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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

BOOK OF AUTHORITIES OF THE AD HOC COMMITTEE OF PURCHASERS OF THE APPLICANT'S SECURITIES, INCLUDING THE REPRESENTATIVE PLAINTIFFS IN THE ONTARIO CLASS ACTION

(Motion Returnable October 9 and 10, 2012)

October 3, 2012

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19. *Re Canadian Airlines Corp.* 2000 CanLII 28185 (AB QB), (2000), 19 C.B.R. (4th) 12.

20. *San Francisco Gifts Ltd. v. Oxford Properties Group Inc.* (2004) 5 C.B.R. (5th) 300 (Alta. C.A.)

21. *Ontario v. Canadian Airlines Corporation*, 2001 ABQB 983 (CanLII), [2001] A.J. No. 1457.

22. *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.)

23. *Fantl v. Transamerica Life Canada*, 2009 ONCA 377.

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28. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522.

29. *Re Vancouver Sun*, 2004 SCC 43.

30. *MacIntyre v. Nova Scotia (Attorney General)*, 1982 CarswellNS 21.

31. *Re Mecachrome Canada Inc.*, 2009 CarswellQue 9963 (S.C.)

32. *Re Calpine Canada Energy Ltd.*, 2007 CarswellAlta 156 (Q.B.)

33. *Re Arclin Canada Ltd.*, [2009] O.J. No. 4260 (S.C.J.)

34. *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41.

35. *GasTOPS v. Forsyth*, 2011 ONCA 186.

36. *Re Canadian Airlines Corp.* (2000), 20 C.B.R. (4^{th}) 1 (ABQB); leave to appeal refused (2000), 20 C.B.R. (4^{th}) 46 (ABCA); leave to appeal to SCC refused (2001), CarswellAlta 888 (SCC).

37. *Silver v. Imax*, 2008 CarswellOnt 2657, 167 A.C.W.S. (3d) 881 (Sup. Ct. J.)

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39. *Ainslie and Marenette v. CV Technologies Inc. et. al.*, 93 O.R. (3d) 200, 304 D.L.R. (4th) 713 (Sup Ct. J.)

40. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379

Secondary Sources

41. *Report of the Committee on Corporate Disclosure, Responsible Corporate Disclosure: A Search for Balance* (Toronto Stock Exchange: 1997)

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Humber Valley Resort Corp., Re

IN THE MATTER OF The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended

And IN THE MATTER OF A Plan of Compromise of Arrangement of Humber Valley Resort Corporation, Newfoundland Travel and Tourism Corporation, Humber Valley Construction Limited and Humber Valley Interiors Limited

And IN THE MATTER OF An Application of Maxium Financial Services Inc. for an Order lifting the Stay of Proceedings provided in the Initial Order dated September 5, 2008, as amended by the Order dated October 14, 2008

Newfoundland and Labrador Supreme Court (Trial Division)

R.M. Hall J.

Heard: October 31, 2008
Judgment: November 4, 2008
Docket: 2008 01T 3743

Counsel: Geoffrey L. Spencer for Applicant

John Stringer, Q.C., Stephen Kingston, Douglas B. Skinner for Respondents

Dean A. Porter for Home Construction Limited

Neil L. Jacobs for Her Majesty the Queen in right of Newfoundland and Labrador

Subject: Insolvency; Civil Practice and Procedure

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

Corporations involved in golf resort granted protection under Companies' Creditors Arrangement Act — M Inc. which held capital leases on resort's equipment applied for lifting of stay as against M Inc. and delivery up of equipment covered by leases — Application dismissed — Test for lifting stay involved balancing prejudice to creditor if stay not lifted against prejudice to debtor and other creditors if stay lifted — M Inc. had not demonstrated prejudice outweighing that to resort — M Inc. had overstated debt by inclusion of GST — Losses forecast by M Inc. if stay not lifted were based only on sale in Canada whereas there were golf courses in United States operating year-

round who might be looking for equipment — M Inc. had not used best efforts.

Cases considered by *R.M. Hall J.*:

Canadian Airlines Corp., Re (2000), 19 C.B.R. (4th) 1, 2000 CarswellAlta 622 (Alta. Q.B.) — followed

Humber Valley Resort Corp., Re (2008), 2008 CarswellNfld 262, 2008 NLTD 160 (N.L. T.D.) — referred to

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd. (2007), 2007 SKCA 72, 2007 CarswellSask 324, [2007] 9 W.W.R. 79, (sub nom. *Bricore Land Group Ltd., Re)* 299 Sask. R. 194, (sub nom. *Bricore Land Group Ltd., Re)* 408 W.A.C. 194, 33 C.B.R. (5th) 50 (Sask. C.A.) — considered

Statutes considered:

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

Generally — referred to

s. 11(4) — considered

s. 11(6) — considered

Personal Property Security Act, S.N. 1998, c. P-7.1

Generally — referred to

APPLICATION by creditor for order lifting stay of proceedings pursuant to *Companies' Creditors Arrangement Act*.

***R.M. Hall J.*:**

Background

1 Humber Valley Corporation, Newfoundland Travel and Tourism Corporation, Humber Valley Construction Limited, and Humber Valley Interiors (collectively referred to as the "Resort") were granted protection pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended (the "*CCAA*") by an Initial Order issued by this Court on September 5, 2008.

2 The Initial Order provided for a Stay of Proceedings with respect to the Resort from the date of the Initial Order up to and including October 6, 2008, and this Stay of Proceedings was extended to December 5, 2008, by an Order of the Court dated October 14, 2008 [*Humber Valley Resort Corp., Re*, 2008 CarswellNfld 262 (N.L. T.D.)]. The extension of the Stay of Proceedings was subject to the right of creditors of the Resort to request a review and reconsideration of the extension.

3 The Applicant, Maxium Financial Services Inc. ("Maxium") seeks to have the Stay of Proceedings lifted as it pertains to Maxium and in particular seeks an order requiring the Resort to deliver up possession to Maxium of various pieces of equipment leased under certain capital leases made between Maxium and the Resort (the "Equipment").

4 Maxium is in the business of providing lease financing and asset management services to, *inter alia*, customers in the golf course industry. It began its relationship with the Resort in 2003 when it leased various pieces of the Equipment to the Resort for the operation of a golf course on the Resort property at Humber Valley, Newfoundland. Security was given to Maxium by Humber Valley Resort Corporation by way of a Master Lease Agreement. The validity and enforceability of the Master Lease Agreement is not contested nor is it contested that payment thereunder is presently in arrears and Maxium is entitled, save and except for the effect of the Stay of Proceedings granted herein, to enforce its security.

5 The Equipment leased under the Master Lease Agreement is still in the possession of Humber Valley Resort Corporation. It is agreed that most of the Equipment has been winterized and stored and there are no concerns about its physical diminishment as a result thereof. Only a few pieces of the Equipment are currently being used to maintain the golf course and to prepare it for winterization. With the advent of snow conditions, that work will cease also and is expected to cease in a few weeks.

The Present Application

6 Maxium contends it is being severely prejudiced by the Stay of Proceedings on the basis that its security position is being eroded. In Affidavits filed with the Court, Maxium contends that the buying season for golf course equipment of the nature leased to the Resort is presently ongoing. It contends that 50% of Canadian golf courses shut down from December 1st to February 1st of each year. Those courses which close on December 1st, Maxium contends, will make their equipment purchase decisions in October and November. Maxium contends that in order to have an opportunity to sell the Equipment to another golf course prior to the commencement of the 2009 golf season (which Maxium says would commence in or around April 1, 2009), Maxium would have to proceed to market the Equipment by November at the latest. If Maxium is unable to market the Equipment during this short window of opportunity, it contends that the value of the Equipment will deteriorate with the loss increasing as the next golf season approaches.

7 Maxium produced a table showing its anticipated realizations on the sale of the golf Equipment at various times. It contends that if the Equipment was sold in November 2008 the realization would be $808,286. However, if the sale was held off and made during the period of December 2008 to April 2009, that realization would be reduced by $135,556 to a total of $672,730. A further delay of the sale to take place during the summer of 2009 would see that reduction in value being to the level $585,100. Maxium points out that even if it were to proceed to sell the Equipment immediately it is anticipated that it will incur deficiency with respect to the indebtedness owed to it by the Resort.

8 Maxium has noted that the Resort had previously indicated that it hoped to attract an operator for the golf course for the 2009 golf season and that such operator would hopefully negotiate lease terms with Maxium in order to secure the continued use of the Equipment. However, Maxium points out that it may not approve financing for such a prospective operator and that Maxium should not be forced to let the Equipment sit idle while it depreciates in value in the interim. It points out that the golf course is no longer in operation and the Equipment is, for the most part, not in use. It contends that the Equipment can be removed without detrimentally affecting the Resort. In the event that the Resort is able to attract a new operator for the golf course, Maxium contends that the new operator can obtain golf course equipment from other sources in time for the 2009 golf season.

The Response of the Resort

9 The Resort, on its part, contends that a functioning golf course is key to a successful restructuring of the Resort's financial affairs. Key to that operation of the golf course is the existence of the Equipment, leased by Maxium to the Resort, said Equipment being in place and ready for the use at the commencement of the golf season in the spring of 2009. Implicit in this argument is the suggestion that if the Equipment is not available, the purchase from new

sources of new equipment will be more expensive, more time-consuming, and likely to delay the opening of the golf course and that collectively these complications will make the restructuring of the financial affairs of the Resort more difficult. In addition, the Resort argues that if the Stay of Proceedings is lifted as against Maxium, such action by the Court is likely to encourage a veritable stampede of applications by other creditors seeking to have their equipment repossessed. The Resort has not received applications from any other creditors seeking a lifting of the Stay of Proceedings. However, a review of the registered PPSA security against the Resort, tendered as an exhibit to the Maxium affidavits, indicates security issued by the Resort to numerous creditors governing various motor vehicles, heavy construction equipment and computer equipment. No evidence was presented by the Resort to show that the loss of this Equipment would prejudice the restructuring, albeit where construction for the completion of approximately 130 chalets will need to recommence after the restructuring, the presence of the heavy equipment would seem to be logically required. Similarly, the loss of computer equipment might impact the restructuring through loss of the financial records and other records of the Resort.

Law and Argument

10 The Court has authority to lift a Stay of Proceedings granted under the *CCAA* by virtue of section 11(4) of the *CCAA*. That section provides:

> 11.(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,
>
> (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

11 It is to be noted that this power is discretionary but the *CCAA* does not set out any specific tests with respect to the lifting of a Stay or Proceedings. Section 11(6) of the *CCAA* does however provide a minimal amount of guidance. It states:

> 11.(6) The court shall not make an order under subsection (3) or (4) unless
>
> (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
>
> (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

12 The Saskatchewan Court of Appeal in *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) held that the test for lifting the Stay of Proceedings under the *CCAA* should be based on sound reasons consistent with the scheme of the *CCAA*:

> 68. In determining what constitutes "sound reasons", much is left to the discretion of the judge. However, previous decisions on this point provide some guidance as to factors that may be considered:
>
> (a) the balance of convenience;

(b) the relative prejudice to the parties;

(c) the merits of the proposed action, where they are relevant to the issue of whether there are "sound reasons" for lifting the stay (i.e., as was said in *Ma, Re*, if the action has little chance of success, it may be harder to establish "sound reasons" for allowing it to proceed).

The supervising *CCAA* judge should also consider the good faith and due diligence of the debtor company as referenced in s. 11(6). Ultimately, it is in the discretion of the supervising *CCAA* judge as to whether the proposed action ought to be allowed to proceed in the face of the stay.

13 In *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.) at paragraph 20 the Court outlined various situations in which courts have lifted a Stay or Proceedings. At paragraph 20 the Court stated:

20. At pages 342 and 343 of this text, Canadian Commercial Reorganization:

Preventing Bankruptcy (Aurora: Canada Law Book, looseleaf), R.H. McLaren describes situations in which the court will lift a stay:

1. When the plan is likely to fail;

2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);

3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence);

4. The applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;

5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passage of time;

6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period

14 In *Canadian Airlines (supra)* the Court dismissed the application to lift the Stay of Proceedings on the basis that the value of the applicant's security was well in excess of what they were owed and that the applicants had not established that they would suffer any material prejudice in having to wait three weeks for the creditors' meeting to vote on the plan or arrangement.

15 In dealing with the issue of the balance of convenience, Maxium contends that if it is permitted to repossess its Equipment the Resort will not be inconvenienced as much as Maxium would be by the refusal to allow repossession. It emphasizes that the Equipment is not in use and is in storage and that the golf course is no longer in operation and that, if the Resort is successful in finding a new operator, that new operator will be able to acquire equipment on its own for the commencement of the golf season in 2009. On the other hand, Maxium will be severely prejudiced by leaving the Equipment idle with the Resort while its security erodes with the passage of time decreasing as much as 28% in value by summer 2009.

16 Maxium contends there would be no prejudice to the other creditors of the Resort, as the Resort would still be in a position to seek an operator of the golf course and that courts generally recognize that a reduction in the value of inventory during a stay period is an important decision and a factor to be considered by a court to lift a Stay for an inventory financier.

17 The Resort, on the other hand, urges that the Court should consider that it continues to work diligently and in good faith to restructure its affairs and that that restructuring ought to be allowed to proceed without interruption by reason of the repossession of the Maxium Equipment.

Conclusion

18 In considering the six tests set out by the Alberta Queens Bench in *Canadian Airlines (supra)*, the single most important test is whether Maxium would be severely prejudiced by the refusal to lift the Stay of Proceedings and that there would be no resulting prejudice to the Resort or to its creditors. It is interesting to note the strong language of this particular condition. Maxium is required to be "severally" prejudiced by the refusal to lift the Stay of Proceedings. On the other hand, there must be "no resulting prejudice" to the Resort or to the position of its creditors if the Stay is lifted. It is difficult to reconcile this extremely strong statement with the requirement set out by the Saskatchewan Court of Appeal in *ICR Commercial Real Estate (supra)* that the Court has to consider a "balance of convenience". It is difficult to conceive how there can be any consideration of a balance of convenience where the *Canadian Airlines (supra)* decision requires that there be no prejudice to the debtor company or to the position of its creditors. If there is no prejudice, what is there to be balanced against the impact upon Maxium if it is not to repossess? I am not satisfied that the tests which I should apply should be as stringent as that set out in condition number six, paragraph 20 of the *Canadian Airlines (supra)* decision. Rather, I am satisfied that there merely should be a balancing of the levels of prejudice to the creditor, Maxium, or to the Resort, depending upon whether the application to lift the Stay or Proceedings is allowed or not. This consideration needs to be made in light of the stated purpose of the *CCAA*, which is to allow a corporation sufficient time to restructure itself and that the Stay of Proceedings is not intended to maintain an absolute Stay of Proceedings at the positions existing before the Initial Order, insofar as they relate to either the Corporation or to creditors.

19 With these principles in mind, I conclude that Maxium has not demonstrated that the level of prejudice, which it might suffer, outweighs the difficulties that the removal and sale of its leased Equipment will cause to the Resort and to its restructuring efforts. Firstly, the stated debt owing to Maxium is overstated by the amount of the goods and services tax of over $100,000. Obviously, if the Equipment is repossessed, that goods and services tax is not payable. Therefore, the initial loss at least of Maxium is overstated. Additionally, Maxium has confined its research and opinion as to its prospective losses solely to the situation that would pertain if the Equipment was to be sold in Canada. Maxium deposes that it does not carry on business in the United States and has no knowledge of the United States market. That ignorance on its part, however, should not be a factor in causing this Court to accept that the only market for the Equipment is a Canadian market. It is logical that brokers would be available in the United States who could provide Maxium with evidence as to the market value of this Equipment in a U.S. market. With U.S. golf courses generally being open for a longer season, it is probable that there would be many more purchasers of this Equipment looking year-round for equipment to purchase. Additionally, the recent decline in value of the Canadian dollar versus the U.S. dollar would give a selling advantage to Maxium, if it were selling in to the United States.

20 Therefore, I am not satisfied that the prejudice to Maxium would substantially outweigh the prejudice to the Resort. In addition, I am not satisfied that Maxium has conducted sufficient investigations to market this Equipment widely and therefore has not used best efforts in its own interest or in the interest of the Resort.

21 **IT IS THEREFORE ORDERED** that the application of Maxium is dismissed. There shall be no order as to

costs.

Application dismissed.

END OF DOCUMENT

2008 CarswellBC 1758, 2008 BCCA 327, [2008] B.C.W.L.D. 6017, [2008] B.C.W.L.D. 6018, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 168 A.C.W.S. (3d) 785, 258 B.C.A.C. 187, 434 W.A.C. 187

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Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.

Cliffs Over Maple Bay Investments Ltd. (Respondent / Petitioner / Respondent) and Fisgard Capital Corp. and Liberty Holdings Excel Corp. (Appellants / Respondents / Applicants)

British Columbia Court of Appeal

Frankel, Tysoe, D. Smith JJ.A.

Heard: August 12, 2008
Judgment: August 15, 2008
Docket: Vancouver CA036261

Counsel: G.J. Tucker, A. Frydenlund for Appellants

H.M.B. Ferris, P.J. Roberts for Respondent

M. Sennott for Century Services Inc.

M.B. Paine for Monitor, Bowra Group

Subject: Insolvency; Corporate and Commercial

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

Applicant creditors held mortgages registered against debtor company's property development — Debtor commenced proceeding under Companies' Creditors Arrangement Act ("CCAA") — Stay order was granted pursuant to s. 11 of CCAA — Debtor applied for extension of stay and authorization for debtor-in-possession financing — Creditors applied to have initial stay set aside and sought appointment of interim receiver — Chambers judge granted debtor's application and dismissed creditors' application — Creditors appealed — Appeal allowed — Ability of court to grant or continue stay under s. 11 of CCAA is not free standing remedy that court may grant whenever insolvent company wishes to undertake restructuring — Section 11 is ancillary to fundamental purpose of CCAA, which is to facilitate compromises and arrangements between companies and their creditors — Stay of proceedings freezing rights of creditors should only be granted in furtherance of CCAA's fundamental purpose — It was not suggested that debtor intended to propose arrangement or compromise to its creditors before embarking on its restructuring plan — In absence of such intention, it was inappropriate for stay to have been granted or extended under s. 11 — Chambers judge failed to take this important factor into account.

2008 CarswellBC 1758, 2008 BCCA 327, [2008] B.C.W.L.D. 6017, [2008] B.C.W.L.D. 6018, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 168 A.C.W.S. (3d) 785, 258 B.C.A.C. 187, 434 W.A.C. 187

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

Applicant creditors held mortgages registered against debtor company's property development — Debtor commenced proceeding under Companies' Creditors Arrangement Act ("CCAA") — Stay order was granted pursuant to s. 11 of CCAA — Debtor applied for extension of stay and authorization for debtor-in-possession financing — Creditors applied to have initial stay set aside and sought appointment of interim receiver — Chambers judge granted debtor's application and dismissed creditors' application — Creditors appealed — Appeal allowed — Ability of court to grant or continue stay under s. 11 is not free standing remedy that court may grant whenever insolvent company wishes to undertake "restructuring" — Section 11 is ancillary to fundamental purpose of CCAA, which is to facilitate compromises and arrangements between companies and their creditors — It was not suggested that debtor intended to propose arrangement or compromise to its creditors before embarking on its restructuring plan — In absence of such intention, it was inappropriate for stay to have been granted or extended under s. 11 — If stay under CCAA should not be extended because debtor is not proposing arrangement or compromise with creditors, it followed that DIP financing should not have been authorized to permit debtor to pursue restructuring plan that did not involve arrangement or compromise with its creditors.

Cases considered by *Tysoe J.A.*:

Anvil Range Mining Corp., Re (2001), 2001 CarswellOnt 1325, 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) — referred to

Anvil Range Mining Corp., Re (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — referred to

Charles Osenton & Co. v. Johnston (1941), [1942] A.C. 130, [1941] 2 All E.R. 245, 110 L.J.K.B. 420, 57 T.L.R. 515 (U.K. H.L.) — considered

Fairview Industries Ltd., Re (1991), 1991 CarswellNS 35, 11 C.B.R. (3d) 43, (sub nom. *Fairview Industries Ltd., Re (No. 2)*) 109 N.S.R. (2d) 12, (sub nom. *Fairview Industries Ltd., Re (No. 2)*) 297 A.P.R. 12 (N.S. T.D.) — referred to

Friends of the Oldman River Society v. Canada (Minister of Transport) (1992), [1992] 2 W.W.R. 193, [1992] 1 S.C.R. 3, 3 Admin. L.R. (2d) 1, 7 C.E.L.R. (N.S.) 1, 84 Alta. L.R. (2d) 129, 88 D.L.R. (4th) 1, 132 N.R. 321, 48 F.T.R. 160, 1992 CarswellNat 649, 1992 CarswellNat 1313 (S.C.C.) — considered

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*) [1991] 2 W.W.R. 136 (B.C. C.A.) — followed

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

New Skeena Forest Products Inc., Re (2005), 7 M.P.L.R. (4th) 153, [2005] 8 W.W.R. 224, (sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*) 210 B.C.A.C. 247, (sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*) 348 W.A.C. 247, 2005 BCCA 192, 2005 CarswellBC 705, 9 C.B.R. (5th) 278, 39 B.C.L.R. (4th) 338 (B.C. C.A.) — considered

Reference re Companies' Creditors Arrangement Act (Canada) (1934), [1934] 4 D.L.R. 75, 1934 CarswellNat 1, 16 C.B.R. 1, [1934] S.C.R. 659 (S.C.C.) — followed

Reza v. Canada (1994), 1994 CarswellOnt 1158, 1994 CarswellOnt 675, 24 Imm. L.R. (2d) 117, 21 C.R.R. (2d) 236, 116 D.L.R. (4th) 61, (sub nom. *Reza v. Canada (Minister of Employment & Immigration)*) 72 O.A.C. 348, 22 Admin. L.R. (2d) 79, [1994] 2 S.C.R. 394, (sub nom. *Reza v. Canada (Minister of Employment & Immigration)*) 167 N.R. 282, 18

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O.R. (3d) 640 (note) (S.C.C.) — considered

Skeena Cellulose Inc., Re (2001), 29 C.B.R. (4th) 157, 2001 BCSC 1423, 2001 CarswellBC 2226 (B.C. S.C.) — considered

United Used Auto & Truck Parts Ltd., Re (2000), 2000 BCCA 146, 135 B.C.A.C. 96, 221 W.A.C. 96, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, 16 C.B.R. (4th) 141, [2000] 5 W.W.R. 178 (B.C. C.A.) — considered

Ursel Investments Ltd., Re (1990), 2 C.B.R. (3d) 260, 1990 CarswellSask 34 (Sask. Q.B.) — considered

Ursel Investments Ltd., Re (1992), (sub nom. *Deloitte & Touche Inc. v. Ursel Investments Ltd. (Receiver of))* [1992] 3 W.W.R. 106, (sub nom. *Deloitte & Touche Inc. v. Ursel Investments Ltd. (Receiver of))* 89 D.L.R. (4th) 246, 10 C.B.R. (3d) 61, (sub nom. *Deloitte & Touche Inc. v. Ursel Investments Ltd. (Receiver of))* 97 Sask. R. 170, (sub nom. *Deloitte & Touche Inc. v. Ursel Investments Ltd. (Receiver of))* 12 W.A.C. 170, 1992 CarswellSask 19 (Sask. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 47(1) — referred to

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

Generally — considered

s. 2 "debtor company" — referred to

s. 3(1) — referred to

s. 4 — considered

s. 5 — considered

s. 6 — considered

s. 11 — considered

s. 11(3) — referred to

s. 11(6) — considered

s. 11.7 [en. 1997, c. 12, s. 124] — referred to

APPEAL by creditors from order of chambers judge granting debtor's application to extend stay of proceedings and to authorize debtor-in-possession financing.

***Tysoe J.A.* (orally):**

2008 CarswellBC 1758, 2008 BCCA 327, [2008] B.C.W.L.D. 6017, [2008] B.C.W.L.D. 6018, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 168 A.C.W.S. (3d) 785, 258 B.C.A.C. 187, 434 W.A.C. 187

1 The appellants appeal from the order dated June 27, 2008, by which the chambers judge extended the stay of proceedings that was initially granted on May 26, 2008, until October 20, 2008, and authorized financing in the amount of $2,350,000.

2 The proceeding was commenced by The Cliffs Over Maple Bay Investments Ltd. (the "Debtor Company") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, (the "*CCAA*") after the appellants appointed a receiver on May 23, 2008. As is often the case for initial applications under the *CCAA*, no notice was given to the appellants or any other of the Debtor Company's creditors of the application giving rise to the May 26 stay order. In accordance with section 11(3) of the *CCAA*, the stay contained in the order was expressed to expire on June 25.

3 The Debtor Company then made application for further relief at the hearing commonly called the comeback hearing. The Debtor Company requested an extension of the stay until October 20, 2008, and authorization for financing in the amount of $2,350,000. This financing, which, following upon American terminology, is commonly referred to as "debtor-in-possession" or "DIP" financing, was to be secured by a charge having priority over the security held by the appellants and all other secured and unsecured creditors. The appellants made a concurrent application requesting that the May 26 order be set aside and that an interim receiver be appointed pursuant to s. 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. The chambers judge granted the Debtor Company's application and dismissed the appellants' application.

Background

4 The business of the Debtor Company is the development of a 300 acre site near Duncan, British Columbia, consisting of single family lots and multi-residential units, a hotel and apartments and a golf course. The business plan was to build the golf course and to construct servicing for subdivided lots, which were to be sold to purchasers.

5 The development of the non-golf course lands was to be carried out in five phases. Phase I consists of 70 single family lots and 60 multi-residential units. Its construction is 95% complete and 54 of the 70 single family lots have been sold and conveyed to the purchasers, with the sale proceeds being applied towards the Debtor Company's mortgage financing.

6 Phase II consists of 76 single family lots and is 50% complete. Phase III consists of 69 single family lots, 112 multi-residential lots and 225 hotel units, and it is 5% complete. Phases IV and V consist of 131 single family lots and 60 multi-residential units, and each is 1% complete.

7 The golf course, which is the focal point of the development, is approximately 60 to 70% complete. A restrictive covenant in favour of the District of North Cowichan stipulates that the golf course must be at least 80% complete before more than 200 lots can be sold.

8 There are four mortgages registered against the development. The first two mortgages are not significant — the first mortgage secures an amount of $900,000 that is also secured by a cash collateral deposit, and the second mortgage secured a loan from Liberty Mortgage Services Ltd. that has not yet been discharged because there is a dispute between the Debtor Company and Liberty Mortgage Services Ltd. as to whether $85,000 of interest is still owing.

9 The third mortgage is held by the appellants. It is in the principal sum of $19,500,000 and has an interest rate of 19.75% per annum. It matured on March 1, 2008, and its balance is approximately $21,160,000 as of June 15, 2008. The fourth mortgage is held by the appellant, Liberty Holdings Excell Corp., and The Canada Trust Company. It is in the principal sum of $7,650,000 and has an interest rate of 28% per annum. It matured on January 1, 2008, and its balance is approximately $8,800,000 as of June 15, 2008.

10 In addition to the indebtedness secured by the mortgages, the Debtor Company has liabilities in the following approximate amounts:

$4,460,000	— trade creditors
1,700,000	— equipment leases
1,135,000	— loans from related parties
45,000	— unpaid source deductions
$7,340,000	

11 The Debtor Company was having some difficulties with respect to the development prior to March 2008 as a result of delays and substantial budget overruns. Ongoing construction on the development was limited. The main two mortgages had matured or were about to mature, and the Debtor was unsuccessful in its efforts to obtain refinancing. However, matters came to a head in March 2008 when the Debtor Company learned that its anticipated water source for the irrigation of the golf course was problematic.

12 It had been contemplated that the Debtor Company would obtain water for the golf course's irrigation from a joint utilities board consisting of representatives of the City of Duncan, the District of North Cowichan and the Cowichan First Nation. The joint utilities board had jurisdiction over reclaimed water from sewage lagoons located on the lands of the Cowichan First Nation. The joint utilities board was apparently prepared to provide water from the sewage lagoons for the irrigation of the golf course but it was unable to enter into an agreement with the Debtor Company because three members of the Cowichan First Nation had rights of possession over part of the sewage lagoons and were being advised by their consultant that they should not agree to an extension of the lease of the lagoons.

13 The Debtor Company advised the mortgage lenders of the water problem, and the lenders reacted by serving the Debtor Company with notices of intention to enforce their security in April 2008. On May 23, 2008, the mortgage lenders appointed a receiver, which precipitated the commencement of the *CCAA* proceeding by the Debtor Company. On May 26, 2008, the chambers judge granted the Debtor Company's *ex parte* application under the *CCAA* and directed the holding of the comeback hearing after notice had been given to the Debtor Company's creditors. The Debtor Company applied for authorization of the DIP financing at the comeback hearing.

14 When the chambers judge granted the *ex parte* application on May 26, 2008, he appointed The Bowra Group Inc. as monitor pursuant to s. 11.7 of the *CCAA* (the "Monitor"). The first report of the Monitor dated June 16, 2008, was before the chambers judge at the comeback hearing. Based on two previous appraisals and discussions with the realtor having the listing for the development, the Monitor estimated the value of the development under the following three scenarios:

(a) liquidation value with no source of water for irrigation — $10 million;

(b) liquidation value with a source of water for irrigation — $28 million;

(c) going concern value with completion of the development — $50 million.

The Monitor also reported that the realtor believes that if the development were to be completed, there would be sufficient sale proceeds to satisfy all obligations of the Debtor Company. The appellants took issue with the going concern valuation and submitted that the development should be re-appraised by an appraiser they consider to be trustworthy.

15 In its report, the Monitor also recommended that the court authorize the DIP financing to enable it to pursue a water source for the irrigation of the golf course. The Monitor stated that it believes that the existing management of the Debtor Company will be unable to execute the restructuring in the absence of assistance and direction. The Monitor requested that it be given additional powers so that it could pursue the water source and to receive any offers for the purchase of all or part of the development, with the view that once a water source is secured, it would make further recommendations to the court with respect to the completion of the development. The application of the Debtor Company at the comeback hearing included a request for the expansion of the Monitor's powers.

2008 CarswellBC 1758, 2008 BCCA 327, [2008] B.C.W.L.D. 6017, [2008] B.C.W.L.D. 6018, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 168 A.C.W.S. (3d) 785, 258 B.C.A.C. 187, 434 W.A.C. 187

Decision of the Chambers Judge

16 The appellants argued before the chambers judge, as they did on this appeal, that this matter should not be under the *CCAA* because the business of the Debtor Company is a single real estate development and the business was essentially dormant as at the date of the application. The chambers judge considered s. 11(6) of the *CCAA*, which reads as follows:

> The court shall not make an order under subsection (3) or (4) unless
>
> (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
>
> (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

The chambers judge concluded that the preconditions contained in s. 11(6) had been met. He did not state why he considered a stay order to be appropriate in the circumstances, although his reasons reflect that he understood the nature and state of the Debtor Company's business.

