdiction of courts — Jurisdiction of general courts
To approve settlement in class proceedings — Representative plaintiffs were some of stakeholders who claimed defendant forestry company and other defendants misstated its financial results, misrepresented its timber rights, overstated value of its assets and concealed material information about its business operations from investors, causing collapse of artificially inflated share price — Representative plaintiffs began class proceedings against forestry company, which was comprised of components related to shareholders and noteholders — Forestry company entered protection under Companies' Creditors Arrangement Act — Settlement reached between representative plaintiffs and particular defendant — Representative plaintiffs brought motion for approval of settlement — Motion granted — Proceedings were appropriate for approval of settlement, and court had jurisdiction in respect of both Companies' Creditors Arrangement Act and Class Proceeding Act — CCAA proceedings could not be ignored despite any ill-effect on opt-out rights in class proceedings — Claim fell within the Companies' Creditors Arrangement Act, and could be subject of settlement and could include claims of all creditors in class — Until settlement was concluded and proceeds paid, there could be no distribution of settlement proceeds to parties entitled to receive them, and approval of release in settlement was necessary to effect any distribution.
Bankruptcy and insolvency --- Proposal — Approval by court — General principles
Where class proceedings ongoing — Representative plaintiffs were some of stakeholders who claimed defendant forestry company and other defendants misstated its financial results, misrepresented its timber rights, overstated value of its assets and concealed material information about its business operations from investors, causing collapse of artificially inflated share price — Representative plaintiffs began class proceedings against forestry company, which was comprised of components related to shareholders and noteholders — Forestry company entered protection under Companies' Creditors Arrangement Act — Settlement reached between representative plaintiffs and particular defendant — Representative plaintiffs brought motion for approval of settlement — Motion granted — Claims in release were rationally related to purpose of the plan in Companies' Creditors Arrangement Act and were necessary for it — Without approval of settlement, objectives of plan remained unfulfilled due to practical inability to distribute settlement proceeds — Defendant made significant monetary contribution to plan -- Plan benefited claimants in form of tangible distribution -- Release was fair and reasonable and not overly broad or offensive to public policy — Clear that claims asserted against forestry company had to be addressed as part of restructuring — Unencumbered participation of forestry company's subsidiaries is crucial to restructuring.
Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Orders, awards and related procedures — Termination of proceedings
Settlement — Representative plaintiffs were some of stakeholders who claimed defendant forestry company and other defendants misstated its financial results, misrepresented its timber rights, overstated value of its assets and concealed material information about its business operations from investors, causing collapse of artificially inflated share price — Representative plaintiffs began class proceedings against forestry company, which was comprised of components related to shareholders and noteholders — Forestry company entered protection under Companies' Creditors Arrangement Act — Settlement reached between representative plaintiffs and particular defendant — Representative plaintiffs brought motion for approval of settlement — Motion granted — Claims in release were rationally related to purpose of the plan in Companies' Creditors Arrangement Act and were necessary for it — Without approval of settlement, objectives of plan remained unfulfilled due to practical inability

to distribute settlement proceeds — Defendant made significant monetary contribution to plan -- Plan benefited claimants in form of tangible distribution -- Release was fair and reasonable and not overly broad or offensive to public policy — Clear that claims asserted against forestry company had to be addressed as part of restructuring — Unencumbered participation of forestry company's subsidiaries is crucial to restructuring.

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Cases considered by *Morawetz J.*:

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ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — considered

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Fischer v. IG Investment Management Ltd. (2012), 2012 ONCA 47, 2012 CarswellOnt 635, 287 O.A.C. 148, 109 O.R. (3d) 498, 346 D.L.R. (4th) 598, 15 C.P.C. (7th) 81 (Ont. C.A.) — referred to

Grace Canada Inc., Re (2008), 50 C.B.R. (5th) 25, 2008 CarswellOnt 6284 (Ont. S.C.J. [Commercial List]) — referred to

Mangan v. Inco Ltd. (1998), 1998 CarswellOnt 801, 16 C.P.C. (4th) 165, 38 O.R. (3d) 703, 27 C.E.L.R. (N.S.) 141 (Ont. Gen. Div.) — referred to

Muscletech Research & Development Inc., Re (2007), 30 C.B.R. (5th) 59, 2007 CarswellOnt 1029 (Ont. S.C.J. [Commercial List]) — referred to

Nortel Networks Corp., Re (2010), 63 C.B.R. (5th) 44, 81 C.C.P.B. 56, 2010 CarswellOnt 1754, 2010 ONSC 1708 (Ont. S.C.J. [Commercial List]) — considered

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Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — referred to

s. 9 — referred to

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

Generally — referred to

s. 2(1) "equity claim" — considered

MOTION by representative plaintiffs for approval of settlement in class proceeding.

***Morawetz J.*:**

Introduction

1 The Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Ad Hoc Securities Purchasers' Committee" or the "Applicant"), including the representative plaintiffs in the Ontario class action (collectively, the "Ontario Plaintiffs"), bring this motion for approval of a settlement and release of claims against Ernst & Young LLP [the "Ernst & Young Settlement", the "Ernst & Young Release", the "Ernst & Young Claims" and "Ernst & Young", as further defined in the Plan of Compromise and Reorganization of Sino-Forest Corporation ("SFC") dated December 3, 2012 (the "Plan")].

2 Approval of the Ernst & Young Settlement is opposed by Invesco Canada Limited ("Invesco"), Northwest and Ethical Investments L.P. ("Northwest"), Comité Syndical National de Retraite Bâtirente Inc. ("Bâtirente"), Matrix Asset Management Inc. ("Matrix"), Gestion Férique and Montrusco Bolton Investments Inc. ("Montrusco") (collectively, the "Objectors"). The Objectors particularly oppose the no-opt-out and full third-party release features of the Ernst & Young Settlement. The Objectors also oppose the motion for a representation order sought by the Ontario Plaintiffs, and move instead for appointment of the Objectors to represent the interests of all objectors to the Ernst & Young Settlement.

3 For the following reasons, I have determined that the Ernst & Young Settlement, together with the Ernst & Young Release, should be approved.

Facts

Class Action Proceedings

4 SFC is an integrated forest plantation operator and forest productions company, with most of its assets and the majority of its business operations located in the southern and eastern regions of the People's Republic of China. SFC's registered office is in Toronto, and its principal business office is in Hong Kong.

5 SFC's shares were publicly traded over the Toronto Stock Exchange. During the period from March 19, 2007 through June 2, 2011, SFC made three prospectus offerings of common shares. SFC also issued and had various notes (debt instruments) outstanding, which were offered to investors, by way of offering memoranda, between March 19, 2007 and June 2, 2011.

6 All of SFC's debt or equity public offerings have been underwritten. A total of 11 firms (the "Underwriters") acted as SFC's underwriters, and are named as defendants in the Ontario class action.

7 Since 2000, SFC has had two auditors: Ernst & Young, who acted as auditor from 2000 to 2004 and 2007 to 2012, and BDO Limited ("BDO"), who acted as auditor from 2005 to 2006. Ernst & Young and BDO are named as defendants in the Ontario class action.

8 Following a June 2, 2011 report issued by short-seller Muddy Waters LLC ("Muddy Waters"), SFC, and others, became embroiled in investigations and regulatory proceedings (with the Ontario Securities Commission (the "OSC"), the Hong Kong Securities and Futures Commission and the Royal Canadian Mounted Police) for allegedly engaging in a "complex fraudulent scheme". SFC concurrently became embroiled in multiple class action proceedings across Canada, including Ontario, Quebec and Saskatchewan (collectively, the "Canadian Actions"), and in New York (collectively with the Canadian Actions, the "Class Action Proceedings"), facing allegations that SFC, and others, misstated its financial results, misrepresented its timber rights, overstated the value of its assets and concealed material information about its business operations from investors, causing the collapse of an artificially inflated share price.

9 The Canadian Actions are comprised of two components: first, there is a shareholder claim, brought on behalf of SFC's current and former shareholders, seeking damages in the amount of $6.5 billion for general damages, $174.8 million in connection with a prospectus issued in June 2007, $330 million in relation to a prospectus issued in June 2009, and $319.2 million in relation to a prospectus issued in December 2009; and second, there is a noteholder claim, brought on behalf of former

holders of SFC's notes (the "Noteholders"), in the amount of approximately $1.8 billion. The noteholder claim asserts, among other things, damages for loss of value in the notes.

10 Two other class proceedings relating to SFC were subsequently commenced in Ontario: *Smith et al. v. Sino-Forest Corporation et al.*, which commenced on June 8, 2011; and *Northwest and Ethical Investments L.P. et al. v. Sino-Forest Corporation et al.*, which commenced on September 26, 2011.

11 In December 2011, there was a motion to determine which of the three actions in Ontario should be permitted to proceed and which should be stayed (the "Carriage Motion"). On January 6, 2012, Perell J. granted carriage to the Ontario Plaintiffs, appointed Siskinds LLP and Koskie Minsky LLP to prosecute the Ontario class action, and stayed the other class proceedings.

CCAA Proceedings

12 SFC obtained an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") on March 30, 2012 (the "Initial Order"), pursuant to which a stay of proceedings was granted in respect of SFC and certain of its subsidiaries. Pursuant to an order on May 8, 2012, the stay was extended to all defendants in the class actions, including Ernst & Young. Due to the stay, the certification and leave motions have yet to be heard.

13 Throughout the CCAA proceedings, SFC asserted that there could be no effective restructuring of SFC's business, and separation from the Canadian parent, if the claims asserted against SFC's subsidiaries arising out of, or connected to, claims against SFC remained outstanding.

14 In addition, SFC and FTI Consulting Canada Inc. (the "Monitor") continually advised that timing and delay were critical elements that would impact on maximization of the value of SFC's assets and stakeholder recovery.

15 On May 14, 2012, an order (the "Claims Procedure Order") was issued that approved a claims process developed by SFC, in consultation with the Monitor. In order to identify the nature and extent of the claims asserted against SFC's subsidiaries, the Claims Procedure Order required any claimant that had or intended to assert a right or claim against one or more of the subsidiaries, relating to a purported claim made against SFC, to so indicate on their proof of claim.

16 The Ad Hoc Securities Purchasers' Committee filed a proof of claim (encapsulating the approximately $7.3 billion shareholder claim and $1.8 billion noteholder claim) in the CCAA proceedings on behalf of all putative class members in the Ontario class action. The plaintiffs in the New York class action filed a proof of claim, but did not specify quantum of damages. Ernst & Young filed a proof of claim for damages and indemnification. The plaintiffs in the Saskatchewan class action did not file a proof of claim. A few shareholders filed proofs of claim separately. No proof of claim was filed by Kim Orr Barristers P.C. ("Kim Orr"), who represent the Objectors.

17 Prior to the commencement of the CCAA proceedings, the plaintiffs in the Canadian Actions settled with Pöyry (Beijing) Consulting Company Limited ("Pöyry") (the "Pöyry Settlement"), a forestry valuator that provided services to SFC. The class was defined as all persons and entities who acquired SFC's securities in Canada between March 19, 2007 to June 2, 2011, and all Canadian residents who acquired SFC securities outside of Canada during that same period (the "Pöyry Settlement Class").

18 The notice of hearing to approve the Pöyry Settlement advised the Pöyry Settlement Class that they may object to the proposed settlement. No objections were filed.

19 Perell J. and Émond J. approved the settlement and certified the Pöyry Settlement Class for settlement purposes. January 15, 2013 was fixed as the date by which members of the Pöyry Settlement Class, who wished to opt-out of either of the Canadian Actions, would have to file an opt-out form for the claims administrator, and they approved the form by which the right to optout was required to be exercised.

20 Notice of the certification and settlement was given in accordance with the certification orders of Perell J. and Émond J. The notice of certification states, in part, that:

IF YOU CHOOSE TO OPT OUT OF THE CLASS, YOU WILL BE OPTING OUT OF THE **ENTIRE** PROCEEDING. THIS MEANS THAT YOU WILL BE UNABLE TO PARTICIPATE IN ANY FUTURE SETTLEMENT OR JUDGMENT REACHED WITH OR AGAINST THE REMAINING DEFENDANTS.

21 The opt-out made no provision for an opt-out on a conditional basis.

22 On June 26, 2012, SFC brought a motion for an order directing that claims against SFC that arose in connection with the ownership, purchase or sale of an equity interest in SFC, and related indemnity claims, were "equity claims" as defined in section 2 of the CCAA, including the claims by or on behalf of shareholders asserted in the Class Action Proceedings. The equity claims motion did not purport to deal with the component of the Class Action Proceedings relating to SFC's notes.

23 In reasons released July 27, 2012 [*Sino-Forest Corp., Re*, 2012 ONSC 4377 (Ont. S.C.J. [Commercial List])], I granted the relief sought by SFC (the "Equity Claims Decision"), finding that "the claims advanced in the shareholder claims are clearly equity claims". The Ad Hoc Securities Purchasers' Committee did not oppose the motion, and no issue was taken by any party with the court's determination that the shareholder claims against SFC were "equity claims". The Equity Claims Decision was subsequently affirmed by the Court of Appeal for Ontario on November 23, 2012 [*Sino-Forest Corp., Re*, 2012 ONCA 816 (Ont. C.A.)].

Ernst & Young Settlement

24 The Ernst & Young Settlement, and third party releases, was not mentioned in the early versions of the Plan. The initial creditors' meeting and vote on the Plan was scheduled to occur on November 29, 2012; when the Plan was amended on November 28, 2012, the creditors' meeting was adjourned to November 30, 2012.

25 On November 29, 2012, Ernst & Young's counsel and class counsel concluded the proposed Ernst & Young Settlement. The creditors' meeting was again adjourned, to December 3, 2012; on that date, a new Plan revision was released and the Ernst & Young Settlement was publicly announced. The Plan revision featured a new Article 11, reflecting the "framework" for the proposed Ernst & Young Settlement and for third-party releases for named third-party defendants as identified at that time as the Underwriters or in the future.

26 On December 3, 2012, a large majority of creditors approved the Plan. The Objectors note, however, that proxy materials were distributed weeks earlier and proxies were required to be submitted three days prior to the meeting and it is evident that creditors submitting proxies only had a pre-Article 11 version of the Plan. Further, no equity claimants, such as the Objectors, were entitled to vote on the Plan. On December 6, 2012, the Plan was further amended, adding Ernst & Young and BDO to Schedule A, thereby defining them as named third-party defendants.

27 Ultimately, the Ernst & Young Settlement provided for the payment by Ernst & Young of $117 million as a settlement fund, being the full monetary contribution by Ernst & Young to settle the Ernst & Young Claims; however, it remains subject to court approval in Ontario, and recognition in Quebec and the United States, and conditional, pursuant to Article 11.1 of the Plan, upon the following steps:

(a) the granting of the sanction order sanctioning the Plan including the terms of the Ernst & Young Settlement and the Ernst & Young Release (which preclude any right to contribution or indemnity against Ernst & Young);

(b) the issuance of the Settlement Trust Order;

(c) the issuance of any other orders necessary to give effect to the Ernst & Young Settlement and the Ernst & Young Release, including the Chapter 15 Recognition Order;

(d) the fulfillment of all conditions precedent in the Ernst & Young Settlement; and

(e) all orders being final orders not subject to further appeal or challenge.

28 On December 6, 2012, Kim Orr filed a notice of appearance in the CCAA proceedings on behalf of three Objectors: Invesco, Northwest and Bâtirente. These Objectors opposed the sanctioning of the Plan, insofar as it included Article 11, during the Plan sanction hearing on December 7, 2012.

29 At the Plan sanction hearing, SFC's counsel made it clear that the Plan itself did not embody the Ernst & Young Settlement, and that the parties' request that the Plan be sanctioned did not also cover approval of the Ernst & Young Settlement. Moreover, according to the Plan and minutes of settlement, the Ernst & Young Settlement would not be consummated (*i.e.* money paid and releases effective) unless and until several conditions had been satisfied in the future.

30 The Plan was sanctioned on December 10, 2012 with Article 11. The Objectors take the position that the Funds' opposition was dismissed as premature and on the basis that nothing in the sanction order affected their rights.

31 On December 13, 2012, the court directed that its hearing on the Ernst & Young Settlement would take place on January 4, 2013, under both the CCAA and the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA"). Subsequently, the hearing was adjourned to February 4, 2013.

32 On January 15, 2013, the last day of the opt-out period established by orders of Perell J. and Émond J., six institutional investors represented by Kim Orr filed opt-out forms. These institutional investors are Northwest and Bâtirente, who were two of the three institutions represented by Kim Orr in the Carriage Motion, as well as Invesco, Matrix, Montrusco and Gestion Ferique (all of which are members of the Pöyry Settlement Class).

33 According to the opt-out forms, the Objectors held approximately 1.6% of SFC shares outstanding on June 30, 2011 (the day the Muddy Waters report was released). By way of contrast, Davis Selected Advisors and Paulson and Co., two of many institutional investors who support the Ernst & Young Settlement, controlled more than 25% of SFC's shares at this time. In addition, the total number of outstanding objectors constitutes approximately 0.24% of the 34,177 SFC beneficial shareholders as of April 29, 2011.

Law and Analysis

Court's Jurisdiction to Grant Requested Approval

34 The Claims Procedure Order of May 14, 2012, at paragraph 17, provides that any person that does not file a proof of claim in accordance with the order is barred from making or enforcing such claim as against any other person who could claim contribution or indemnity from the Applicant. This includes claims by the Objectors against Ernst & Young for which Ernst & Young could claim indemnity from SFC.

35 The Claims Procedure Order also provides that the Ontario Plaintiffs are authorized to file one proof of claim in respect of the substance of the matters set out in the Ontario class action, and that the Quebec Plaintiffs are similarly authorized to file one proof of claim in respect of the substance of the matters set out in the Quebec class action. The Objectors did not object to, or oppose, the Claims Procedure Order, either when it was sought or at any time thereafter. The Objectors did not file an independent proof of claim and, accordingly, the Canadian Claimants were authorized to and did file a proof of claim in the representative capacity in respect of the Objectors' claims.

36 The Ernst & Young Settlement is part of a CCAA plan process. Claims, including contingent claims, are regularly compromised and settled within CCAA proceedings. This includes outstanding litigation claims against the debtor and third parties. Such compromises fully and finally dispose of such claims, and it follows that there are no continuing procedural or other rights in such proceedings. Simply put, there are no "opt-outs" in the CCAA.

37 It is well established that class proceedings can be settled in a CCAA proceeding. See *Robertson v. ProQuest Information & Learning Co.*, 2011 ONSC 1647 (Ont. S.C.J. [Commercial List]) [*Robertson*].

38 As noted by Pepall J. (as she then was) in *Robertson*, para. 8:

> When dealing with the consensual resolution of a CCAA claim filed in a claims process that arises out of ongoing litigation, typically no court approval is required. In contrast, class proceedings settlements must be approved by the court. The notice and process for dissemination of the settlement agreement must also be approved by the court.

39 In this case, the notice and process for dissemination have been approved.

40 The Objectors take the position that approval of the Ernst & Young Settlement would render their opt-out rights illusory; the inherent flaw with this argument is that it is not possible to ignore the CCAA proceedings.

41 In this case, claims arising out of the class proceedings are claims in the CCAA process. CCAA claims can be, by definition, subject to compromise. The Claims Procedure Order establishes that claims as against Ernst & Young fall within the CCAA proceedings. Thus, these claims can also be the subject of settlement and, if settled, the claims of all creditors in the class can also be settled.

42 In my view, these proceedings are the appropriate time and place to consider approval of the Ernst & Young Settlement. This court has the jurisdiction in respect of both the CCAA and the CPA.

Should the Court Exercise Its Discretion to Approve the Settlement

43 Having established the jurisdictional basis to consider the motion, the central inquiry is whether the court should exercise its discretion to approve the Ernst & Young Settlement.

CCAA Interpretation

44 The CCAA is a "flexible statute", and the court has "jurisdiction to approve major transactions, including settlement agreements, during the stay period defined in the Initial Order". The CCAA affords courts broad jurisdiction to make orders and "fill in the gaps in legislation so as to give effect to the objects of the CCAA." [*Nortel Networks Corp., Re*, 2010 ONSC 1708 (Ont. S.C.J. [Commercial List]), paras. 66-70 ("*Re Nortel*"); *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]), para. 43]

45 Further, as the Supreme Court of Canada explained in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), para. 58:

> CCAA decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly described as "the hothouse of real time litigation" has been the primary method by which the CCAA has been adapted and has evolved to meet contemporary business and social needs (internal citations omitted). ...When large companies encounter difficulty, reorganizations become increasingly complex. CCAA courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the Debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the CCAA.

46 It is also established that third-party releases are not an uncommon feature of complex restructurings under the CCAA [*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.) ("*ATB Financial*"); *Nortel Networks Corp., Re*, *supra*; *Robertson*, *supra*; *Muscletech Research & Development Inc., Re* (2007), 30 C.B.R. (5th) 59, 156 A.C.W.S. (3d) 22 (Ont. S.C.J. [Commercial List]) ("*Muscle Tech*"); *Grace Canada Inc., Re* (2008), 50 C.B.R. (5th) 25 (Ont. S.C.J. [Commercial List]); *Allen-Vanguard Corp., Re*, 2011 ONSC 5017 (Ont. S.C.J. [Commercial List])].

47 The Court of Appeal for Ontario has specifically confirmed that a third-party release is justified where the release forms part of a comprehensive compromise. As Blair J. A. stated in *ATB Financial*, *supra*:

> 69. In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or

the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

70. The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan ...

71. In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

a) The parties to be released are necessary and essential to the restructuring of the debtor;

b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;

c) The Plan cannot succeed without the releases;

d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and

e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

72. Here, then — as was the case in T&N — there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed ...

73. I am satisfied that the wording of the CCAA — construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation — supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

. . .

78. ... I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

. . .

113. At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here — with two additional findings — because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

a) The parties to be released are necessary and essential to the restructuring of the debtor;

b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;

c) The Plan cannot succeed without the releases;

d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;

e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;

f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,

g) The releases are fair and reasonable and not overly broad or offensive to public policy.

48 Furthermore, in *ATB Financial*, *supra*, para. 111, the Court of Appeal confirmed that parties are entitled to settle allegations of fraud and to include releases of such claims as part of the settlement. It was noted that "there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given".

Relevant CCAA Factors

49 In assessing a settlement within the CCAA context, the court looks at the following three factors, as articulated in *Robertson*, *supra*:

(a) whether the settlement is fair and reasonable;

(b) whether it provides substantial benefits to other stakeholders; and

(c) whether it is consistent with the purpose and spirit of the CCAA.

50 Where a settlement also provides for a release, such as here, courts assess whether there is "a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan". Applying this "nexus test" requires consideration of the following factors: [*ATB Financial*, *supra*, para. 70]

(a) Are the claims to be released rationally related to the purpose of the plan?

(b) Are the claims to be released necessary for the plan of arrangement?

(c) Are the parties who have claims released against them contributing in a tangible and realistic way? and

(d) Will the plan benefit the debtor and the creditors generally?

Counsel Submissions

51 The Objectors argue that the proposed Ernst & Young Release is not integral or necessary to the success of Sino-Forest's restructuring plan, and, therefore, the standards for granting thirdparty releases in the CCAA are not satisfied. No one has asserted that the parties require the Ernst & Young Settlement or Ernst & Young Release to allow the Plan to go forward; in fact, the Plan has been implemented prior to consideration of this issue. Further, the Objectors contend that the $117 million settlement payment is not essential, or even related, to the restructuring, and that it is concerning, and telling, that varying the end of the Ernst & Young Settlement and Ernst & Young Release to accommodate opt-outs would extinguish the settlement.

52 The Objectors also argue that the Ernst & Young Settlement should not be approved because it would vitiate opt-out rights of class members, as conferred as follows in section 9 of the CPA: "Any member of a class involved in a class proceeding may opt-out of the proceeding in the manner and within the time specified in the certification order." This right is a fundamental element of procedural fairness in the Ontario class action regime [*Fischer v. IG Investment Management Ltd.*, 2012 ONCA 47 (Ont. C.A.), para. 69], and is not a mere technicality or illusory. It has been described as absolute [*Durling v. Sunrise Propane Energy Group Inc.*, 2011 ONSC 266 (Ont. S.C.J.)]. The opt-out period allows persons to pursue their self-interest and to preserve their rights to pursue individual actions [*Mangan v. Inco Ltd.* (1998), 16 C.P.C. (4th) 165, 38 O.R. (3d) 703 (Ont. Gen. Div.)].

53 Based on the foregoing, the Objectors submit that a proposed class action settlement with Ernst & Young should be approved solely under the CPA, as the Pöyry Settlement was, and not through misuse of a third-party release procedure under the CCAA. Further, since the minutes of settlement make it clear that Ernst & Young retains discretion not to accept or recognize normal opt-outs if the CPA procedures are invoked, the Ernst & Young Settlement should not be approved in this respect either.

54 Multiple parties made submissions favouring the Ernst & Young Settlement (with the accompanying Ernst & Young Release), arguing that it is fair and reasonable in the circumstances, benefits the CCAA stakeholders (as evidenced by the broad-based support for the Plan and this motion) and rationally connected to the Plan.

55 Ontario Plaintiffs' counsel submits that the form of the bar order is fair and properly balances the competing interests of class members, Ernst & Young and the non-settling defendants as:

> (a) class members are not releasing their claims to a greater extent than necessary;
>
> (b) Ernst & Young is ensured that its obligations in connection to the Settlement will conclude its liability in the class proceedings;
>
> (c) the non-settling defendants will not have to pay more following a judgment than they would be required to pay if Ernst & Young remained as a defendant in the action; and
>
> (d) the non-settling defendants are granted broad rights of discovery and an appropriate credit in the ongoing litigation, if it is ultimately determined by the court that there is a right of contribution and indemnity between the co-defendants.