17 The chambers judge considered various authorities in relation to the application for the DIP financing. After considering the benefits and prejudice of the DIP financing, the chambers judge concluded that it was appropriate to authorize it.

18 Finally, the chambers judge granted the expanded powers to the Monitor. This aspect of the order was not directly challenged on appeal, but it may be affected by the outcome on the first ground of appeal.

Appraisal Evidence

19 The affidavit of the principal of the Debtor Company filed at the time of the commencement of the *CCAA* proceeding exhibited the first 11 pages of two appraisals of portions of the development. As a result of the dispute between the parties over the value of the development, the Debtor Company applied for leave to file a supplemental appeal book containing complete copies of the appraisals. We tentatively received the supplemental appeal book subject to a subsequent ruling on the leave application.

20 In view of my conclusion on this appeal, the value of the development is not relevant. I would decline to grant the requested leave.

Standard of Review

21 Both aspects of the order challenged on appeal were discretionary in nature. The standard of review in respect of discretionary orders has been expressed in various ways. In *Reza v. Canada*, [1994] 2 S.C.R. 394, 116 D.L.R. (4th) 61 (S.C.C.), the standard of review was expressed in terms of whether the judge at first instance "has given sufficient weight to all relevant circumstances" (¶ 20).

22 In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 76-7, 88 D.L.R. (4th) 1 (S.C.C.), the Court quoted the following statement in *Charles Osenton & Co. v. Johnston*, [1942] A.C. 130 (U.K. H.L.) at 138 with approval:

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already

> exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

This passage was also referred to by this Court in a case involving the *CCAA*, *New Skeena Forest Products Inc., Re*, 2005 BCCA 192 (B.C. C.A.) at ¶ 20. Newbury J.A. also made reference in that paragraph to the principle that appellate courts should accord a high degree of deference to decisions made by chambers judges in *CCAA* matters and will not exercise their own discretion in place of that already exercised by the chambers judge. She also stated at ¶ 26 that appellate courts should not interfere with an exercise of discretion where "the question is one of the weight or degree of importance to be given to particular factors, rather than a failure to consider such factors or the correctness, in the legal sense, of the conclusion."

23 In my opinion, the comments of Newbury J.A. in *New Skeena* were directed at ongoing *CCAA* matters and do not necessarily apply to the granting and continuation of a stay of proceedings at the hearing of the initial *ex parte* application or the comeback hearing. However, in view of my conclusion on this appeal, I need not decide whether a different standard of review applies in respect of threshold decisions to grant or continue stays of proceedings in the early stages of *CCAA* proceedings.

Analysis

24 On this appeal, the appellants challenge the decision of the chambers judge to continue the stay of proceedings until October 20, 2008, on the same basis as they opposed the application before the chambers judge. They say that the *CCAA* should not apply to companies whose sole business is a single land development or to companies whose business is essentially dormant. However, the real question is not whether the *CCAA* applies to the Debtor Company because it falls within the definition of "debtor company" in s. 2 of the *CCAA* and it satisfies the criterion contained in s. 3(1) of the *CCAA* of having liabilities in excess of $5 million. The *CCAA* clearly applies to the Debtor Company, and it is entitled to propose an arrangement or compromise to its creditors pursuant to the *CCAA*. The real question is whether a stay of proceedings should have been granted under s. 11 of the *CCAA* for the benefit of the Debtor Company.

25 I agree with the submission on behalf of the Debtor Company that the nature and state of its business are simply factors to be taken into account when considering under s. 11(6) whether it is appropriate to grant or continue a stay. If the more deferential standard of review is applicable to the granting and continuation of the stay of proceedings at the initial and comeback hearings, there would be insufficient basis to interfere with the decision of the chambers judge because he did give weight to these factors. However, there is another, more fundamental, factor that was not considered by the chambers judge.

26 In my opinion, the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the *CCAA*, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the *CCAA*'s fundamental purpose.

27 The fundamental purpose of the *CCAA* is expressed in the long title of the statute:

> An Act to facilitate compromises and arrangements between companies and their creditors.

28 This fundamental purpose was articulated in, among others, two decisions quoted with approval by this Court in *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 16 C.B.R. (4th) 141 (B.C. C.A.). The first is *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659, 16 C.B.R. 1 at 2, [1934] 4 D.L.R. 75 (S.C.C.), where the following was stated:

> . . . the aim of the Act is to deal with the existing condition of insolvency in itself to enable arrangements to be made in view of the insolvent condition of the company under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. *Ex facie* it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation."
>
> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

29 The second decision is *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at 315-16, where Gibbs J.A. said the following:

> The purpose of the *C.C.A.A.* is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the *C.C.A.A.*, the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the Court under s. 11.

30 Sections 4 and 5 of the *CCAA* provide that the court may order meetings of creditors if a debtor company proposes a compromise or an arrangement between it and its unsecured or secured creditors or any class of them. Section 6 authorizes the court to sanction a compromise or arrangement if a majority in number representing two-thirds in value of each class of creditor has voted in favour of it, in which case the compromise or arrangement is binding on all of the creditors.

31 The filing of a draft plan of arrangement or compromise is not a prerequisite to the granting of a stay under s. 11: see *Fairview Industries Ltd., Re* (1991), 109 N.S.R. (2d) 12, 11 C.B.R. (3d) 43 (N.S. T.D.). In my view, however, a stay should not be granted or continued if the debtor company does not intend to propose a compromise or arrangement to its creditors. If it is not clear at the hearing of the initial application whether the debtor company is intending to propose a true arrangement or compromise, a stay might be granted on an interim basis, and the intention of the debtor company can be scrutinized at the comeback hearing. The case of *Ursel Investments Ltd., Re* (1990), 2 C.B.R. (3d) 260 (Sask. Q.B.), rev'd on a different point (1991), 89 D.L.R. (4th) 246 (Sask. C.A.) is an example of where the court refused to direct a vote on a reorganization plan under the *CCAA* because it did not involve an element of mutual accommodation or concession between the insolvent company and its creditors.

32 Counsel for the Debtor Company has cited two decisions containing comments approving the use of the *CCAA* to effect a sale, winding up or liquidation of a company such that its business would not be ongoing following an arrangement with its creditors: namely, *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at ¶ 7 and *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) at ¶ 11), aff'd (2002), 34 C.B.R. (4th) 157 (Ont. C.A.) at ¶ 32. I agree with these comments if it is intended that the sale, winding up or liquidation is part of the arrangement approved by the creditors and sanctioned by the court. I need not decide the point on this appeal, but I query whether the court should grant a stay under the *CCAA* to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan of arrangement intended to be made by the debtor company will simply propose that the net proceeds from the sale, winding up or liquidation be distributed to its creditors.

33 Counsel for the Debtor Company also relies upon the decision in *Skeena Cellulose Inc., Re* (2001), 29 C.B.R. (4th) 157 (B.C. S.C.), where a creditor unsuccessfully opposed an extension of the stay of proceedings on the basis that the restruc-

turing plan was wholly dependent upon the debtor company finding a purchaser of its assets. I note that the debtor company in that case was planning to make an arrangement with its creditors. I again query, without deciding, whether the court should continue the stay to allow the debtor company to attempt to fulfil a critical prerequisite to its plan of arrangement without requiring a vote by the creditors. I appreciate that it is frequently necessary for insolvent companies to satisfy certain prerequisites before negotiating a plan of arrangement with its creditors, but some prerequisites may be so fundamental that they should properly be regarded as an element of the debtor company's overall plan of arrangement.

34 In the present case, the Debtor Company described its proposed restructuring plan in the following paragraphs of the petition commencing the *CCAA* proceeding:

> 47 The Petitioner intends to proceed with a three-part strategic restructuring plan consisting of:
>
> (a) securing sufficient funds to complete Phase 2 and 3;
>
> (b) securing access to water for the irrigation system of the golf course; and
>
> (c) finishing the construction of the golf course.
>
> 48 Upon completion of the matters described in the preceding paragraph, the Petitioner believes that proceeds generated from the sale of the remaining units in Phases 1-3, will be sufficient to fund the balance of the costs that will be incurred in completing the remaining portions of the Development.

35 It was not suggested in the petition, nor in the Monitor's report before the chambers judge at the comeback hearing, that the Debtor Company intended to propose an arrangement or compromise to its creditors before embarking on its restructuring plan. In my opinion, in the absence of such an intention, it was not appropriate for a stay to have been granted or extended under s. 11 of the *CCAA*. The chambers judge failed to take this important factor into account, and it is open for this Court to interfere with his exercise of discretion. To be fair to the chambers judge, I would point out that this factor was not drawn to his attention by counsel, and it was raised for the first time at the hearing of the appeal.

36 Although the *CCAA* can apply to companies whose sole business is a single land development as long as the requirements set out in the *CCAA* are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exercising their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing.

37 The failure of the chambers judge to consider the fundamental purpose of the *CCAA* and his error in extending the stay also infects his exercise of discretion in authorizing the DIP financing. If a stay under the *CCAA* should not be extended because the debtor company is not proposing an arrangement or compromise with its creditors, it follows that DIP financing should not be authorized to permit the debtor company to pursue a restructuring plan that does not involve an arrangement or compromise with its creditors. It also follows that expanded powers should not have been given to the Monitor.

38 I wish to add that it was open, and continues to be open, to the Debtor Company to propose to its creditors an arrangement or compromise along the lines of the restructuring plan described in paragraph 47 of the petition, although it may be a challenge to make such a plan attractive to its creditors. The creditors could then vote on such an arrangement or compromise which would involve, on their part, the concession that their rights would remain frozen while the Debtor Company carried out its restructuring. What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights

2008 CarswellBC 1758, 2008 BCCA 327, [2008] B.C.W.L.D. 6017, [2008] B.C.W.L.D. 6018, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 168 A.C.W.S. (3d) 785, 258 B.C.A.C. 187, 434 W.A.C. 187

of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The *CCAA* was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

Other Matters

39 In addition to the appellants and the Debtor Company, two persons appeared at the hearing of the appeal without having obtained intervenor status. The first was the Monitor, which also filed a factum. Other than clarifying certain facts, the factum was limited to the issue of preserving the charge against the assets of the Debtor Company as security for the Monitor's fees and disbursements in the event that the appeal was allowed on the appellants' first ground. In my opinion, the Monitor should have obtained intervenor status if it wished to make submissions on appeal, but the issue became academic when counsel for the appellants advised that his clients did not object to the Monitor retaining the priority charge for its fees and disbursements up to the day on which the decision on appeal is pronounced.

40 The second additional person appearing at the hearing of the appeal was Century Services Inc., which is the lender arranged by the Debtor Company to provide the DIP financing authorized by the chambers judge. Century Services Inc. wished to make submissions with respect to the priority charge for its financing, the first tranche of which was apparently advanced last week. After counsel for the appellants advised us that there were evidentiary matters subsequent to the decision of the chambers judge bearing on this issue, we declined to hear submissions on behalf of Century Services Inc. We did not have affidavits dealing with this matter, and the Supreme Court is better suited to deal with issues that may turn on the evidence.

Disposition

41 I would allow the appeal and set aside the order dated June 27, 2008. I would declare that the powers and duties of the Monitor contained in the orders dated May 26, 2008, and June 27, 2008, continued until today's date and that the Administration Charge created by the May 26 order shall continue in effect until all of the Monitor's fees and disbursements, including the fees and disbursements of its counsel, have been paid. I would remit to the Supreme Court any issues relating to the DIP financing that has been advanced.

Frankel J.A.:

42 I agree.

D. Smith J.A.:

43 I agree.

Frankel J.A.:

44 The respondent's application to file a supplemental appeal book is dismissed. The appeal is allowed in the terms stated by Mr. Justice Tysoe.

Appeal allowed.

END OF DOCUMENT

2001 CarswellBC 2226, 2001 BCSC 1423, 29 C.B.R. (4th) 157

C

2001 CarswellBC 2226, 2001 BCSC 1423, 29 C.B.R. (4th) 157

Skeena Cellulose Inc., Re

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT* R.S.C. 1985, c. c-36; AND IN THE MATTER OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. c-44, as amended; AND IN THE MATTER OF THE *COMPANY ACT*, R.S.B.C., 1966, c.62, as amended; AND IN THE MATTER OF SKEENA CELLULOSE INC. ORENDA FOREST PRODUCTS LTD. ORENDA LOGGING LTD. and 9753 ACQUISITION CORP. (PETITIONERS)

British Columbia Supreme Court

Brenner C.J.S.C.

Heard: October 5, 2001
Judgment: October 23, 2001
Docket: Vancouver L012405

Counsel: *D.I. Knowles, Q.C., C. Emslie*, for Petitioners

C.S. Bird, R.L. Bozzer, for Her Majesty the Queen in Right of the Province of British Columbia, 552513 British Columbia

R.J. Kearns, for T.D. Bank

D.R. Leigh, for Arthur Andersen Inc. Monitor

R. Macquisten, for District of Port Edward

T.D. Timberg, for Pacific Northern Gas Inc.

W.E. Skelly, for Pulp, Paper and Woodworkers of Canada, Local 4

C.M. Baron, for Slocan Forest Products Ltd.

G. Anderson, for City of Prince Rupert

T.V. Martin, for Alstom Canada Inc.

2001 CarswellBC 2226, 2001 BCSC 1423, 29 C.B.R. (4th) 157

J.J. Talstra, for City of Terrace

B.J. Brown, for Jock's Excavating Ltd., William Scott Milne

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Company filed for protection under Companies' Creditors Arrangement Act — Petitioners successfully applied for stay pursuant to provisions of Act — At comeback hearing one month later, petitioners sought extension of stay for 30 days — Application granted — Consequences of terminating CCAA protection would be severe — Liquidation of company would have drastic impact on Northwestern British Columbia which would be felt directly by company's employees, contractors and suppliers — Restructuring plan was wholly dependent on finding of purchaser — Simple failure of company's management to comply with monitor's recommended timetable for layoffs of employees did not constitute lack of good faith or due diligence so as to disentitle company to extension of stay under s. 11(6) of Act — Extraordinary nature of this case justified 30-day extension to stay order — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11(6).

Statutes considered:

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

Generally — referred to

s. 11(6) — considered

s. 11(6)(a) — considered

s. 11(6)(b) — considered

APPLICATION for extension of stay under *Companies' Creditors Arrangement Act*.

***Brenner C.J.S.C.*:**

1 On September 5, 2001, I granted the Petitioners' application for an initial stay pursuant to the provisions of the *Companies' Creditors Arrangement Act ("CCAA")*. At the comeback hearing on October 5, 2001, I extended that stay for 30 days to November 5, 2001. These are the written reasons for that Order.

2 Skeena Cellulose Inc. ("SCI") is an integrated forest company operating in Northwestern British Columbia. It has a two-line pulp mill on Watson Island near Prince Rupert, sawmills in Terrace, South Hazelton, Smithers and one sawmill near Kitwanga. It has numerous timber tenures held either directly or through subsidiary companies.

3 After accumulating operating losses through much of the 1990s, the owner of Repap British Columbia (as Skeena was previously known) abandoned the operation in 1996. The company filed for *CCAA* protection. In early 1998 SCI formally emerged from *CCAA* protection with the Province of British Columbia and the Toronto Dominion Bank ("TD Bank") acting as the company's major lenders and shareholders.

4 As noted by the Monitor, poor markets combined with a number of unforeseen operational delays have re-

quired SCI's lenders to advance further funding on a number of occasions to maintain operations.

5 The enterprise again filed for *CCAA* protection on September 5, 2001. SCI was unable to meet its obligations after the TD Bank issued a payment demand on August 31, 2001, and froze the company's bank accounts.

6 As a condition of the TD Bank's involvement following the 1997 reorganization, the Province guaranteed a proportion of the TD debt. The functioning of this arrangement is described in the Monitor's report as follows:

> Virtually all of the funding provided to Skeena since the Company emerged from CCAA protection has been loaned directly or indirectly, by the Province, with TD Bank providing additional advances only if the Province provided its guarantee.

Prior to this hearing on October 5, 2001 the Province paid much of this guaranteed debt to the TD Bank. In the result, SCI currently owes $410 million to the secured lenders. Of this $94.2 million or 23% of the secured debt is owed to the TD Bank while the balance is owed to the Province. Approximately $100 million is owed to unsecured creditors.

7 At page 24 of his Report, the Monitor sets out the status of the restructuring plan. It is wholly dependent on a purchaser being found. The two major shareholders, the Province and the TD Bank, have been seeking a new owner for SCI since 1998 when they engaged Goepel and McDermid Inc. (now Raymond James Limited ("RJL")) for this purpose.

8 The history of RJL's efforts is set out in the Monitor's Report. Since 1998 RJL has actively exposed the assets of SCI to the worldwide market. Since September 6, 2001 RJL has held discussions with numerous parties and written proposals were requested by September 27, 2001. This produced two proposals, one of which has been withdrawn. SCI also advises that a third party has approached it and has outlined its intentions and a written presentation that it wishes to discuss further.

9 The Monitor has reviewed the remaining proposal and the written presentation and comments as follows:

> 1. Neither of the documents constitute a formal offer but rather a basis of further discussion between the parties;
>
> 2. Each proposal requires changes to the forest practices for the region in which Skeena operates and requires indemnities from the Province for certain potential liabilities;
>
> 3. Each proposal is dependent upon the parties raising funds in excess of 100 million to complete the transaction and provide funding for working capital and proposed capital investment programs aimed at enhancing the competitiveness of Skeena; and
>
> 4. The purchase prices are less than the projected net realizable values of Skeena's working capital assets at September 30, 2001.

10 The Monitor notes that SCI and the Province have indicated that they intend to continue discussions with both parties to determine whether an agreement for the sale of the shares of SCI can be reached as part of its restructuring plan. A share sale is critical if a purchaser is to be able to take the benefit of what I understand to be significant SCI tax losses.

11 The Monitor also states that a sale of the Company's shares under the current proposals will not maximize the recovery to the secured creditors given the current estimates of the net realizable value of the working capital

assets. However, the Monitor does note if an agreement can be reached and a restructuring plan approved the employee and supplier stakeholders to the CCAA process stand to realize a significant benefit through ongoing employment and supply business. If a sale of shares cannot be achieved, a sale of SCI's assets through a bankruptcy or receivership process will likely be done on a piecemeal basis. The likely result will be that various components of SCI's operations will be dismantled and discontinued.

12 Apart from the TD Bank, which opposed this application, all parties before the court on October 5, 2001 supported a 30-day extension of the Stay Order. As noted by counsel for the TD Bank, any extension will effectively be financed by the secured lenders. While the Province is prepared to bear its share, the TD Bank is not. The cost of a 30-day extension to the Bank is approximately $3.5 million.

13 The burden of proof on this application rests on the Petitioners. S. 11 (6) of the *CCAA* provides that:

> The court shall not make an order under subsection (3) or (4) unless
>
> (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
>
> (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

14 It is important to note the distinction between an initial stay under the *CCAA*, which the court can grant for a period of up to 30 days and any subsequent extensions. To have a stay extended past the period of the initial stay, the petitioner must meet the test set out in s.11(6).

15 Here the TD Bank says SCI has failed to meet the tests in both subsection (a) and (b). It complains about SCI's lack of good faith and due diligence in the delays in laying off both salaried and non-salaried personnel. These were steps recommended by the Monitor to conserve cash. In the TD Bank's view SCI did not act with sufficient alacrity. Its counsel submits that SCI's failure to carry out the layoffs on the timetable recommended by the Monitor constitutes a lack of good faith and due diligence.

16 However, in my view, the simple failure of SCI's management to comply with the Monitor's recommended timetable does not constitute, in and of itself, a lack of either good faith or due diligence. This is not a case where a management has completely ignored a Monitor's recommendations. Here SCI's management is being criticized only for the delay in carrying out the Monitor's recommendations. Given all the stakeholders in this matter and their respective interests, such a delay did not represent a lack of due diligence or good faith.

17 The TD Bank's principal objection is that the Petitioners have failed the test in s. 11(6)(a) and that they have failed to establish that there are circumstances that make an extension of the stay appropriate. In the case at bar, SCI's restructuring plan is wholly dependent upon SCI finding a purchaser. Without a purchaser, there will be no plan and the stay will terminate.

18 An affidavit was filed by Mark Lofthouse, Director, Financial and Project Evaluation Branch of the Ministry of Competition, Service and Enterprise, of the Province of British Columbia. Mr. Lofthouse is also a director of SCI. He deposed as to information he has received from Daniel D. Veniez, who is the CEO of a company involved in the written presentation. His group has raised $10 million for this purpose. In addition, members of the group were to travel to New York on October 8, 2001 for meetings to raise the additional financing. Lofthouse further deposes that following the New York meetings, Mr. Veniez and his group intend to travel to British Columbia to outline their business plan to SCI.

19 With respect to the one proposal, Mr. Lofthouse deposes that it contains requirements for significant provin-

cial government financial support that the Province has determined is not feasible. He deposes that discussions with this proposor are continuing to see if the existing proposal can be further amended in a way that is acceptable to both parties.

20 One cannot overstate the economic impact of SCI's operations in the communities of Northwestern British Columbia. For example, in the District of Port Edward, SCI constitutes 43% of the general municipal tax base. As set out in the affidavit of Ron Bedard, the District's Chief Administrative Officer, the loss of SCI's tax revenue will mean that the taxes for the owner of a $100,000 home will have to increase from $539.45 to $980.33 per year.

21 In addition to losing the SCI municipal tax payments, the District has also been required to make substantial payments to other agencies in the form of school taxes, regional and hospital district assessments based on taxes SCI ought to have paid.

22 The position of the District of Port Edward is replicated in the many other Northwestern communities in which SCI has its operations.

23 There are also many unpaid SCI contractors. In addition to suffering the loss of their SCI receivables, they are out-of-pocket for the necessary expenses they have incurred to provide their services to SCI, which in turn has enabled SCI to earn revenue. Many employees of SCI have also been directly affected.

24 I have earlier stated that the effect of the additional 30-day stay that is sought will be to erode the position of the TD Bank by some $3.5 million.

25 In his affidavit of October 3, 2001 Robert Allen, the President and Chief Executive Officer of SCI states:

> In my opinion, if the stay of proceedings is continued for a further 30 days, this will allow for a more full consideration of the two outstanding proposals and put the Petitioners in a position of being able to place a more complete and comprehensive plan before the court.

26 In my view the extraordinary nature of this case justifies a 30-day extension to the Stay Order. When it decided to continue financing SCI at the time of the last *CCAA* re-organization, the TD Bank negotiated substantial protections for its position by obtaining indemnities from the Provincial Government. It has called on these indemnities and shortly before this hearing was paid some $125 million pursuant to those guarantees.

27 The consequences of terminating the *CCAA* protection will be severe. The liquidation of SCI will have a drastic impact on Northwestern British Columbia. This will be felt directly by the employees, contractors and suppliers of SCI. It will also be felt by many of the other residents, including each and every property taxpayer. These far reaching consequences are appropriate matters for the court to weigh and consider when determining whether to extend a Stay Order under the *CCAA*.

28 In my view, circumstances did exist on October 5, 2001 that made it appropriate to extend the stay to November 5, 2001.

29 However, I also want to state my view that a further extension of the Stay Order past November 5, 2001 will likely require the Petitioners to demonstrate measurable and substantive progress towards a plan.

30 In this case the Petitioners are not looking to reorganize the companies and continue to operate. Everyone agrees that the only viable plan of arrangement open to SCI is a sale to a purchaser that can take advantage of the accumulated tax losses. The company at this stage is almost completely shutdown; it is now operating only one

sawmill. The tenuous nature of SCI's position was, no doubt, a consideration in the Petitioners' decision to apply for an extension of only 30 days and not a longer period at the comeback hearing.

31 Accordingly, if there is an application for a further stay I would expect the Petitioners to place before the court evidence that measurable and demonstrable progress towards a plan of arrangement has been made.

Application granted.

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2010 CarswellOnt 894, 2010 ONSC 1102, 81 C.C.P.B. 88, 63 C.B.R. (5th) 66

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2010 CarswellOnt 894, 2010 ONSC 1102, 81 C.C.P.B. 88, 63 C.B.R. (5th) 66

Dura Automotive Systems (Canada) Ltd., Re.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C., c. C036, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DURA AUTOMOTIVE SYSTEMS (CANADA) LTD. (Applicant)

Ontario Superior Court of Justice [Commercial List]

Morawetz J.

Heard: February 11, 2010
Judgment: February 17, 2010
Docket: 09-8434-00CL

Counsel: Christopher Besant, Frank Spizzirri for Applicant, Dura Automotive Systems (Canada) Ltd.

Hugh O'Reilly, Amanda Pask for International Association of Machinists and Aerospace Workers

Barry Wadsworth for CAW-Canada

Mark Bailey for Superintendent of Financial Services (Ontario)

Roger Jaipargas, James Szumski for Monitor, PricewaterhouseCoopers Inc.

James H. Grout, Larry Ellis for Morneau Sobeco Limited Partnership, in its Capacity as the Plan Administrator of the Registered Pension Plans of Dura Automotive Systems (Canada) Ltd.

Subject: Civil Practice and Procedure; Insolvency

Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings

Applicant, DA Ltd., obtained stay of proceedings in bankruptcy proceedings — DA Ltd. brought motion to extend stay period from February 11, 2010 to March 12, 2010 and for order establishing process for filing, determining and barring of claims against DA Ltd. and its current and former officers and directors — In addition, DA Ltd. requested order, in connection with claims determination procedure, in case of registered pension plans, that MS LLP be entitled to file single claim and vote claims related to each of three registered pension plans after certain pre-conditions

had been satisfied — Motion dismissed — DA Ltd. had not met s. 11.02(3) test — DA Ltd.'s negotiations with CAW, IAMAW and plan administrator had not established that negotiations as between parties were such that it was unrealistic to expect that any viable plan could be put forward — Further, by questioning representative status of parties at last possible moment, DA Ltd. had demonstrated that it could not be said to be acting in good faith and with due diligence.

Statutes considered:

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

Generally — referred to

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

s. 22(2) — considered

MOTION by DA Ltd. to extend stay period from February 11, 2010 to March 12, 2010 and for order establishing process for filing, determining and barring of claims against DA Ltd. and its current and former officers and directors.

Morawetz J.:

1 Dura Automotive Systems (Canada) Ltd. ("Dura Canada" or the "Applicant") brings this motion to extend the Stay Period from February 11, 2010 to March 12, 2010 and for an order establishing a process for the filing, determining and barring of claims against the Applicant and its current and former officers and directors. In addition, Dura requests an order, in connection with the claims determination procedure, in the case of registered pension plans, that Morneau Sobeco LLP be entitled to file a single claim and vote the claims related to each of the three registered pension plans after certain pre-conditions have been satisfied.

2 For the following reasons, the motion is dismissed.

3 Dura Canada filed for CCAA protection on October 30, 2009.

4 The International Association of Machinists and Aerospace Workers ("IAMAW") has, from the outset of the proceedings, raised concerns about the actions of Dura Canada. These concerns are set out in the Notice of Motion of the IAMAW which was also returnable February 11, 2010.

5 The IAMAW seeks a declaration that there is no basis for the remedy sought by the Applicant through the CCAA application, in that the liability to make payments into the Canadian pension and benefit plans is held by Dura Automotive Systems Inc. (Delaware) and its subsidiaries ("Dura US"), pursuant to the Revised Joint Plan of Reorganization of Dura Automotive Systems Inc. et al dated May 8, 2008, and confirmed by this court on May 22, 2008.

6 The IAMAW also sought an order terminating these proceedings and a declaration that the commencement of the application was an abuse of process; a declaration that the Applicant is estopped from taking the position that the Applicant bears sole liability to make payments to the Canadian pension and benefit plans under the Revised Plan; and a bankruptcy order against Dura Canada.

7 The IAMAW is not alone in its opposition to the motion. The Canadian Auto Workers - Canada ("CAW-

Canada") and Morneau Sobeco as the Administrator of the three registered pension plans (the "Canadian Plans") (the "Plan Administrator") joined IAMAW in opposition.

8 In addition, the Superintendent of Financial Services opposes the relief sought, submitting that there is no basis on which to conclude that a viable plan can be put forward. Counsel to the Superintendent also raised, as did counsel to the Plan Administrator, an issue as to whether there is a constitutional question that should have been brought to the attention of the appropriate Ministries.

9 Finally, the Monitor, in its comprehensive Sixth Report, does not support the extension of the Stay Period. The Monitor is not convinced that the Applicant is acting in good faith and with due diligence.

10 The opposition of the IAMAW, the CAW-Canada and the Plan Administrator has been consistently put on the record throughout these proceedings. The Applicant has been aware of this opposition and continually negotiated with the two unions and the Plan Administrator in an effort to develop a plan.

11 As late as January 29, 2010, the Applicant recognized the legitimacy of the IAMAW, the CAW-Canada and the Plan Administrator as the parties with whom they should be negotiating. The role of the Superintendent was also recognized. The endorsement of January 29, 2010 recites the presence of counsel to the Applicant, the IAMAW, the Plan Administrator, FSCO, the CAW-Canada and the Monitor and reads as follows:

> The parties are in negotiations in respect of the structure of the plan. I am satisfied that the Applicant continues to work in good faith and with due diligence such that a short extension to February 11, 2010 is appropriate. The parties are conducting their negotiations in accordance with a schedule of events which are outlined in an email from Mr. Spizzirri (counsel to the Applicant) to Mr. O'Reilly (counsel to IAMAW) dated January 28, 2010 at 5:10 p.m. This email is to form part of this endorsement...

12 The parties to the negotiations as listed in the email include the Monitor, IAMAW, CAW-Canada, FSCO and the Plan Administrator.

13 The Plan Administrator takes the position that Dura Canada and Dura US owe approximately $9 million to the Canadian Plans as at December 31, 2009 on account of the wind-up deficiencies in the Canadian Plans. In addition, the Applicant acknowledged that there is a debt of approximately $8.2 million owing in relation to benefit plan obligations.

14 In its Initial Application, Dura disclosed total unsecured liabilities of just over $90 million of which $72 million are owed to related entities.

15 Section 22(3) of the CCAA provides that a creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

16 In order to succeed with any plan, the Applicant has to have the required voting support of the claims arising out of the wind-up deficiencies in the Canada Plans and claims relating to the benefit plan obligations.

17 The Applicant has put forth a plan that it submits is a better option for the creditors than the alternative of a bankruptcy.

18 In oral submissions, counsel to the Monitor stated that in the best case scenario, the Monitor expects a return to unsecured creditors of between $0.12 and $0.20 under the plan.

19 The Monitor has confirmed that the recovery for unsecured creditors will likely be better in the plan as opposed to the bankruptcy but this does not take into account any potential recovery associated with any actions that could be taken against Dura US for outstanding pension and benefit obligations. The plan requires a complete release of all claims against Dura Canada and related Dura group parties and their officers, directors and employees (the "Dura Group Parties"), and a release of any claims against third parties which result in a claim against any of the Dura Group Parties, as some of the stakeholders have threatened to sue one or more Dura Group Parties.