56 SFC argues that Ernst & Young's support has simplified and accelerated the Plan process, including reducing the expense and management time otherwise to be incurred in litigating claims, and was a catalyst to encouraging many parties, including the Underwriters and BDO, to withdraw their objections to the Plan. Further, the result is precisely the type of compromise that the CCAA is designed to promote; namely, Ernst & Young has provided a tangible and significant contribution to the Plan (notwithstanding any pitfalls in the litigation claims against Ernst & Young) that has enabled SFC to emerge as Newco/NewcoII in a timely way and with potential viability.

57 Ernst & Young's counsel submits that the Ernst & Young Settlement, as a whole, including the Ernst & Young Release, must be approved or rejected; the court cannot modify the terms of a proposed settlement. Further, in deciding whether to reject a settlement, the court should consider whether doing so would put the settlement in "jeopardy of being unravelled". In this case, counsel submits there is no obligation on the parties to resume discussions and it could be that the parties have reached their limits in negotiations and will backtrack from their positions or abandon the effort.

Analysis and Conclusions

58 The Ernst & Young Release forms part of the Ernst & Young Settlement. In considering whether the Ernst & Young Settlement is fair and reasonable and ought to be approved, it is necessary to consider whether the Ernst & Young Release can be justified as part of the Ernst & Young Settlement. See *ATB Financial*, *supra*, para. 70, as quoted above.

59 In considering the appropriateness of including the Ernst & Young Release, I have taken into account the following.

60 Firstly, although the Plan has been sanctioned and implemented, a significant aspect of the Plan is a distribution to SFC's creditors. The significant and, in fact, only monetary contribution that can be directly identified, at this time, is the $117 million from the Ernst & Young Settlement. Simply put, until such time as the Ernst & Young Settlement has been concluded and the settlement proceeds paid, there can be no distribution of the settlement proceeds to parties entitled to receive them. It seems to me that in order to effect any distribution, the Ernst & Young Release has to be approved as part of the Ernst & Young Settlement.

61 Secondly, it is apparent that the claims to be released against Ernst & Young are rationally related to the purpose of the Plan and necessary for it. SFC put forward the Plan. As I outlined in the Equity Claims Decision, the claims of Ernst & Young

as against SFC are intertwined to the extent that they cannot be separated. Similarly, the claims of the Objectors as against Ernst & Young are, in my view, intertwined and related to the claims against SFC and to the purpose of the Plan.

62 Thirdly, although the Plan can, on its face, succeed, as evidenced by its implementation, the reality is that without the approval of the Ernst & Young Settlement, the objectives of the Plan remain unfulfilled due to the practical inability to distribute the settlement proceeds. Further, in the event that the Ernst & Young Release is not approved and the litigation continues, it becomes circular in nature as the position of Ernst & Young, as detailed in the Equity Claims Decision, involves Ernst & Young bringing an equity claim for contribution and indemnity as against SFC.

63 Fourthly, it is clear that Ernst & Young is contributing in a tangible way to the Plan, by its significant contribution of $117 million.

64 Fifthly, the Plan benefits the claimants in the form of a tangible distribution. Blair J.A., at paragraph 113 of *ATB Financial*, *supra*, referenced two further facts as found by the application judge in that case; namely, the voting creditors who approved the Plan did so with the knowledge of the nature and effect of the releases. That situation is also present in this case.

65 Finally, the application judge in *ATB Financial*, *supra*, held that the releases were fair and reasonable and not overly broad or offensive to public policy. In this case, having considered the alternatives of lengthy and uncertain litigation, and the full knowledge of the Canadian plaintiffs, I conclude that the Ernst & Young Release is fair and reasonable and not overly broad or offensive to public policy.

66 In my view, the Ernst & Young Settlement is fair and reasonable, provides substantial benefits to relevant stakeholders, and is consistent with the purpose and spirit of the CCAA. In addition, in my view, the factors associated with the *ATB Financial* nexus test favour approving the Ernst & Young Release.

67 In *Nortel Networks Corp., Re*, *supra*, para. 81, I noted that the releases benefited creditors generally because they "reduced the risk of litigation, protected Nortel against potential contribution claims and indemnity claims and reduced the risk of delay caused by potentially complex litigation and associated depletion of assets to fund potentially significant litigation costs". In this case, there is a connection between the release of claims against Ernst & Young and a distribution to creditors. The plaintiffs in the litigation are shareholders and Noteholders of SFC. These plaintiffs have claims to assert against SFC that are being directly satisfied, in part, with the payment of $117 million by Ernst & Young.

68 In my view, it is clear that the claims Ernst & Young asserted against SFC, and SFC's subsidiaries, had to be addressed as part of the restructuring. The interrelationship between the various entities is further demonstrated by Ernst & Young's submission that the release of claims by Ernst & Young has allowed SFC and the SFC subsidiaries to contribute their assets to the restructuring, unencumbered by claims totalling billions of dollars. As SFC is a holding company with no material assets of its own, the unencumbered participation of the SFC subsidiaries is crucial to the restructuring.

69 At the outset and during the CCAA proceedings, the Applicant and Monitor specifically and consistently identified timing and delay as critical elements that would impact on maximization of the value and preservation of SFC's assets.

70 Counsel submits that the claims against Ernst & Young and the indemnity claims asserted by Ernst & Young would, absent the Ernst & Young Settlement, have to be finally determined before the CCAA claims could be quantified. As such, these steps had the potential to significantly delay the CCAA proceedings. Where the claims being released may take years to resolve, are risky, expensive or otherwise uncertain of success, the benefit that accrues to creditors in having them settled must be considered. See *Nortel Networks Corp., Re*, *supra*, paras. 73 and 81; and *Muscletech*, *supra*, paras. 19-21.

71 Implicit in my findings is rejection of the Objectors' arguments questioning the validity of the Ernst & Young Settlement and Ernst & Young Release. The relevant consideration is whether a proposed settlement and third-party release sufficiently benefits all stakeholders to justify court approval. I reject the position that the $117 million settlement payment is not essential, or even related, to the restructuring; it represents, at this point in time, the only real monetary consideration available to stakeholders.

The potential to vary the Ernst & Young Settlement and Ernst & Young Release to accommodate opt-outs is futile, as the court is being asked to approve the Ernst & Young Settlement and Ernst & Young Release as proposed.

72 I do not accept that the class action settlement should be approved solely under the CPA. The reality facing the parties is that SFC is insolvent; it is under CCAA protection, and stakeholder claims are to be considered in the context of the CCAA regime. The Objectors' claim against Ernst & Young cannot be considered in isolation from the CCAA proceedings. The claims against Ernst & Young are interrelated with claims as against SFC, as is made clear in the Equity Claims Decision and Claims Procedure Order.

73 Even if one assumes that the opt-out argument of the Objectors can be sustained, and optout rights fully provided, to what does that lead? The Objectors are left with a claim against Ernst & Young, which it then has to put forward in the CCAA proceedings. Without taking into account any argument that the claim against Ernst & Young may be affected by the claims bar date, the claim is still capable of being addressed under the Claims Procedure Order. In this way, it is again subject to the CCAA fairness and reasonable test as set out in *ATB Financial*, *supra*.

74 Moreover, CCAA proceedings take into account a class of creditors or stakeholders who possess the same legal interests. In this respect, the Objectors have the same legal interests as the Ontario Plaintiffs. Ultimately, this requires consideration of the totality of the class. In this case, it is clear that the parties supporting the Ernst & Young Settlement are vastly superior to the Objectors, both in number and dollar value.

75 Although the right to opt-out of a class action is a fundamental element of procedural fairness in the Ontario class action regime, this argument cannot be taken in isolation. It must be considered in the context of the CCAA.

76 The Objectors are, in fact, part of the group that will benefit from the Ernst & Young Settlement as they specifically seek to reserve their rights to "opt-in" and share in the spoils.

77 It is also clear that the jurisprudence does not permit a dissenting stakeholder to opt-out of a restructuring. [*Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List])).] If that were possible, no creditor would take part in any CCAA compromise where they were to receive less than the debt owed to them. There is no right to opt-out of any CCAA process, and the statute contemplates that a minority of creditors are bound by the plan which a majority have approved and the court has determined to be fair and reasonable.

78 SFC is insolvent and all stakeholders, including the Objectors, will receive less than what they are owed. By virtue of deciding, on their own volition, not to participate in the CCAA process, the Objectors relinquished their right to file a claim and take steps, in a timely way, to assert their rights to vote in the CCAA proceeding.

79 Further, even if the Objectors had filed a claim and voted, their minimal 1.6% stake in SFC's outstanding shares when the Muddy Waters report was released makes it highly unlikely that they could have altered the outcome.

80 Finally, although the Objectors demand a right to conditionally opt-out of a settlement, that right does not exist under the CPA or CCAA. By virtue of the certification order, class members had the ability to opt-out of the class action. The Objectors did not opt-out in the true sense; they purported to create a conditional opt-out. Under the CPA, the right to opt-out is "in the manner and within the time specified in the certification order". There is no provision for a conditional opt-out in the CPA, and Ontario's single opt-out regime causes "no prejudice...to putative class members". [CPA, section 9; *Osmun v. Cadbury Adams Canada Inc.* (2009), 85 C.P.C. (6th) 148 (Ont. S.C.J.), paras. 43-46; and *Eidoo v. Infineon Technologies AG*, 2012 ONSC 7299 (Ont. S.C.J.).]

Miscellaneous

81 For greater certainty, it is my understanding that the issues raised by Mr. O'Reilly have been clarified such that the effect of this endorsement is that the Junior Objectors will be included with the same status as the Ontario Plaintiffs.

Disposition

82 In the result, for the foregoing reasons, the motion is granted. A declaration shall issue to the effect that the Ernst & Young Settlement is fair and reasonable in all the circumstances. The Ernst & Young Settlement, together with the Ernst & Young Release, is approved and an order shall issue substantially in the form requested. The motion of the Objectors is dismissed.

Motion granted.

2013 ONCA 456
Ontario Court of Appeal

Sino-Forest Corp., Re

2013 CarswellOnt 8896, 2013 ONCA 456, [2013] O.J. No. 3085, 230 A.C.W.S. (3d) 124

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

The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, the Trustees of the International Union of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario, Sjunde Ap-Fonden, David Grant and Robert Wong, Plaintiffs and Sino-Forest Corporation, Ernst & Young LLP, BDO Limited (formerly known as BDO McCabe Lo Limited), Allen T.Y. Chan, W. Judson Martin, Kai Kit Poon, David J. Horsley, William E. Ardell, James P. Bowland, James M.E. Hyde, Edmund Mak, Simon Murray, Peter Wang, Garry J. West, Poyry (Beijing) Consulting Company Limited, Credit Suisse Securities (Canada), Inc., TD Securities Inc., Dundee Securities Corporation, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd., Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorported (successor by merger to Banc of America Securities LLC) Proceedings under the Class Proceedings Act, 1992, Defendants

J. MacFarland J.A., David Watt J.A., Gloria Epstein J.A.

Judgment: June 26, 2013
Docket: CA M42068, M42399

Proceedings: refusing leave to appeal *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.* (2013), 37 C.P.C. (7th) 135, 100 C.B.R. (5th) 30, 2013 ONSC 1078, 2013 CarswellOnt 3361 (Ont. S.C.J. [Commercial List]); and refusing leave to appeal *Sino-Forest Corp., Re* (2012), 2012 CarswellOnt 15913, 2012 ONSC 7050 (Ont. S.C.J. [Commercial List])

Counsel: James C. Orr, Won J. Kim, Megan B. McPhee, Michael C. Spencer, for Moving Parties, Invesco Canada Ltd., Northwest & Ethical Investments L.P., and Comité Syndical National de Retraite Bâtirente Inc.
Ken Rosenberg, Massimo Starnino, Jonathan Ptak, Jonathan Bida, Charles M. Wright, A. Dimitri Lascaris, for Ad Hoc Committee of Purchasers of the Applicant's Securities, including the Representative Plaintiffs in the Ontario Class Action
Benjamin Zarnett, Robert Chadwick, Brendan O'Neill, for Respondent Ad Hoc Committee of Noteholders
Peter R. Greene, Kathryn L. Knight, Kenneth A. Dekker, for Responding Party, DBO Limited
Robert W. Staley, Kevin Zych, Derek J. Bell, Raj Sahni, Jonathan Bell, for Sino-Forest Corporation
David Bish, John Fabello, Adam M. Slavens, for Underwriters
Derrick Tay, Clifton Prophet, Jennifer Stam, for FTI Consulting Canada Inc., in its capacity as Monitor
Peter H. Griffin, Peter J. Osborne, Shara N. Roy, for Ernst & Young LLP

Subject: Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.4 Appeals
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Appeals

There were two motions for leave to appeal in proceedings under Companies' Creditors Arrangement Act (CCAA) — Motions related to supervising judge's approval of settlement releasing E.Y. from any claims arising from its auditing of company — Settlement was part of company's plan of compromise and reorganization — Leave to appeal was sought for order sanctioning plan of compromise and reorganization and approving settlement — Motions dismissed — Leave to appeal in CCAA proceedings was to be granted sparingly and only where there were serious and arguable grounds that were of real and significant interest to parties — Test for granting leave to appeal in CCAA proceedings was not met — Proposed appeal of sanction order was moot, as plan had been implemented — There was no basis to interfere with decision approving settlement.

Table of Authorities

Cases considered:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — followed

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 257 O.A.C. 400 (note), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 390 N.R. 393 (note) (S.C.C.) — referred to

Country Style Food Services Inc., Re (2002), 158 O.A.C. 30, 2002 CarswellOnt 1038 (Ont. C.A. [In Chambers]) — referred to

Robertson v. ProQuest Information & Learning Co. (2011), 2011 ONSC 1647, 2011 CarswellOnt 1770 (Ont. S.C.J. [Commercial List]) — followed

Sino-Forest Corp., Re (2012), 99 C.B.R. (5th) 269, 2012 ONSC 7041, 2012 CarswellOnt 15919 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

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

Generally — referred to

MOTIONS for leave to appeal from judgment reported at *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.* (2013), 37 C.P.C. (7th) 135, 100 C.B.R. (5th) 30, 2013 ONSC 1078, 2013 CarswellOnt 3361 (Ont. S.C.J. [Commercial List]), and judgment reported at *Sino-Forest Corp., Re* (2012), 2012 CarswellOnt 15913, 2012 ONSC 7050 (Ont. S.C.J. [Commercial List]), in proceedings under *Companies' Creditors Arrangement Act*.

Per curiam:

1 Leave to appeal is denied.

2 The test for granting leave to appeal in *CCAA* proceedings is well-settled. It is to be granted sparingly and only where there are serious and arguable grounds that are of real and significant interest to the parties. In determining whether leave ought to be granted, this court is required to consider the following four-part inquiry:

- Whether the point on the proposed appeal is of significance to the practice;
- Whether the point is of significance to the action;
- Whether the proposed appeal is *prima facie* meritorious or frivolous; and
- Whether the appeal will unduly hinder the progress of the action.

See *Country Style Food Services Inc., Re* (2002), 158 O.A.C. 30 (Ont. C.A. [In Chambers]).

3 In our view the proposed appeals fail to meet this stringent test.

4 These motions for leave to appeal relate to the supervising judge's approval of a settlement releasing Ernst & Young LLP from any claims arising from its auditing of Sino-Forest Corporation.

5 The Ernst & Young settlement is part of Sino-Forest's Plan of Compromise and Reorganization ("the Plan") following a bankruptcy triggered by allegations of corporate fraud. The settlement has the support of all parties to the *CCAA* proceedings, including the Monitor, Sino-Forest's creditors and a group of plaintiffs seeking to recover their investment losses in a contemplated, but not yet certified, class action ("the Ontario Plaintiffs").

6 These motions for leave to appeal are brought by a single group of Sino-Forest investors, collectively known as Invesco, who together held approximately 1.6% of Sino-Forest's outstanding shares at the time of its collapse. Invesco chose not to participate in any of the chose not to participate in any of the chose not to participate in any of the

7 Invesco is represented by Kim Orr LLP, the firm that ranked last in a fight for carriage of the Ontario class action against Sino-Forest and its auditors and underwriters. In January 2012, Perell J. awarded carriage of that action to Koskie Minsky and Siskinds LLP, with the Ontario Plaintiffs as the proposed representative plaintiffs. No appeal was taken from the order of Perell J.

8 There are two motions for leave to appeal before the court.

- *M42068* — Invesco seeks leave to appeal the supervising judge's order dated December 10, 2012 [2012 CarswellOnt 15919 (Ont. S.C.J. [Commercial List])], sanctioning a Plan of Compromise and Reorganization for Sino-Forest (the "Sanction Order")

- *M42399* — Invesco seeks leave to appeal the supervising judge's orders dated March 20, 2013 [2013 CarswellOnt 3361 (Ont. S.C.J. [Commercial List])], approving the Ernst & Young settlement and dismissing Invesco's motion for an order to represent all prospective class members who oppose the settlement (the "Settlement Order" and the "Representation Dismissal Order").

9 By order of Simmons J.A. dated May 1, 2013, the motion for leave to appeal the Sanction Order was ordered to be consolidated and heard together with the motion for leave to appeal the Settlement Order and the Representation Dismissal Order.

10 The motions for leave to appeal are opposed by Sino-Forest, the Monitor, Sino-Forest's auditors and underwriters, the Ontario Plaintiffs, and a group representing Sino-Forest's major creditors.

The Sanction Order

11 The supervising judge dismissed Invesco's arguments opposing the Sanction Order on the ground that, since the settlement was not part of the Plan at that point, its objections were premature. It could raise those objections when the court considered whether or not to approve the settlement.

12 Invesco did not move to stay this order and the Plan has since been implemented. This proposed appeal is moot, and in any event, we see no basis to interfere with the supervising judge's decision.

The Settlement Order and the Representation Dismissal Order

13 In approving the settlement, the supervising judge applied the test set out in *Robertson v. ProQuest Information & Learning Co.*, 2011 ONSC 1647 (Ont. S.C.J. [Commercial List]). And because the proposed settlement provided for a release to Ernst & Young, he went on to consider the test prescribed by this court in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513 (Ont. C.A.), leave to appeal refused, [2008] S.C.C.A. No. 337 (S.C.C.) (*"ATB Financial*"). He found that the proposed settlement met those requirements. He concluded that the Ernst & Young settlement was fair and reasonable, provided substantial benefits to relevant stakeholders and was consistent with the purpose and spirit of the *CCAA*.

14 There is no basis on which to interfere with his decision. The issues raised on this proposed appeal are, at their core, the very issues settled by this court in *ATB Financial*.

15 Having dismissed their objection to the settlement order, it follows that Invesco's motion for a representation order would also be dismissed.

16 The motions for leave to appeal are dismissed.

17 Costs are to the responding parties on the motions on a partial indemnity scale fixed in the sum of $1,500 per motion inclusive of disbursements and applicable taxes.

Motions dismissed.

2014 CarswellOnt 3023
Supreme Court of Canada

Sino-Forest Corp., Re

2014 CarswellOnt 3023, 2014 CarswellOnt 3024, [2013]
S.C.C.A. No. 395, 338 O.A.C. 400 (note), 472 N.R. 395 (note)

Invesco Canada Ltd., Northwest & Ethical Investments L.P., Comité Syndical National de Retraite Bâtirente Inc., Matrix Asset Management Inc., Gestion Férique, and Montrusco Bolton Investments Inc. v. The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, The Trustees of the International Union of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario, Sjunde SP-Fonden, David Grant, Robert Wong, Sino-Forest Corporation, Ernst & Young LLP, BDO Limited (formely known as BDO McCabe Lo Limited), Allen T.Y. Chan, Kai Kit Poon, David J. Horsley, Credit Suisse Securities (Canada), Inc., TD Securities Inc., Dundee Securities Corporation, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd., Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated (Successor by merger to Bank of America Securities LLC) and Pöyry (Beijing) Consulting Company Limited

LeBel J., Karkatsanis J., Wagner J.

Judgment: March 13, 2014
Docket: 35541

Proceedings: Leave to appeal refused, 2013 CarswellOnt 8896, 230 A.C.W.S. (3d) 124, 2013 ONCA 456 (Ont. C.A.); Leave to appeal refused, 2012 CarswellOnt 15913, 224 A.C.W.S. (3d) 21, 2012 ONSC 7050 (Ont. S.C.J. [Commercial List]); Leave to appeal refused, 2013 CarswellOnt 3361, 227 A.C.W.S. (3d) 930, 100 C.B.R. (5th) 30, 2013 ONSC 1078, 37 C.P.C. (7th) 135 (Ont. S.C.J. [Commercial List])

Counsel: Counsel — not provided

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency
Civil practice and procedure

Per curiam:

1 The applications for leave to appeal from the judgments of the Court of Appeal for Ontario, Numbers M42068 and M42399, 2013 ONCA 456, dated June 26, 2013 and Numbers C566961, M42436 and M42453, dated June 28, 2013, are dismissed with costs to the respondents The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, The Trustees of the International Union of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario, Sjunde SP-Fonden, David Grant and Robert Wong, the respondent Sino-Forest Corporation, the respondent Ernst & Young LLP and the respondents Credit Suisse Securities (Canada), Inc., TD Securities Inc., Dundee Securities Corporation, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd., Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated (Successor by merger to Bank of America Securities LLC).

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paras. 11, 26

Most Negative Treatment: Check subsequent history and related treatments.

2013 SCC 37
Supreme Court of Canada

Sable Offshore Energy Inc. v. Ameron International Corp.

2013 CarswellNS 428, 2013 CarswellNS 429, 2013 SCC 37, [2013] 2 S.C.R. 623, [2013] S.C.J. No. 37, 1052 A.P.R. 1, 228 A.C.W.S. (3d) 78, 22 C.L.R. (4th) 1, 332 N.B.R. (2d) 1, 359 D.L.R. (4th) 381, 37 C.P.C. (7th) 225, 446 N.R. 35, J.E. 2013-1134

Sable Offshore Energy Inc., as agent for and on behalf of the Working Interest Owners of the Sable Offshore Energy Project, ExxonMobil Canada Properties, Shell Canada Limited, Imperial Oil Resources, Mosbacher Operating Ltd., Pengrowth Corporation, ExxonMobil Canada Properties, as operator of the Sable Offshore Energy Project, Appellants and Ameron International Corporation, Ameron B.V., Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. and Serious Business Inc., Respondents

McLachlin C.J.C., LeBel, Abella, Cromwell, Moldaver, Karakatsanis, Wagner JJ.

Heard: March 25, 2013
Judgment: June 21, 2013
Docket: 34678

Proceedings: reversing *Sable Offshore Energy Inc. v. Ameron International Corp.* (2011), 12 C.L.R. (4th) 129, 2011 CarswellNS 893, 2011 NSCA 121, 983 A.P.R. 382, 310 N.S.R. (2d) 382, 346 D.L.R. (4th) 68, 26 C.P.C. (7th) 1 (N.S. C.A.); reversing *Sable Offshore Energy Inc. v. Ameron International Corp.* (2010), 299 N.S.R. (2d) 216, 947 A.P.R. 216, 2010 CarswellNS 907, 2010 NSSC 473 (N.S. S.C.)

Counsel: Robert Belliveau, Q.C., Kevin Gibson, for Appellants
John P. Merrick, Q.C., Darlene Jamieson, Q.C., for Respondents, Ameron International Corporation and Ameron B.V.
Terrence L.S. Teed, Q.C., Ronald J. Savoy, for Respondents, Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. and Serious Business Inc.

Subject: Civil Practice and Procedure; Evidence
Related Abridgment Classifications
Civil practice and procedure
XVI Disposition without trial
XVI.7 Settlement
XVI.7.e Miscellaneous
Evidence
XIV Privilege
XIV.9 Miscellaneous
Headnote
Civil practice and procedure --- Disposition without trial — Settlement — Miscellaneous
Privilege with respect to amount of settlement — Plaintiffs were involved in litigation with multiple defendants — Plaintiffs reached settlement with some defendants ("settling defendants") — Plaintiffs and settling defendants executed Pierringer agreement — Remaining defendants brought unsuccessful application for disclosure of quantum of settlement under R. 20 of Civil Procedure Rules (1972) — Chambers judge held quantum met relevancy threshold for disclosure under R. 20, but not until after trial — Chambers judge held disadvantage to remaining defendants of not knowing quantum did not outweigh benefit

of encouraging settlement in future multi-party litigation — Chambers judge held that protection of settlement privilege was necessary to encourage remaining parties to settle for reasons of certainty and potential cost savings — Non-settling defendants successfully appealed timing of disclosure of settlement amount — Plaintiffs appealed — Appeal allowed — It was not clear how knowledge of settlement amounts materially affected ability of non-settling defendants to know and present case — Defendants remained fully aware of claims they must defend themselves against and of overall amount that plaintiffs was seeking — It was true that knowing settlement amounts might allow defendants to revise estimate of how much they want to invest in case, but this did not rise to sufficient level of importance to displace public interest in promoting settlements.

Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous

Privilege with respect to amount of settlement — Plaintiffs were involved in litigation with multiple defendants — Plaintiffs reached settlement with some defendants ("settling defendants") — Plaintiffs and settling defendants executed Pierringer agreement — Remaining defendants brought unsuccessful application for disclosure of quantum of settlement under R. 20 of Civil Procedure Rules (1972) — Chambers judge held quantum met relevancy threshold for disclosure under R. 20, but not until after trial — Chambers judge held disadvantage to remaining defendants of not knowing quantum did not outweigh benefit of encouraging settlement in future multi-party litigation — Chambers judge held that protection of settlement privilege was necessary to encourage remaining parties to settle for reasons of certainty and potential cost savings — Non-settling defendants successfully appealed timing of disclosure of settlement amount — Plaintiffs appealed — Appeal allowed — It was not clear how knowledge of settlement amounts materially affected ability of non-settling defendants to know and present case — Defendants remained fully aware of claims they must defend themselves against and of overall amount that plaintiffs was seeking — It was true that knowing settlement amounts might allow defendants to revise estimate of how much they want to invest in case, but this did not rise to sufficient level of importance to displace public interest in promoting settlements.