20 The Monitor also made recommendations in the Sixth Report.

21 The Monitor has identified a number of risks in the plan outline, which are summarized in detail at Appendix C to the Sixth Report. Generally speaking:

(a) there is uncertainty with respect to the realizable value of the companies' assets;

(b) there is uncertainty with respect to the realizable value of the assets to be contributed by other Dura Group entities;

(c) the back-stop is unsecured and partially conditional in respect of the tax receivable and may or may not provide adequate support for a minimum recovery, as the company has suggested.

22 With respect to the claims process put forward by Dura Canada, the Monitor advises that it has not had adequate time to review the process, which was unveiled at the last minute. However, it did conduct a preliminary review. The Monitor stated that it does not support the relief sought by the company as:

(a) there is no process to properly assess and value "claims" of individual pensioners and therefore, no mechanism for voting such "claims";

(b) the February 9 Skotak Affidavit questions the ability of counsel to the IAMAW and the CAW-Canada to speak for the pensioners and also questions the independence of the Plan Administrator. However, there is no mention of or provision for representative counsel to advise and assist individual pensioners, particularly in the circumstances where the company has proposed to seek broad, third party releases for other Dura Group entities and its officers, directors and employees;

(c) in the event that the court found that counsel for the IAMAW and the CAW-Canada and the Plan Administrator were not "suitable counsel" for the pensioners, and was of the view that other representative counsel was necessary, in the circumstances, such representative counsel would represent an additional cost to the company's estate, whereas the costs of representation on behalf of the IAMAW, the CAW-Canada and the Plan Administrator are not currently being borne by the company; and

(d) the Monitor has significant concerns about the incurrence of additional costs, the lack of resources available to fund the CCAA proceedings, and the fact that no assurances have been offered by the Dura group to support the CCAA proceedings with additional funding.

23 The February 10 Notice of Motion brought by Dura Canada requests an order to establish a process for filing, determining, and barring claims against it and its current and former officers and directors. The Monitor does not support the relief being sought by Dura Canada in respect of the claims process as the Monitor has no details with respect to what Dura Canada is proposing.

24 On the issue of the extension of the Stay Period, the Monitor has summarized its position at paragraphs 46 -

54 of its Report. Included is the statement that the Monitor is of the view that the company has had enough time to attempt to negotiate the framework for a plan. The company has no ongoing operations and no other restructuring activities are necessary in respect of the CCAA proceedings.

25 The Monitor concludes its recommendations with the statement that in its view the continuation of the CCAA proceedings will likely result in the dissipation of the remaining cash in the company's estate, without any reasonable assurance of the outcome of such continuation resulting in a viable plan.

26 Dura Canada has made a number of proposals to the parties with whom it was negotiating. These proposals were forthcoming right up to the morning of this scheduled motion.

27 The final revised plan outline submitted by Dura Canada at 6:15 p.m. on Wednesday, February 10, 2010 was rejected by the stakeholders early in the morning of Thursday, February 11, 2010. The affidavit of Bethune Whitson, an employee of the Plan Administrator, is that the parties are not close to a plan.

28 On February 10, 2010, Dura Canada served its motion record seeking an extension of the stay of proceedings and an order requiring that Dura Canada's last revised plan outline be voted on by the members of the Canadian Plans whose votes Dura Canada submits would be binding upon the Plan Administrator who would then vote upon the revised plan outline.

29 Counsel for Dura Canada submits that, at present, there is no representative appointed for either the individual pension or post-retirement beneficiaries and, as such, the individual pensioners and benefits claimants would have to file and vote their own claims.

30 Counsel to Dura Canada does acknowledge that the unions and the Plan Administrator oppose the notion of the retirees, proving and voting their own claims. Counsel to Dura Canada submits it is questionable whether the unions or the Plan Administrator have any ability to speak for the pension and benefit beneficiaries or can bind them in a plan or litigation in any event.

31 The position taken by Dura Canada is opposed by the IAMAW, the CAW-Canada and the Plan Administrator.

32 In my view, the issue of who can vote in these circumstances does not have to be determined as I have not been satisfied that the Applicant has met the test which would entitle it to obtain a further extension of the Stay Period.

33 The fundamental issue in these proceedings is whether Dura Canada bears sole liability to make payments to the Canadian pension and benefit plans or whether the liability also extends to related Dura entities, including Dura US.

34 Dura Canada was clearly aware of the importance of this issue and negotiated with the IAMAW, the CAW-Canada and the Plan Administrator until such time that it recognized that negotiations were not going to be successful. It has now changed its position and seeks an order that the plan be presented to the retirees for a vote. It is in the context of this change of tactics at the 11th hour that the motion to extend the stay must be considered.

35 The test for an extension of the stay is set out in s. 11.02(3) of the CCAA:

> 11.02(3) Burden of proof on application - The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

36 The Applicants gave every appearance that, up to the morning of February 10, 2010, it was negotiating with the appropriate representative groups. If this indeed was the situation, the inescapable conclusion is that the negotiations were not successful and no plan could proceed with any realistic chance of being accepted by the creditors. In these circumstances, to grant a further extension of time would, in my view, not be appropriate.

37 Alternatively, if one accepts the position of Dura Canada that the IAMAW and the CAW-Canada and the Plan Administrator cannot represent the interests of the retirees, it begs the question as to why Dura Canada did not raise this issue long before February 10, 2010. As counsel to the CAW-Canada pointed out, the CAW-Canada put its cards on the table on day one and if representation had been an issue, a formal representation order could have been obtained long ago. I agree.

38 The Applicant changed course at the last moment as they were unable to reach agreement with the IAMAW, the CAW-Canada and the Plan Administrator. The last-minute shift in tactics leads to the inescapable conclusion that Dura Canada did not act in good faith in negotiating with the IAMAW, the CAW-Canada and the Plan Administrator and further that they did not act with due diligence in failing to address these representative issues on a timely basis.

39 I have also taken into account certain factors that are unique to this CCAA proceeding; namely, there is no active business and, consequently, the employment impact of failure to extend the CCAA proceedings is minimal.

40 The Applicant's negotiations with the CAW-Canada, the IAMAW and the Plan Administrator have established to my satisfaction that the negotiations as between these parties, are such that it is unrealistic to expect that any viable plan can be put forward. Further, by questioning the representative status of the parties at the last possible moment, the Applicant has demonstrated that it cannot be said to be acting in good faith and with due diligence.

41 In my view, the Applicant has not met the s. 11.02(3) test. Accordingly, the motion is dismissed.

42 The IAMAW and Morneau Sobeco, the Plan Administrators have brought motions to permit the issuance of a bankruptcy application against Dura Canada and that a bankruptcy order be immediately issued appointing PricewaterhouseCoopers Inc. as Trustee. Counsel to Dura Canada objected to the scope of this relief arguing that Dura Canada should be permitted to dispute any bankruptcy application notwithstanding its acknowledged insolvency.

43 As a result of this decision, there is no stay, such that parties, if so advised, can proceed to issue bankruptcy applications.

44 In my view, it is in the interests of all stakeholders that chaos be avoided. To this end, the CCAA proceedings continue as do any charges created in the proceedings. Stakeholders are encouraged to consider the appropriate next steps and to attend at a 9:30 a.m. appointment later this week for further directions.

45 If any party wishes to raise the issue of costs, they can do so by brief written submission within 20 days.

Motion dismissed.

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2010 CarswellOnt 5919, 2010 ONSC 4520, 2010 C.L.L.C. 210-044, 3 C.P.C. (7th) 81

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McCracken v. Canadian National Railway

Proceedings under the Class Proceedings Act, 1992

Michael Ian McCracken (Plaintiff) and Canadian National Railway Company (Defendant)

Ontario Superior Court of Justice

Perell J.

Heard: July 12-16, 2010
Judgment: August 17, 2010[FN*]
Docket: 08-CV-351183 CP

Counsel: Louis Sokolov, Steven Barrett, Peter L. Roy, Sean Grayson, Christine Davies for Plaintiff

Sylvie Rodrigue, Mary Gleason, Jeremy Devereux, Michael Kotrly for Defendant

Subject: Labour and Employment; Public; Civil Practice and Procedure; Torts

Labour and employment law --- Employment standards legislation — Hours of work

Under s. 167(2) of Canada Labour Code, overtime and maximum hours of work rules of Code did not apply to employees who were managers or superintendents or who exercised management functions — Plaintiff alleged that defendant railway company unlawfully classified all its first line supervisors as managers, depriving them of overtime and holiday wages payable under Code — Plaintiff brought motion for certification of class action — Defendant brought cross-motion to stay or dismiss action — Motion granted with qualifications and conditions; cross-motion granted in part — Court had jurisdiction to determine whether it had subject-matter jurisdiction over plaintiff's claims and causes of action — Court had subject-matter jurisdiction and there was cause of action by force of statute to enforce overtime wage entitlements created by Code — It followed that defendant's motion under R. 21.01(3)(a) of Rules of Civil Procedure had to be dismissed — Plaintiff showed cause of action for unjust enrichment and for breach of contract based on express and implied terms, and terms implied by force of statute — It was desirable to stay claims for breach of express or implied term of contract — Claim for breach of duty of good faith was to be struck out as free-standing cause of action — It was plain and obvious that there were policy reasons to negate duty of care with result that there was no reasonable claim for negligence — Criterion of identifiable class was satisfied — Six questions passed test for certification as common issues — Four additional questions involving aggregate assessment of damages could not be certified as common issues — Plaintiff was suitable representative plaintiff — Granting of certification was subject to condition that litigation plan be settled — Plaintiff's litigation

plan was based on supposition that all of causes of action and common issues would be certified, which did not occur.

Labour and employment law --- Labour law — Labour relations boards — Jurisdiction — Concurrent jurisdiction — With courts

Under s. 167(2) of Canada Labour Code, overtime and maximum hours of work rules of Code did not apply to employees who were managers or superintendents or who exercised management functions — Plaintiff alleged that defendant railway company unlawfully classified all its first line supervisors as managers, depriving them of overtime and holiday wages payable under Code — Plaintiff brought motion for certification of class action — Defendant brought cross-motion to stay or dismiss action — Motion granted with qualifications and conditions; cross-motion granted in part — Court had jurisdiction to determine whether it had subject-matter jurisdiction over plaintiff's claims and causes of action — Court had subject-matter jurisdiction and there was cause of action by force of statute to enforce overtime wage entitlements created by Code — It followed that defendant's motion under R. 21.01(3)(a) of Rules of Civil Procedure had to be dismissed — Parliament intended that courts have concurrent jurisdiction to enforce claims for overtime and holiday pay — Parliament intended that courts have subject-matter jurisdiction to enforce wage claims for overtime, and this conclusion led to adjunct conclusion that statutory rights were terms of contract by force of statute — Court proceeding was preferable procedure for resolving claims and common issues, and therefore it was appropriate that court not defer and that court exercise its subject-matter jurisdiction — It was appropriate to use motion for judgment jurisdiction in this case to dismiss plaintiff's claim for holiday pay on its merits — This jurisdiction may exceptionally be used in aid of court's jurisdiction under R. 21 — Court had jurisdiction to decide or stay what would otherwise be common issue on motion for certification — Under R. 37.13(2)(a), judge who hears motion may in proper case order that motion be converted into motion for judgment.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Jurisdiction

Under s. 167(2) of Canada Labour Code, overtime and maximum hours of work rules of Code did not apply to employees who were managers or superintendents or who exercised management functions — Plaintiff alleged that defendant railway company unlawfully classified all its first line supervisors as managers, depriving them of overtime and holiday wages payable under Code — Plaintiff brought motion for certification of class action — Defendant brought cross-motion to stay or dismiss action — Motion granted with qualifications and conditions; cross-motion granted in part — Court had jurisdiction to determine whether it had subject-matter jurisdiction over plaintiff's claims and causes of action — Court had subject-matter jurisdiction and there was cause of action by force of statute to enforce overtime wage entitlements created by Code — It followed that defendant's motion under R. 21.01(3)(a) of Rules of Civil Procedure had to be dismissed — Parliament intended that courts have concurrent jurisdiction to enforce claims for overtime and holiday pay — Parliament intended that courts have subject-matter jurisdiction to enforce wage claims for overtime, and this conclusion led to adjunct conclusion that statutory rights were terms of contract by force of statute — Court proceeding was preferable procedure for resolving claims and common issues, and therefore it was appropriate that court not defer and that court exercise its subject-matter jurisdiction — It was appropriate to use motion for judgment jurisdiction in this case to dismiss plaintiff's claim for holiday pay on its merits — This jurisdiction may exceptionally be used in aid of court's jurisdiction under R. 21 — Court had jurisdiction to decide or stay what would otherwise be common issue on motion for certification — Under R. 37.13(2)(a), judge who hears motion may in proper case order that motion be converted into motion for judgment.

Civil practice and procedure --- Pleadings — Statement of claim — Striking out for absence of reasonable cause of action — Plain and obvious

Under s. 167(2) of Canada Labour Code, overtime and maximum hours of work rules of Code did not apply to em-

ployees who were managers or superintendents or who exercised management functions — Plaintiff alleged that defendant railway company unlawfully classified all its first line supervisors as managers, depriving them of overtime and holiday wages payable under Code — Plaintiff brought motion for certification of class action — Defendant brought cross-motion to stay or dismiss action — Motion granted with qualifications and conditions; cross-motion granted in part — It was appropriate to use motion for judgment jurisdiction in this case to dismiss plaintiff's claim for holiday pay on its merits — Plaintiff showed reasonable cause of action for breach of express term of contract of employment — Plaintiff pleaded reasonable cause of action based on implied contractual terms, and for breach of statutory implied term — Court had jurisdiction to decide or stay what would otherwise be common issue on motion for certification — Under R. 37.13(2)(a) of Rules of Civil Procedure, judge who hears motion may in proper case order that motion be converted into motion for judgment — It was appropriate to exercise discretion and decide claim about holiday pay on its merits and to decide that terms of Code were terms of employment contracts by force of law — It was desirable to stay claims for breach of express or implied term of contract — Claim for breach of duty of good faith was to be struck out as free-standing cause of action — Pleading of material facts alleging breach of duty of good faith could remain to extent that material facts were pleaded in support of cause of action for breach of contract (breach of contract claims were to be stayed) — Plaintiff showed cause of action for unjust enrichment — It was plain and obvious that there were policy reasons to negate duty of care with result that there was no reasonable claim for negligence.

Torts --- Negligence — Practice and procedure — Trials — Nonsuit or dismissal of action — Miscellaneous

Under s. 167(2) of Canada Labour Code, overtime and maximum hours of work rules of Code did not apply to employees who were managers or superintendents or who exercised management functions — Plaintiff alleged that defendant railway company unlawfully classified all its first line supervisors as managers, depriving them of overtime and holiday wages payable under Code — Plaintiff brought motion for certification of class action — Defendant brought cross-motion to stay or dismiss action — Motion granted with qualifications and conditions; cross-motion granted in part — It was plain and obvious that there was no cause of action in negligence — It was assumed that it was not plain and obvious that defendant did not have prima facie duty of care to first line supervisors — However, it was plain and obvious that there were policy reasons to negate duty of care with result that there was no reasonable claim for negligence — Proposed tort was unnecessary intrusion of law of tort into area in which it was not needed and where it might cause confusion and uncertainty and disturb existing law that did not require fixing — Proposed tort would encourage much needless litigation — Proposed duty of care, if recognized, would establish liability for conduct that did not actually cause plaintiff's injury.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Pleadings disclose cause of action

Under s. 167(2) of Canada Labour Code, overtime and maximum hours of work rules of Code did not apply to employees who were managers or superintendents or who exercised management functions — Plaintiff alleged that defendant railway company unlawfully classified all its first line supervisors as managers, depriving them of overtime and holiday wages payable under Code — Plaintiff brought motion for certification of class action — Defendant brought cross-motion to stay or dismiss action — Motion granted with qualifications and conditions; cross-motion granted in part — Plaintiff showed cause of action for unjust enrichment and for breach of contract based on express and implied terms, and terms implied by force of statute — It was appropriate to use motion for judgment jurisdiction in this case to dismiss plaintiff's claim for holiday pay on its merits — Plaintiff showed reasonable cause of action for breach of express term of contract of employment — Plaintiff pleaded reasonable cause of action based on implied contractual terms, and for breach of statutory implied term — Court had jurisdiction to decide or stay what would otherwise be common issue on motion for certification — Under R. 37.13(2)(a) of Rules of Civil Procedure, judge who hears motion may in proper case order that motion be converted into motion for judgment — It was appropriate to exercise discretion and decide claim about holiday pay on its merits and to decide that terms of Code were terms of employment contracts by force of law — It was desirable to stay claims for breach of express or implied term of contract — Claim for breach of duty of good faith was to be struck out as free-standing cause of action

— Pleading of material facts alleging breach of duty of good faith could remain to extent that material facts were pleaded in support of cause of action for breach of contract (breach of contract claims were to be stayed) — Plaintiff showed cause of action for unjust enrichment — It was plain and obvious that there were policy reasons to negate duty of care with result that there was no reasonable claim for negligence.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Identifiable class

Under s. 167(2) of Canada Labour Code, overtime and maximum hours of work rules of Code did not apply to employees who were managers or superintendents or who exercised management functions — Plaintiff alleged that defendant railway company unlawfully classified all its first line supervisors as managers, depriving them of overtime and holiday wages payable under Code — Plaintiff brought motion for certification of class action — Defendant brought cross-motion to stay or dismiss action — Motion granted with qualifications and conditions; cross-motion granted in part — Criterion of identifiable class was satisfied — Plaintiff established that there was some basis in fact for his own cause of action and for his own job description — Therefore, there was sufficient evidentiary basis for him to submit that there was group of similarly situated claimants with similar claims — Plaintiff provided some basis in fact to identify persons who had potential claim against defendant — There were persons like him whom defendant classified as first line supervisors and who because of that classification (not job description) were not paid overtime.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Common issue or interest

Under s. 167(2) of Canada Labour Code, overtime and maximum hours of work rules of Code did not apply to employees who were managers or superintendents or who exercised management functions — Plaintiff alleged that defendant railway company unlawfully classified all its first line supervisors as managers, depriving them of overtime and holiday wages payable under Code — Plaintiff brought motion for certification of class action — Defendant brought cross-motion to stay or dismiss action — Motion granted with qualifications and conditions; cross-motion granted in part — Following six questions passed test for certification as common issues: (1) Did class members receive overtime pay under Code as amended; (2) What were terms by force of statute of class members' contracts of employment with defendant respecting classification, regular and overtime hours, and recording of hours worked; (3) In accordance with meaning under s. 167(2) of Code of "employees who are managers or superintendents or exercise management functions", what were minimum requirements to be managerial employee; (4) Would defendant be unjustly enriched by failing to compensate class member with pay or overtime pay for hours worked in excess of his or her standard hours of work; (5) If defendant breached duty or its contract or was unjustly enriched, what remedies were available to class members; and (6) Would defendant's conduct justify award of aggravated, exemplary or punitive damages — These questions were necessary to resolution of each class member's claim — Four of these six questions could be answered before common issues trial and those answers would substantially advance litigation — Four additional questions involving aggregate assessment of damages could not be certified as common issues — Preconditions set by ss. 24(1)(b) and (c) of Class Proceedings Act, 1992 for aggregate assessment could not be satisfied.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Preferable procedure

Under s. 167(2) of Canada Labour Code, overtime and maximum hours of work rules of Code did not apply to employees who were managers or superintendents or who exercised management functions — Plaintiff alleged that defendant railway company unlawfully classified all its first line supervisors as managers, depriving them of overtime and holiday wages payable under Code — Plaintiff brought motion for certification of class action — Defendant brought cross-motion to stay or dismiss action — Motion granted with qualifications and conditions; cross-motion granted in part — It was plain that plaintiff's class action with its six common issues coupled with resources

of s. 25 of Class Proceedings Act, 1992 would be preferable procedure for resolving claims of 1,550 class members — Class action as structured would be manageable — It would provide access to justice and judicial economy, and it would provide behaviour modification if that ultimately proved to have been necessary.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Fair and adequate representation

Under s. 167(2) of Canada Labour Code, overtime and maximum hours of work rules of Code did not apply to employees who were managers or superintendents or who exercised management functions — Plaintiff alleged that defendant railway company unlawfully classified all its first line supervisors as managers, depriving them of overtime and holiday wages payable under Code — Plaintiff brought motion for certification of class action — Defendant brought cross-motion to stay or dismiss action — Motion granted with qualifications and conditions; cross-motion granted in part — Plaintiff was suitable representative plaintiff — It was overstatement for defendant to claim that plaintiff's animosity towards several members suggested that he would not fairly and adequately represent whole class — Plaintiff acted in rude and unprofessional manner, and while he ought not have let his emotions get better of him, his conduct did not warrant disqualifying him as representative plaintiff — But for his verbal indiscretions aimed at some identified class members, there was little suggestion plaintiff had not been able to carry out responsibilities or that he would not be able to carry out those responsibilities in future — Plaintiff may have had personality conflicts with several class members, but he had no conflict of interest in sense that his claim or position in class action was adverse in interest to those of other class members — Plaintiff was astute enough to hire seasoned class action counsel determined to establish overtime wage claims as appropriate for certification and to prosecute litigation notwithstanding resistance of equally seasoned and determined defence counsel.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Litigation plan

Under s. 167(2) of Canada Labour Code, overtime and maximum hours of work rules of Code did not apply to employees who were managers or superintendents or who exercised management functions — Plaintiff alleged that defendant railway company unlawfully classified all its first line supervisors as managers, depriving them of overtime and holiday wages payable under Code — Plaintiff brought motion for certification of class action — Defendant brought cross-motion to stay or dismiss action — Motion granted with qualifications and conditions; cross-motion granted in part — Certification was granted subject to condition that litigation plan be settled, which would be done by case conference or by motion if necessary — Plaintiff's litigation plan, which was subject to fulsome attack by defendant, was based on supposition that all of plaintiff's causes of action and common issues would be certified, which did not occur — It was not necessary to discuss defendant's objections because plaintiff had to prepare new litigation plan based on outcomes of motion and cross-motion — Given structure of class action that would go forward, there was no foreseeable, insurmountable problem that would prevent litigation plan being drafted — Outcome was regarded as producing manageable proceeding.

Cases considered by *Perell J.*:

Abdool v. Anaheim Management Ltd. (1995), 1995 CarswellOnt 129, 21 O.R. (3d) 453, 31 C.P.C. (3d) 197, 78 O.A.C. 377, 121 D.L.R. (4th) 496 (Ont. Div. Ct.) — referred to

Adams v. Cusack (2006), 47 C.C.E.L. (3d) 48, 2006 C.L.L.C. 220-017, 2006 NSCA 9, 2006 CarswellNS 27, 22 C.P.C. (6th) 152, 264 D.L.R. (4th) 692, 147 L.A.C. (4th) 225, 242 N.S.R. (2d) 66, 770 A.P.R. 66 (N.S. C.A.) — considered

A'Hearn v. T.N.T. Canada Inc. (1990), 1990 CarswellBC 867, 74 D.L.R. (4th) 663 (B.C. C.A.) — considered

A'Hearn v. T.N.T. Canada Inc. (1991), 133 N.R. 240 (note), 79 D.L.R. (4th) vi (note) (S.C.C.) — referred to

Anderson v. Wilson (1999), 36 C.P.C. (4th) 17, 44 O.R. (3d) 673, 1999 CarswellOnt 2073, 175 D.L.R. (4th) 409, 122 O.A.C. 69 (Ont. C.A.) — referred to

Anderson v. Wilson (2000), 138 O.A.C. 200 (note), 2000 CarswellOnt 1837, 2000 CarswellOnt 1838, 258 N.R. 194 (note), 185 D.L.R. (4th) vii (S.C.C.) — referred to

Andrzewski v. Greyhound Canada Transportation Corp. (August 13, 1998), M.R. Newman Referee (Can. Arb. Bd.) — referred to

Anns v. Merton London Borough Council (1977), (sub nom. *Anns v. London Borough of Merton*) [1977] 2 All E.R. 492, [1978] A.C. 728, [1977] 2 W.L.R. 1024, 121 S.J. 377, [1977] UKHL 4 (U.K. H.L.) — followed

Attis v. Canada (Minister of Health) (2003), 29 C.P.C. (5th) 242, 2003 CarswellOnt 347 (Ont. S.C.J.) — referred to

Attis v. Canada (Minister of Health) (2003), 2003 CarswellOnt 4868 (Ont. C.A.) — referred to

Avalon Aviation Ltd. v. Desgagne (1981), 1981 CarswellNat 568, 42 N.R. 337 (Fed. C.A.) — referred to

Banque Canadienne Impériale de Commerce c. Torre (2010), 2010 CarswellNat 844, 2010 FC 105, (sub nom. *Canadian Imperial Bank of Commerce v. Torre*) 2010 C.L.L.C. 210-026, 362 F.T.R. 232, 2010 CF 105, 2010 CarswellNat 180, 81 C.C.E.L. (3d) 258 (F.C.) — referred to

Beardsley v. Ontario (2001), 17 C.P.C. (5th) 94, 2001 CarswellOnt 4137, 151 O.A.C. 324, 57 O.R. (3d) 1 (Ont. C.A.) — referred to

Beaulne v. Kaverit Steel & Crane ULC (2002), 19 C.C.E.L. (3d) 252, 2002 CarswellAlta 1071, 2002 ABQB 787, 325 A.R. 237, 2003 C.L.L.C. 210-009, 219 D.L.R. (4th) 482 (Alta. Q.B.) — referred to

Bhadauria v. Seneca College of Applied Arts & Technology (1981), 2 C.H.R.R. D/468, 1981 CarswellOnt 117, 1981 CarswellOnt 616, [1981] 2 S.C.R. 181, (sub nom. *Seneca College of Applied Arts & Technology v. Bhadauria*) 124 D.L.R. (3d) 193, 37 N.R. 455, 14 B.L.R. 157, 81 C.L.L.C. 14,117, 22 C.P.C. 130, 17 C.C.L.T. 106 (S.C.C.) — referred to

Bisaillon c. Concordia University (2006), 51 C.C.P.B. 163, (sub nom. *Bisaillon v. Concordia University*) 149 L.A.C. (4th) 225, (sub nom. *Bisaillon v. Concordia University*) 348 N.R. 201, (sub nom. *Concordia v. Bisaillon*) 2006 C.L.L.C. 220-033, 2006 C.E.B. & P.G.R. 8200, 2006 SCC 19, 2006 CarswellQue 3689, 2006 CarswellQue 3690, (sub nom. *Bisaillon v. Concordia University*) 266 D.L.R. (4th) 542, [2006] 1 S.C.R. 666 (S.C.C.) — considered

Boulanger v. Johnson & Johnson Corp. (2002), 14 C.C.L.T. (3d) 233, 2002 CarswellOnt 1395 (Ont. S.C.J.) — referred to

Boulanger v. Johnson & Johnson Corp. (2002), 2002 CarswellOnt 1813 (Ont. S.C.J.) — referred to

Boulanger v. Johnson & Johnson Corp. (2003), 2003 CarswellOnt 1405, 32 C.P.C. (5th) 203, 226 D.L.R. (4th) 747, 170 O.A.C. 333, 64 O.R. (3d) 208 (Ont. Div. Ct.) — referred to

Boulanger v. Johnson & Johnson Corp. (2003), 2003 CarswellOnt 2129, 174 O.A.C. 44 (Ont. C.A.) — referred to

Buffa v. Gauvin (1994), 18 O.R. (3d) 725, 5 M.V.R. (3d) 235, 1994 CarswellOnt 38 (Ont. Gen. Div.) — referred to

Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172, 1998 CarswellOnt 4645, 83 O.T.C. 1 (Ont. Gen. Div.) — considered

Canada (Procureur général) c. Gauthier (1980), [1980] 2 F.C. 393, 34 N.R. 549, 113 D.L.R. (3d) 419, 1980 CarswellNat 51, 1980 CarswellNat 51F (Fed. C.A.) — referred to

Canadian Imperial Bank of Commerce v. Bateman (1991), 91 C.L.L.C. 14,028, 42 F.T.R. 218, [1991] 3 F.C. 586, 1 Admin. L.R. (2d) 226, 1991 CarswellNat 792, 1991 CarswellNat 355 (Fed. T.D.) — referred to

Canadian Pacific Hotels Ltd. v. Bank of Montreal (1987), 77 N.R. 161, [1987] 1 S.C.R. 711, 21 O.A.C. 321, 41 C.C.L.T. 1, 40 D.L.R. (4th) 385, 1987 CarswellOnt 760, 1987 CarswellOnt 962 (S.C.C.) — referred to

Canadian Pacific International Freight Services Ltd. v. Starber International Inc. (1992), 12 C.C.L.T. (2d) 321, 44 C.P.R. (3d) 17, 1992 CarswellOnt 839 (Ont. Gen. Div.) — referred to

Canadian Transit Co. v. Nanni (2009), 2009 CarswellNat 4742 (Can. Arb. Bd.) — referred to

Cassano v. Toronto Dominion Bank (2007), 47 C.P.C. (6th) 209, 87 O.R. (3d) 401, 2007 ONCA 781, 2007 CarswellOnt 7341, 230 O.A.C. 224, (sub nom. *Cassano v. Toronto-Dominion Bank*) 287 D.L.R. (4th) 703 (Ont. C.A.) — referred to

Centre Town Developments Ltd. v. Hull (1997), 108 O.A.C. 210, 1997 CarswellOnt 4285 (Ont. Div. Ct.) — referred to

Chadha v. Bayer Inc. (2001), 2001 CarswellOnt 1697, 200 D.L.R. (4th) 309, 8 C.P.C. (5th) 138, 15 B.L.R. (3d) 177, 147 O.A.C. 223, 54 O.R. (3d) 520 (Ont. Div. Ct.) — referred to

Chadha v. Bayer Inc. (2003), 223 D.L.R. (4th) 158, 168 O.A.C. 143, 2003 CarswellOnt 49, 63 O.R. (3d) 22, 23 C.L.R. (3d) 1, 31 B.L.R. (3d) 214, 31 C.P.C. (5th) 40 (Ont. C.A.) — referred to

Chadha v. Bayer Inc. (2003), 320 N.R. 399 (note), 65 O.R. (3d) xvii, 2003 CarswellOnt 2810, 2003 CarswellOnt 2811, 191 O.A.C. 397 (note) (S.C.C.) — referred to

Childs v. Desormeaux (2006), 30 M.V.R. (5th) 1, 80 O.R. (3d) 558 (note), 210 O.A.C. 315, 2006 CarswellOnt 2710, 2006 CarswellOnt 2711, 2006 SCC 18, 347 N.R. 328, 266 D.L.R. (4th) 257, 39 C.C.L.T. (3d) 163, [2006] 1 S.C.R. 643, [2006] R.R.A. 245 (S.C.C.) — referred to

Chrysalis Restaurant Enterprises Inc. v. 212 King Street West Ltd. (1994), 1994 CarswellOnt 3693 (Ont. Gen. Div.) — referred to

Cloud v. Canada (Attorney General) (2003), 41 C.P.C. (5th) 226, 2003 CarswellOnt 4630, 65 O.R. (3d) 492 (Ont. Div. Ct.) — referred to

Cloud v. Canada (Attorney General) (2004), 2004 CarswellOnt 5026, 73 O.R. (3d) 401, 192 O.A.C. 239, 27 C.C.L.T. (3d) 50, [2005] 1 C.N.L.R. 8, 2 C.P.C. (6th) 199, 247 D.L.R. (4th) 667 (Ont. C.A.) — considered

Cloud v. Canada (Attorney General) (2005), 2005 CarswellOnt 1866, 2005 CarswellOnt 1867, 344 N.R. 192 (note), [2005] 1 S.C.R. vi (note), 207 O.A.C. 400 (note) (S.C.C.) — referred to

CMLQ Investors Co. v. CIBC Trust Corp. (1996), 1996 CarswellOnt 3376, 3 C.P.C. (4th) 62 (Ont. C.A.) — referred to

Conrad v. Imperial Oil Ltd. (1999), 1999 CarswellNS 123, 1999 NSCA 29, 174 N.S.R. (2d) 62, 532 A.P.R. 62, 173 D.L.R. (4th) 286 (N.S. C.A.) — considered

Cooper v. Hobart (2001), [2002] 1 W.W.R. 221, 2001 CarswellBC 2502, 2001 CarswellBC 2503, 2001 SCC 79, 8 C.C.L.T. (3d) 26, 206 D.L.R. (4th) 193, 96 B.C.L.R. (3d) 36, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.)*) 277 N.R. 113, [2001] 3 S.C.R. 537, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.)*) 160 B.C.A.C. 268, (sub nom. *Cooper v. Registrar of Mortgage Brokers (B.C.)*) 261 W.A.C. 268 (S.C.C.) — considered

Corktown Films Inc. v. Ontario (1996), 1996 CarswellOnt 4078, 34 B.L.R. (2d) 168, 18 O.T.C. 308 (Ont. Gen. Div.) — referred to

Corless v. KPMG LLP (2008), 2008 CarswellOnt 4708 (Ont. S.C.J.) — considered

D. (B.) v. Children's Aid Society of Halton (Region) (2007), 39 R.F.L. (6th) 245, 49 C.C.L.T. (3d) 1, 284 D.L.R. (4th) 682, 2007 CarswellOnt 4789, 2007 CarswellOnt 4790, 2007 SCC 38, 365 N.R. 302, 227 O.A.C. 161, (sub nom. *Syl Apps Secure Treatment Centre v. D. (B.)*) [2007] 3 S.C.R. 83, 86 O.R. (3d) 720 (note) (S.C.C.) — referred to

Dennis v. Ontario Lottery & Gaming Corp. (2010), 318 D.L.R. (4th) 110, 2010 ONSC 1332, 2010 CarswellOnt 1975 (Ont. S.C.J.) — considered

Drady v. Canada (Minister of Health) (2007), 2007 CarswellOnt 4631 (Ont. S.C.J.) — referred to

Dumoulin v. Ontario (2005), 2005 CarswellOnt 4544, 19 C.P.C. (6th) 234, 48 C.L.R. (3d) 72 (Ont. S.C.J.) — considered

Falloncrest Financial Corp. v. Ontario (1995), (sub nom. *Nash v. Ontario*) 27 O.R. (3d) 1, 1995 CarswellOnt 910 (Ont. C.A.) — referred to

Fischer v. IG Investment Management Ltd. (2010), 2010 CarswellOnt 135, 2010 ONSC 296 (Ont. S.C.J.) — referred to

Folland v. Ontario (2003), 2003 CarswellOnt 1087, 104 C.R.R. (2d) 244, 17 C.C.L.T. (3d) 271, 225 D.L.R. (4th) 50, 170 O.A.C. 17, 64 O.R. (3d) 89 (Ont. C.A.) — referred to

Folland v. Ontario (2003), 194 O.A.C. 200 (note), 2003 CarswellOnt 3811, 2003 CarswellOnt 3812, 229 D.L.R. (4th) vi (note), 325 N.R. 391 (note) (S.C.C.) — referred to

Frame v. Smith (1987), 1987 CarswellOnt 969, 78 N.R. 40, [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81, 23 O.A.C.