Procédure civile --- Jugement rendu sans procès — Règlement — Divers

Secret concernant le montant d'une transaction — Demandeurs étaient engagés dans un litige avec de nombreuses défenderesses — Demandeurs ont conclu une transaction avec certaines d'entre elles (les « défenderesses parties à la transaction ») — Demandeurs et les défenderesses parties à la transaction ont exécuté des ententes de type Pierringer — Autres défenderesses ont déposé une demande de divulgation du quantum de la transaction en vertu du R. 20 des Règles de procédure civile de 1972, sans succès — Juge en chambre a estimé que le quantum pouvait être divulgué, en vertu du critère portant sur la pertinence de la divulgation décrit au R. 20, mais pas avant la fin du procès — Juge en chambre a conclu que le désavantage que représentait, pour les autres défenderesses, le fait de ne pas savoir quel était le quantum ne l'emportait pas sur le fait de favoriser les transactions dans les litiges futurs impliquant plusieurs parties — Juge en chambre a statué qu'il était nécessaire de protéger le secret relatif aux transactions afin d'encourager les parties qui ne l'ont pas fait à transiger pour permettre un meilleur contrôle et économiser des frais — Défenderesses non parties à la transaction ont interjeté appel à l'encontre du moment choisi pour la divulgation du montant de la transaction, avec succès — Demandeurs ont formé un pourvoi — Pourvoi accueilli — Il n'était pas évident que la connaissance des sommes convenues aux ententes influait grandement sur l'aptitude des défenderesses non parties à la transaction à connaître et à présenter leurs arguments — Ces défenderesses demeuraient pleinement conscientes des poursuites contre lesquelles elles devaient se défendre ainsi que de la somme globale que réclamaient les demandeurs — Certes, le fait de connaître les sommes convenues aux ententes pourrait permettre aux défenderesses de revoir leur estimation de la somme qu'elles voulaient investir pour se défendre, mais la connaissance de ces sommes ne semblait pas suffisamment importante pour écarter l'intérêt public à favoriser les transactions.

Preuve --- Preuve documentaire — Confidentialité en ce qui concerne les documents — Divers

Secret concernant le montant d'une transaction — Demandeurs étaient engagés dans un litige avec de nombreuses défenderesses — Demandeurs ont conclu une transaction avec certaines d'entre elles (les « défenderesses parties à la transaction ») — Demandeurs et les défenderesses parties à la transaction ont exécuté des ententes de type Pierringer — Autres défenderesses ont déposé une demande de divulgation du quantum de la transaction en vertu du R. 20 des Règles de procédure civile de 1972, sans succès — Juge en chambre a estimé que le quantum pouvait être divulgué, en vertu du critère portant sur la pertinence de la divulgation décrit au R. 20, mais pas avant la fin du procès — Juge en chambre a conclu que le désavantage que représentait, pour les autres défenderesses, le fait de ne pas savoir quel était le quantum ne l'emportait pas sur le fait de favoriser les transactions dans les litiges futurs impliquant plusieurs parties — Juge en chambre a statué qu'il était nécessaire de protéger le secret relatif aux transactions afin d'encourager les parties qui ne l'ont pas fait à transiger pour permettre un meilleur contrôle et économiser des frais — Défenderesses non parties à la transaction ont interjeté appel à l'encontre du moment choisi pour la divulgation

du montant de la transaction, avec succès — Demandeurs ont formé un pourvoi — Pourvoi accueilli — Il n'était pas évident que la connaissance des sommes convenues aux ententes influait grandement sur l'aptitude des défenderesses non parties à la transaction à connaître et à présenter leurs arguments — Ces défenderesses demeuraient pleinement conscientes des poursuites contre lesquelles elles devaient se défendre ainsi que de la somme globale que réclamaient les demandeurs — Certes, le fait de connaître les sommes convenues aux ententes pourrait permettre aux défenderesses de revoir leur estimation de la somme qu'elles voulaient investir pour se défendre, mais la connaissance de ces sommes ne semblait pas suffisamment importante pour écarter l'intérêt public à favoriser les transactions.

The plaintiffs were involved in litigation with multiple defendants. The plaintiffs reached settlement with some defendants. The remaining defendants brought an unsuccessful application for disclosure of the quantum of settlement under R. 20 of Civil Procedure Rules (1972).

The chambers judge held that the quantum met the relevancy threshold for disclosure under R. 20, but not until after the trial. The chambers judge held that the disadvantage to the remaining defendants of not knowing quantum did not outweigh the benefit of encouraging settlement in future multi-party litigation. The chambers judge held that protection of settlement privilege was necessary to encourage remaining parties to settle for reasons of certainty and potential cost savings.

The non-settling defendants successfully appealed the timing of disclosure of the settlement amount.

The plaintiffs appealed.

Held: The appeal was allowed.

Per Abella J. (McLachlin C.J.C., LeBel, Cromwell, Moldaver, Karakatsanis, Wagner JJ. concurring): It was not clear how knowledge of the settlement amounts materially affected the ability of the non-settling defendants to know and present their case. The defendants remained fully aware of the claims they must defend themselves against and of the overall amount that the plaintiffs were seeking.

It was true that knowing the settlement amounts might allow the defendants to revise their estimate of how much they wanted to invest in the case, but this did not rise to a sufficient level of importance to displace the public interest in promoting settlements.

Les demandeurs étaient engagés dans un litige avec de nombreuses défenderesses. Les demandeurs ont conclu une transaction avec certaines d'entre elles. Les autres défenderesses ont déposé une demande de divulgation du quantum de la transaction en vertu du R. 20 des Règles de procédure civile de 1972, sans succès.

Le juge en chambre a estimé que le quantum pouvait être divulgué, en vertu du critère portant sur la pertinence de la divulgation décrit au R. 20, mais pas avant la fin du procès. Le juge en chambre a conclu que le désavantage que représentait, pour les autres défenderesses, le fait de ne pas savoir quel était le quantum ne l'emportait pas sur le fait de favoriser les transactions dans les litiges futurs impliquant plusieurs parties. Le juge en chambre a statué qu'il était nécessaire de protéger le secret relatif aux transactions afin d'encourager les parties qui ne l'ont pas fait à transiger pour permettre un meilleur contrôle et économiser des frais.

Les défenderesses non parties à la transaction ont interjeté appel à l'encontre du moment choisi pour la divulgation du montant de la transaction, avec succès.

Les demandeurs ont formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Abella, J. (McLachlin, J.C.C., LeBel, Cromwell, Moldaver, Karakatsanis, Wagner, JJ., souscrivant à son opinion) : Il n'était pas évident que la connaissance des sommes convenues aux ententes influait grandement sur l'aptitude des défenderesses non parties à la transaction à connaître et à présenter leurs arguments. Ces défenderesses demeuraient pleinement conscientes des poursuites contre lesquelles elles devaient se défendre ainsi que de la somme globale que réclamaient les demandeurs.

Certes, le fait de connaître les sommes convenues aux ententes pourrait permettre aux défenderesses de revoir leur estimation de la somme qu'elles voulaient investir pour se défendre, mais la connaissance de ces sommes ne semblait pas suffisamment importante pour écarter l'intérêt public à favoriser les transactions.

Table of Authorities

Cases considered by *Abella J.*:

Amoco Canada Petroleum Co. v. Propak Systems Ltd. (2001), [2001] 6 W.W.R. 628, 2001 CarswellAlta 575, 2001 ABCA 110, 281 A.R. 185, 248 W.A.C. 185, 4 C.P.C. (5th) 20, 200 D.L.R. (4th) 667, 91 Alta. L.R. (3d) 13 (Alta. C.A.) — referred to

Bioriginal Food & Science Corp. v. Gerspacher (2012), 2012 SKQB 469, 2012 CarswellSask 823 (Sask. Q.B.) — considered

Brown v. Cape Breton (Regional Municipality) (2011), 2011 NSCA 32, 2011 CarswellNS 186, 331 D.L.R. (4th) 307, 955 A.P.R. 84, 302 N.S.R. (2d) 84 (N.S. C.A.) — followed
Cutts v. Head (1984), [1984] 1 All E.R. 597, [1984] 2 W.L.R. 349, [1984] Ch. 290 (Eng. C.A.) — considered
Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada (2005), 249 D.L.R. (4th) 416, 40 B.C.L.R. (4th) 245, [2005] 7 W.W.R. 1, (sub nom. *Dos Santos Estate v. Sun Life Assurance Co. of Canada)* 207 B.C.A.C. 54, (sub nom. *Dos Santos Estate v. Sun Life Assurance Co. of Canada)* 341 W.A.C. 54, 2005 BCCA 4, 2005 CarswellBC 5, 17 C.C.L.I. (4th) 180, 5 C.P.C. (6th) 278 (B.C. C.A.) — referred to
Hudson Bay Mining & Smelting Co. v. Fluor Daniel Wright (1997), 12 C.P.C. (4th) 94, 1997 CarswellMan 388, (sub nom. *Hudson Bay Mining & Smelting Co. v. Wright)* 120 Man. R. (2d) 214, [1997] 10 W.W.R. 622 (Man. Q.B.) — referred to
Loewen, Ondaatje, McCutcheon & Co. c. Sparling (1992), (sub nom. *Kelvin Energy Ltd. v. Lee)* 97 D.L.R. (4th) 616, (sub nom. *Kelvin Energy Ltd. v. Lee)* [1992] 3 S.C.R. 235, (sub nom. *Kelvin Energy Ltd. v. Lee)* 51 Q.A.C. 49, 143 N.R. 191, 1992 CarswellQue 126, 1992 CarswellQue 126F (S.C.C.) — considered
Middelkamp v. Fraser Valley Real Estate Board (1992), 1992 CarswellBC 267, 71 B.C.L.R. (2d) 276, 10 C.P.C. (3d) 109, 96 D.L.R. (4th) 227, 17 B.C.A.C. 134, 29 W.A.C. 134, 45 C.P.R. (3d) 213 (B.C. C.A.) — considered
Pierringer v. Hoger (1963), 124 N.W.2d 106, 21 Wis. 2d 182 (U.S. Wis. S.C.) — considered
Rush & Tompkins Ltd. v. Greater London Council (1988), [1988] 3 All E.R. 737, 104 N.R. 392, [1989] A.C. 1280, [1988] 3 W.L.R. 939 (U.K. H.L.) — considered
Sparling v. Southam Inc. (1988), 66 O.R. (2d) 225, 1988 CarswellOnt 121, 41 B.L.R. 22 (Ont. H.C.) — considered
Underwood v. Cox (1912), 26 O.L.R. 303, 4 D.L.R. 66, 21 O.W.R. 757, 1912 CarswellOnt 200 (Ont. Div. Ct.) — referred to
Unilever Plc v. Procter & Gamble Co. (1999), [2000] 1 W.L.R. 2436, [2001] 1 All E.R. 783 (Eng. C.A.) — referred to

Statutes considered:

Competition Act, R.S.C. 1985, c. C-34
Generally — referred to

Rules considered:

Civil Procedure Rules (1972), N.S. Civ. Pro. Rules
R. 20.02 — considered

R. 20.06 — considered

Authorities considered:

Bryant, Alan W., Sidney N. Lederman and Michelle K. Fuerst, *The Law of Evidence in Canada*, 3rd ed. (Markham, Ont.: LexisNexis, 2009)

Knapp, Peter B., "Keeping the *Pierringer* Promise: Fair Settlements and Fair Trials" (1994), 20 *Wm. Mitchell L. Rev.* 1

Vaver, David, "'Without Prejudice' Communications — Their Admissibility and Effect" (1974), 9 *U.B.C. L. Rev.* 85

APPEAL by plaintiffs from decision reported at *Sable Offshore Energy Inc. v. Ameron International Corp.* (2011), 12 C.L.R. (4th) 129, 2011 CarswellNS 893, 2011 NSCA 121, 983 A.P.R. 382, 310 N.S.R. (2d) 382, 346 D.L.R. (4th) 68, 26 C.P.C. (7th) 1 (N.S. C.A.), which granted non-settling defendants' appeal of timing of disclosure of settlement amount.

POURVOI formé par les demandeurs à l'encontre d'une décision publiée à *Sable Offshore Energy Inc. v. Ameron International Corp.* (2011), 12 C.L.R. (4th) 129, 2011 CarswellNS 893, 2011 NSCA 121, 983 A.P.R. 382, 310 N.S.R. (2d) 382, 346 D.L.R. (4th) 68, 26 C.P.C. (7th) 1 (N.S. C.A.), ayant accueilli l'appel des défenderesses non parties à une transaction à l'encontre du moment choisi pour la divulgation du montant de la transaction.

***Abella J.*:**

1 The justice system is on a constant quest for ameliorative strategies that reduce litigation's stubbornly endemic delays, expense and stress. In this evolving mission to confront barriers to access to justice, some strategies for resolving disputes have

proven to be more enduringly successful than others. Of these, few can claim the tradition of success rightfully attributed to settlements.

2 The purpose of settlement privilege is to promote settlement. The privilege wraps a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible.

3 Sable Offshore Energy Inc. sued a number of defendants. It settled with some of them. The remaining defendants want to know what amounts the parties settled for. The question before us is whether those negotiated amounts should be disclosed or whether they are protected by settlement privilege.

Background

4 Sable undertook the Sable Offshore Energy Project, whose purpose was the building of several offshore structures and onshore gas processing facilities in Nova Scotia. Ameron International Corporation and Ameron B.V. (Ameron) and Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. and Serious Business Inc. (collectively Amercoat) supplied Sable with paint for parts of the Sable structures. Sable brought three lawsuits alleging that the paint failed to prevent corrosion.

5 In the lawsuit that is the subject of this appeal, Sable sued Ameron, Amercoat, and 12 other contractors and applicators who were responsible for preparing surfaces and applying the paint coatings. The claims against Ameron and Amercoat were for negligence, negligent misrepresentation and breach of a collateral warranty. The claims against the other defendants were similar.

6 Sable entered into three Pierringer Agreements with some of the defendants. Named for the 1963 Wisconsin case of *Pierringer v. Hoger*, 124 N.W.2d 106 (U.S. Wis. S.C. 1963), a Pierringer Agreement allows one or more defendants in a multi-party proceeding to settle with the plaintiff and withdraw from the litigation, leaving the remaining defendants responsible only for the loss they actually caused. There is no joint liability with the settling defendants, but non-settling defendants may be jointly liable with each other.

7 As part of the terms of the Agreements, Sable agreed to amend its statement of claim against the non-settling defendants to pursue them only for their share of liability. In addition, all the relevant evidence in the possession of the settling defendants, would, in accordance with the Agreements, be given to the Plaintiffs and be discoverable by the non-settling defendants.

8 Ameron and Amercoat did not settle. All the terms of the Pierringer Agreements were disclosed to Ameron and Amercoat except the amounts agreed to.

9 These settlement agreements were approved by court order on April 27, 2010. On December 3, 2010, Ameron filed an application pursuant to Rules 20.02 and 20.06 of Nova Scotia's 1972 *Civil Procedure Rules* (which the parties previously agreed would govern the litigation) for disclosure of the settlement amounts paid under the Pierringer Agreements. Sable's position was that the amounts were subject to settlement privilege.

10 Hood J. dismissed the defendants' application for disclosure of the settlement amounts. She concluded that the public interest was best served by preserving settlement privilege and keeping the settlement amounts confidential. The Court of Appeal overturned that decision and ordered the amounts disclosed.

Analysis

11 Settlements allow parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation. The benefits of settlement were summarized by Callaghan A.C.J.H.C. in *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (Ont. H.C.):

> [T]he courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial Court system. [p. 230]

This observation was cited with approval in *Loewen, Ondaatje, McCutcheon & Co. c. Sparling*, [1992] 3 S.C.R. 235 (S.C.C.), at p. 259, where L'Heureux-Dubé J. acknowledged that promoting settlement was "sound judicial policy" that "contributes to the effective administration of justice".

12 Settlement privilege promotes settlements. As the weight of the jurisprudence confirms, it is a class privilege. As with other class privileges, while there is a *prima facie* presumption of inadmissibility, exceptions will be found "when the justice of the case requires it" (*Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737 (U.K. H.L.), at p. 740).

13 Settlement negotiations have long been protected by the common law rule that "without prejudice" communications made in the course of such negotiations are inadmissible (see David Vaver, "'Without Prejudice' Communications — Their Admissibility and Effect" (1974), 9 *U.B.C. L. Rev.* 85, at p. 88). The settlement privilege created by the "without prejudice" rule was based on the understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed. As Oliver L.J. of the English Court of Appeal explained in *Cutts v. Head*, [1984] 1 All E.R. 597 (Eng. C.A.), at p. 605:

> [P]arties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations ... may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in *Scott Paper Co v. Drayton Paper Works Ltd* (1927) 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table.

What is said during negotiations, in other words, will be more open, and therefore more fruitful, if the parties know that it cannot be subsequently disclosed.

14 *Rush & Tompkins* confirmed that settlement privilege extends beyond documents and communications expressly designated to be "without prejudice". In that case, a contractor settled its action against one defendant, the Greater London Council (the GLC), while maintaining it against the other defendant, the Carey contractors. The House of Lords considered whether communications made in the process of negotiating the settlement with the GLC should be admissible in the ongoing litigation with the Carey contractors. Lord Griffiths reached two conclusions of significance for this case. First, although the privilege is often referred to as the rule about "without prejudice" communications, those precise words are not required to invoke the privilege. What matters instead is the intent of the parties to settle the action (p. 739). Any negotiations undertaken with this purpose are inadmissible.

15 Lord Griffiths' second relevant conclusion was that although most cases considering the "without prejudice" rule have dealt with the admissibility of communications once negotiations have failed, the rationale of promoting settlement is no less applicable if an agreement is actually reached. Lord Griffiths explained that a plaintiff in Rush & Tompkins' situation would be discouraged from settling with one defendant if any admissions it made during the course of its negotiations were admissible in its claim against the other:

> In such circumstances it would, I think, place a serious fetter on negotiations ... if they knew that everything that passed between them would ultimately have to be revealed to the one obdurate litigant. [p. 744]

16 *Middelkamp v. Fraser Valley Real Estate Board* (1992), 71 B.C.L.R. (2d) 276 (B.C. C.A.), subsequently endorsed the view that settlement privilege covers any settlement negotiations. The plaintiff James Middelkamp launched a civil suit against Fraser Valley Real Estate Board claiming that it had engaged in practices that were contrary to the *Competition Act*, R.S.C. 1985, c. C-34, and caused him to suffer damages. He also complained about the Board's conduct to the Director of Investigation and Research under different provisions of the *Act*, resulting in an investigation by the Director and criminal charges against the Board. The Board negotiated a settlement with the Department of Justice, leading to the criminal charges being resolved. Middelkamp sought disclosure of any communications made during the course of negotiations between the Board and the Department of Justice. McEachern C.J.B.C. refused to order disclosure of the communications on the basis of settlement privilege, explaining:

> ... the public interest in the settlement of disputes generally requires "without prejudice" documents or communications created for, or communicated in the course of, settlement negotiations to be privileged. I would classify this as a "blanket, *prima facie*, common law, or 'class'" privilege because it arises from settlement negotiations and protects the class of communications exchanged in the course of that worthwhile endeavour.
>
> In my judgment this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, *and whether or not a settlement is reached*. This is because, as I have said, a party communicating a proposal related to settlement, or responding to one, usually has no control over what the other side may do with such documents. Without such protection, the public interest in encouraging settlements will not be served. [Emphasis added; paras. 19-20.]

17 As McEachern C.J.B.C. pointed out, the protection is for settlement negotiations, whether or not a settlement is reached. That means that successful negotiations are entitled to no less protection than ones that yield no settlement. The reasoning in *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32, 302 N.S.R. (2d) 84 (N.S. C.A.), is instructive. A plaintiff brought separate claims against two defendants for unrelated injuries to the same knee. She settled with one defendant and the Court of Appeal had to consider whether the trial judge was right to order disclosure of the amount of the settlement to the remaining defendant. Bryson J.A. found that disclosure should not have been ordered since a principled approach to settlement privilege did not justify a distinction between settlement *negotiations* and what was ultimately negotiated:

> Some of the cases distinguish between extending privilege from negotiations to the concluded agreement itself.... *The distinction ... is arbitrary*. The reasons for protecting settlement communications from disclosure are not usually spent when a deal is made. *Typically parties no more wish to disclose to the world the terms of their agreement than their negotiations in achieving it*.
>
> [Emphasis added; para. 41.]

Notably, this is the view taken in Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, *The Law Of Evidence in Canada* (3rd ed. 2009), where the authors conclude:

> ... the privilege applies not only to failed negotiations, but also to the *content of successful negotiations*, so long as the existence or interpretation of the agreement itself is not in issue in the subsequent proceedings and none of the exceptions are applicable.
>
> [Emphasis added; para. 14. 341.]

18 Since the negotiated amount is a key component of the "content of successful negotiations", reflecting the admissions, offers, and compromises made in the course of negotiations, it too is protected by the privilege. I am aware that some earlier jurisprudence did not extend the privilege to the concluded agreement (see *Amoco Canada Petroleum Co. v. Propak Systems Ltd.*, 2001 ABCA 110, 281 A.R. 185 (Alta. C.A.), at para. 40, citing *Hudson Bay Mining & Smelting Co. v. Fluor Daniel Wright* (1997), 120 Man. R. (2d) 214 (Man. Q.B.)), but in my respectful view, it is better to adopt an approach that more robustly promotes settlement by including its content.

19 There are, inevitably, exceptions to the privilege. To come within those exceptions, a defendant must show that, on balance, "a competing public interest outweighs the public interest in encouraging settlement" (*Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4, 207 B.C.A.C. 54 (B.C. C.A.), at para. 20). These countervailing interests have been found to include allegations of misrepresentation, fraud or undue influence (*Unilever Plc v. Procter & Gamble Co.* (1999), [2001] 1 All E.R. 783 (Eng. C.A.), *Underwood v. Cox* (1912), 26 O.L.R. 303 (Ont. Div. Ct.)), and preventing a plaintiff from being overcompensated (*Dos Santos*).

20 The non-settling defendants argue that there should be an exception to the privilege for the amounts of the settlements because they say they need this information to conduct their litigation. I see no tangible prejudice created by withholding the amounts of the settlements which can be said to outweigh the public interest in promoting settlements.

21 The particular settlements negotiated in this case are known as Pierringer Agreements. Pierringer Agreements were developed in the United States to address the obstacles to settlement that arose in multi-party litigation. Professor Peter B. Knapp summarized the value — and complexity — of trying to settle multi-party litigation as follows:

> Settlement of complicated multi-defendant civil litigation is particularly valuable, because complicated civil trials can consume enormous amounts of a judge's time and can be expensive for the parties. However, settling multi-defendant civil litigation can be especially difficult. Different defendants have different tolerances for risk, and some defendants are simply far less willing to settle than others.
>
> "Keeping the *Pierringer* Promise: Fair Settlements and Fair Trials" (1994), 20 *Wm. Mitchell L. Rev.* 1, at p. 5.

22 Professor Knapp also explained why, prior to Pierringer Agreements, settlements had been difficult to encourage:

> On one hand, a plaintiff contemplating settlement with one of several defendants faced the possibility that release of the one defendant would also extinguish all claims against the nonsettling defendants. On the other hand, in jurisdictions which permitted contribution among joint tortfeasors, a settling defendant faced the possibility of post-settlement contribution claims made by the nonsettling defendants. [pp. 6-7]

23 In the United States, Pierringer Agreements were found to significantly attenuate the obstacles in the way of negotiating settlements in multi-party litigation. Under a Pierringer Agreement, the plaintiff's claim was only "extinguished" against those defendants with whom it settled; the claims against the non-settling defendants continued. The settling defendants, meanwhile, were assured that they could not be subject to a contribution claim from the non-settling defendants, who would be accountable only for their own share of liability at trial.

24 Pierringer Agreements in Canada built on these American foundations and routinely included additional protections for non-settling defendants, such as requiring that non-settling defendants be given access to the settling defendants' evidence. In this case, for example, the court order approving the settlement required that the plaintiffs get production of all relevant evidence from the settling defendants and make this evidence available to the non-settling defendants on discovery. It also ordered that, with respect to factual matters, there be no restrictions on the non-settling defendants' access to experts retained by the settling defendants. In addition, the Agreements in this case specified that their non-financial terms would be disclosed to the court and non-settling defendants "to the extent required by the laws of the Province of Nova Scotia and the rulings and ethical guidelines promulgated by the Nova Scotia Barristers' Society" (A.R., at pp. 142 and 184).

25 The non-settling defendants have in fact received all the non-financial terms of the Pierringer Agreements. They have access to all the relevant documents and other evidence that was in the settling defendants' possession. They also have the assurance that they will not be held liable for more than their share of damages. Moreover, Sable agreed that at the end of the trial, once liability had been determined, it would disclose to the trial judge the amounts it settled for. As a result, should the non-settling defendants establish a right to set-off in this case, their liability for damages will be adjusted downwards if necessary to avoid overcompensating the plaintiff.

26 As for any concern that the non-settling defendants will be required to pay more than their share of damages, it is inherent in Pierringer Agreements that non-settling defendants can only be held liable for their share of the damages and are severally, and not jointly, liable with the settling defendants.