84, 42 C.C.L.T. 1, [1988] 1 C.N.L.R. 152, 9 R.F.L. (3d) 225, 1987 CarswellOnt 347 (S.C.C.) — referred to

Franklin v. University of Toronto (2001), 2001 CarswellOnt 3978, 14 C.C.E.L. (3d) 85, 13 C.P.C. (5th) 340, 56 O.R. (3d) 698 (Ont. S.C.J.) — referred to

Fredericks v. 2753014 Canada Inc. (2008), 272 N.S.R. (2d) 186, 869 A.P.R. 186, 2008 CarswellNS 714, 2008 NSSC 377 (N.S. S.C.) — referred to

Fresco v. Canadian Imperial Bank of Commerce (2009), 2009 C.L.L.C. 210-032, 71 C.P.C. (6th) 97, 2009 CarswellOnt 3481 (Ont. S.C.J.) — followed

Frohlinger v. Nortel Networks Corp. (2007), 2007 CarswellOnt 240, 40 C.P.C. (6th) 62, 2007 C.E.B. & P.G.R. 8233 (Ont. S.C.J.) — referred to

Fulawka v. Bank of Nova Scotia (2010), 2010 C.L.L.C. 210-025, 2010 CarswellOnt 1057, 2010 ONSC 1148 (Ont. S.C.J.) — distinguished

Fulawka v. Bank of Nova Scotia (2010), 2010 ONSC 2645, 2010 CarswellOnt 3419 (Ont. Div. Ct.) — referred to

G. Ford Homes Ltd. v. Draft Masonry (York) Co. (1983), 43 O.R. (2d) 401, 2 O.A.C. 231, 2 C.L.R. 210, 1 D.L.R. (4th) 262, 1983 CarswellOnt 732 (Ont. C.A.) — considered

Garland v. Consumers' Gas Co. (2004), 2004 CarswellOnt 1558, 2004 CarswellOnt 1559, 2004 SCC 25, 72 O.R. (3d) 80 (note), 237 D.L.R. (4th) 385, 319 N.R. 38, 43 B.L.R. (3d) 163, 9 E.T.R. (3d) 163, 42 Alta. L. Rev. 399, 186 O.A.C. 128, [2004] 1 S.C.R. 629 (S.C.C.) — referred to

Giorno v. Pappas (1999), 170 D.L.R. (4th) 160, 117 O.A.C. 187, 99 C.L.L.C. 220-026, 42 O.R. (3d) 626, 1999 CarswellOnt 164, 39 C.C.E.L. (2d) 262 (Ont. C.A.) — referred to

Goudie v. Ottawa (City) (2003), 2003 C.L.L.C. 220-028, 23 C.C.E.L. (3d) 1, 30 C.P.C. (5th) 207, 301 N.R. 201, 223 D.L.R. (4th) 395, [2003] 1 S.C.R. 141, 2003 CarswellOnt 862, 2003 CarswellOnt 863, 2003 SCC 14, 170 O.A.C. 201 (S.C.C.) — distinguished

Grant v. Canada (Attorney General) (2009), 81 C.P.C. (6th) 68, 2009 CarswellOnt 7642 (Ont. S.C.J.) — referred to

Harris v. GlaxoSmithKline Inc. (2010), 2010 ONSC 2326, 2010 CarswellOnt 2501 (Ont. S.C.J.) — referred to

Healey v. Lakeridge Health Corp. (2006), 38 C.P.C. (6th) 145, 2006 CarswellOnt 6574 (Ont. S.C.J.) — referred to

Hercules Management Ltd. v. Ernst & Young (1997), 31 B.L.R. (2d) 147, [1997] 2 S.C.R. 165, 1997 CarswellMan 198, 211 N.R. 352, 1997 CarswellMan 199, 115 Man. R. (2d) 241, 139 W.A.C. 241, (sub nom. *Hercules Managements Ltd. v. Ernst & Young*) 146 D.L.R. (4th) 577, 35 C.C.L.T. (2d) 115, [1997] 8 W.W.R. 80 (S.C.C.) — referred to

Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board (2007), 2007 SCC 41, 2007 CarswellOnt 6265, 2007 CarswellOnt 6266, 87 O.R. (3d) 397 (note), 40 M.P.L.R. (4th) 1, 64 Admin. L.R. (4th)

163, 50 C.C.L.T. (3d) 1, 368 N.R. 1, 285 D.L.R. (4th) 620, [2007] 3 S.C.R. 129, [2007] R.R.A. 817, 50 C.R. (6th) 279, 230 O.A.C. 253 (S.C.C.) — referred to

Hislop v. Canada (Attorney General) (2009), 2009 C.E.B. & P.G.R. 8339, 95 O.R. (3d) 81, 2009 CarswellOnt 2513, 2009 ONCA 354, 248 O.A.C. 205 (Ont. C.A.) — referred to

Hislop v. Canada (Attorney General) (2009), 2009 CarswellOnt 5367 (S.C.C.) — referred to

Hollick v. Metropolitan Toronto (Municipality) (2001), (sub nom. *Hollick v. Toronto (City)*) 56 O.R. (3d) 214 (headnote only), (sub nom. *Hollick v. Toronto (City)*) 205 D.L.R. (4th) 19, (sub nom. *Hollick v. Toronto (City)*) [2001] 3 S.C.R. 158, (sub nom. *Hollick v. Toronto (City)*) 2001 SCC 68, 2001 CarswellOnt 3577, 2001 CarswellOnt 3578, 24 M.P.L.R. (3d) 9, 13 C.P.C. (5th) 1, 277 N.R. 51, 42 C.E.L.R. (N.S.) 26, 153 O.A.C. 279 (S.C.C.) — followed

Hopkins v. Paul Revere Insurance Co. (1989), 1989 CarswellOnt 3013 (Ont. Dist. Ct.) — referred to

Hrooshkin v. ECL Group of Cos. (August 29, 2002), W.F.J. Hood Referee (Can. Arb. Bd.) — referred to

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Zicherman v. Equitable Life Insurance Co. of Canada (2003), 2003 CarswellOnt 1206, [2003] I.L.R. I-4182, 226 D.L.R. (4th) 131, 47 C.C.L.I. (3d) 60 (Ont. C.A.) — referred to

80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd. (1972), 1972 CarswellOnt 1010, 25 D.L.R. (3d) 386, [1972] 2 O.R. 280 (Ont. C.A.) — referred to

1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd. (2002), 28 C.P.C. (5th) 135, 62 O.R. (3d) 535, 2002 CarswellOnt 4272 (Ont. S.C.J.) — referred to

1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd. (2003), 2003 CarswellOnt 998, 169 O.A.C. 343, 64 O.R. (3d) 42 (Ont. Div. Ct.) — referred to

1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd. (2004), 50 C.P.C. (5th) 25, 184 O.A.C. 298, 70 O.R. (3d) 182, 2004 CarswellOnt 945 (Ont. Div. Ct.) — referred to

2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp. (2007), 2007 CarswellOnt 1768, 45 C.P.C. (6th) 375 (Ont. S.C.J.) — considered

2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp. (2007), 2007 CarswellOnt 3923 (Ont. Div. Ct.) — referred to

2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp. (2008), 2008 CarswellOnt 3428 (Ont. S.C.J.) — referred to

2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp. (2009), 70 C.P.C. (6th) 27, 2009 CarswellOnt 2533, 96 O.R. (3d) 252, 250 O.A.C. 87 (Ont. Div. Ct.) — referred to

2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp. (2010), 100 O.R. (3d) 721, 87 C.P.C. (6th) 375, 2010 ONCA 466, 2010 CarswellOnt 4305 (Ont. C.A.) — referred to

Statutes considered:

Canada Labour Code, R.S.C. 1985, c. L-2

Generally — referred to

Pt. I — referred to

Pt. II — referred to

Pt. III — referred to

Pt. III, Div. I — referred to

Pt. III, Div. IX — referred to

s. 3(1) "employee" — referred to

s. 166 "employer" — referred to

s. 166 "general holiday" — referred to

s. 166 "inspector" — referred to

s. 166 "order" — referred to

s. 166 "overtime" — considered

s. 166 "standard hours of work" — referred to

s. 166 "wages" — considered

s. 167(1)(a) — referred to

s. 167(1)(b) — referred to

s. 167(1)(c) — referred to

s. 167(2) — pursuant to

s. 168(1) — considered

s. 169(1) — referred to

s. 171(1) — referred to

s. 174 — considered

s. 191 "employed in a continuous operation" (b) — referred to

s. 198 — considered

s. 198(a) — considered

s. 198(b) — considered

s. 199 — considered

s. 240(1) — considered

s. 240(1)(a) — referred to

ss. 240-245 — referred to

s. 241(3) — considered

s. 242(1) — referred to

s. 242(4) — considered

s. 243 — referred to

s. 244 — referred to

s. 246(1) — considered

s. 247 — considered

s. 248(1) — referred to

s. 249(1) — considered

s. 249(2) — considered

s. 249(7) — considered

s. 251(1) — referred to

s. 251.1(1) [en. 1993, c. 42, s. 37] — referred to

s. 251.1(2) [en. 1993, c. 42, s. 37] — referred to

s. 251.11(1) [en. 1993, c. 42, s. 37] — referred to

s. 251.12(1) [en. 1993, c. 42, s. 37] — referred to

s. 251.12(4) [en. 1993, c. 42, s. 37] — referred to

s. 251.12(6) [en. 1993, c. 42, s. 37] — referred to

s. 251.12(7) [en. 1993, c. 42, s. 37] — referred to

s. 252(2) — referred to

s. 252(3) — referred to

s. 256 — referred to

s. 257(1) — referred to

s. 257(2) — referred to

s. 258 — considered

s. 261 — considered

s. 264 — referred to

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

Generally — referred to

s. 1 "common issues" — considered

s. 1 "common issues" (a) — considered

s. 1 "common issues" (b) — considered

s. 5 — considered

s. 5(1) — considered

s. 5(1)(a) — referred to

s. 5(1)(b) — referred to

s. 5(1)(b)-5(1)(e) — referred to

s. 5(1)(c) — referred to

s. 5(1)(d) — referred to

s. 5(1)(e) — referred to

s. 12 — considered

s. 13 — considered

s. 23 — considered

s. 24 — considered

s. 24(1) — considered

s. 24(1)(b) — considered

s. 24(1)(c) — considered

s. 24(2)(d) — referred to

s. 24(3) — considered

s. 25 — considered

Code civil du Québec, L.Q. 1991, c. 64

art. 2925 — referred to

Employment Standards Act, 1974, S.O. 1974, c. 112

s. 2(2) — referred to

Employment Standards Act, R.S.O. 1980, c. 137

s. 2(2) — referred to

Employment Standards Act, R.S.O. 1990, c. E.14

s. 2(2) — referred to

Employment Standards Act, 2000, S.O. 2000, c. 41

Generally — referred to

Hours of Work and Vacations with Pay Act, R.S.O. 1960, c. 181

Generally — referred to

Labour Standards Act, 1969, S.S. 1969, c. 24

Generally — referred to

s. 17 — referred to

Limitation Act, R.S.B.C. 1996, c. 266

s. 3(2)(a) — referred to

s. 3(5) — referred to

Limitation of Actions Act, R.S.M. 1987, c. L150

s. 2(1)(b) — referred to

s. 2(1)(e) — referred to

s. 2(1)(i) — referred to

s. 2(1)(k) — referred to

Limitation of Actions Act, R.S.N.B. 1973, c. L-8

s. 3 — referred to

s. 6 — referred to

s. 7 — referred to

s. 9 — referred to

Limitation of Actions Act, R.S.N.S. 1989, c. 258

s. 2(1)(b) — referred to

s. 2(1)(e) — referred to

Limitation of Actions Act, R.S.N.W.T. 1988, c. L-8

s. 2(1)(b) — referred to

s. 2(1)(f) — referred to

s. 2(1)(h) — referred to

s. 2(1)(j) — referred to

Limitation of Actions Act, R.S.Y. 2002, c. 139

s. 2(1)(b) — referred to

s. 2(1)(f) — referred to

s. 2(1)(h) — referred to

s. 2(1)(j) — referred to

Limitations Act, R.S.A. 2000, c. L-12

s. 3(1) — referred to

Limitations Act, S.N. 1995, c. L-16.1

s. 5(a) — referred to

s. 5(b) — referred to

s. 5(h) — referred to

s. 6(1)(f) — referred to

s. 6(1)(h) — referred to

s. 9 — referred to

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

s. 24(3) — referred to

Limitations Act, S.S. 2004, c. L-16.1

s. 5 — referred to

Nunavut Act, S.C. 1993, c. 28

s. 29 — referred to

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

s. 45(1)(g) — referred to

Statute of Limitations, R.S.P.E.I. 1988, c. S-7

s. 2(1)(b) — referred to

s. 2(1)(e) — referred to

s. 2(1)(g) — referred to

Rules considered:

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

R. 21 — referred to

R. 21.01(1) — considered

R. 21.01(1)(a) — considered

R. 21.01(1)(b) — considered

R. 21.01(2) — considered

R. 21.01(3) — referred to

R. 21.01(3)(a) — considered

R. 37.13(2)(a) — considered

R. 57.01(4) — considered

R. 57.02-57.07 — referred to

Regulations considered:

Canada Labour Code, R.S.C. 1985, c. L-2

Canada Labour Standards Regulations, C.R.C. 1978, c. 986

Generally — referred to

s. 24(2)(d) — referred to

MOTION by plaintiff for certification of class action; CROSS-MOTION by defendant to stay or dismiss action.

Perell J.:

Reasons for Decision

Introduction and Overview

1 Under s. 167(2) of the *Canada Labour Code*, R.S. 1985, c. L-2, which is found in Part III of the *Code*, the overtime and maximum hours of work rules of the *Code* do *not* apply to employees who "are managers or superintendents or who exercise management functions".

2 Under s. 5 of the *Class Proceedings Act*, 1992, S.O. 1992, c. C.6, the plaintiff, Michael Ian McCracken, moves for certification of a class action against the defendant Canadian National Railway Company ("CN"). Mr. McCracken alleges that CN has unlawfully classified all its "first line supervisors" ("FLSs") as "managers" thus depriving them of overtime and holiday wages payable under the *Code*.

3 Mr. McCracken advances claims of violation of the *Code*, breach of contract, breach of a duty of good faith, unjust enrichment, and negligence. He submits that common issues arising from these claims are informed by the contract of employment, CN's duties and obligations under the *Code*, and CN's failure to develop and implement reasonable and effective systems, procedures, and practices to ensure that first line supervisors are or were properly classified and that all of their hours worked, including overtime and holiday hours, were properly recorded.

4 Mr. McCracken brings his action on behalf of the proposed Class Members, who are:

All current and former non-unionized CN employees who were first line supervisors on or after July 5, 2002.

5 The date of July 5, 2002 in the proposed class definition is the date that CN is alleged to have misclassified the first line supervisors as managers. The proposed Class is estimated to be 1,550 persons, of which 842 are cur-

rently CN employees.

6 In his statement of claim, Mr. McCracken makes many claims for relief including, but not limited to, the following:

- He claims $250 million in damages and an order pursuant to s. 24 of the *Class Proceedings Act, 1992* directing an aggregate assessment of damages. He seeks an order from the court directing the distribution of payments to Class Members. He seeks an order pursuant to s. 23 of the Act admitting into evidence statistical information.

- He claims an order directing CN to disgorge amounts withheld in respect of unpaid hours, including overtime and holiday hours worked by each member of the class. He seeks a declaration that CN has been unjustly enriched to the deprivation of Class Members by the value of the unpaid overtime and holiday hours.

- He seeks a declaration that CN has breached the *Code* by: (1) misclassifying Class Members as exempt from overtime compensation; (2) failing to pay overtime at the prescribed rates; (3) failing to pay holiday pay; and (4) violating the anti-retaliation provisions of s. 256 of the *Code*.

- He seeks a declaration that CN has breached the obligation under the *Canada Labour Standards Regulations* C.R.C. c. 986 (the "*Regulations*") to accurately record and maintain records of Class Members' hours of work.

- He seeks a declaration that the duties of the *Code* or the *Regulations* are express or implied terms of the Class Members' contracts of employment. He seeks a declaration that CN has breached the express or implied terms of its contracts of employment with each Class Member.

- He seeks a declaration that CN owes the Class Members a duty to act in good faith and has breached that duty in the performance of its contracts with Class Members.

- He seeks punitive, aggravated, and exemplary damages of $50 million.

- He seeks injunctive relief restraining CN from enforcing its "Compensation Management - Time Management Policy."

7 On his motion for certification, Mr. McCracken argues that all of the criteria for certification as a class proceeding have been satisfied. Further, he submits that his action is a "misclassification case" and these cases are "inherently amenable to resolution by way of class proceeding".

8 For its part, CN argues that all five criteria for certification have not been satisfied and that the motion for certification should be dismissed.

9 Although it challenges whether there is some basis in fact for the class definition, CN does not contest the definition, as such, and relying essentially on an argument developed for a cross-motion under Rule 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 set out below, it submits that the first criterion for certification (cause of action) has not been satisfied, and it disputes the inherent amenability of misclassification cases for certification. It submits that there are no common issues that would support certification as a class action. Among other challenges, CN disputes that there could be an aggregate assessment of damages, and it submits that the proceeding would inevitably require 1,550 individual assessments of liability and of damages. CN argues that a class action would not be the preferable procedure, and it submits that the putative Class Members' claims would be much more efficiently addressed by the administrative process established under Part III of the *Code*. Finally, it submits that certification

should be refused because Mr. McCracken would not be a suitable representative plaintiff and because he has not prepared an adequate litigation plan.

10 As mentioned, CN brings a cross-motion pursuant to Rule 21 of the *Rules of Civil Procedure* to have Mr. McCracken's action stayed or dismissed, and this cross-motion forms part of its defence to the certification motion. On its Rule 21 motion, CN submits that the Superior Court does not have or ought not to exercise subject matter jurisdiction to hear Mr. McCracken's claims. It also submits that Mr. McCracken has not pleaded a reasonable cause of action under any of: (a) the *Code* or its *Regulations*; (b) contract; (c) duty of good faith; (d) unjust enrichment; (e) negligence; and (f) punitive damages. CN also submits that certain claims of the Class Members are statute-barred. More particularly, CN's line of argument is as follows:

• CN submits that under Rule 21.01(3)(a), it may move to have Mr. McCracken's action stayed or dismissed on the ground that the court has no jurisdiction over the subject matter of the action. It submits that the test under Rule 21.01(3)(a) is not the "plain and obvious test" of Rules 21.01(1)(a) or 21.01 (1)(b), and the issue under Rule 21.01(3)(a) is simply whether or not the Superior Court has jurisdiction over the subject matter of the claims advanced by Mr. McCracken.

• CN submits that the subject matter of Mr. McCracken's claims is an entitlement to overtime pay and holiday pay under the *Code* arising from CN's alleged misclassification of the first line supervisors and breaches of the *Code* regarding record-keeping and anti-reprisal. CN submits that Mr. McCracken's claims are purely statutory and are not common law or equitable claims.

• Then, CN submits that since Mr. McCracken's claims under the *Code* do not exist at common law or equity, the next issue, which is a matter of statutory interpretation, is whether Parliament intended to create a common law cause of action for enforcement of these rights from the *Code*.

• On the statutory interpretative issue, CN submits that an analysis of the *Code* reveals that the *Code* is a comprehensive scheme and that Parliament did not intend to confer any jurisdiction on the courts to enforce the rights created by the *Code*, and, therefore, Mr. McCracken and the Class Members must seek any remedy exclusively under the administrative process of the *Code* and not in the Superior Court.

• Further, CN submits that Mr. McCracken cannot avoid the conclusion that the jurisdiction to decide the subject matter of his claims rests only with the officials and tribunals of the *Canada Labour Code* by characterizing his claim as a breach of contract, a tort, breach of duty of good faith, or a restitutionary claim that ordinarily are within the jurisdiction of the Superior Court.

• Shifting the analysis to Rules 21.01(1)(a) and 21.01(1)(b), CN then argues that if the Superior Court does have jurisdiction, then it is plain and obvious that Mr. McCracken does not have any reasonable cause of action.

• It is CN's submission that under Rules 21.01(1)(a) and 21.01(1)(b), it is plain and obvious that the breach of contract cause of action is not viable because it depends upon express or implied contractual terms that are inconsistent with the express terms of the first line supervisors' contracts of employment, and, in any event, some of the alleged breaches by CN are not breaches under the *Canada Labour Code* and its Regulations. I foreshadow the discussion to note that for its Rule 21 motion, this argument must accept that CN has breached the *Canada Labour Code*, but CN, nevertheless, submits that there would not be a breach of any contract term.

• It is CN's submission that under Rules 21.01(1)(a) and 21.01(1)(b), it is plain and obvious that the cause of action based on a breach of an alleged duty of good faith is not a reasonable cause of action, and since

this claim is based on conduct in 2002, the claim is statute-barred.

• (Although its position changed during argument,) it was CN's submission that under Rules 21.01(1)(a) and 21.01(1)(b), the cause of action based on unjust enrichment is not a reasonable cause of action.

• It is CN's submission that under Rules 21.01(1)(a) and 21.01(1)(b), it is plain and obvious that the cause of action based on the tort of negligence is not a reasonable cause of action and if it is legally viable, the action is statute-barred.

• Finally, CN submits that with all other causes of action being struck, the claim for punitive damages cannot stand alone.

11 CN also argues that *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (Ont. S.C.J.), and *Fulawka v. Bank of Nova Scotia*, [2010] O.J. No. 716 (Ont. S.C.J.), leave to appeal to the Div. Ct. granted, 2010 ONSC 2645 (Ont. Div. Ct.), which are cases about overtime claims under the *Code*, are distinguishable or wrong to the extent that they support the holding that Mr. McCracken has viable claims in contract, tort, unjust enrichment, or breach of a duty of good faith and to the extent that they suggest that any of the criterion for certification have been satisfied.

12 Mr. McCracken's response to the Rule 21 motion is to make numerous arguments. His main arguments are:

• He argues that the *Code* can be enforced by a civil cause of action before the Superior Court.

• He argues that CN's jurisdictional arguments are premised on a mischaracterization of his claim and that the correct characterization is that the claims are in contract, unjust enrichment, breach of a duty of good faith, or negligence, all of which are within the Superior Court's ordinary jurisdiction.

• He argues that CN's Rule 21 motion does not present a question of law amenable to determination on a Rule 21 motion.

• He argues that CN is using Rule 21 in a procedurally unsuitable manner, to advance defences without having to plead and without being subjected to discovery.

• He argues that *Fresco v. Canadian Imperial Bank of Commerce*, *supra*, and *Fulawka v. The Bank of Nova Scotia*, *supra*, are correct on the inherent amenability of misclassification cases for certification as class proceedings but that *Fulawka* is correct on the cause of action point but wrong on the matter of the jurisdiction of the Superior Court to enforce the *Code* directly.

13 On the two motions, there were five days of hearings, eight factums totaling over 700 pages, nine gowned lawyers (and others in the courtroom), twenty-five proposed common issues for certification, twenty-six volumes of motion records or compendiums, forty-three affiants, who provided the factual background, and over 400 cases and statutes referred to in the factums and bound in the case books to provide the legal background.

14 The discussion of the issues will lead to the following main conclusions or orders:

• The Superior Court has subject matter jurisdiction to decide Mr. McCracken's claims for overtime and holiday wages.

• The provisions of the *Code* about overtime and holiday wages are terms of the contracts of employment of the

first line supervisors by force of statute.

• Mr. McCracken's proposed causes of action for negligence and breach of a duty of good faith should be struck from his statement of claim. The pleadings of the material facts in support of these causes of action should be struck from the pleadings except to the extent that these material facts are pleaded in support of the remaining causes of action.

• Mr. McCracken's claim for failure to pay holiday pay should be dismissed.

• With qualifications or conditions, Mr. McCracken has satisfied all five criteria for certification of his action as a class proceeding.

• One of the qualifications or conditions is that Mr. McCracken's claims for breach of an express or implied contract term should be stayed, but the claims for unjust enrichment and for breach of a contract term implied by force of statute may proceed.

• A consequence of the certification and Rule 21 motions is that several common issues will have been determined.

• The main common issue and the focus of the common issues trial will be the question: "In accordance with the meaning under s. 167 (2) of the *Code*, of 'employees who are managers or superintendents or exercise management functions' what are the minimum requirements to be a managerial employee at CN?"

15 My ultimate conclusions are that I grant CN's motion, in part, and I grant Mr. McCracken's motion for certification with qualifications and conditions.

16 It should be noted that consequences of the terms of the court's orders on the two motions will be that several common issues will be decided in favour of the plaintiff, two causes of action will be stayed, and one claim will be dismissed - all before the common issues trial. These consequences also influenced the common issues that were certified to be tried at the common issues trial. My Reasons for Decision will need to discuss the court's jurisdiction to decide a common issue, dismiss a claim, stay a claim, and sculpture the common issues before the common issues trial.

17 The above introduction reveals that there are many issues to discuss in these Reasons for Decision. What the introduction does not reveal is that there are also latent issues about the operation of the *Class Proceedings Act, 1992* that require discussion such as the issue of how the "some basis in fact" standard operates and the issue of how the aggregate assessment provisions of the Act operate. It will prove necessary for me to address some important general issues about the Act in these Reasons for Decision.