27 It is therefore not clear to me how knowledge of the settlement amounts materially affects the ability of the non-settling defendants to know and present their case. The defendants remain fully aware of the claims they must defend themselves against and of the overall amount that Sable is seeking. It is true that knowing the settlement amounts might allow the defendants to

revise their estimate of how much they want to invest in the case, but this, it seems to me, does not rise to a sufficient level of importance to displace the public interest in promoting settlements.

28 The non-settling defendants also argued that refusing disclosure impedes their own possible settlement initiatives since they are more likely to settle if they know the settlement amounts already negotiated. Perhaps. But they may also, depending on the amounts, arguably come to see them as a disincentive. In any event, theirs is essentially a circular argument that the interest in *subsequent* settlement outweighs the public interest in encouraging the *initial* settlement. But the likelihood of an initial settlement decreases if the amount is disclosable.

29 Someone has to go first, and encouraging that first settlement in multiparty litigation is palpably worthy of more protection than the speculative assumption that others will only follow if they know the amount. The settling defendants, after all, were able to come to a negotiated amount without the benefit of a guiding settlement precedent. The non-settling defendants' position is no worse. As Smith J. noted in protecting the settlement amount from disclosure in *Bioriginal Food & Science Corp. v. Gerspacher*, 2012 SKQB 469 (Sask. Q.B.):

> ... imperfect knowledge is virtually always the case in settlement negotiations. There are always knowns and known unknowns ... [para. 33].

And Bryson J.A. compellingly summarized the competing arguments in *Brown* as follows:

> Some courts have argued that it is necessary to go further and disclose the settlement amount itself.... They hold either that the agreement (unlike negotiations) is not privileged or that the settling parties have an advantage which should be redressed by disclosure. ... If indeed settling parties thereby enjoy an advantage over non-settling parties, it is one for which they have bargained. The court should hesitate to expropriate that advantage by ordering disclosure at the instance of non-settling parties, intransigent or otherwise. The argument that disclosure would facilitate settlement amongst the remaining parties ignores that, but for the privilege, the first settlement would often not occur. [Citations omitted; para. 67.]

30 A proper analysis of a claim for an exception to settlement privilege does not simply ask whether the non-settling defendants derive some tactical advantage from disclosure, but whether the reason for disclosure *outweighs* the policy in favour of promoting settlement. While protecting disclosure of settlement negotiations and their fruits has the demonstrable benefit of promoting settlement, there is little corresponding harm in denying disclosure of the settlement amounts in this case.

31 I would therefore allow the appeal with costs throughout.

Appeal allowed.

Pourvoi accueilli.

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para. 33

Most Negative Treatment: Distinguished
Most Recent Distinguished: Luckevich v. Ivany | 2018 ONCA 144, 2018 CarswellOnt 2087, 288 A.C.W.S. (3d) 419, 140 O.R. (3d) 532, 420 D.L.R. (4th) 701 | (Ont. C.A., Feb 14, 2018)

2009 ONCA 487
Ontario Court of Appeal

Taylor v. Canada (Attorney General)

2009 CarswellOnt 3443, 2009 ONCA 487, [2009] O.J. No. 2490, 178 A.C.W.S. (3d) 685, 264 O.A.C. 229, 309 D.L.R. (4th) 400, 95 O.R. (3d) 561

Kathryn Anne Taylor (Plaintiff) and Her Majesty the Queen in Right of Canada as Represented by the Minister of Health, the Attorney General of Canada (Defendant / Appellant) and University Health Network (formerly Toronto General Hospital), and Dr. W. Dobrovolosky (Third Parties / Respondents)

E.E. Gillese J.A., Laskin J.A., and R.A. Blair J.A.

Heard: December 19, 2008
Judgment: June 17, 2009
Docket: CA C48750

Proceedings: affirming *Taylor v. Canada (Attorney General)* (2008), 2008 CarswellOnt 1882 (Ont. S.C.J.)

Counsel: Paul J. Evraire, James Max Soldatich for Appellant, the Attorney General of Canada
Patrick J. Hawkins for Respondent, University Health Network
Margaret L. Waddell for Respondent, Dr. W. Dobrovolosky
Grace Tsang for Plaintiff, Kathryn Anne Taylor

Subject: Civil Practice and Procedure; Public
Related Abridgment Classifications
Civil practice and procedure
X Pleadings
X.2 Statement of claim
X.2.f Striking out for absence of reasonable cause of action
X.2.f.i General principles
Headnote
Civil practice and procedure --- Pleadings — Statement of claim — Striking out for absence of reasonable cause of action — General principles
Plaintiff limiting own claim — Plaintiff began class action alleging that she suffered injuries as result of surgical implantation of device in her jaw — Plaintiff claimed that Health Canada's negligent regulation of devices caused her injuries — Plaintiff brought action only against Attorney General of Canada who represented Minister of Health and Health Canada — After several amendments to claim she ultimately sought "those damages that are attributable to its proportionate degree of fault" — Attorney General brought third party claim against dental surgeon who performed plaintiff's surgery, and hospital where surgery took place, alleging they bore liability — Third parties brought motion to strike pleading and dismiss third party claim — Motion was granted — Attorney General appealed — Appeal dismissed — Plaintiff's amendents to her statement of claim rendered third party claim untenable — Trial judge did not err in applying test for striking pleading and finding that third parties met test — Plaintiff had limited her claim to only those losses attributable to Health Canada — Contribution rights arise only where a defendant is required to pay more than its proportionate share of a plaintiff's damages and that was not happening given

pleadings by plaintiff — Health Canada could have no claim over doctor or hospital as claim was limited to those damages attributable to Health Canada's fault — Court would still be able to apportion fault against doctor or hospital even though neither was party to action.

Table of Authorities

Cases considered by *Laskin J.A.*:

Athey v. Leonati (1996), [1997] 1 W.W.R. 97, 140 D.L.R. (4th) 235, 81 B.C.A.C. 243, 132 W.A.C. 243, 203 N.R. 36, [1996] 3 S.C.R. 458, 31 C.C.L.T. (2d) 113, 1996 CarswellBC 2295, 1996 CarswellBC 2296 (S.C.C.) — distinguished

Holthaus v. Bank of Montreal (2000), 2000 CarswellOnt 945, 131 O.A.C. 119 (Ont. C.A.) — considered

M. (J.) v. Bradley (2004), 47 C.P.C. (5th) 234, 240 D.L.R. (4th) 435, (sub nom. *M. (J.) v. B. (W.)*) 71 O.R. (3d) 171, 2004 CarswellOnt 2243, 187 O.A.C. 201 (Ont. C.A.) — referred to

Martin v. Listowel Memorial Hospital (2000), 2000 CarswellOnt 3839, 138 O.A.C. 77, 192 D.L.R. (4th) 250, 48 C.P.C. (4th) 195, 51 O.R. (3d) 384 (Ont. C.A.) — distinguished

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Statutes considered:

Negligence Act, R.S.O. 1990, c. N.1

Generally — referred to

s. 1 — considered

s. 5 — considered

Rules considered:

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

R. 21.01(1)(b) — referred to

APPEAL of judgment reported at *Taylor v. Canada (Attorney General)* (2008), 2008 CarswellOnt 1882 (Ont. S.C.J.).

***Laskin J.A.*:**

A. Overview

1 This appeal raises the question whether a defendant in a negligence action can maintain a third party claim for contribution and indemnity against alleged joint tortfeasors, if the plaintiff has limited her claim to those damages attributable to the defendant's degree of fault.

2 The plaintiff, Kathryn Taylor, began a class action in which she alleges that she suffered injuries as a result of the surgical implantation of a device in her jaw. She claims that Health Canada's negligent regulation of these devices caused her injuries. She has sued only the Attorney General of Canada, which represents the Minister of Health and Health Canada. After several amendments to her statement of claim, she now seeks from Health Canada only "those damages that are attributable to its proportionate degree of fault."

3 The Attorney General, however, brought a third party claim against the dental surgeon (Dr. Dobrovolosky) who performed the implant surgery on Ms. Taylor and against the hospital (University Health Network) where the surgery took place. The Attorney General alleges that these third parties may be liable for part or all of Ms. Taylor's injuries. He seeks contribution from them for their proportionate degrees of fault.

4 The third parties brought a motion under rule 21.01(1)(b) of the *Rules of Civil Procedure* to dismiss the third party claim on the ground that it discloses no reasonable cause of action. Cullity J. granted the motion. He held that in view of the amendment to the statement of claim "the exposure of the Crown is limited to damages for which it would have no right to contribution

from any person who may have caused or contributed to the damages suffered by the plaintiff and any of the class members." The third party claim was thus "untenable."

5 The Attorney General appeals on three grounds:

> 1. The plaintiff's injuries are indivisible. If the Attorney General cannot bring a third party claim, Health Canada may unfairly be held liable for the negligent acts of the doctor and the hospital.
>
> 2. A court cannot apportion fault under the *Negligence Act*, R.S.O. 1990, c. N.1, against a person who is not a party to the action. If the third party claim is struck, Health Canada potentially may bear 100 per cent of the plaintiff's damages.
>
> 3. Even if the motion judge was right to strike the third party claim, he erred by failing to order that the Attorney General is entitled to production of documents from and discovery of the proposed third parties.

6 For the reasons that follow, I would not give effect to the first two grounds of appeal. On the third ground, whether production and discovery are required to prevent any unfairness to the Attorney General, this is a matter best addressed by the judge case managing the class action.

B. Procedural History

7 This litigation has had a protracted history. Many of the details are unnecessary to decide this appeal.

8 In brief, the action was begun in 1999. Ms. Taylor claims that her injuries resulted from the insertion of a Vitek Propast Temporomandibular (TMJ) implant in her jaw. She contends that Health Canada's negligent regulation of TMJ implants caused her injuries. She says either that Health Canada was negligent in even permitting these implants or that it was negligent in failing to properly regulate them. Her claim has been certified as a national class action (except in British Columbia and Quebec).

9 The statement of claim has been amended several times. In an amendment in 2006, Ms. Taylor tried to preclude the Attorney General's attempt to assert a third party claim by limiting her claim to the "several liability" of the Crown. Still the Attorney General brought a third party claim against the doctor and the hospital. In July 2007, a motion to strike the third party claim was dismissed by Cullity J. who found the 2006 amendment to be ambiguous. In Cullity J.'s view, Ms. Taylor still seemed to be claiming that the Crown was liable for all the damages she had suffered from the implant. Thus, the Attorney General had the right to seek contribution. However, at para. 57 of his ruling, he commented on how the defendant's right to contribution might be eliminated:

> The difference between a claim that the defendant is liable for all the damages suffered by the plaintiff, and a claim that is limited to the part of the damages caused solely by the defendant is, I believe, critical. While the latter cannot entitle the defendant to contribution, the former can if the plaintiff is unsuccessful in establishing that no other person's negligence or fault was involved.

10 Cullity J. returned to this idea a few months later in his ruling on the certification motion:

> [88] ... The possibility of third party claims will be obviated if the references to several liability of the Crown in the statement of claim are clarified in a manner referred to in the previous motion.

11 Ms. Taylor then amended her statement of claim again, as well as her reply, to incorporate Cullity J.'s suggestion. Her current pleadings - her further fresh as amended statement of claim and her fresh as amended reply - expressly plead that her claim and the claim of each class member is limited to the "damages that would be apportioned to the defendant in accordance with the relative degree of fault that is attributable to the defendant's negligence." These pleadings are the subject of this appeal. The main amendments are contained in paras. 83 and 189 of the amended statement of claim and paras. 25 and 81 of the amended reply:

> 83. The Plaintiff pleads that the injuries, damages and losses set out in the Statement of Claim were caused or contributed to by the negligence of Health Canada
>
> 189. The Plaintiff's claim, and the claim of each Class Member, is limited to the amount of the Plaintiff's or other Class Member's damages that would be apportioned to the Defendant in accordance with the relative degree of fault that is attributable to the Defendant's negligence.
>
> 25. The Plaintiff states and the fact is that the Defendant is liable in whole or in part for the damage to the Plaintiff and to the Class Members caused by the implantation of the Vitek TMJ implants, and the Plaintiff seeks on her own behalf and on behalf of the class those damages that would be apportioned to the Defendant in accordance with the relative degree of fault that is attributable to the Defendant's negligence.
>
> 81. The Plaintiff's claim is against the Defendant for those damages that are attributable to its proportionate degree of fault, and she does not seek, on her own behalf or on behalf of the Class, any damages that are found to be attributable to the fault or negligence of any other person, or for which the Defendant could claim contribution or indemnity.

12 In Cullity J.'s view, which I share, these amendments made the Attorney General's third party claim untenable.

C. Analysis

13 A motion to strike a pleading under rule 21.01(1)(b) will succeed only if it is "plain and obvious" that the pleading does not disclose a reasonable cause of action. The Attorney General submits that the motion judge erred by holding that the third parties met this test.

1) May Health Canada potentially be liable for the negligent acts of the doctor and hospital if the third party claim is struck?

14 The Attorney General contends that unless he can maintain a third party claim, Health Canada may potentially be held liable for the negligent acts of the doctor and the hospital. In support of this contention, the Attorney General relies on the point made in *Athey v. Leonati*, [1996] 3 S.C.R. 458 (S.C.C.), at para. 25, that where a plaintiff's injury is indivisible, any defendant who has negligently contributed to the injury will be fully liable for it.

15 As Ms. Taylor has not sued either the doctor or the hospital, the Attorney General says he is entitled to exercise his right under s. 5 of the *Negligence Act* to add them as third parties, and, by so doing, enable the court to apportion liability for the damages to Ms. Taylor and the other class members among all three potential tortfeasors. He argues that this apportionment would allow the Attorney General to claim contribution for any portion of the plaintiff's total loss not attributable to his negligence. In my view, because of Ms. Taylor's circumscribed pleading, neither *Athey v. Leonati* nor s. 5 of the *Negligence Act* applies here. I can best show why this is so by an example.

16 Take a case where a plaintiff is injured and three tortfeasors, T1, T2 and T3, caused the injuries. Assume that their respective degrees of fault are 20%, 30% and 50%. If the plaintiff sues only T1, then even though T1 is only 20% at fault, as between it and the plaintiff, it will be liable for 100% of the plaintiff's damages. As Major J. said at para. 25 of *Athey v. Leonati*, any tortfeasor who caused a plaintiff's injuries must fully compensate the plaintiff:

> In the present case, there is a single indivisible injury, the disc herniation, so division is neither possible nor appropriate. The disc herniation and its consequences are one injury, and any defendant found to have negligently caused or contributed to the injury will be fully liable for it.

17 To limit the amount of its loss, T1 is entitled to exercise its statutory right to apportionment of fault by adding T2 and T3 as third parties under s. 5 of the *Negligence Act*:

> Wherever it appears that a person not already a party to an action is or may be wholly or partly responsible for the damages claimed, such person may be added as a party defendant to the action upon terms as are considered just or may be made a third party to the action in the manner prescribed by the rules of court for adding third parties.

18 The court will apportion fault under s. 1 of the *Negligence Act*, so that among themselves, T1, T2 and T3 will indemnify each other in accordance with their respective degrees of fault:

> Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

19 In this example, T1 may still have to pay the plaintiff 100% of the plaintiff's damages, but it can recover 80% of that amount from T2 and T3. It has a right to contribution from T2 and T3 under the *Negligence Act*.

20 However, contribution rights arise only where a defendant is required to pay more than its proportionate share of a plaintiff's damages. In the present case, Ms. Taylor has limited her claim and those of the class members to those losses attributable to Health Canada's negligence. In other words, she is not seeking all of her damages from Health Canada; she seeks only the portion of her damages attributable to Health Canada's neglect and not the portion of her damages that may be attributable to the neglect of the doctor or the hospital. In my example, if Health Canada is T1, in this action Ms. Taylor is seeking only 20% of her damages. Because she is not seeking 100% of her damages, the full compensation principle articulated in *Athey v. Leonati* does not apply; equally, resort to s. 5 of the *Negligence Act* is unnecessary.

21 The decision of this court in *Holthaus v. Bank of Montreal* (2000), 131 O.A.C. 119 (Ont. C.A.), is directly on point. There, the plaintiff sued the Bank of Montreal and another for their role in the improper cancellation of some share certificates. The plaintiff, however, limited its claim to those damages attributable to the Bank's negligence. Nonetheless, the Bank issued a third party claim against the securities dealer, RBC Dominion Securities Ltd., for contribution and indemnity. The motion judge struck out this third party claim and his decision was upheld by this court. In its brief endorsement, this court said at para. 9:

> As the statement of claim is limited to the damages which can be attributed to the fault of the Bank, the Bank can have no claim-over against RBC with respect to these damages. Sections 1, 2 or 5 of the *Negligence Act* do not assist the appellants.

22 Similarly, because Ms. Taylor has limited her claim to those damages attributable to Health Canada's fault, Health Canada can have no claim over against the doctor or the hospital for the damages claimed by Ms. Taylor and the other class members. To ensure that Health Canada's exposure is limited to the damages attributable to its fault, the court may have to apportion fault among the three potential tortfeasors: Health Canada, the doctor and the hospital. The next question is whether the court is entitled to do so if neither the doctor nor the hospital is a party to the action.

2. Can the court apportion fault against a person who is not a party to the action?

23 The Attorney General submits that even if Ms. Taylor has limited her claim, the court has no jurisdiction to apportion fault against the doctor and the hospital unless they are parties to the action. He relies on the judgment of this court in *Martin v. Listowel Memorial Hospital* (2000), 51 O.R. (3d) 384 (Ont. C.A.) where, at para. 32, the court said that "there is no basis in s. 1 [of the *Negligence Act*] or anywhere in the Act for a judge to attribute a portion of fault to a non-party." The court repeated this limit on the judge's jurisdiction when it discussed the effect of s. 1 at para. 48 of its reasons, a paragraph the Attorney General says is decisive of this appeal:

> In our view, the effect of s. 1 of the Act is to define the legal effect of a finding of fault by concurrent wrongdoers. The effect is to change the common law, and impose on concurrent wrongdoers joint and several liability to the plaintiff. It is the only section of the Act which imposes liability, as opposed to apportioning fault. The section is substantive, not

> procedural. Therefore, when applying the section to any specific action, it is understood that joint and several liability to the plaintiff can and will attach only to a party defendant, although others who may also have been at fault could potentially have been found jointly and severally liable had they been sued by the plaintiff. Because procedurally the section only affects defendants, under this section the court is to apportion degrees of fault only to defendants. The court must also apportion fault to the other parties, the plaintiff and third parties, not under s. 1 of the Act but rather pursuant to ss. 3 and 4 of the Act, and in accordance with the requirements of the pleadings.

24 I do not accept the Attorney General's submission. In my view, the excerpts from *Martin v. Listowel Memorial Hospital* to which I have referred are not dispositive of this appeal.

25 As my colleague, Rosenberg J.A. observed in the later case of *Misko v. John Doe* (2007), 87 O.R. (3d) 517 (Ont. C.A.), at para. 20, these excerpts are *obiter* statements and therefore, strictly speaking, not a precedent binding on this court. Indeed, in *Martin v. Listowel Memorial Hospital* itself, the court accepted the trial judge's apportionment against two doctors who had been sued but had settled before trial, and therefore were not parties at the trial.

26 Moreover, the statement in *Martin v. Listowel Memorial Hospital* that a court has no jurisdiction to apportion fault against a non-party has been overtaken by later decisions of this court. In different factual settings, this court held that a judge has jurisdiction under s. 1 of the *Negligence Act* to apportion fault against a person who is not a party to the action, and can exercise this jurisdiction in an appropriate case. See *M. (J.) v. Bradley* (2004), 71 O.R. (3d) 171 (Ont. C.A.),, where Cronk J.A. discussed and distinguished *Martin v. Listowel*; and *Misko v. John Doe*.

27 Both statutory interpretation and policy support the holdings in *B. (W.)* and *Misko*. I think it noteworthy - although the panel in *Martin v. Listowel Memorial Hospital* did not - that s. 1 of the *Negligence Act* speaks of apportioning fault between "persons", not between "parties." And s. 5 speaks of adding a "person" not already a party to the action. As a matter of statutory interpretation it seems to me the Act itself recognizes that a court has jurisdiction to apportion fault against a person not a party to the action. Put differently, nothing in the language of s. 1 precludes a court from doing so.

28 Interpreting s. 1 of the *Negligence Act* to permit a court to apportion fault against a non-party makes good sense. Interpreting s. 1 in this way promotes the streamlining of litigation, as in the present case, and, as in other cases, the settlement of parts of the litigation.

29 In my view, this is an appropriate case for the court to determine whether to apportion fault against the doctor or the hospital, though neither is a party to the action. Permitting apportionment without insisting that they be parties will mean fewer parties at trial, a shorter trial and reduced costs. The remaining question is whether the Attorney General is entitled to procedural relief so he can pursue his claim to apportionment.

3. Did the motion judge err by failing to order that the Attorney General is entitled to production of documents from a discovery of the proposed third parties?

30 The Attorney General submits that he cannot pursue his right to apportionment against the doctor and the hospital in a vacuum. If neither is to be a party to the action then, he argues, he is at least entitled to production of documents from each of them and to examine each of them for discovery. Otherwise he is prejudiced in his defence of the main claim. He points to the order of Winkler J. in *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (Ont. S.C.J.), as a sensible practical solution to rectify this unfairness.

31 In the *Chevron Chemical* case, certain defendants had settled a class action for damages for negligently designed and manufactured products, and other defendants had not settled. Because of the terms of the settlement agreement, which had to be approved by the court, Winkler J. precluded the non-settling defendants from taking third party proceedings for contribution from the settling defendants. However, to protect the interests of the non-settling defendants in limiting their liability, he ordered that the settlement agreement be approved subject to the terms that the non-settling defendants could obtain from the settling defendants documentary and oral discovery, requests to admit, and an undertaking to produce a representative to testify at trial.

32 The Attorney General's request for procedural protection seems to have merit. However, this request was not made to Cullity J. on the motion to strike the third party claim. I therefore do not think we should address it on this appeal. Instead, it is a proper matter to be considered by the judge case managing the class action.

D. Conclusion

33 Because Ms. Taylor has limited her claim and the claim of the other class members to those damages attributable to the fault of Health Canada, the Attorney General's third party claim against the doctor and the hospital for contribution and indemnity discloses no reasonable cause of action. Cullity J. correctly struck the claim. I would therefore dismiss this appeal, with costs to the respondents in the amount of $10,000, inclusive of disbursements and G.S.T.

Appeal dismissed.

FTI CONSULTING CANADA INC. Plaintiff		ESL INVESTMENTS INC. et al. Defendants	Court File No. CV-18-00611219-00CL
SEARS CANADA INC., by its Court-appointed Litigation Trustee, J. Douglas Cunningham, Q.C. Plaintiff	-and-	ESL INVESTMENTS INC. et al. Defendants	Court File No. CV-18-00611214-00CL
MORNEAU SHEPELL LTD. Plaintiff	-and-	ESL INVESTMENTS INC. et al. Defendants	Court File No. CV-18-00611217-00CL
1291079 ONTARIO LIMITED Plaintiff	-and-	ESL INVESTMENTS INC. et al. Defendants	Court File No. CV-19-00617792-00CL
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 SEARS CANADA INC., et al			Court File No. CV-17-11846-00CL

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PLAINTIFFS' BOOK OF AUTHORITIES
(SHC Settlement Approval and Bar Order)

BLAKE, CASSELS & GRAYDON LLP
199 Bay Street, Suite 4000
Commerce Court West
Toronto ON M5L 1A9

Michael Barrack LSO #21941W
michael.barrack@blakes.com
Tel: 416 863 5280
Kathryn Bush LSO #23636O
kathryn.bush@blakes.com
Tel: 416 863 2633
Kiran Patel LSO #58398H
kiran.patel@blakes.com
Tel: 416 863 2205
Fax: 416 863 2653

Lawyers for Morneau Shepell Ltd., in its capacity as administrator of the Sears Canada Inc. Registered Retirement Plan

SOTOS LLP
180 Dundas St W Suite 1200,
Toronto, ON M5G 1Z8

David Sterns LSO #36274J
dsterns@sotosllp.com
Tel: 416 977 0007
Fax: 416 977 0717

-and-

BLANEY McMURTRY LLP
Suite 1500 – 2 Queen Street East
Toronto ON M5C 3G5

Lou Brzezinski LSO #19794M
lbrzezinski@blaney.com
Tel: 416 539 1221
Fax 416 539 5437

Lawyers for 1291079 Ontario Limited

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Matthew P. Gottlieb LSO#: 32268B
mgottlieb@lolg.ca
Tel: 416 644 5353
Andrew Winton LSO#: 54473I
awinton@lolg.ca
Tel: 416 644 5342
Philip Underwood LSO#: 73637W
punderwood@lolg.ca
Tel: 416 645 5078
Fax: 416 598 3730

Lawyers for Sears Canada Inc., by its Court-appointed Litigation Trustee, J. Douglas Cunningham, Q.C.

NORTON ROSE FULBRIGHT CANADA LLP
222 Bay Street, Suite 3000, P.O. Box 53
Toronto ON M5K 1E7

Orestes Pasparakis LSO#: 36851T
orestes.pasparakis@nortonrosefulbright.com
Tel: 416 216 4815
Evan Cobb LSO#: 55787N
evan.cobb@nortonrosefulbright.com
Tel: 416 216 1929
Fahad Siddiqui LSO#: 67001A
fahad.siddiqui@nortonrosefulbright.com
Tel: 416 216 2424
Fax: 416 216 3930

Lawyers for FTI Consulting Canada Inc., in its capacity as Court-appointed monitor