18 To discuss the issues, I have organized my Reasons for Decision under the following titles in the following order:

- Introduction and Overview
- Evidence on the Certification Motions
- Factual, Contractual, and Legal Background
    - Introduction

- Michael Ian McCracken
- Canadian National Railway Company and First Line Supervisors
- The *Canada Labour Code*
- Classification as a Manager under the *Canada Labour Code*
- The Employment Contract and Mr. McCracken's Claims

- Rule 21 and s. 5 (1) (a) of the *Class Proceedings Act*
- The Court's Jurisdiction under Rule 21 to Determine its Jurisdiction
- Whether the Court has Subject Matter Jurisdiction
  - General Principles
  - The Concurrent Jurisdiction to Enforce Wage Claims
    - Introduction
    - First Stage of the Analysis
    - Second Stage of the Analysis
    - Third Stage of the Analysis
    - Conclusion of the Analysis and the Effect of the Conclusion
  - Deferring to the Administrative Process under the *Canada Labour Code*
- The Claim in Contract
  - Introduction
  - Breach of an Express Contractual Term
  - Breach of an Implied Contractual Term
  - Breach of a Statutory Implied Term
- The Motion for Judgment and Deciding or Staying Common Issues
- The Claim for Breach of a Duty of Good Faith

- The Unjust Enrichment Claim
- The Negligence Claim
- Rule 21 and CN's Limitation Period Argument
- The Criteria for Certification
- The "Some Basis in Fact" Test and Certification
- Disclosure of Cause of Action
- Identifiable Class
- Common Issues
    - General Principles
    - Evolution of the Common Issues
    - Analysis of the Common Issues
- Process of Elimination and Commentary
- The Approved Common Issues, and Commentary
    - *Fresco* and *Fulawka* and Commonality
    - *Fresco* and *Fulawka* and the Commonality of Misclassification Cases
- Aggregate Assessment of Damages
- Preferable Procedure
    - Introduction
    - Evidentiary Background to the Preferable Procedure Dispute
    - Analysis
- Representative Plaintiff
    - Introduction
    - Evidentiary Background to the Dispute about the Representative Plaintiff
    - Analysis

- The Litigation Plan

- Conclusion

- Schedule A - Excerpts from the *Canada Labour Code*

Evidence on the Certification Motion

19 Mr. McCracken supported his motion for certification with:

- affidavits from 11 current or former first line supervisors, including Mr. McCracken, who was cross-examined;

- an affidavit from Enzo Fabrizi, a CN employee who was unsuccessful in an application for overtime and statutory holiday pay pursuant to the administrative process of the *Canada Labour Code*;

- affidavits from two union representatives; namely: Rex Beatty and John Dinnery; and

- affidavits from three expert witnesses; namely: (1) Judith Ann Fudge, who is a Professor of Law and the Lansdowne Chair in Law at the Faculty of Law at the University of Victoria and an employment and labour law scholar; (2) Richard Drogin, who is Emeritus Professor of the Department of Statistics from the University of California, Berkeley, and (3) Cristina G. Banks, who is President and Founder of Lamorinda Consulting LLC and a senior lecturer at the Haas School of Business at the University of California, Berkeley, who is a consultant in strategic human resource management, all of whom were cross-examined.

20 CN supported its opposition to the motion for certification with:

- affidavits from 19 current or former first line supervisors;

- an affidavit from Barry Hogan, a CN labour relations manager;

- an affidavit from Louis Lagacé, CN's Director of Compensation, who was cross-examined;

- an affidavit from Jim Vena, CN's Senior Vice-President Operations, Southern Region, who had been a first line supervisor before promotions to executive positions in several regions and who was cross-examined;

- affidavits from four expert witnesses; namely: (1) Richard Chaykowski, who is a professor at the School of Policy Studies with a cross-appointment to the Faculty of Law, both at Queen's University, with a doctorate in the field of industrial and labour relations; (2) Lorne Sossin, who is a Professor of law (and recently appointed Dean of Osgoode Hall Law School) and an administrative law scholar; (3) Elizabeth Becker, who is Managing Director at Huron Consulting Group, which provides forensic statistical services, and who holds a Ph.D. in applied economics from Clemson University; and (4) Colm O'Muircheartaigh, who is a Professor at the Harris School of Public Policy and Senior Fellow at the National Opinion Centre, both at the University of Chicago, and who is a statistician and consultant on survey research.

Factual, Contractual, and Legal Background

Introduction

21 With several exceptions, the factual, contractual, and some legal background to the two motions and about the *Code* are set out in the next parts of my Reasons for Decision. The exceptions concern several issues, such as the criteria for certification, the possibility of an aggregate assessment, the question of whether the procedure under *Code* is the preferable procedure to a class action, and Mr. McCracken's qualifications as a representative plaintiff. I will set out the legal and factual background to these particular issues later in these Reasons for Decision.

22 The factual background is taken from Mr. McCracken's Amended Fresh as Amended Statement of Claim, which is the fifth version of his pleading, documents incorporated by reference into the statement of claim, and from affidavit and transcript evidence found in the voluminous record for the certification motion.

Michael Ian McCracken

23 Mr. McCracken began work at CN in April 1998 as a unionized employee. In October 2005, he became a "Manager of Corridor Operations," which is a first line supervisor position that CN alleges has attendant management responsibilities and authority.

24 In January 2008, Mr. McCracken was promoted to the position of Senior Manager, Corridor Operations, also known as Senior Operations Officer, which CN states is a higher ranking managerial position in the hierarchy at CN than a first line supervisor.

25 CN submits that Mr. McCracken knew from the outset of his promotion from unionized ranks to a first line supervisor position that he would be required to long work hours and that he would not be paid overtime by the hour under the *Code*.

26 Some time in 2007 to early 2008, Mr. McCracken came to the view that first line supervisors should have been paid overtime pay and holiday pay under the *Code*, and he retained the lawyers who were representing the proposed representative plaintiffs in *Fresco v. Canadian Imperial Bank of Commerce*, *supra*, and *Fulawka v. The Bank of Nova Scotia*, *supra*, the two Ontario class actions involving claims for overtime pay associated with the *Code* that are currently before appellate courts. I will have more to say about these cases later.

27 On March 18, 2008, Mr. McCracken commenced his proposed class action against CN.

28 Mr. McCracken's superiors at CN apparently were offended, affronted, and felt betrayed that the proposed class action was commenced without Mr. McCracken having first discussed his concerns or grievances with them.

29 On March 26, 2008, the day after CN was served with the statement of claim, McCracken was demoted to a unionized employee position. He deposed that Mike Cory, CN's Vice-President of Operations for the Eastern Region, told him he was demoted to dispatcher because he had commenced the proposed class action.

30 Mr. McCracken pleads that his demotion was intimidation and a retaliatory response to the proposed class action. He alleges that CN's conduct was in breach of the anti-retaliation provisions of s. 256 of the *Code* and was a breach of CN's Anti-Harassment Policy both or which he alleges are incorporated into the Class Members' employment contracts. He submits CN's conduct warrants an award of punitive damages. CN denies retaliation and submits that it had good reason to demote Mr. McCracken and to remove him from the management side of its business.

31 Two years later, on March 21, 2010, Mr. McCracken resigned from his employment at CN. He did not leave quietly. CN alleges that before his resignation, Mr. McCracken sent e-mails to Class Members that insulted and li-

beled CN and several fellow Class Members.

32 The record indicates that there is no love lost between Mr. McCracken and CN. I will have more to say about this circumstance when I discuss the representative plaintiff criterion for certification.

Canadian National Railway Company and First Line Supervisors

33 CN is a federally-regulated company headquartered in Montreal that operates the largest rail network in Canada. It has routes in 8 provinces and 16 states in the U.S.A. It has approximately 15,000 employees in Canada, of which approximately 3,000 are non-unionized. The proposed class constitutes about half of the non-unionized positions at CN.

34 CN has three regions (Western, Eastern, and Southern) with three main functions: (1) train operations; (2) sales and marketing; and (3) support services (human resources, finance, information technology, public affairs, etc.).

35 Train operations in each region have three main departments: (1) mechanical (maintaining the trains); (2) engineering (maintaining the railroad); and (3) transportation (movement of locomotives, cars, and crews).

36 CN operates a "precision," *i.e.* centrally controlled railroad in a continuous and uniform manner over a massive geographic area. It has an intricate and integrated "Service Plan" that is designed by the Service Design Group and sent to the General Managers and Superintendents for their review and input before implementation. Whether the dictates of the Service Plan preclude first line supervisors from being managers is a contested issue between the parties.

37 In CN's employment hierarchy, first line supervisors are immediately above the unionized workforce.

38 More than 90% of first line supervisors are employed in the Operations Division, supervising employees who work in Transportation (*i.e.* movement of trains) Engineering (*i.e.* repair and maintenance of track and signals) and Mechanical (*i.e.* repair and maintenance of train cars and engines).

39 CN's recruiting materials describe the duties of FLSs as follows:

> The First Line Supervisor manages the day-to-day operation of their territory through their unionized staff; ensures the on-time performance of trains, delivering on our commitments to our customers; the efficient utilization of locomotives and repair of cars (Mechanical); repair and maintenance of trackage and signals (Engineering); and safe haulage of merchandise to their destination (Transportation); as well as interacting with customers (Marketing).

40 CN stated that it does not maintain detailed job descriptions for first line supervisors, but there are 70 different positions based on payroll codes.

41 Mr. McCracken presented evidence from first line supervisors with the job classifications of: (1) assistant track supervisor: (2) chief train dispatcher (also known as Manager of Corridor Operations or MCO); (3) Coordinator Operations; (4) Supervisor Crew Management (5) Supervisor Mechanical; and (6) Trainmaster.

42 On the certification motion, CN made much of the fact that the court only had evidence from affiants that had experience in 14 of the 70 jobs and that there was no evidence from employees from the other 56 job descriptions. CN submits that there is no basis in fact for including employees from these job descriptions as Class Mem-

bers.

43 Mr. McCracken points out that from CN's list of pay code classifications, the vast majority of currently employed Class Members (nearly 80%) would fall within 10 job titles; namely (1) Assistant Track Supervisor-160; (2) Trainmaster-151; (3) Track Supervisor-70; (4) Shop Supervisor-87; (5) Mechanical Supervisor-61; (6) Signals and Communications Supervisor-46; (7) Chief Train Dispatcher-30; (8) Crew Management Supervisor-26; (9) Program Supervisor-25; and (10) Bridges and Structures Supervisor-14.

44 CN led evidence to show that members of the proposed class work in different environments ranging from small towns to large cities, from office environments to shops, garages, small depots, or outdoors in train yards or along the vast length of track that comprises CN's rail network.

45 The salary range of first line supervisors is between $56,000.00 and $105,000.00. They are eligible for bonuses equivalent to 15% to 30% of their base pay. They are entitled to benefits, including a defined benefit pension plan and a share purchase plan.

46 With a few exceptions, from at least 1998, CN has not paid hourly overtime to first line supervisors, and it takes the position that it is not required to pay overtime to them under the *Code*.

47 CN does not keep records of the hours worked by first line supervisors. There was evidence that many FLSs do not work on pre-established work schedules or specific shifts but rather set their own hours of work.

48 The evidence on the motion for certification establishes that there is some basis in fact for Mr. McCracken's allegations that: (a) first line supervisors on average work over 50 hours per week and sometimes as many as 90 hours per week; (b) they regularly work 12-hour shifts on consecutive days; (c) they are given pagers so that they are available at all times, including while off duty; and (d) they are frequently called for unscheduled work and to substitute for unionized and non-unionized employees.

The Canada Labour Code

49 It is not disputed that because CN is federally regulated, it is subject to the *Canada Labour Code*. Mr. McCracken submits that the provisions of the *Code* inform the duties that CN owes to the plaintiff and the Class Members, be they contractual duties, a duty of good faith, or a tort duty of care independent of contract.

50 Mr. McCracken relies on the provisions of the *Code* that require that contracts of employment not fall below minimum standards, including the requirement to pay overtime pay and holiday pay. He submits that to the extent that the contract of employment between the parties includes a term denying overtime pay to the Class, such term is inconsistent with the *Code* and is therefore illegal and void.

51 Mr. McCracken submits that the following provisions from the *Code* are incorporated and implied into the employment contracts of each Class Member: (a) they will be paid for all hours worked, including overtime at the rate of 1 $^1/_2$ times their regular hourly rate for all hours worked in excess of 8 hours in a day or 40 hours in a week; (b) they will be compensated for all hours worked on holidays; (c) CN will maintain accurate records of all hours worked; and (d) CN will act in good faith in classifying employees, and will re-classify employees only where there is a change in duties and responsibilities.

52 With respect to Mr. McCracken's claim and to the issue of whether the Superior Court has subject matter jurisdiction, the most pertinent sections of the *Code* are set out in Schedule A to these Reasons for Decision. In addition to those provisions, for the purposes of the motions before the court, several other features of the *Code* are pertinent to the parties' arguments. In this regard, it should be noted that:

• Part I of the *Code* contains the provisions dealing with labour relations and provides for the constitution of both the Canada Industrial Relations Board ("CIRB") and labour arbitrators, who are charged with interpreting and applying collective agreements). Under Part I of the *Code*, the Minister of Labour possesses jurisdiction (with the consent of the CIRB) to institute penal proceedings for breaches of certain of the obligations contained in Part I of the *Code*. Part I of the *Code* contains a privative clause that shields the decisions of the CIRB and labour arbitrators from judicial review.

• Part II of the *Code* contains provisions dealing with health and safety matters in federally-regulated undertakings. Part II of the *Code* creates administrative tribunals and protects their decisions with a privative clause. Under Part II, the Minister of Labour may institute proceedings for breaches of Part II of the *Code*.

• Part III of the *Code*, in a series of Divisions, prescribes minimum employment standards about overtime pay and regulates many other matters including: (I) hours of work; (II) minimum wages; (III) equal wages; (IV) annual vacations; (V) general holidays, (VI) multi-employer employments; (VII) reassignment, maternity leave, parental leave and compassionate care leave; (VIII) bereavement leave: (IX) group termination of employment; (X) individual terminations of employment; (XI) severance pay; (XII) garnishment; (XIII) sick leave; (XIII.1) work-related illness and injury; (XIV) unjust dismissal; (XV) payment of wages; (XV.1) sexual harassment; (XV.2) leave of absence for members of the reserve.

• Part III constitutes various administrative tribunals and protects their decisions from judicial review with a privative clause. Under Part III, the Minister may institute prosecutions for breaches of the requirements of Part III of the *Code*.

• Under Parts I and III of the *Code*, orders of the various tribunals may be filed with the Federal Court for enforcement purposes, and, once filed, have the same force and effect as an order of that Court.

• The *Code* and *Regulations* require employers to keep records for employees who are overtime-entitled. Employers are required to keep records of hours worked each day for three years: *Canada Labour Code*, s. 252(2) and (3) and *Regulations*, C.R.C. 1978, c. 986, s. 24(2)(d).

53 Unlike several provincial employment standards acts, including the version of the Ontario *Employment Standards Act* in force from 1974 to 2000 (*Employment Standards Act*, S.O. 1974, c. 112, s. 2(2); *Employment Standards Act*, R.S.O. 1980, c. 137, s. 2(2); *Employment Standards Act*, R.S.O. 1990, c. E-14, s. 2(2)), the *Code* contains no section stating that its requirements are implied into employees' contracts of employment. The *Code* also contains no section stating that any contractual provision that derogates from the statute is void.

Classification as a Manager under the Canada Labour Code

54 In this section of the Reasons for Decision, I will discuss the law associated with the status of being a manager under the *Canada Labour Code*, the evidence submitted by the parties on this issue, and the parties' competing positions in this regard. It will be well to recall this discussion when I come to discuss the common issues for certification and the commonality criterion.

55 As mentioned above, Mr. McCracken, in his statement of claim, pleads that all first line supervisors are subject to uniform and consistent CN policies and practices concerning their duties and entitlements. He pleads that the first line supervisors are not managers, superintendents, or employees exercising management functions within the meaning of s. 167 (2) of the *Code*. He submits that the status of first line supervisors is a common issue.

56 In paragraphs 14 and 15 of his statement of claim, Mr. McCracken pleads:

> 14. As a result of the Defendant's uniform and consistent corporate policies and practices, the Plaintiff and other members of the class have been deliberately, improperly and illegally misclassified by the Defendant as exempt from entitlement to compensation for hours worked in excess of 40 hours per week or 8 hours per day when, in fact, they do not fall under any exemption from overtime pay under the *Code* or otherwise at law.
>
> 15. The Plaintiff and members of the class have been regularly scheduled, as a matter of uniform company policy, to work, and, in fact have worked in excess of 40 hours per week or 8 hours per day without receiving overtime pay, in breach of their contracts of employment, contrary to law and in violation of the *Code*.

57 CN's position is that although all its first line supervisors are managers, as a matter of adjudication, this cannot be proved globally in a class action. CN's argument is that the status of each first line supervisor must be assessed individually, supervisor by supervisor. It submits that there is considerable diversity in the roles and degree of managerial authority of the first line supervisors such that a global determination of the status of Class Members is not possible.

58 Underlying the position of both parties is the question of what is the legal nature of a manager or a person who exercises a management function.

59 The case law about who is a manager or who exercises a management function provides that this question is a question of fact for each case and in the context of the overall organization in which the person is employed: *Island Telephone Co. v. Canada (Minister of Labour)*, [1991] F.C.J. No. 978 (Fed. T.D.); *Leontsini v. Business Express Inc.*, [1997] F.C.J. No. 26 (Fed. T.D.); *McKinley Transport Ltd. v. Sirianni*, [1998] C.L.A.D. No. 759 (Can. Arb. Bd.) (R.H. McLaren, Arbitrator); *Hrooshkin v. ECL Group of Cos.*, [2002] C.L.A.D. No. 419 (Can. Arb. Bd.) (W.F.J. Hood, Referee).

60 Being a manager relates to the nature of the work actually performed: *Lee-Shanok v. Banca Nazionale del Lavoro of Canada Ltd.*, [1987] F.C.J. No. 548 (Fed. C.A.); *Leontsini v. Business Express Inc.*, [1997] F.C.J. No. 26 (Fed. T.D.).

61 An employee's title or job description is not determinative of whether the employee is a manager, and his or her status is determined by what the employee does or has been charged to do in the business enterprise: *Canadian Imperial Bank of Commerce v. Bateman*, [1991] F.C.J. No. 414 (Fed. T.D.); *Banque Canadienne Impériale de Commerce c. Torre*, [2010] F.C.J. No. 85 (F.C.).

62 An essential element of being a manager is that the person performs an administrative and leadership role and not just an operational role in the organization: *Canadian Imperial Bank of Commerce v. Bateman*, *supra*; *Lee-Shanok v. Banca Nazionale del Lavoro of Canada Ltd.*, *supra*; *Canada (Procureur général) c. Gauthier*, [1980] 2 F.C. 393 (Fed. C.A.); *Avalon Aviation Ltd. v. Desgagne* (1981), 42 N.R. 337 (Fed. C.A.); *Banque Canadienne Impériale de Commerce c. Torre*, *supra*.

63 The case law reveals that certain activities or functions are regarded as management functions, such as representing the employer in collective bargaining or in discipline or grievance procedure, setting a budget, determining the organization's structure, determining the organization's policies; controlling day-to-day operations; determining staffing levels, supervising and reviewing the performance of subordinates, hiring and firing employees, and dealing with emergencies, but the mere presence of these activities is not enough and they must be accompanied by a significant level of autonomy and real decision-making authority and discretion: *Island Telephone Co. v. Canada (Minister of Labour)*, [1991] F.C.J. No. 978 (Fed. T.D.); *Banque Canadienne Impériale de Commerce c. Torre*, *supra*; *Msuya v. Sundance Balloons International Ltd.*, [2006] F.C.J. No. 398 (F.C.); *Isaac v. Listuguj Mi'gmaq First Na-*

tion, [2004] C.I.A.D. No. 287 (Can. Adjud. app. under Can. Lab. Code) (A.E. Bertrand, Adjudicator); *Lonestar C.C. Inc. v. Flett-Jodoin*, [2004] C.L.A.D. No. 486 (Can. Arb. Bd.) (C.R.B. Dunlop, Referee); *RTL - Robinson Enterprises Ltd. v. Baird*, [2007] C.L.A.D. No. 73 (Can. Arb. Bd.) (C.R.B. Dunlop, Referee); *Canadian Transit Co. v. Nanni*, [2009] C.L.A.D. No. 108 (Can. Arb. Bd.) (N. Dissanayake, Referee).

64 The degree of autonomy and decision-making authority needs to be significant, but it need not be absolute or unfettered, and a manager may have to report to and be supervised by more senior managers and officials in the organization: *Canadian Imperial Bank of Commerce v. Bateman*, *supra*; *Leontsini v. Business Express Inc.*, *supra*; *Lonestar C.C. Inc. v. Flett-Jodoin*, *supra*; *RTL - Robinson Enterprises Ltd. v. Baird*, *supra*.

65 In some cases, s. 167 (2) of the *Code* has been interpreted restrictively to include as managers only those in the most senior positions who act as administrators, having power of independent action, autonomy and discretion: *Island Telephone Co. v. Canada (Minister of Labour)*, [1991] F.C.J. No. 978 (Fed. T.D.); *Canada (Procureur général) c. Gauthier*, *supra*, and *Avalon Aviation Ltd. v. Desgagne*, *supra*.

66 However, many cases have not been so restrictive. Where an employee has significant decision-making authority and responsibilities, he or she may be a manager without being at the more senior level of the organization: *Canadian Imperial Bank of Commerce v. Bateman*, *supra*; *Island Telephone Co. v. Canada (Minister of Labour)*, *supra*; *Andrzewski v. Greyhound Canada Transportation Corp.*, [1998] C.L.A.D. No. 485 (Can. Arb. Bd.) (M.R. Newman, Referee); *McKinley Transport Ltd. v. Sirianni*, *supra*; *Hrooshkin v. ECL Group of Cos.*, *supra*; *Shoreline Bus Lines Ltd. v. Klingler*, [2008] C.L.A.D. No. 77 (Can. Arb. Bd.) (M.V. Watters, Referee).

67 In some cases, evidence that other employees or the public regarded the employee as exercising management duties and responsibilities was a factor in deciding whether a person is a manager. See: *Lynx Warehousing & Transportation Ltd. v. Hurtubise*, [2001] C.L.A.D. No. 403 (Can. Arb. Bd.) (H.R. Jamieson, Referee); *Hrooshkin v. ECL Group of Cos.*, *supra*.

68 CN offered evidence that first line supervisors are expected to play a pivotal role in managing CN's workforce because they are the primary point of contact between management and the unionized employees. It was CN's evidence that many FLSs undergo extensive training to acquire the management skills required for their jobs. It was CN's evidence that the training received by FLSs was designed to empower and equip them to exercise independent judgment in matters of supervision and discipline. It was CN's evidence that some first line supervisors have the authority to approve overtime and leaves of absence for unionized employees, to co-ordinate crews, to schedule shifts, to approve changes to the vacation schedule, to complete job performance appraisals of the employees being supervised, to administer collective agreements, and to oversee compliance with applicable safety legislations. It was CN's evidence that FLSs are expected to actively manage operations essential to CN's core business and make a multitude of key operational decisions using independent judgment and discretion.

69 However, to show diversity and an absence of commonality, CN also lead evidence to show that how First Line Supervisors carry out their role depended upon their experience and aptitudes, the character of the senior manager(s) to whom they report, the nature of the workforce they manage and the particular position held by the FLS. In para. 79 of its factum, CN submitted:

> Some FLSs manage a large number of employees, while others exercise control over significant budgets in the millions of dollars. Some FLS positions include participation in the union grievance process, while others do not. Most FLSs play a role in disciplining and evaluating subordinates, but the level of responsibility delegated for these matters varies widely from job to job and person to person. Some FLSs represent the company with third parties, while others do not. Still others make decisions and exercise control over CN's day-to-day operations while others do not. The Record demonstrates the level and type of responsibility delegated to FLSs may vary, depending on the location where they work. For example, FLSs working at different locations have differ-

ent numbers of employees reporting to them and at smaller yards where there are fewer senior managers on site, more authority is typically delegated to the FLSs.

70 For his part, Mr. McCracken provided evidence about the role of first line supervisors, and his evidence shows that there is some basis in fact for his allegations that first line supervisors are not managers under the *Code*. There is evidence that at least some of them: (a) do not have authority to hire, terminate, promote, demote, or transfer employees; (b) do not represent management in collective bargaining or in grievance procedures; (c) have limited authority to discipline restricted to investigating and recommending minor discipline; and (d) are not involved in setting budgets, CN policies, or its Service Plan.

71 Thus to summarize, while CN maintains that all FLSs are managers under the *Code*, it submits that the adjudicative determination of whether FLSs are managers as defined under the *Code* cannot be determined on a class-wide basis. This submission, which is directed at the common issues and preferable procedure criteria for certification, is a hotly contested point on the certification motion because Mr. McCracken submits that he can prove on a global basis that all first line supervisors are not managers.

The Employment Contract and Mr. McCracken's Claims

72 CN's overtime policy for its employees is set out, in part, in a document entitled "*Compensation Management Time Management Policy*" (the "*Policy*"). The *Policy* expressly states that it is for "non-unionized professional and administrative support employees working in Canada". The *Policy* expressly excludes from its scope "managers, supervisors or anyone who exercises management functions".

73 CN has applied this *Policy* to exclude all its first line supervisors from being paid overtime compensation.

74 Although nothing seems to turn on it, it may be noted that the *Code* speaks of managers, superintendents and employees who exercise management functions, but CN's overtime policy speaks of supervisors and does not mention superintendents.

75 Although the *Policy* states that it does not apply to "managers, supervisors or anyone who exercises management functions", it does mention some rights of supervisors to wages. The *Policy* states that first line supervisors may be paid a discretionary lump sum for overtime work in extraordinary circumstances.

76 CN's *Policy* also mentions the rights of first line supervisors with respect to holiday compensation. The *Policy* states:

> First Line Supervisors required to work on a General Holiday will receive, in addition to their regular wages, time off at the regular rate. Likewise, if the General Holiday falls on a rest day, time off will be provided at the regular rate. Time off will be scheduled at a period that is convenient to both the employee and the supervisor. For First Line Supervisors working on a 4/3 schedule throughout the year, these terms will be applied for the 9 General Holidays set out under the *Canada Labour Code*.

77 CN's "*Company Holiday Non-Unionized Employees - Canada Policy*" also mentions first line supervisors. It provides:

> **1 Objective**
>
> CN will grant paid holiday time to all non-unionized employees on Company recognized holidays.

2. Scope

This policy applies to all non-unionized employees in Canada

. . . . .

4. Eligibility and Payment

CN will grant, in full compliance with the *Canada Labour Code*, paid holiday time to all non-unionized permanent employees [...]

For First Line Supervisors working on a 4/3 schedule throughout the year, the Company recognizes the 9 general holidays set out in the *Canada Labour Code*.

78 Mr. McCracken pleads and submits that when the contractual sources for the first line supervisors' contract of employment are viewed as a whole, the contract includes a term by which CN has agreed to abide by the *Code* with respect to overtime and holiday pay and several other matters.

79 Mr. McCracken pleads that the terms of the *Code* are implied terms of the contracts of employment of first line supervisors. In his statement of claim, he pleads that class members have an entitlement to overtime and to holiday compensation under the *Code*. He pleads that CN is required to comply with the minimum conditions set out in the *Code* in respect of such matters as wages, hours of employment, severance entitlement and holiday compensation. He states that Division I of Part III of the *Code* applies to all federally regulated employees except those excluded under s. 167 (2) of the *Code*. He pleads that class members are not among the excluded employees. In paragraph 27 of his statement of claim, he pleads:

> 27. The implied *Code* Terms are implied terms in the contracts of employment of the Class. As a result, the Defendant is contractually bound to not exclude FLSs (who are not managers, superintendents or persons who exercise management functions) from entitlement to and pay for overtime of 1.5 times their normal wages for all hours worked in excess of eight hours per day or 40 hours per week.

80 In a recently delivered amendment to his statement of claim, Mr. McCracken alleges that CN expressly contracted to abide by the minimum standards of the *Code*. In paragraph 32a of his statement of claim, he pleads:

> 32a. Moreover, it is an express term in the contracts of employment of the Class that the Defendant will abide by the minimum standards of the *Code* concerning, inter alia overtime, holiday compensation, record-keeping and classification of employees as managers, superintendents or persons exercising management functions.

81 Mr. McCracken also pleads that the various obligations to pay overtime and holiday compensation form part of the contracts independently of the requirements of the *Code*. In paragraph 53 of his statement of claim, he pleads:

> 53. The Defendant has breached the express, Implied *Code* Terms and/or otherwise implied terms of its contracts of employment with the Class Members that it pay all hours worked, including its obligation to pay overtime at a rate of one and one-half times the Class Members' regular hourly rates for all hours worked in excess of 8 hours in a day or 40 hours in a week, that it properly compensate the Class Members for all hours worked on holidays, and that it keep accurate records of all hours worked. The Plaintiff pleads that these terms form part of the employment contracts independently of the requirements of the *Code*. These terms arise by virtue of the nature of the relationship or contact, the usage or custom in the industry,

> the intention or presumed intention of the parties, the provisions of the Defendant's Overtime and Holiday Policies and applicable prior versions thereof (save for and except any provisions of those Polices that are contrary to the *Code* and in particular section 168, or otherwise illegal, unenforceable or void) and other policies, practices, representations, training materials of class-wide application including, but not limited to, the CN *Code* of Business Conduct and Labour Relations Workshops Participants Manuals.

82 Mr. McCracken pleads that CN has been unjustly enriched as a result of receiving the benefit of the unpaid hours worked by the Class Members. He pleads that the Class Members have suffered a deprivation and that there is no juristic reason why CN should be permitted to retain the benefit of the unpaid hours of work.

83 Mr. McCracken pleads that CN owes him and the Class Members a duty of care to ensure that they are properly classified and compensated for the hours worked at the appropriate rates and that CN has breached that duty and is liable for the tort of negligence.

84 Mr. McCracken pleads that the Class Members are in a position of vulnerability and that CN owes them and has breached a duty of good faith including a duty to honour its statutory and contractual obligations to them and not act in a manner so as to eviscerate or defeat the objectives of the Class Members contracts of employment or the *Code*.

85 Mr. McCracken pleads that on or about July 5, 2002, CN began the illegal policy of uniformly classifying first line supervisors as managerial employees. He alleges that before that date they were treated as non-managerial employees who received wages for overtime and statutory holiday work.

86 He alleges that the reclassification that occurred in July 2002 was arbitrary and not based on any analysis or any proper analysis of the job functions of first line supervisors, which did not change as a part of the reclassification. In paragraph 35 of his statement of claim, he alleges: "In so doing, it failed to implement and follow proper systems, procedures and practices regarding the classification of the Class Members to determine whether it was in compliance with s. 167 (2) of the *Code* in respect of FLSs."

87 CN denies that first line supervisors were treated as non-managerial employees before 2002. It states that it always regarded them as managers who were excluded from the overtime provisions of the *Code*. However, CN did pay overtime wages to its first line supervisors for a time, but these payments stopped in 1998, not 2002, as alleged by Mr. McCracken.

88 CN refers to the First Line Operation Supervisors Changes to Overtime Provisions at p. 49 to make the point that until 2002, CN's overtime policy for the Operational FLSs provided that they were not paid overtime on an hourly basis but rather they were paid a stipend of either 5 or 10% of base salary, which is a compensation scheme for overtime pay that is different from the scheme provided under the *Code*.

89 Mr. McCracken alleges that CN is intentionally avoiding its obligations under the *Code*. He pleads in paragraph 41 of his statement of claim:

> 41. ... the Defendant has used the Policy, and its internal job level grading system, as a pretext to avoid paying Class Members overtime and holiday compensation that it is obligated to pay pursuant to the express and implied *Code* Terms of Class Members' contracts of employment, under the *Code*, and otherwise at law. The Plaintiff pleads that the Policy is an illegal attempt by the Defendant to contract out of statutorily mandated standards under the *Code*, and is void and of no effect.

90 Mr. McCracken alleges that CN knowingly or otherwise engaged in an illegal policy and practice of not maintaining the appropriate records of hours of work in violation of the *Code*. CN denies that it was obliged to keep

these records for management employees including the first line supervisors.

91 With this legal and factual background, I can now turn to the two motions before the Court. I will first discuss CN's motion under Rule 21, the substance of which overlaps with the requirement in s. 5(1)(a) of the *Class Proceedings Act, 1992* that the plaintiff show a reasonable cause of action in order for his action to be certified as a class proceeding.

Rule 21 and s. 5 (1) (A) of the Class Proceedings Act

92 CN's Rule 21 motion is brought pursuant to rles 21.01(1)(a), 21.01(1)(b) and 21.01(3)(a), which state:

> 21.01 (1) A party may move before a judge,
>
> > (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or
> >
> > (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
>
> and the judge may make an order or grant judgment accordingly.
>
> 21.01 (3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,
>
> > (a) the court has no jurisdiction over the subject matter of the action;...
>
> and the judge may make an order or grant judgment accordingly.

93 As I will repeat below, the test for a motion under rule 21.01 3(a) is different from the test for deciding an issue of law under rule 21.01(1)(a) or the test for determining whether a reasonable cause of action has been disclosed under rule 21.01(1)(b). Rules 21.01(1)(a) and 21.01(1)(b) use a "plain and obvious" test. That test, however, does not apply to a motion under rule 21.01 (3)(a), where the test is whether or not the court has jurisdiction over the subject matter of the action: *TeleZone Inc. v. Canada (Attorney General)* (2008), 94 O.R. (3d) 19 (Ont. C.A.), leave to appeal granted, [2009] S.C.C.A. No. 77 (S.C.C.).

94 To make an order under either rule 21.01 (1)(a) or rule 21.01 (1)(b), the court must be satisfied that it is plain and obvious that the allegations pleaded are incapable of supporting a cause of action and that the claim cannot succeed: *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.); *R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.* (1991), 5 O.R. (3d) 778 (Ont. C.A.); *MacDonald v. Ontario Hydro* (1994), 19 O.R. (3d) 529 (Ont. Gen. Div.), aff'd (1995), 86 O.A.C. 37 (Ont. Div. Ct.); *Falloncrest Financial Corp. v. Ontario* (1995), 27 O.R. (3d) 1 (Ont. C.A.).

95 Under rules 21.01 (1)(a) or 21.01 (1)(b), matters of law that are not fully settled should not be disposed of on a motion to strike an action as not showing a reasonable cause of action: *Falloncrest Financial Corp. v. Ontario*, *supra*; *Folland v. Ontario* (2003), 64 O.R. (3d) 89 (Ont. C.A.), leave to appeal to S.C.C. refused [2003] S.C.C.A. No. 249, 229 D.L.R. (4th) vi (note) (S.C.C.); *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (Ont. C.A.).

96 The law must be allowed to evolve and the novelty of a claim will not militate against a plaintiff: *Johnson v. Adamson* (1981), 34 O.R. (2d) 236 (Ont. C.A.), leave to appeal to the S.C.C. ref'd, [1982] S.C.C.A. No. 277, 35

O.R. (2d) 64n (S.C.C.); *MacKinnon v. Ontario (Municipal Employees Retirement Board)*, [2007] O.J. No. 4860 (Ont. C.A.). However, a novel claim must have some elements of a cause of action recognized in law and be a reasonably logical and arguable extension of established law: *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (Ont. S.C.J.) at para. 20; *Silber v. DDJ High Yield Fund*, [2006] O.J. No. 2503 (Ont. S.C.J.); *Harris v. GlaxoSmithKline Inc.*, [2010] O.J. No. 1710 (Ont. S.C.J.).

97 In assessing the cause of action or the defence, the court accepts the pleaded allegations of fact as proven, unless they are patently ridiculous or incapable of proof: *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735 (S.C.C.); *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.); *Falloncrest Financial Corp. v. Ontario*, *supra*; *Folland v. Ontario*, *supra*; *Canadian Pacific International Freight Services Ltd. v. Starber International Inc.* (1992), 44 C.P.R. (3d) 17 (Ont. Gen. Div.) at para. 9; *Harris v. GlaxoSmithKline Inc.*, *supra*.

98 Rule 21.01 (1)(a) may be applied to strike a claim where the limitation period has expired and no additional facts could be pleaded to alter that conclusion: *Beardsley v. Ontario*, [2001] O.J. No. 4574 (Ont. C.A.) at para. 21.

99 Rule 21.01(2) restricts what evidence is admissible if the motion is brought under rules 21.01(1)(a) or 21.01(1)(b). However, the ordinary rules about evidence on motions applies to a motion pursuant to subrule 21.01(3)(a). Rule 21.01(2) states:

> 21.01 (2) No evidence is admissible on a motion,
>
> (a) under clause (1) (a), except with leave of a judge or on consent of the parties;
>
> (b) under clause (1) (b).

100 Thus, no evidence is permitted on a motion under rules 21.01(1)(a) or 21.01(1)(b). The court must accept the facts alleged in the statement of claim as proven unless they are patently ridiculous or incapable of proof: *Falloncrest Financial Corp. v. Ontario*, *supra*.

101 A motions judge, however, is entitled to consider any documents specifically referred to and relied on in the pleading: *Web Offset Publications Ltd. v. Vickery* (1999), 43 O.R. (3d) 802 (Ont. C.A.); *Corktown Films Inc. v. Ontario* (1996), 34 B.L.R. (2d) 168 (Ont. Gen. Div.); *Montreal Trust Co. of Canada v. Toronto Dominion Bank* (1992), 40 C.P.C. (3d) 389 (Ont. Gen. Div.); *Harris v. GlaxoSmithKline Inc.*, *supra*.

102 The law with respect to a Rule 21 motion is also applied to determine whether or not a proposed representative plaintiff has satisfied the first criterion for certification of an action as a class proceeding.

103 The "plain and obvious" test for disclosing a cause of action from *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.) is used to determine whether the proposed class proceedings discloses a cause of action: *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (Ont. C.A.) at p. 679, leave to appeal to S.C.C. ref'd, (2000), [1999] S.C.C.A. No. 476 (S.C.C.); *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (Ont. S.C.J.) at para. 19, leave to appeal granted, (2003), 64 O.R. (3d) 42 (Ont. Div. Ct.), aff'd (2004), 70 O.R. (3d) 182 (Ont. Div. Ct.); *Healey v. Lakeridge Health Corp.*, [2006] O.J. No. 4277 (Ont. S.C.J.) at para. 25; thus, a claim will be satisfactory unless it has a radical defect or it is plain and obvious that it could not succeed.

104 In a proposed class proceeding, in determining whether the pleading discloses a cause of action, no evidence is admissible, and the material facts pleaded are accepted as true, unless patently ridiculous or incapable of proof. The pleading is read generously and a pleading will be struck out only if it is plain, obvious, and beyond a reasonable doubt that the plaintiff cannot succeed. See: *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at para. 25; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para.

41, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50 (S.C.C.), rev'g (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.); *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.) at p. 469.

The Court's Jurisdiction under Rule 21 to Determine Its Jurisdiction

105 Mr. McCracken makes what is, in effect, a preliminary objection to the court exercising it jurisdiction under Rule 21 in the circumstances of this case.

106 Mr. McCracken argues that for the purposes of the Rule 21 motion, it is a presumptive fact from the statement of claim that first line supervisors are not managers and that they do not exercise management functions. The non-managerial status, he submits, is a pleaded fact that must be taken as true for the purposes of the Rule 21 motion. He then submits that with this presumptive fact, there is not a question of law amenable to determination on a Rule 21 motion and, therefore, the Rule 21 motion should be dismissed.

107 I agree that whether the first line supervisors are non-managerial employees is not an issue that could or should be determined under Rule 21. However, that is not the issue that I will decide. The issue that I will decide is: "Given that for the purpose of the motion, the first line supervisors are not managers, does the Superior Court have subject matter jurisdiction to determine their grievance that they have not been paid overtime and holiday pay or is the subject matter jurisdiction exclusively that of the officials and administrative tribunals under the *Canada Labour Code*?" In my opinion, that is an issue of law amenable to the Court's jurisdiction under rule 21.01(3)(a).

108 As the Court of Appeal noted in *TeleZone Inc. v. Canada (Attorney General)* (2008), 94 O.R. (3d) 19 (Ont. C.A.), leave to appeal granted, [2009] S.C.C.A. No. 77 (S.C.C.) at paras. 3, 5, and 92, the term "jurisdiction" has many meanings. When there is a straightforward question about whether a court has jurisdiction over the subject matter of a dispute, the question is properly determined without reference to extrinsic evidence of facts not pleaded. In such cases, as noted in *Telezone Inc.*, as long as the "facts pleaded in the statement of claim raise a claim cognizable in the Superior Court, the Superior Court has jurisdiction to decide the claim" unless there is "legislation or... an arbitral agreement that clearly and unequivocally removes that jurisdiction". Unlike a rule 21.01(1) motion to strike a claim, there is no forgiving "plain and obvious" standard, whereby the moving party must establish beyond peradventure that the court lacks jurisdiction. Either the court has jurisdiction or it does not.

109 Mr. McCracken relies on *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141 (S.C.C.) at paras. 27-34 for the proposition that it is inappropriate to move under rule 21.01 (3) to resolve a question of jurisdiction that turns on contested facts and that the jurisdictional issue must be determined on a full evidentiary record. In *Goudie*, there was a contested factual question that was within the jurisdiction of the court and outside the jurisdiction of a labour arbitrator under a collective agreement. In *Goudie*, animal control officers alleged that they had pre-employment contracts that promised them that they would continue to receive certain employee benefits. That contested factual allegation was within the subject matter jurisdiction of the courts and had to be decided before that matter could be arbitrated.

110 The rule 21.01(3)(a) motion in the case at bar, however, does not turn on contested facts. For the purposes of this motion, I do not have to decide whether Mr. McCracken and the Class Members are managerial or non-managerial, which would be the contested matter to be determined on a full evidentiary record. All I need to decide the matter is Mr. McCracken's statement of claim and the assumed to be true fact that the first line supervisors are not managers. The authority of *Goudie* is irrelevant to the circumstances of the case at bar.

111 Mr. McCracken also argues that CN is using Rule 21 in a procedurally unsuitable manner, to advance defences without having to plead, let alone being subjected to discovery or cross-examination. I disagree with this argument. CN is not advancing the obvious defence, which would be one of mixed fact and law; that Mr. McCracken and all or most of the first line supervisors have been correctly treated as managerial employees, because for the

purposes of this motion that defence is not open to them. Rather, they are advancing the argument that as a matter of jurisdiction, it is exclusively for the officials and the tribunals under Part III of the *Code* to decide this issue of mixed fact and law.

112 I, therefore, disagree with Mr. McCracken's preliminary objection to the rule 21.01(3)(a) motion. In my opinion, this Court has the jurisdiction to determine whether it has subject matter jurisdiction over Mr. McCracken's claims and causes of action.

Whether the Court Has Subject Matter Jurisdiction

General Principles

113 Pursuant to rule 21.01(3)(a), CN submits that Mr. McCracken's claims should all be dismissed because the Superior Court does not have subject matter jurisdiction to decide these claims. Then, assuming that the Court has jurisdiction, pursuant to rules 21.01(1)(a) and 21.01(1)(b), CN goes on to argue that Mr. McCracken has not shown a reasonable cause of action. I have outlined CN's arguments in the introduction to these Reasons for Decision. In this part of my Reasons for Decision, I will focus my attention on the arguments under rule 21.01(3)(a).

114 For the reasons that follow, it is my opinion that the Court does have subject matter jurisdiction and there is a cause of action by force of statute to enforce the overtime wage entitlements created by the *Code*. On this point, I disagree with and decline to follow *Fulawka v The Bank of Nova Scotia*, *supra*. Thus, for the reasons set out below, I dismiss CN's motion made pursuant to rule 21.01(3)(a).

115 I begin the discussion about subject matter jurisdiction with the point that at common law, there is no entitlement to overtime pay or holiday pay at a special rate. These are rights conferred by employment and labour law statutes. See: *Macaraeg v. E Care Contact Centers Ltd.* (2008), 295 D.L.R. (4th) 358 (B.C. C.A.), leave to appeal ref'd [2008] S.C.C.A. No. 293 (S.C.C.); *Stewart v. Park Manor Motors Ltd.* (1967), [1968] 1 O.R. 234-242 (Ont. C.A.).

116 Since the rights to be paid a special rate of pay for overtime and for holiday work are statutory rights that did not exist at common law or equity, the question of subject matter jurisdiction is a question of determining what Parliament intended about the enforcement of those rights. In the case of the *Canada Labour Code*, Parliament has set out a scheme that provides for administrative agencies and tribunals to enforce claims for overtime and holiday pay, and the precise question is whether or not Parliament also intended to confer jurisdiction on the courts to enforce the rights provided by the *Code*.

117 It is important not to misstate this question, because the question is not whether Parliament intended to oust the court's existing jurisdiction over employment law or contracts generally. In the case at bar, there is no indication in the *Code* that Parliament intended to interfere with the court's existing employment law or contract law jurisdiction. Indeed, the statutory indications that I will discuss below are expressly to the contrary. But overtime and holiday wages are statutory rights that did not exist at common law and equity and the question is whether Parliament intended to add these statutory rights to the court's common law and equitable jurisdiction.

118 Speaking generally, jurisdiction may be expressly conferred on a court to enforce rights that are created by statute. An everyday example is the considerable jurisdiction expressly conferred on courts to divide matrimonial property and to order child and spousal support, some of which jurisdiction would not be available to the court but for it having been statutorily conferred on the court.

119 It is, therefore, not true to say that a Canadian superior court has a universal jurisdiction, and such an idea would be contrary to the rule of law. There are many areas of the law where the court's jurisdiction to deal with a

matter has to be created. This point is important in the case at bar because Mr. McCracken relies on the principles that: (a) Ontario's Superior Court is a superior court of general jurisdiction and has universal jurisdiction over all matters of substantive law; and (b) it requires clear and unequivocal language for Parliament or a legislature to oust the Superior Court's substantive law jurisdiction: *Michie Estate v. Toronto (City)* (1967), [1968] 1 O.R. 266 (Ont. H.C.) - 271; *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*, [1972] 2 O.R. 280 (Ont. C.A.) - 284; *TeleZone Inc. v. Canada (Attorney General)* (2008), 94 O.R. (3d) 19 (Ont. C.A.), leave to appeal granted, [2009] S.C.C.A. No. 77 (S.C.C.); *Peacock v. Bell* (1667), 1 Wms. Saund. 73, 85 E.R. 84 (Eng. K.B.), at pp. 87 -88. He relies on the principle that a statute should not be interpreted as abrogating the inherent jurisdiction of the superior courts unless it employs clear language to this effect: *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 (S.C.C.).

120 In the case at bar, in reaching my conclusion that the court has subject matter jurisdiction, I do not rely on these principles about the Superior Court's general jurisdiction. I do not dispute the principles, but they beg the question of what is the Superior Court's jurisdiction. The Superior Court's jurisdiction may be called universal, but that universe is not comprehensive of all the jurisdictional universes that exist. Sometimes, it takes a statute to create and confer jurisdiction where none existed before, and in those circumstances, if the jurisdiction is conferred exclusively on an administrative tribunal and if the legislation is constitutionally *infra vires*, then it is not correct to speak of the Superior Court's jurisdiction being ousted because it did not exist to be ousted. As will be seen, I come to my conclusion based only on interpreting the intent of Parliament as expressed in the *Canada Labour Code*.

121 It is necessary to emphasize that there is a difference between a court not having jurisdiction in the first place and having its jurisdiction ousted. Mr. McCracken argues that CN's jurisdictional arguments are premised on a mischaracterization of his claim and that the correct characterization is that the claims are in contract, unjust enrichment, or negligence all of which are within the Ontario Superior Court's jurisdiction. I agree, of course, that the Superior Court has jurisdiction over claims in contract, unjust enrichment, and tort, but I disagree with Mr. McCracken's suggestion that CN's argument about the court's subject matter jurisdiction is premised on a mischaracterization of Mr. McCracken's claims. The point of CN's argument is that however the claims may be characterized, they are not within the subject matter jurisdiction of the Superior Court.

122 In *TeleZone Inc. v. Canada (Attorney General)*, *supra*, at para. 3, the Court of Appeal stated that where jurisdiction to adjudicate a claim exists, it takes clear legislative language to remove jurisdiction. In the case at bar, however, the question is not whether Parliament intended to remove the court's employment law jurisdiction; rather, the question is one of determining whether Parliament's language conferred or recognized a superior court jurisdiction to adjudicate Mr. McCracken's claims that are based on the *Code*.

123 Still speaking generally, a legislature or Parliament may confer jurisdiction exclusively on an administrative tribunal; for example, a labour relations board or a landlord or tenant tribunal may be the recipient of an exclusive jurisdiction, which jurisdiction, however, might be subject to judicial or appellate review by a court. The conferral of jurisdiction on to an administrative tribunal, which must be constitutionally valid, may or may not oust the Superior Court's jurisdiction. That would depend upon whether there was an existing jurisdiction to be ousted. But, if the administrative tribunal's jurisdiction is indeed exclusive, then the Court would not have subject matter jurisdiction but for its judicial review jurisdiction under the principles of administrative and constitutional law, which may, however, also be curtailed by privative clauses in the legislation that confers the subject matter jurisdiction.

124 In the circumstances where an administrative tribunal has exclusive jurisdiction, there is a principle that a plaintiff may not cast his or claim as one within the court's existing jurisdiction to thereby circumvent the administrative tribunal's exclusive jurisdiction. If the essential character of the dispute, in its factual context, arises from the statutory scheme, the fact that the claim is asserted for a cause of action that is ordinarily within the subject matter jurisdiction of the court and upon which the statute may be silent does not provide the court with jurisdiction over the dispute. If the substance of the claim falls within the ambit of the statute and the statute is comprehensive or exhaustive, then the court does not have subject matter jurisdiction whatever jurisdictional label the claimant chooses to describe his or her claim: *Snopko v. Union Gas Ltd.*, [2010] O.J. No. 1335 (Ont. C.A.) at para. 24.

125 The characterization of the dispute is resolved by whether the subject matter of the dispute expressly or inferentially is governed by the statute: *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 (S.C.C.); *Giorno v. Pappas* (1999), 42 O.R. (3d) 626 (Ont. C.A.); *Regina Police Assn. v. Regina (City) Police Commissioners*, [2000] 1 S.C.R. 360 (S.C.C.); *Toronto Police Assn. v. Toronto Police Services Board*, [2007] O.J. No. 4156 (Ont. C.A.), leave to appeal to S.C.C. ref'd Sept. 25, 2008 [2008 CarswellOnt 5593 (S.C.C.)].

126 The jurisdictional principal that it is necessary to determine the substance and not the legal form of the claim in order to determine whether a court or tribunal or both have subject matter jurisdiction is important to the case at bar. This principle does not seem to have been argued before Justice Strathy in *Fulawka v Bank of Nova Scotia*, *supra*, and I will return to these points below, but I note here three points about the matter of how a claim is characterized that are relevant to a discussion of *Fulawka* and, more importantly, that are relevant to determining the case at bar.

127 First, in the principle that involves characterizing the essential nature of a dispute, rests the rebuttal to Mr. McCracken's argument that his claims are within the Ontario Superior Court's ordinary subject matter jurisdiction to enforce contracts, torts, and other causes of action. His claims are indeed dressed up as causes of action within the Superior Court's subject matter jurisdiction, but, substantively, their subject matter are claims within the jurisdiction of the officials and tribunals under Part III of the *Canada Labour Code*. Under the characterization principle, if Parliament intended to confer an exclusive jurisdiction on the officials of the *Code* to enforce claims for overtime wages, then the Superior Court would not have jurisdiction no matter how the claim was jurisdictionally labeled.

128 Second, and this point is a corollary to the first point, if it is determined that the officials under the *Code* have exclusive subject matter jurisdiction to enforce claims for overtime wages, then the statutory rights cannot inform claims for negligence or breach of contract.

129 Third, conversely, if Parliament intended to confer or maintain a concurrent jurisdiction in the civil courts, there would have to be a means for the claimant of the statutory right to pursue his or her claim in the civil courts. As the discussion below will show, one means is by implying contract terms by force of statute.

130 Returning to general principles, a legislature or Parliament may expressly and clearly confer a civil remedy or indicate an intention to confer a civil remedy so that a court will have jurisdiction, sometimes a concurrent jurisdiction, to enforce the statutory right. The case at bar is not such a case because there is no section in the *Code*, as there is in some provincial employment statutes, that makes it indisputable that Parliament intended to confer a concurrent jurisdiction

131 Still further, speaking generally, a legislature or Parliament may confer jurisdiction on an administrative tribunal but not expressly indicate whether that jurisdiction is exclusive and exhaustive. In these instances, which are the circumstances of the immediate case, it is a matter of interpretation of the statute to determine whether a legislature or Parliament intended the court to have subject matter jurisdiction to enforce the statutory rights.

132 The general interpretative principle, which is subject to exceptions, is that if a statute establishes a legal right or entitlement and provides its own remedy, then the court does not have jurisdiction to enforce a claim under the statute: *Orpen v. Roberts*, [1925] S.C.R. 364 (S.C.C.). More precisely, if the Act provides a right and a remedy, the statutory scheme is exclusive, but the general rule would give way if the scope and language of the Act indicates that the legislature did not intend the Act's remedy to be exclusive: *Stewart v. Park Manor Motors Ltd.*, *supra*. Another general principle is that the breach of a statute does not give rise to common law cause of action: *Saskatchewan Wheat Pool v. Canada*, [1983] 1 S.C.R. 205 (S.C.C.); *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.).

133 There are many cases where courts have been asked to apply these principles, and in making their argu-

ments, the parties have referred me to many of those many cases. I was referred to employment law cases where courts have ruled that they have subject matter jurisdiction to enforce statutory rights. See: *Stewart v. Park Manor Motors Ltd.* (1967), [1968] 1 O.R. 234 (Ont. C.A.); *Hopkins v. Paul Revere Insurance Co.*, [1989] O.J. No. 2424 (Ont. Dist. Ct.); *Poletek v. Thomas Cook Group (Canada) Ltd.*, [1997] O.J. No. 1289 (Ont. Gen. Div.); *Ostashek v. Dental Aesthetics Ltd.*, [1998] A.J. No. 718 (Alta. Master) (Master Breitkreuz); *Franklin v. University of Toronto* (2001), 56 O.R. (3d) 698 (Ont. S.C.J.); *Kumar v. Sharp Business Forms Inc.*, [2001] O.J. No. 1729 (Ont. S.C.J.); *Beaulne v. Kaverit Steel & Crane ULC*, [2002] A.J. No. 1066 (Alta. Q.B.); *Fredericks v. 2753014 Canada Inc.*, [2008] N.S.J. No. 570 (N.S. S.C.).

134 I was referred to cases, where applying the above principles, courts have ruled that they are without jurisdiction because an administrative tribunal has exclusive jurisdiction. See: *Sitka Forest Products Ltd. v. Andrew*, [1988] B.C.J. No. 2069 (B.C. S.C.) (employment standards); *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 (S.C.C.) and *St. Anne-Nackawic Pulp & Paper Co. v. C.P.U., Local 219*, [1986] 1 S.C.R. 704 (S.C.C.) (labour arbitrators with respect to collective agreements); *Bhadauria v. Seneca College of Applied Arts & Technology*, [1981] 2 S.C.R. 181 (S.C.C.) and *Keays v. Honda Canada Inc.*, [2008] 2 S.C.R. 362 (S.C.C.) at para 63 (human rights tribunal); See also *Politzer v. 170498 Canada Inc.*, [2005] O.J. No. 5224 (Ont. S.C.J.) and *Mackie v. Toronto (City)*, 2010 ONSC 3801 (Ont. S.C.J.) (landlord and tenant tribunal).

135 In this last regard, CN referred me to employment law cases where courts have ruled that employment standards legislation has been held to provide a comprehensive *Code* that did not give the employee the right to pursue a civil cause of action based on the statutory obligations created by the legislation. See: *Pateman v. Ray's Ambulance Service Ltd.* (1973), 38 D.L.R. (3d) 709 (Sask. Q.B.); *Kenney v. Browning-Ferris Industries Ltd.* (1988), 63 Alta. L.R. (2d) 164 (Alta. Q.B.); *Thiessen v. Carriere Toyota NWT Ltd.* (1995), 15 C.C.E.L. (2d) 203 (N.W.T. S.C.) and *Macaraeg v. E Care Contact Centers Ltd.* (2008), 295 D.L.R. (4th) 358 (B.C. C.A.), leave to appeal ref'd [2008] S.C.C.A. No. 293 (S.C.C.), rev'g [2006] B.C.J. No. 3211 (B.C. S.C.).

136 I was referred to *Bisaillon c. Concordia University*, [2006] 1 S.C.R. 666 (S.C.C.), which is interesting because it was a proposed class action. In this case, a member of the University's pension plan sought to commence a class action. The proposed class included unionized and non-unionized members of the pension plan. The plaintiff was a unionized employee, and his collective agreement mentioned the pension plan. By a narrow split decision (4 to 3), the Supreme Court of Canada held that the subject matter of the action fell within the exclusive jurisdiction of a labour arbitrator despite the fact that the pension plan applied to employees represented by nine different unions as well as several hundred non-unionized employees.

137 I was referred to *Adams v. Cusack* (2006), 264 D.L.R. (4th) 692 (N.S. C.A.). In this case, the Nova Scotia Court of Appeal held that the plaintiff, a non-unionized public servant, had no recourse to a civil action for constructive dismissal because all of his possible employment-related claims fell within the authority of the Public Service Commission and Public Service Labour Relations Board.

138 In opposition to the cases referred to by CN, Mr. McCracken referred me to *Stewart v. Park Manor Motors Ltd.* (1967), [1968] 1 O.R. 234 (Ont. C.A.), which I regard as a very important and helpful case to resolve the issues at bar, because it sets out and explains the general principles to be applied.

139 In *Stewart*, an employee was not granted a vacation as required by the *Hours of Work and Vacations with Pay Act*, R.S.O. 1960, c.181. Under the Act, it was a summary conviction offence to fail to pay vacation pay and upon conviction, the summary convictions court had jurisdiction to order that the vacation pay be paid to the employee. However, no summary conviction proceedings were initiated, and the employee sued the employer in the County Court. The employee's action for vacation pay was successful, and the employer appealed. The Court of Appeal dismissed the appeal. The Court of Appeal held that the Act created the new obligation of paying vacation pay. Following *Orpen v. Roberts*, [1925] S.C.R. 364 (S.C.C.) and several English authorities, the Court of Appeal held that where a statute creates a new right or obligation and also provides a scheme for enforcement, it is a question of

interpreting the words and operation of the statute to determine whether the legislator intended the statutory remedy to be exclusive. The general rule is that if the Act provides a right and a remedy, the statutory scheme is exclusive, but the general rule would give way if the scope and language of the Act indicated that the Legislature did not intend the Act's remedy to be exclusive. The Court of Appeal analyzed the Act and concluded that the Legislature had not intended to preclude court proceedings.

140 In a point that is significant to the case at bar, the Court of Appeal in *Stewart* also held that where the interpretation of the statute leads to the conclusion that a court action was not precluded, then the effect of the statute is to introduce by force of the statute a term of the contract between the parties. Thus, Justice Schroeder stated at para. 10:

> ... the statute under review should not be construed as excluding the respondent's right to invoke the jurisdiction of the civil Courts. It appears to me that the true answer to the position taken by the appellant is this, that the essential effect of the Act is to introduce a further contractual term into a contract of employment by proving for the granting of an annual vacation or payment in lieu thereof at a stated rate. Thus that amenity becomes by force of the statute a term of the contract between the parties as fully and effectively as if it had been included therein by their own agreement.

141 The *Stewart* case was adopted by the Saskatchewan Court of Appeal in *Kolodziejski v. Auto Electric Service Ltd.* (1999), 174 D.L.R. (4th) 525 (Sask. C.A.), which overturned the older case of *Pateman v. Ray's Ambulance Service Ltd.* (1973), 38 D.L.R. (3d) 709 (Sask. Q.B.). See also *Watson v. Wozniak*, [2004] S.J. No. 511 (Sask. Q.B.).

The Concurrent Jurisdiction to Enforce Wage Claims

Introduction

142 Moving from the general principles to the particulars of the case at bar, the *Canada Labour Code* does not unequivocally make the jurisdiction of its officers and tribunals about overtime and holiday pay an exclusive jurisdiction, and, in the case at bar, the *Code* does not expressly confer jurisdiction on the court with respect to enforcing employment standards under Part III of the *Code*. Thus, it is open for analysis and argument about what Parliament intended.

143 I will make my analysis in three stages as follows:

144 In the first stage, I will analyze the *Canada Labour Code* in the light of the general principles discussed above and several other principles that are relevant to the analysis.

145 In the second stage, I will discuss several cases that CN relied on to argue that the Superior Court does not have subject matter jurisdiction and several rebuttal cases relied on by Mr. McCracken.

146 In the third stage, I will discuss the relatively few court cases that have directly addressed the question of the court's subject matter jurisdiction under the *Canada Labour Code*.

First Stage of the Analysis

147 In the first stage of my analysis, I will review the text of the *Canada Labour Code* to determine Parliament's intentions about the jurisdiction of the court to enforce statutory rights found in Part III of the *Code*.

148 I will begin with Mr. McCracken's "quick kill" argument that s. 261 of the *Code* makes it clear that the

courts have concurrent jurisdiction with the administrative process under the *Code*.

149 Section 261 provides that "no civil remedy of an employee against his employer is suspended or affected by this Part". Mr. McCracken argues that standing alone, s. 261 shows that Parliament intended to confer jurisdiction on the Superior Court to enforce claims for breach of the *Code*.

150 In my opinion, however, standing alone, s. 261 actually begs the question of whether there is a civil remedy. It preserves existing rights, but the section does not explain what those rights might be. In *A'Hearn v. T.N.T. Canada Inc.* (1990), 74 D.L.R. (4th) 663 (B.C. C.A.), leave to appeal ref'd (1991), [1990] S.C.C.A. No. 530 (S.C.C.), the British Columbia Court of Appeal came to the same conclusion when a similar argument was made about how to interpret a similar provision in the British Columbia legislation. Similarly, see also: *Kenney v. Browning-Ferris Industries Ltd.* (1988), 63 Alta. L.R. (2d) 164 (Alta. Q.B.) and *Thiessen v. Carriere Toyota NWT Ltd.* (1995), 15 C.C.E.L. (2d) 203 (N.W.T. S.C.) at para. 9.

151 Mr. McCracken's argument, in effect, is to read s. 261 as if it read: "the civil remedy of an employee against his employer is not suspended or affected by this Part," but that is not what the section says.

152 There is, however, a more elaborate argument available to Mr. McCracken that s. 261 indicates that Parliament intended the courts to have jurisdiction to enforce wage claims for overtime. The more elaborate argument is that it may be inferred from reading the whole *Canada Labour Code* that Parliament intended the courts to have this jurisdiction or else there would be no need to include a provision like s. 261 in the Act.

153 The precise line of the elaborate argument is that: (a) under s. 166, "wages" includes "every form of remuneration for work performed"; (b) under s. 166, "overtime" means hours of work in excess of standard hours of work; (c) s. 174 provides for overtime pay "at a rate of wages"; (d) therefore, overtime pay is included in wages; (e) s. 247 requires an employer to pay "to any employee any wages to which the employee is entitled"; (f) therefore, an employer is obliged to pay overtime pay as wages; (g) s. 258 provides that where an employer has been convicted of an offence, the convicting court shall "order the employer to pay to the employee any overtime pay, vacation pay, holiday pay or other wages or amounts to which the employee is entitled;" (h) therefore, under the administrative process of the *Code* an employer may be ordered to pay overtime wages; (i) however, under s. 261 "no civil remedy for arrears of wages [which includes overtime pay] is suspended or affected by [the administrative process of Part III]"; and (j) therefore, by inference, there must be a civil claim for overtime pay, because otherwise s. 261 would have no purpose in preserving a civil claim for overtime pay which is included in wage claims.

154 There are other indications that Parliament intended that there be a civil claim to enforce wage claims including payment of overtime.

155 Under s. 249 (1) of the *Code*, the Minister of Labour is empowered to appoint inspectors, and under s. 249 (2), the inspectors have considerable powers of inspection, examination, and to compel disclosure with respect to wages and other matters. Section 249(7) provides that "no inspector, and no person who has accompanied or assisted the inspector in carrying out the inspector's duties and functions, shall be required to give testimony in any civil suit or civil proceedings". This provision presupposes that there would be civil proceedings that would benefit by testimony from the inspector to enforce wage claims, which would include claims for overtime pay.

156 Under s. 240 (1) of the *Code*, a complaint may be made to an inspector for unjust dismissal, and pursuant to subsections 241(3) and (4) where the complaint is not settled, there may be a reference to an adjudicator. Under s. 242(4), where an adjudicator decides that a person has been unjustly dismissed, the adjudicator may order the employer to pay the person compensation not exceeding the amount of money that is equivalent to the remuneration [which could include overtime pay] that would, but for the dismissal, have been paid by the employer to the person. Section 246(1) provides that no civil remedy of an employee against his employer is suspended of affected by sec-

tions 240 to 245. Once again, s.246 (1) presupposes that there must be a civil action for compensation for wages including overtime pay.

157 Section 168(1) of the *Code* provides that Part III applies notwithstanding any other law or any custom, contract or arrangement, but nothing in Part III shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part. Under s. 168(1) contract rights that are more favourable than the rights under the *Code* are not affected. This suggests that, for example, a more favourable right to overtime pay could be enforced by an action in the courts for breach of contract. This example, in turn, suggests that Parliament intended that there be a civil action to enforce rights to overtime.

158 This last example is particularly interesting in the case at bar, because, as noted above in the factual background, it was CN's evidence that until 2002, CN's overtime policy for the Operational FLSs provided that they were not paid overtime on an hourly basis, but rather they were paid a stipend of either 5% or 10% of base salary, which is a compensation scheme for overtime pay that is different from and presumably more favourable than the scheme provided under the *Code*. It would also appear that the FLSs would have been able to enforce this entitlement to overtime pay by a court action.

159 Moving on from just the textual analysis, it may be recalled that in *Stewart v. Park Manor Motors Ltd., supra*, the Court of Appeal concluded that the prosecution provisions of the employment legislation were inadequate to protect employees and did not preclude a civil action. In contrast, the *Code* provides not only for prosecution but also for enforcement of wage claims by payment orders made by inspectors under s. 251(1) that may be confirmed or varied by a referee under s. 251.12(4).

160 I concede the more extensive provisions of the *Canada Labour Code* favour CN's argument that where there is an adequate scheme under the statute, then the statutory jurisdiction precludes resort to the courts. However, as postulated in *Stewart v. Park Manor Motors Ltd.*, there are exceptions to the general rule and ultimately it is a matter of statutory interpretation as to what was the legislator's intent. The provisions that I have reviewed from the *Code* suggest that Parliament did not view the Act's scheme for the enforcement of wage claims, including overtime pay, as comprehensive and in a variety of ways indicated that the courts should have a concurrent subject matter jurisdiction.

161 Subject to continuing the analysis through its second and third stages, I conclude that Parliament intended the courts to have a concurrent jurisdiction to enforce claims for overtime and holiday pay.

162 Before moving on to the second stage of my analysis, I note that in interpreting the intent of Parliament, I did not rely on anything said in the reports in *Hansard* about the debates in Parliament about the legislation, notwithstanding the submissions of Mr. McCracken that I do so. I did not find the debates helpful in determining Parliament's intent.

Second Stage of the Analysis

163 In the second stage of the analysis, I will discuss several cases that CN relied on to argue that the Superior Court does not have subject matter jurisdiction and several rebuttal cases relied on by Mr. McCracken.

164 *Pateman v. Ray's Ambulance Service Ltd.* (1973), 38 D.L.R. (3d) 709 (Sask. Q.B.) was a case about the right to overtime pay under s. 17 of Saskatchewan's *Labour Standards Act*, S.S. 1969, c. 24. In this case, Justice Tucker reluctantly came to the conclusion that the plaintiffs' claims for unpaid overtime wages were outside the subject matter jurisdiction of the Court of Queen's Bench. Justice Tucker reasoned that the legislation conferred a new right and also a special and particular remedy for enforcing the right. In these circumstances, the rule taken from

Orpen v. Roberts, [1925] S.C.R. 364 (S.C.C.) and other cases was that *prima facie* a person claiming that the statute had been infringed can use only the statutory remedies but the object and provisions of the statute as a whole had to be examined to determine whether the statutory remedies were to be the sole remedies available. After making this examination of the *Labour Standards Act*, Justice Tucker decided that the *prima facie* rule applied and the Court did not have subject-matter jurisdiction.

165 In my opinion, Justice Tucker applied the correct methodology, which is the methodology adopted by the Ontario Court of Appeal in *Stewart v. Park Manor Motors Ltd.*, *supra*. It is the same methodology that I have applied above. I need not decide whether his conclusion that the Saskatchewan statute did not provide the court with subject matter jurisdiction is correct. I need not make that decision because it would not be helpful in deciding the case at bar that must address a statute that is not identical with the Saskatchewan statute and that therefore, ultimately requires its own analysis of its text and operation.

166 In any event, as noted above, the Saskatchewan Court of Appeal overturned the *Pateman* decision in *Kolodziejski v. Auto Electric Service Ltd.* (1999), 174 D.L.R. (4th) 525 (Sask. C.A.), which was a case about a claim for unpaid holiday pay under the *Labour Standards Act*, R.R.S. 1998, c. L-1. The appellate court overturned *Pateman* by adopting *Stewart v. Park Manor Motors Ltd.* (1967), [1968] 1 O.R. 234 (Ont. C.A.) and by concluding that the legislature had intended that the Court have jurisdiction notwithstanding that there was an administrative scheme to enforce rights newly created by statute.

167 In *Kolodziejski*, the Saskatchewan appellate court, reinforced its conclusion by relying on *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) and *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.) by taking from these cases an interpretative principle that labour standards legislation is "benefits-conferring legislation" and, accordingly, in any cases of doubt about the statute's interpretation, the court should choose the interpretation that would be most beneficial to the beneficiary of the rights conferred and that would extend the legislation's protections as much as possible.

168 Digressing for a moment from the case law analysis to the case at bar, it is not necessary for me to rely on the interpretative principle employed by the Saskatchewan Court of Appeal in *Kolodziejski* because my conclusion is that based on a reading of the whole statute, the intention of Parliament was to confer a concurrent jurisdiction on the Superior Court. That conclusion is based on my analysis of the *Canada Labour Code* independent of this interpretative principle about benefits-conferring legislation. That said, I will rely on the principle because it reinforces my conclusion.

169 *Kenney v. Browning-Ferris Industries Ltd.* (1988), 63 Alta. L.R. (2d) 164 (Alta. Q.B.) is an Alberta case that applied the Saskatchewan case of *Pateman v. Ray's Ambulance Service Ltd.* (1973), 38 D.L.R. (3d) 709 (Sask. Q.B.). As occurred in *Pateman*, Justice Conrad applied the correct methodology, and after reviewing the totality of the Alberta legislation, he concluded that the legislature had indicated that the statute was a complete *Code*. Justice Conrad stated that he must interpret the statute before him, and he concluded that the plaintiff could not enforce his statutory rights in the courts. I must interpret the *Canada Labour Code*, and there is nothing in the *Kenney* case that persuades me that Parliament intended to make the *Code* a complete code that would preclude resort to the courts to enforce a claim for overtime wages.

170 In advancing its argument, CN relied heavily on the decision of the British Columbia Court of Appeal in *Macaraeg v. E Care Contact Centers Ltd.* (2008), 295 D.L.R. (4th) 358 (B.C. C.A.), leave to appeal ref'd [2008] S.C.C.A. No. 293 (S.C.C.), rev'g [2006] B.C.J. No. 3211 (B.C. S.C.). In *Macaraeg*, in a proposed class action, the Court of Appeal held that overtime rights under British Columbia legislation could not be enforced by a civil action.

171 In *Macaraeg*, Justice Chiasson stated at para. 45: "the question is not whether the legislation takes away the right to bring a civil action, but whether it [the Legislature] intended that civil action be available as an exception to

the general rule that rights conferred by statute are to be enforced in the statutory regime". As the discussion above and below reveals, that is indeed the question to be asked to determine whether the court has subject matter jurisdiction.

172 Justice Chiasson then undertook a detailed analysis of numerous cases about employment standards legislation from across the country, including *Kolodziejski v. Auto Electric Service Ltd.* (1999), 174 D.L.R. (4th) 525 (Sask. C.A.); *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.) and *Beaulne v. Kaverit Steel & Crane ULC*, [2002] A.J. No. 1066 (Alta. Q.B.), ultimately to return to the law as it was set out in *Stewart v. Park Manor Motors Ltd.* (1967), [1968] 1 O.R. 234 (Ont. C.A.), which law, in turn, had been taken from *Orpen v. Roberts*, [1925] S.C.R. 364 (S.C.C.). The heart of his judgment comes in paragraphs 74 and 78 of his judgment, where he states, with my emphasis added:

> 74. In my view, in ascertaining the intention of the legislators an important *indicium* is whether the legislation provides effective enforcement of the right conferred by statute. If the statute does so, there is no need for enforcement outside the statute and prima facie there is no civil cause of action. If the statutory remedy is inadequate, a logical conclusion is the Legislature intended the right to be enforceable by civil action. If it were not, granting the right would be pyrrhic. It is at this stage of the analysis in the context of employment standards legislation that the issue of implied contractual terms arises.
>
> 75. I do not accept the proposition articulated by the court in *Kolodziejski* at para. 21 when interpreting Stewart:
>
> The decision [in *Stewart*] re-states the underlying basis of the employment standards legislation which is to introduce further terms into employment contracts which can be enforced in the same manner as any other contractual term.
>
> 76 The proposition is based, in part, on the characterizing of employment standards legislation as "benefits-conferring" (*Re Rizzo & Rizzo Shoes Ltd.*). In my view, there is no correlation between "benefits-conferring" and the importation of terms into a contract. There is a relationship between "benefits-conferring" and enforcement. That is, if the statutory enforcement mechanism were inadequate to enforce the conferred benefit, the recipient of the benefit should have recourse to a civil cause of action.
>
> 77 I reject the broad proposition that rights granted by employment standards legislation are implied terms of employment contracts. In my view, the cases relied on by the learned chambers judge do not support such a conclusion. *Machtinger* and *Kenpo Greenhouses* do not concern statutorily-implied terms. While asserting the broad proposition that statutory rights are implied contractual terms, in my view, *Stewart* and *Kolodziejski* are on much more solid ground insofar as the statutory enforcement regimes in those cases were determined to be unsatisfactory and this afforded the plaintiffs a cause of action for breach of contract. *Parry Sound* concerned the jurisdiction and obligation of arbitrators in a collective agreement setting to apply laws of general application in the context of the exercise of management rights.
>
> 78 In my view, the judge erred concluding as a general proposition that rights in employment standards legislation are implied by law into employment agreements. The implication of terms is an adjunct to the conclusion, based on a consideration of the legislation as a whole, that the Legislature intended the rights could be enforced by civil action, a conclusion that may be derived from the absence of an effective statutory enforcement regime.

173 I agree with paragraph 78 of the *Macaraeg* judgment. The implication of terms by force of statute is an adjunct to a conclusion based on a consideration of the legislation as a whole that the Legislature intended the rights by the statute could be enforced by civil action. My analysis of the *Code*, set out above, leads me to the conclusion that

Parliament intended that courts have a subject matter jurisdiction to enforce wage claims for overtime and this conclusion leads to the adjunct conclusion that the statutory rights are terms of the contract by force of statute.

Third Stage of the Analysis

174 In the third stage of the analysis, I will discuss the relatively few cases that have directly addressed the question of the court's subject matter jurisdiction under the *Canada Labour Code*.

175 In *Jordan v. Direct Transportation System Ltd.*, [1986] O.J. No. 1887 (Ont. Dist. Ct.), Justice Hoilett followed *Pateman v. Ray's Ambulance Service Ltd.* (1973), 38 D.L.R. (3d) 709 (Sask. Q.B.) and distinguished *Stewart v. Park Manor Motors Ltd.* (1967), [1968] 1 O.R. 234 (Ont. C.A.) to arrive at the conclusion that the *Code* was an exhaustive code that precluded a court action. For the reasons expressed above and since it is my view that Parliament intended the court to have concurrent jurisdiction, I would not follow *Jordan*.

176 In *Jumbo Motor Express Ltd. v. Hilchie*, [1988] N.S.J. No. 375 (N.S. Co. Ct.), Judge Palmater of the Nova Scotia County Court held that a claim for overtime pay under the *Canada Labour Code* was not within the jurisdiction of the small claims court because it was a statutory right and not a contractual right. Judge Palmater relied on *Pateman v. Ray's Ambulance Service Ltd.* (1973), 38 D.L.R. (3d) 709 (Sask. Q.B.) for the proposition that where adequate protection is found to exist within the statutory enforcement mechanism there is no right to bring a court civil action. For the reasons expressed above and since it is my view that Parliament intended the court to have concurrent jurisdiction, I would not follow *Hilchie*.

177 *Conrad v. Imperial Oil Ltd.* (1999), 173 D.L.R. (4th) 286 (N.S. C.A.) concerned a claim that an employer had contravened the group termination provisions of the *Canada Labour Code*. In a decision upheld by the Nova Scotia Court of Appeal, Justice Gruchy ruled that the *Code* is a comprehensive statutory scheme with its own enforcement mechanisms and he declined to exercise the court's jurisdiction.

178 While at first blush it might appear that the *Conrad* judgment stands against my conclusion that the courts have subject matter jurisdiction, upon further analysis, the *Conrad* judgment actually supports my conclusion that the courts have subject matter jurisdiction to enforce claims for overtime wages.

179 At para. 8 of the Court of Appeal's judgment, the Court noted that while the *Code* preserved an employee's right to bring a civil action against an employer for arrears of wages, it did not contemplate a resort to the civil courts by employees who have lost tangible benefits as the result of an employer's breaches of the termination provisions of Division IX of Part III of the *Code*. This comment indicates that the appellate court was not deciding that courts do not have jurisdiction to enforce other claims that might arise under Part III of the *Code*. It was focusing on the group termination provisions of the *Code* and deciding a different and narrower point from the one that I must decide and the court was noting that the *Code* preserves the right to bring a civil action for wages.

180 Further, the Court of Appeal interpreted Justice Gruchy as having jurisdiction, but declining to exercise it. This interpretation indicates that the Court was moving from the question of subject matter jurisdiction to the matter of whether the court ought to exercise its subject matter jurisdiction, and in this regard, the appellate court decided that the Superior Court ought not to exercise its jurisdiction. I will deal with this point about the discretion to defer the court's jurisdiction in the next section of these Reasons. For present purposes, the point to note is that deferring jurisdiction presupposes that there is a jurisdiction to defer.

181 I, therefore, conclude that the *Conrad v. Imperial Oil Ltd.* judgment supports my conclusion that the Superior Court has subject matter jurisdiction over claims for overtime pay.

182 *Vlahakos v. Ridley Inc.*, [2002] M.J. No. 491 (Man. Q.B.) was an appeal from a Small Claims Court judg-

ment that had refused an employee's claim for overtime pay under the *Code*. Justice Kennedy allowed the appeal. He regarded the court as having a discretion to enforce a civil claim for overtime, and he regarded *Conrad v. Imperial Oil Ltd.*, *supra*, as a case where the court decided to defer its jurisdiction to that of the administrative process under the *Code*. Justice Kennedy also relied upon s. 168 (1) of the *Code*, which preserves contractual rights that are more favourable to the employee than the rights or benefits under the *Code*. The *Vlahakos* judgment supports my opinion that the court has subject matter jurisdiction.

183 Lastly, there is *Fulawka v. Bank of Nova Scotia*, [2010] O.J. No. 716 (Ont. S.C.J.), leave to appeal to the Div. Ct. granted, 2010 ONSC 2645 (Ont. Div. Ct.). *Fulawka* is a class action by a group of bank employees for overtime wages. Their employer was subject to the *Code*, and the employees' eligibility for overtime wages under the *Code* was not an issue. Justice Strathy concluded, however, that the *Code* does not give rise to a direct civil cause of action for overtime and holiday pay, and he struck out Ms. Fulawka's claims that sought to directly enforce the *Code*. At para. 97 of his judgment, Justice Strathy concluded that viewed as a whole, the *Code* demonstrated a parliamentary intention to enact a comprehensive and exclusive jurisdiction. For the reasons set out above, while I agree that Justice Strathy applied the correct methodology, I do not agree with his conclusion. I would place greater significance on several sections of the *Code* than he did, and thus, I come to the different conclusion that the court has subject matter jurisdiction.

184 In *Fulawka*, having decided that there was no direct jurisdiction under the *Canada Labour Code*, Justice Strathy, nevertheless, went on to allow Ms. Fulawka's claims for breach of contract, breach of a duty of good faith, and negligence to proceed in the Superior Court "informed" by the *Code*. Practically speaking, his decision circumvented his conclusion that the court did not have jurisdiction to enforce the *Code*. For the reasons set out above associated with the principle that the essential character of the dispute determines whether the court has subject matter jurisdiction, which principles do not appear to have been argued in *Fulawka*, I disagree with Justice Strathy's conclusion that the common law actions could be informed by the *Code*.

185 I will have more to say about *Fulawka* below when I discuss the criteria for certification, but I have said enough for the purposes of deciding the question of the court's subject matter jurisdiction. My conclusion is to do directly what Justice Strathy did indirectly and recognize that the provisions of the *Code* may be enforced in the Superior Court.

Conclusion of the Analysis and the Effect of the Conclusion

186 From the above analysis, I conclude that the Superior Court has subject matter jurisdiction to decide Mr. McCracken's claims. It follows from this conclusion that CN's motion under Rule 21.01(3)(a) should be dismissed.

187 But there is more to this conclusion, because the conclusion has an effect on Mr. McCracken's action and his proposed class proceeding. As noted above in the discussion of the case law, the effect of a conclusion that the courts have a jurisdiction to enforce the statutory right is that the right is an implied term of the contract of employment by force of statute. In other words, as a matter of law, the statutory provisions become contractual stipulations.

188 This determination that contractual terms are implied by force of statute is a substantive conclusion, and it has occurred before the common issues trial where the question could have been posited as a common issue. This is a remarkable consequence and, as far as I am aware, it is an unprecedented phenomenon in class proceedings. I will return to discuss this matter later in these Reasons for Decision when I discuss the claim in contract and the common issues and preferable procedure criteria of the test for the certification of an action as a class proceeding.

Deferring to the Jurisdiction under the Canada Labour Code

189 Having found that the Court does have subject matter jurisdiction, it is necessary to deal with CN's argu-

ment that if the Court has concurrent jurisdiction with the officials under the *Canada Labour Code*, then it has the discretion to defer to the jurisdiction and to the expertise of the administrative officials and tribunals under the *Code*. CN submits that the Court should exercise its discretion and refuse to adjudicate Mr. McCracken's and the Class Members' claims.

190 Here, I can be brief in dealing with this point, because the matter of deferring to the administrative officials and tribunals under the *Code* is subsumed by the preferable procedure analysis that I will undertake later in these Reasons for Decision.

191 This use of the preferable procedure criterion to determine whether the Court should exercise its jurisdiction or defer to another tribunal's jurisdiction has been used to resolve the competition between jurisdiction under the *Class Proceedings Act, 1992* and the jurisdiction of an arbitrator to decide the plaintiff's claim. See *Smith v. National Money Mart Co.*, [2005] O.J. No. 2660 (Ont. S.C.J.), appeal quashed [2005] O.J. No. 4269 (Ont. C.A.), leave to appeal to S.C.C. ref'd, (2006), [2005] S.C.C.A. No. 528 (S.C.C.); *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, [2007] O.J. No. 1136 (Ont. S.C.J.), leave to appeal ref'd [2007] O.J. No. 2404 (Ont. Div. Ct.); and see *Smith Estate v. National Money Mart Co.*, [2008] O.J. No. 2248 (Ont. S.C.J.), aff'd on other grounds [2008] O.J. No. 4327 (Ont. C.A.), where I discuss the jurisprudence about this approach.

192 As I have already foreshadowed, my opinion is that a court proceeding is the preferable procedure for resolving the claims and common issues in the case at bar. Therefore, in the case at bar, the court should not defer and it should exercise its subject matter jurisdiction.

The Claim in Contract

Introduction

193 Since I have just decided that the court has jurisdiction to decide Mr. McCracken's claims and since I will decide that the court ought to exercise that jurisdiction, it is necessary for me to address CN's arguments based on rules 21.01(1)(a) and 21.01(1)(b) that it is plain and obvious that Mr. McCracken's actions for breach of contract, breach of a duty of good faith, unjust enrichment, or negligence are not reasonable causes of action. This analysis is also necessary in any event because of Mr. McCracken's motion for certification and its requirement under s. 5 (1)(a) of the *Class Proceedings Act, 1992* that he show a reasonable cause of action.

194 As part of its Rule 21 motion, CN argues that it is plain and obvious that Mr. McCracken does not have a reasonable cause of action for breach of contract. More precisely, since Mr. McCracken pleads the breach of both express and also implied contractual terms, CN's argument is two branched and asserts that it is plain and obvious that Mr. McCracken does not have a reasonable cause of action for: (a) breach of an express contract term or (2) breach of an implied term.

195 CN also submits that Mr. McCracken has not pleaded his claim with sufficient particularity. In the context of a proposed class action that has had a two-year run up with 21 volumes of affidavit and documentary evidence and cross-examinations of Mr. McCracken and other witnesses, this technical argument becomes hollow, and I will say no more about it other than I disagree with the submission.

196 I note and foreshadow that CN also submits that Mr. McCracken has not shown some basis in fact for his claims based on a breach of contract. I will have more to say about this argument when I come to discuss the some basis in fact test and the commonality and preferable procedure criteria for certification.

197 Mr. McCracken's counter-argument to refute the attack against his claim in contract is that CN is misapplying Rule 21, which, he submits, was not designed to decide the merits of the claim or the defence but rather was

designed to test whether the claims or defences are tenable under the law. In effect, Mr. McCracken submits that he has pleaded a legally viable claim for breach of contract and it will be for a trial court or a court on a motion for summary judgment to determine the merits of that adequately pleaded breach of contract claim.

198 For the reasons that follow, with an exception, I agree with Mr. McCracken's counter-argument.

Breach of an Express Contractual Term

199 The first branch of CN's argument addresses Mr. McCracken's claim that an express term of the contract has been breached. Here, CN submits that apart from the express terms in the employment contract about holiday pay, which terms, it submits, have not been breached, there are no express contract terms promising first line supervisors compensation under the overtime provisions of the *Code*. Thus, CN submits that since there are no express terms, it is plain and obvious that there can be no cause of action for breach of an express contractual term.

200 It is relatively easy to plead a claim for breach of contract. The constituent elements are the existence of a contract, which is not disputed in the case at bar, and the breach of a described express or implied term of that contract.

201 It is trite that a contract can be an oral contract or it can be in writing or it can be both oral and in writing. As noted above, in paragraph 32a of his statement of claim, Mr. McCracken pleads: [I]t is an express term in the contracts of employment of the Class that the Defendant will abide by the minimum standards of the *Code* concerning, *inter alia* overtime, holiday compensation, record-keeping and classification of employees as managers, superintendents or persons exercising management functions. Mr. McCracken pleads that these described express terms have been breached.

202 CN may be correct that the alleged express terms do not actually exist, that is, they cannot be proven, but that is a matter for a trial judge or a judge on a motion for summary judgment to determine. At this juncture, it is not plain and obvious, which is a very high bar for CN to vault, that a court might interpret the contract in the way pleaded by Mr. McCracken.

203 Thus, I agree with Mr. McCracken's argument that CN has misconceived the function of Rule 21, which is not to adjudicate the truth of a claim or defence. Truth finding is a function of a trial court.

204 CN's argues, however, that at least Mr. McCracken's claim of breach of a contract term about holiday pay should be struck out because it is plain and obvious that this term has not been breached.

205 CN's argument about holiday pay relies on s. 199 of the *Canada Labour Code* and the factual record that shows that CN provides days in lieu rather than holiday pay.

206 CN submits that even if it misclassified the first line supervisors as managers, the alleged failure to pay holiday pay could not be a breach of contract or of the *Code* because days in lieu as a matter of law are compliant with the *Code* for both managers and non-managers.

207 Section 199 of the *Code* provides that managers should receive holiday pay or time in lieu of holiday pay if they work on a holiday. Section 199 states:

> 199. Notwithstanding sections 197 and 198, an employee excluded from the application of Division I under subsection 167(2) who is required to work on a day on which the employee is entitled under this Division to a holiday with pay shall be given a holiday and pay in accordance with section 196 at some other time,

which may be by way of addition to his annual vacation or granted as a holiday with pay at a time convenient to both the employee and the employer.

208 Section 198 of the *Canada Labour Code* provides for non-managerial employees to receive holiday pay. Under s. 198 of the *Code*, an employee who is required to work on a day on which the employee is entitled to a holiday with pay shall: (a) be paid at a rate at least equal to one and one-half times his regular rate of wages for the time that the employee worked on that day; or (b) shall be given a holiday with pay at a time convenient to both the employee and the employer.

209 As appears both s. 198 and s. 199 provide time in lieu as a lawful alternative to wages as compensation for working on a holiday.

210 Mr. McCracken admitted in his cross-examination that he had received his days off in lieu of pay as compensation for the general holidays he worked, and his only rebuttal to CN's argument that it met any obligations under the *Code* to pay holiday wages is his submission that while time in lieu may be a lawful alternative to holiday wages, CN still breached the contract of employment and the *Code* because the *Code* should be interpreted so that the employee has the absolute right to choose how he or she receives holiday wages. I see, however, no basis or reason for interpreting the *Code* in that way.

211 Thus, I agree with CN that Mr. McCracken and the Class Members have no provable claim for breach of contract with respect to holiday pay. But that is not the same thing as showing that it is plain and obvious that they do not have a viable claim in law for breach of contract. I repeat that the function of Rule 21 is not to adjudicate the genuine merits of a claim or defence. However, there is a way on any motion to obtain a judgment on the merits. It is by a motion for judgment, the nature of which I will discuss below.

212 In my opinion, it is appropriate to use the motion for judgment jurisdiction in the case at bar to dismiss Mr. McCracken's claim for holiday pay on its merits. This jurisdiction may exceptionally be used in aid of the court's jurisdiction under Rule 21. (As will be seen, it is also appropriate to use this jurisdiction and jurisdiction provided by the *Class Proceedings Act, 1992* to decide common issues on their merits before the common issues trial.)

213 My conclusion, therefore, is that Mr. McCracken has shown a reasonable cause of action for breach of an express term of the contract of employment. However, his cause of action based on an alleged failure to pay holiday wages should be dismissed by way of a motion for judgment.

Breach of an Implied Contractual Term

214 Mr. McCracken alleges Class Members' employment contracts contain implied terms. These terms allegedly arise by virtue of the nature of the relationship or contract, the usage or custom of the industry, the intention or presumed intention of the parties, and the legal provisions of the Defendants Overtime and Holiday Policies. He submits that the terms of the Class Members' contracts of employment are not set out in a single document and are determined by CN's representations, general custom in the industry, the expectations of the parties, and the totality of CN's written and unwritten policies and practices.

215 The second branch of CN's argument about Mr. McCracken's claim in contract addresses Mr. McCracken's claim based on implied contractual terms. The alleged implied terms would impose obligations on CN of: (1) paying overtime pay at time and half; (2) paying holiday compensation; (3) keeping accurate records of overtime hours worked; and (4) acting in good faith in classifying employees.

216 CN's argument is that these implied terms would be inconsistent with the express term that excludes the first line supervisors from overtime pay under the *Canada Labour Code*. CN argues that these terms cannot be im-

plied because they are contrary to the express terms of the employment contract. CN's argument is that regardless of whether it breached the *Code*, it cannot be the case that it breached any contract term that would imply what has been expressly excluded; namely the operation of the *Code*.

217 Terms may be implied in a contract: (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary to give business efficacy to a contract or as otherwise meeting the "officious bystander" test as a term that the parties would say, if questioned, that they had obviously assumed: *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 (S.C.C.); *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711 (S.C.C.); *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.), at para. 137.

218 In *G. Ford Homes Ltd. v. Draft Masonry (York) Co.* (1983), 43 O.R. (2d) 401 (Ont. C.A.) at para. 9, Justice Cory described the general principles about when a term may be implied in a contract. He stated:

> When may a term be implied in a contract? A court faced with that question must first take cognizance of some important and time-honoured cautions. For example, the courts will be cautious in their approach to implying terms to contracts. Certainly a court will not rewrite a contract for the parties. As well, no term will be implied that is inconsistent with the contract. Implied terms are as a rule based upon the presumed intention of the parties and should be founded upon reason. The circumstances and background of the contract, together with its precise terms, should all be carefully regarded before a term is implied. As a result, it is clear that every case must be determined on its own particular facts.

219 In its factum for the Rule 21 motion, CN submits that it is plain and obvious that the implied terms do not and could not exist because they would be inconsistent with the express terms of the contract. In his responding factum, Mr. McCracken responds with a complicated counter-argument based on the principles of contract illegality and the prohibition against contracting out of statutory protections to negate the express provisions that CN argues preclude the implied terms pleaded by Mr. McCracken. To which CN replies in its reply factum with a counter-counter-argument about the law associated with illegal contracts.

220 For present purposes these complicated and elaborate arguments, counter-arguments, and counter-counter arguments need not be resolved, but since none of them are fanciful, they do demonstrate that it is not plain and obvious that a court would not imply terms into the contracts of employment of the first line supervisors.

221 CN's arguments ultimately may be correct, but that is a matter for a trial judge or a judge on a motion for summary judgment to determine. At this juncture, it is not plain and obvious that a court might interpret the contract in the way pleaded by Mr. McCracken.

222 Thus, again I agree with Mr. McCracken's argument that CN has misconceived the function of rule 21.01 (1)(a) and rule 21.01 (1)(b), which is not to adjudicate the genuine merits of a claim or defence but to determine whether it is plain and obvious the claim and defence have legal viability.

223 I conclude that Mr. McCracken has pleaded a reasonable cause of action based on implied contractual terms.

Breach of a Statutory Implied Term

224 I have just decided that Mr. McCracken has pleaded a reasonable cause of action based on implied contractual terms. This decision is supported by the discussion earlier about the court's subject matter jurisdiction, which noted that statutory rights may be implied terms of a contract by force of statute. However, that earlier discussion does more than indicate that it is not plain and obvious that Mr. McCracken does not have a cause of action for

breach of an implied contractual term. It goes further and concludes that Mr. McCracken actually has a cause of action for breach of a statutory implied term.

225 As noted in the previous part of these Reasons for Decision, contractual terms may be implied as a fact arising from the circumstances of the contractual relations and they may be implied as the legal incidents of a particular class or kind of contract. Contractual terms may also be implied as a matter of law. Mr. McCracken's statement of claim seeks a declaration that the duties of the *Code* are implied terms of the Class Members' contracts of employment. The discussion about the court's subject matter jurisdiction determines that the overtime provisions of the *Code* are part of the employment contract between the parties by force of statute.

226 This determination does not mean that it has been proven that CN has breached the terms of the employment contract. The determination of whether there has been a breach depends upon the outcome of the contested issue of mixed fact and law about whether the first line supervisors are managers.

227 The determination does mean however that Mr. McCracken has proven an issue that might otherwise have been decided at the common issues trial. I will explain in the next section of these Reasons for Decision how it is that the court has jurisdiction to decide this point now and before the common issues trial.

Motion for Judgment and Deciding or Staying Common Issues

228 In my opinion, the court has the jurisdiction to decide or to stay what would otherwise be a common issue on a motion for certification. Under Rule 37.13(2)(a), a judge who hears a motion may in a proper case order that the motion be converted into a motion for judgment: *Wilson v. Ingersoll (Town)* (1916), 38 O.L.R. 260 (Ont. H.C.); *Janisse v. Livesey*, [1944] O.J. No. 185 (Ont. H.C.); *CMLQ Investors Co. v. CIBC Trust Corp.* (1996), 3 C.P.C. (4th) 62 (Ont. C.A.).

229 The jurisdiction under this rule is narrow, and a judge may resort to it only where the motion for judgment would result in the resolution of the case, either by granting judgment in favour of the plaintiff or dismissing the plaintiff's action and where all the necessary evidence is before the court and where the parties have had full opportunity to argue their positions: *Centre Town Developments Ltd. v. Hull*, [1997] O.J. No. 4458 (Ont. Div. Ct.); *McNab v. Lechner* (2002), 21 C.P.C. (5th) 16 (Ont. C.A.); *Buffa v. Gauvin* (1994), 18 O.R. (3d) 725 (Ont. Gen. Div.); *CMLQ Investors Co. v. CIBC Trust Corp.* (1996), 3 C.P.C. (4th) 62 (Ont. C.A.); *Chrysalis Restaurant Enterprises Inc. v. 212 King Street West Ltd.*, [1994] O.J. No. 1983 (Ont. Gen. Div.).

230 The court's jurisdiction to grant judgment on any motion is augmented and enhanced by ss. 12 and 13 of the *Class Proceedings Act, 1992*, which state:

> 12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.
>
> 13. The court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate.

231 In the circumstances of the case at bar, in my opinion, it would be propitious to the advancement of the class action to and fair to both the class members and to the defendant CN to exercise the court's jurisdiction and decide the claim about holiday pay on its merits.

232 In the circumstances of the case at bar, in my opinion, it would be propitious to the advancement of the class action to and fair to both the class members and to the defendant CN to exercise the court's jurisdiction to de-

cide that that the terms of the *Canada Labour Code* are terms of the employment contracts by force of law.

233 It also is desirable to stay the claims for a breach of an express or implied term of the contract. With the court having concluded that the terms of the *Canada Labour Code* are terms of the contract by force of statute, these causes of action are academic or moot and they need not be decided on their merits while the claim based on contract terms by force of statute proceeds.

234 The resources of the parties need not be further expended on the issue of the terms of the employment contract, and the focus of the action can turn to the crucial issue of whether the first line supervisors are managers and therefore excluded from the terms of the *Canada Labour Code*. That issue is really what this proposed class action is all about, and it is the issue around which the goals of class proceedings of access to justice, behaviour modification, and judicial economy may be achieved.

The Claim for Breach of a Duty of Good Faith

235 I turn now to Mr. McCracken's claim for breach of a duty of good faith. He pleads good faith as an independent cause of action and in relation to his other causes of action.

236 Mr. McCracken pleads that the Class Members are in a position of vulnerability and that CN owes them a duty of good faith including a duty to honour its statutory and contractual obligations and to not act in a manner so as to eviscerate or defeat the objectives of the Class Members contracts of employment or the *Canada Labour Code.*

237 He alleges that CN breached its duty of good faith by: (a) failing to establish procedures to ensure that the Class Members were correctly classified; (b) failing to pay overtime and holiday pay; (c) failing to advise the Class Members of their entitlements to be paid under the terms of their contracts or under the *Code* and the Regulations; (d) retaining for itself the alleged benefits of unpaid overtime and holiday work; (e) creating a working environment that requires overtime or holiday work and dissuades employees from reporting or obtaining compensation for such hours; (f) imposing overtime approval requirements that are impractical, unfair, dangerous, and unconscionable and (g) carrying out reprisals against the Plaintiff and other Class Members.

238 Good faith is a nebulous legal term that presents itself in a wide variety of different legal contexts. It appears in contract law, in property law, in municipal law, in administrative law, in procedural law, in tort law, and in numerous statutes.

239 In the territory of contract law, there are several different contexts for good faith, including the context of contract negotiation, contract interpretation, contract performance, and contract enforcement. Good faith is sometimes viewed as associated with duties and relationships where it falls in between contractual relationships and duties and fiduciary relationships and duties.

240 In some contexts, the meaning and application of good faith is well-established, but in other contexts its meaning and application may be in the state of development. Thus, good faith is a huge topic, and good faith's meaning and application depends on context, and its application ranges from being well established to being in a state of development.

241 In several cases, the Ontario Court of Appeal has held that Ontario law does not recognize a stand-alone duty of good faith that is independent of the terms of a contract or the objectives of the contract. See: *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (Ont. C.A.) at para. 53; *Nareerux Import Co. v. Canadian Imperial Bank of Commerce* (2009), 97 O.R. (3d) 481 (Ont. C.A.) at para. 69.

242 In *Transamerica Life Canada Inc. v. ING Canada Inc.* at para. 53, the Ontario Court of Appeal held that a

duty of good faith cannot be implied to impose new and unbargained-for obligations on the parties but can be implied with a view to securing the performance of the contract between the parties. In *Transamerica Life Canada Inc.*, the Court struck out a general pleading of good faith that was not tied to performance or enforcement of the contract. In this case, Associate Chief Justice O'Connor stated at para. 53:

> I agree with Transamerica that Canadian courts have not recognized a stand-alone duty of good faith that is independent from the terms expressed in a contract or from the objectives that emerge from those provisions. The implication of a duty of good faith has not gone so far as to create new, unbargained-for rights and obligations. Nor has it been used to alter the express terms of the contract reached by the parties. Rather, courts have implied a duty of good faith with a view to securing the performance and enforcement of the contract made by the parties, or as it is sometimes put, to ensure that parties do not act in a way that eviscerates or defeats the objectives of the agreement that they have entered into....

243 In my opinion, in the case at bar, Mr. McCracken's pleadings of breach of a duty of good faith to the extent that they set out a claim for breach of a free-standing duty of good faith should be struck from the statement of claim. This ruling, however, would not preclude pleading good faith as a doctrine that is relevant to the other causes of action.

244 In any event, at the hearing of the certification motion, Mr. McCracken took the position that he was not advancing breach of a duty of good faith as a cause of action but only as a legal doctrine that was relevant to his other causes of action.

245 In my opinion, this position was tenable as a matter of law, and it follows that Mr. McCracken's claim for breach of a duty of good faith should be struck out as a free-standing cause of action. However, the pleading of the material facts alleging a breach of duty of good faith may remain to the extent that the material facts are pleaded in support of the cause of action for breach of contract. (Once the amendments are made, the breach of contract claims will be stayed for the reasons already expressed and to the extent already expressed.)

The Unjust Enrichment Claim

246 Mr. McCracken pleads that CN has been unjustly enriched as a result of receiving the benefit of the unpaid hours worked by the Class Members. He pleads that CN has been enriched, the Class Members have suffered a deprivation, and that there is no juristic reason why CN should be permitted to retain the benefit of the unpaid hours of work, which are the constituent elements of a claim for unjust enrichment. See: *Garland v. Consumers' Gas Co.*, [2004] S.C.J. No. 21 (S.C.C.).

247 At the hearing of the certification motion, CN conceded that if its jurisdictional objection based on the court's subject matter jurisdiction did not prevail, then Mr. McCracken had properly pleaded a claim for unjust enrichment.

248 I conclude that Mr. McCracken has shown a cause of action for unjust enrichment.

The Negligence Claim

249 Mr. McCracken pleads that CN owes him and the Class Members a duty of care to ensure that they are properly classified and compensated for the hours worked at the appropriate rates and that CN has breached that duty in a variety of ways and is liable for the tort of negligence.

250 He pleads that CN was negligent by: failing to undertake a proper and adequate analysis in determining whether FLSs exercised management functions; failing to take reasonable steps to monitor and record all hours

worked by FLSs; failing to take reasonable steps to ensure that FLSs were properly compensated for hours worked; failing to implement and maintain an effective, reasonable and accurate class-wide system - centrally and uniformly controlled - to ensure its duties were complied with; and failing to advise FLSs of their right to be properly classified and recover for unpaid hours.

251 CN argues, however, that there is no duty of care and that if there is duty of care, then it is negated by policy factors.

252 For the reasons that follow, it is my opinion, that it plain and obvious that Mr. McCracken and the Class Members do not have a cause of action in negligence. In reaching this opinion, I have assumed that it is not plain and obvious that CN does not have a *prima facie* duty of care to the first line supervisors, but I conclude that it is plain and obvious that there are policy reasons to negate the duty of care with the result that Mr. McCracken and the Class Members do not have a reasonable claim for the tort of negligence.

253 The contemporary Canadian approach to determining whether there is a duty of care has been developed in a series of Supreme Court of Canada decisions adapting and explaining the House of Lord's decision in *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.). See: *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2 (S.C.C.); *Cooper v. Hobart*, [2001] 3 S.C.R. 537 (S.C.C.); *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 (S.C.C.); *Childs v. Desormeaux*, [2006] 1 S.C.R. 643 (S.C.C.); *D. (B.) v. Children's Aid Society of Halton (Region)*, [2007] 3 S.C.R. 83 (S.C.C.); and *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114 (S.C.C.).

254 The contemporary analysis of whether a duty of care exists begins by asking whether the plaintiff and the defendant are in a relationship that the law categorically recognizes as involving a duty of care or whether the relationship constitutes a new category of claim. If the claim falls within an established category, then precedent will have established that there is a duty of care associated with the relationship between the parties: *Childs v. Desormeaux*, [2006] 1 S.C.R. 643 (S.C.C.) at para. 14.

255 In *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.), the House of Lords adopted a two-step analysis to determining whether there was a duty of care between a plaintiff and a defendant: (1) Is there a sufficiently close relationship between the defendant and the plaintiff such that in the reasonable contemplation of the defendant, carelessness on its part might cause damage to the plaintiff? and, (2) Are there any considerations that ought to negative or limit: (a) the scope of the duty; (b) the class of persons to whom it is owned; or the damages to which a breach of it may give rise.

256 As developed by the subsequent case law in Canada, if the relationship between the plaintiff and the defendant does not fall within a recognized class whose members have a duty of care to others, then whether a duty of care to another exists involves satisfying three requirements: (1) foreseeability, in the sense that the defendant ought to have contemplated that the plaintiff would be affected by the defendant's conduct; (2) sufficient proximity, in the sense that the relationship between the plaintiff and the defendant is sufficient to give rise to a duty of care; and (3) the absence of overriding policy considerations that would negate any prima facie duty established by foreseeabilty and proximity.

257 Proximity focuses on the relationship between the parties and asks whether this relationship is so close that the one may reasonably be said to owe the other a duty to take care not to injure the other: *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562 (U.K. H.L.). Proximate relationships giving rise to a duty of care are of such a nature as the defendant in conducting his or her affairs may be said to be under an obligation to be mindful of the plaintiff's legitimate interests *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 (S.C.C.) at para. 49; *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.), at para. 24.

258 The proximity inquiry focuses on the facts of the particular relationship and asks whether the relationship

discloses factors which show that the relationship between the plaintiff and the defendant was sufficiently close to give rise to a legal duty of care to prevent the type of harm that was suffered. The focus is on the nature of the relationship between alleged wrongdoer and victim: is the relationship one where the imposition of legal liability for the wrongdoer's actions is appropriate? See *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41 (S.C.C.) at para. 23.

259 This second stage of the analysis is not concerned with the relationship between the parties but, rather, with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally: *Cooper v. Hobart*, [2001] 3 S.C.R. 537 (S.C.C.) at para. 37; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 (S.C.C.) at para. 51. At this stage of the analysis, the question to be asked is whether there exist broad policy considerations that would make the imposition of a duty of care unwise, despite the fact that harm was a reasonably foreseeable consequence of the conduct in question and there was a sufficient degree of proximity between the parties that the imposition of a duty would not be unfair: *Cooper v. Hobart*, [2001] 3 S.C.R. 537 (S.C.C.) at para. 37; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 (S.C.C.) at para. 51.

260 In the case at bar, the alleged duty of care does not fall within an established category. However, in the context of motion under Rule 21, I will assume that it is not plain and obvious that CN does not have a duty of care to its first line supervisors to ensure that they are properly classified and compensated for the hours worked at the appropriate rates. Thus, I will assume without deciding that Mr. McCracken's proposed tort satisfies the first stage of the duty of care inquiry and that there is a proximate relationship and a duty of care owed by CN to its first line supervisors.

261 I, therefore, move on to the second stage of the duty of care analysis to consider whether there any overriding policy considerations that would negate any *prima facie* duty established by foreseeabilty and proximity. Here, in my opinion, it is plain and obvious that the policy considerations negate the duty of care. There are at least three policy reasons for not recognizing a duty of care as proposed by Mr. McCracken.

262 First, the tort proposed by Mr. McCracken is an unnecessary intrusion of the law of tort into an area in which it is not needed and where it might cause confusion and uncertainty and disturb existing law that does not require fixing.

263 The tort proposed by Mr. McCracken is an economic tort that claims compensation for purely economic losses. He has suffered no personal injury and there is no injury to property; his losses are purely monetary. Although the categories for negligence are not closed, the law in Canada has so far recognized only five categories of negligence claims for pure economic loss; namely: (1) negligent misrepresentation; (2) negligent performance of a service; (3) defective products or buildings; (4) relational economic loss; and (5) independent liability of statutory public authorities: *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85 (S.C.C.). The case at bar does not fall within the recognized categories of torts for pure economic losses.

264 Courts are reluctant to extend the categories of torts for purely economic loses, especially when the subject matter of the alleged loss is already governed by contract or the law of unjust enrichment. See: *Martel Building Ltd. v. R.*, [2000] 2 S.C.R. 860 (S.C.C.); *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.). Part of the court's reluctance is a concern about indeterminate liability, which would seem not to be a serious concern in the case of the tort proposed by Mr. McCracken, but another part of the court's reluctance to acknowledge new types of purely economic loss claims is the prospect that the tort would unnecessarily interfere with commercial and contractual relations. This concern is present in the case at bar.

265 Mr. McCracken posits that an employer should have a duty of care to properly categorize its employees because the employees could foreseeable be economically harmed by a wrong classification. The law of tort would regulate the commercial and contractual relations between the employer and the employee. Assuming this duty ex-

isted as the foundation for a negligence claim, the adjudication of the claim would have the law of tort regulate the employer's management rights and the court would have to determine whether the employer met the standard of a reasonably competent employer in categorizing its employees.

266 In *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.), a majority of the Supreme Court rejected a tort for breach of a good faith and fair dealing obligation by employers in dismissing employees as overly intrusive and inconsistent with established principles of employment law and a change in the law better left to the legislatures. In *Piresferreira v. Ayotte*, [2010] O.J. No. 2224 (Ont. C.A.), the Court of Appeal rejected a duty of care on employers to shield employees from the acts of other employees that might cause mental suffering as unnecessary. In my opinion, the proposed tort of the immediate case is equally intrusive and inconsistent and ought to be rejected on similar policy grounds.

267 In the case at bar, the law's involvement is unnecessary to protect the employee who already has a strict liability claim under the *Canada Labour Code*'s administrative process or for breach of contract by force of statute if he or she has not been correctly categorized. Upon analysis, there is no need for the tort at all. The duty of care proposed by Mr. McCracken would be an intrusion by tort law into an area adequately governed by the statutory law, contract law, and the law of restitution.

268 In *Martel Building Ltd. v. R.*, [2000] 2 S.C.R. 860 (S.C.C.), the Supreme Court declined to recognize a tort duty to regulate the conduct of commercial negotiations. In a judgment written by Justice Iacobucci and Major, the court identified the introduction of an unnecessary common law regulatory function as a policy reason that would negate a duty of care. The court stated:

> [T]o extend the tort of negligence into the conduct of commercial negotiations would introduce the courts to a significant regulatory function, scrutinizing the minutiae of pre-contractual conduct. It is undesirable to place further scrutiny upon commercial parties when other causes of action already provide remedies for many forms of conduct. Notably, the doctrines of undue influence, economic duress and unconscionability provide redress against bargains obtained as a result of improper negotiation. As well, negligent misrepresentation, fraud and the tort of deceit cover many aspects of negotiation which do not culminate in an agreement.

Much the same thing could be said about the undesirability of court's unnecessarily scrutinizing an employer's classification of its employees.

269 The proposed tort would also be a source of confusion. One problem is that there is the prospect that the alleged breach of duty to properly classify may only become a breach after-the-fact of classification. The misclassification would arise because a first line supervisor did not actualize his or her managerial authority and responsibilities and thus caused his or her classification as a manager to be wrong. This prospect would produce a litany of confusing did-didn't, could-couldn't, should-shouldn't factual disputes about classification.

270 Second, the tort proposed by Mr. McCracken would encourage needless litigation and lots of it. The discouragement of needless litigation was another policy factor that would negate a duty of care. This policy factor was identified in *Martel Building Ltd. v. R.*, *supra* at para. 71.

271 Third, the duty of care proposed by Mr. McCracken, if it were recognized, would establish liability for conduct that that did not actually cause the plaintiff's injury. This may be just another way of saying that the tort is needless, confusing or mongering, but the point is that the employee is not economically injured by the employer's failure to take due care in categorizing the employee, the employee is actually injured by the employer's strict liability failure to pay overtime wages when it is contractually or statutorily obliged to do so. The proposed tort is not an example of useful concurrent liability. It is an example of useless and superfluous surrogate liability. Visualize, if a categorization was negligently performed but nonetheless correct, the employee would suffer no damages from the

negligently performed categorization. If the categorization was negligently performed and wrong, the employee would be entitled to recover no more or no differently than he or she would contractually or statutorily under the *Canada Labour Code*.

272 Apart from the fact that Mr. McCracken would like to use the proposed tort to get a leg up on satisfying the criteria for certification and finding a class-wide basis for liability, the proposed tort is unnecessary, has no social utility, and would actually be disruptive. I conclude that Mr. McCracken has not pleaded a reasonable cause of action in negligence.

Rule 21 and CN's Limitation Period Argument

273 CN's limitation period argument is limited to the claims and causes of action based on CN allegedly improperly classifying its first line supervisors as managers. These causes of action focus on the act of classifying as opposed to the failure to pay overtime pay. As pleaded, these claims arose on or after July 5, 2002.

274 CN's argument is that since these particular claims allegedly arose on July 5, 2002 and since the amended pleading making these claims was not delivered until July 28, 2008, the pleading comes after the expiry of the various provincial limitation periods applicable to the Class Members' claims.

275 The limitation statutes are: *Limitations Act, 2002*, S.O. 2002, c. 24, s. 24(3); *Limitations Act*, R.S.O. 1990, c. L.15, s. 45(1)(g); *Limitations Act*, R.S.B.C. 1996, c. 266, ss. 3(2)(a), 3(5); *Limitations Act*, R.S.A. 2000, c. L-12, s. 3(1); *Limitations Act*, S.S. 2004, c. L 16.1, s. 5; *Limitations Act*, C.C.S.M. c. L150, ss. 2(1)(b), 2(1)(e), 2(1)(i) and 2(1)(k); *Code Civil du Québec*, S.Q. 1991, c. 64, Art. 2925; *Limitation of Actions Act*, R.S.N.B. 1973, c. L-8, ss. 3, 6, 7 and 9; *Limitation of Actions Act*, R.S.N.S. 1989, c. 258, ss. 2(1)(b) and 2(1)(e); *Statute of Limitations*, R.S.P.E.I. 1988, c. S-7, ss. 2(1)(b), (e) and 2(1)(g); of the *Limitations Act*, S.N.L. 1995, c. L-16.1, ss. 5(a), 5(b), 5(h), 6(f), 6(h) and 9; of the *Limitation of Actions Act*, R.S.N.W.T. 1988, c. L-8, ss. 2(1)(b), 2(1)(f), 2(1)(h) and 2(1)(j); *Nunavut Act*, S.C. 1993, c. 28, s. 29; *Limitation of Actions Act*, R.S.Y. 2002, c. 139, 2(1)(b), 2(1)(f), 2(1)(h) and 2(1)(j).

276 Because of my conclusions above that there is no reasonable cause of action for negligence or for a breach of a free-standing duty of good faith, it is not necessary to address CN's limitation period argument or Mr. McCracken's counter-arguments. In other words, the limitation period arguments apply to claims that are not proceeding, and thus the limitation period arguments and counter-arguments are moot.

The Criteria for Certification

277 Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

278 For an action to be certified as a class proceeding, there must be a cause of action, shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers: *Sauer v. Canada (Minister of Agriculture)*, [2008] O.J. No. 3419 (Ont. S.C.J.) at para. 14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Ont. Div. Ct.).

279 On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits but whether the claims can appropriately be prosecuted as a class proceeding: *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at para. 16.

280 The test for certification is to be applied in a purposive and generous manner, to give effect to the important goals of class actions - providing access to justice for litigants; promoting the efficient use of judicial resources; and sanctioning wrongdoers to encourage behavior modification: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at paras. 26-29; *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at paras. 15 and 16.

281 The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim; there is to be no preliminary review of the merits of the claim: *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at paras. 28-29.

282 Motions for certification are procedural in nature and are not intended to provide the occasion for an exhaustive inquiry into factual questions that would be determined at a trial when the merits of the claims of class members are in issue: *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 (Ont. S.C.J.) at para. 82.

The "Some Basis in Fact" Test and Certification

283 In the case at bar, the matter of the evidentiary burden for certification is both important and also problematic with respect to the debate between the parties about the class definition, the common issues, preferable procedure, and the representative plaintiff criteria for certification.

284 *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at paras. 16-26; *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 (Ont. S.C.J.) at paras. 56-74; *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (Ont. C.A.) at paras. 49 to 52; *Grant v. Canada (Attorney General)*, [2009] O.J. No. 5232 (Ont. S.C.J.) at para. 21; *LeFrancois v. Guidant Corp.*, [2009] O.J. No. 2481 (Ont. S.C.J.) at paras. 13-14, leave to appeal ref'd [2009] O.J. No. 4464 (Ont. Div. Ct.); *Ring v. Canada (Attorney General)*, [2010] N.J. No. 107 (N.L. C.A.) are all authority for the propositions that: (a) the plaintiff's evidentiary burden on a certification motion is low; and (b) the plaintiff is only required to adduce evidence to show some "basis in fact" to meet the requirements of ss. 5(1)(b) to (e) of the test for certification as a class action.

285 It is also established that a certification motion is not the time to resolve conflicts in the evidence: *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (Ont. C.A.) at para. 50 or to resolve the conflicting opinions of experts: *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, [2009] O.J. No. 1874 (Ont. Div. Ct.) at paras 101-102, aff'd. [2010] O.J. No. 2683 (Ont. C.A.).

286 For the discussion that follows, it is important to keep in mind that the low evidentiary basis for a certification motion applies both: (a) to evidence that this is some factual support for the plaintiff's claim; and also (b) to evidence to satisfy the four criteria for certification other than the criteria of showing a cause of action.

287 There are many subtle points here. One of them is that although the plaintiff need not adduce some basis in fact for criteria 5 (1)(a) and indeed no evidence is admissible in this regard, there still must be some basis in fact for the plaintiff's class action claims. Justice Cullity made this point in *Dennis v. Ontario Lottery & Gaming Corp.*, [2010] O.J. No. 1223 (Ont. S.C.J.) at para. 84, where he stated:

> There is one other aspect of the inquiry required by section 5(1)(a) that is of particular importance in this case. It is fundamental to the requirements for certification that the relevant question under section 5(1)(a) is whether the pleading discloses a cause of action of the plaintiffs. It is not whether causes of action of the other class members have been pleaded. The existence of claims of such other class members is to be considered under the requirements in section 5(1)(b) and 5(1)(c) that there be a class whose members share issues in common. For these purposes, evidence is required to satisfy the minimum burden of "some basis in fact" referred to in *Hollick*

at para. 25.

288 In *LeFrancois v. Guidant Corp.*, [2009] O.J. No. 2481 (Ont. S.C.J.), leave to appeal ref'd [2009] O.J. No. 4464 (Ont. Div. Ct.), Justice Cullity stated the orthodox position about the some basis in fact test at para.14:

> [T]he minimum evidential standard affirmed in *Hollick*, applies to factual issues that may be determinative of both the requirements for certification and the merits of the claims advanced on behalf of the class. The usual process of fact-finding is, therefore, not intended to be a feature of certification motions and this court has deprecated the delivery of extensive motion records by the parties and taken this into account when awarding costs.

289 These legal propositions about the operation of class proceedings legislation have caused dismay to defendants, although as I will shortly show, their concerns are overstated or not justified.

290 In *LeFrancois v. Guidant Corp.*, at para. 15, Justice Cullity noted the complaint of defendants and of the defence bar that: "the requirements for certification in sections 5(1)(b) and 5 (1)(c) are too easily satisfied and do not provide sufficient protection for the rights of [defendants]." Moreover, defendants confront a tougher evidentiary standard than do plaintiffs. As Justice Cullity pointed out in *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 (Ont. S.C.J.) at para. 68, a very heavy evidentiary burden has been placed on defendants in contrast to the very light burden placed on plaintiffs. He stated:

> [A]lthough a defendant would be entitled to deliver affidavit evidence in rebuttal, the standard of proof is inversely heavy. It is not enough for the defendant to establish on a balance of probabilities that facts that bear on the existence of "colourable" claims differ from those asserted by the plaintiff - the onus must be to demonstrate that there is no basis in the evidence for the latter.

291 The festering point of the complaint by defendants is that that the some basis in fact test is applied to the criteria for certification rather than to the plaintiff just showing some factual basis for his or her cause of action. More precisely, the objection of the defendants is that the some basis in fact test is applied so as to entail the satisfaction of the criteria for certification, and applied in this way, the criterion for certification become devoid of any utility as a qualification for certification, because the criteria inevitably will be satisfied by a some basis in fact test.

292 In other words, it is not objectionable that the plaintiff must present a very modest evidentiary basis about his or her claims as a prerequisite to certification of his or her action as a class proceeding, but it is the view of defendants that it is arguably unfair and unjust that a plaintiff may successfully argue that because there is some basis in fact for each of the criteria for certification, therefore, certification must necessarily be granted.

293 I agree that it would be unfair and unjust if the some basis in fact test was applied in the way described by defendants. The case at bar can be used to demonstrate the unfairness. A crucial and contested issue is the status of the first line supervisors as managers or as non-managers and whether this issue can be resolved at the common issues trial on a class-wide basis. Mr. McCracken has provided some basis in fact for the proposition that all first line managers are non-managers. Therefore, he might assert that the commonality of the first line supervisors is established as a common issue to be decided at the common issues trial. However, as I will explain later in these Reasons for Decision, accepting Mr. McCracken's submission as correct is to accept as a given truth something that is patently or obviously untrue because here are some questions that are not common issues and rather are fundamentally or intrinsically or unavoidably individual questions.

294 Here, an example of a hypothetical proposed class action is helpful to make my point. The example I used during the hearing of the motions is a proposed class action by a class of public school students in grade seven, say at Pearson Public School. Using this example, a question that might be proposed as a common issue about this group of students is: "What are the requirements for grade seven students at Person Public School to be promoted to grade

eight?" The some basis in fact test would not be problematic for this question. Another question is: "Do the grade seven students at Pearson Public School satisfy the requirements to be promoted into grade eight?" For this question, a plaintiff could lead evidence that two grade seven students at Pearson Public School out of a class of thirty had report cards stating that they had been promoted to grade eight and thus the plaintiff would be able to assert that there was some basis in fact for the proposed common question about the grade seven students having satisfied the requirements to enter grade eight. Nevertheless, the genuine truth of the matter is that the question of whether the class of grade seven students qualified for grade eight is inherently an individual question and not a common or class-wide issue.

295 In *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (Ont. S.C.J.), Justice Cullity was aware of the problem of accepting that commonality have been established based simply on the some basis in fact test. He stated at para. 27:

> Where, for example, commonality itself depends on a disputed question of fact - as it will infrequently do - the question must I think be decided by the motions judge on a balance of probabilities. The necessity for a minimum evidential basis for the common issues relates not to the question whether commonality exists but, rather, to whether the claims to which they relate have any factual support.

296 Justice Cullity, however, modified these observations in *LeFrancois v. Guidant Corp.*, [2009] O.J. No. 2481 (Ont. S.C.J.), leave to appeal ref'd [2009] O.J. No. 4464 (Ont. Div. Ct.) and, as noted above, in that case, he expressed the orthodox position that the some basis in fact test applies both to showing some factual support for the cause of action and also to the various criteria for certification. This was also his approach in *Grant v. Canada (Attorney General)*, [2009] O.J. No. 5232 (Ont. S.C.J.), where he stated at para. 21: "At least for the purposes of the inquiry into commonality, it appears that the evidence must show merely that there is some basis in reality for the assertion that the Class members have claims raising issues in common..."

297 The preferable procedure criterion provides another illustration of unfairness if the some basis in fact test were being applied to this criterion for certification in the way maligned by defendants. In some cases, and the case at bar is an example, the debate about the preferable procedure is a contest about whether a class proceeding is preferable to individual actions, arbitration, or an administrative process. In this debate, there will always be some basis in fact for asserting that a class proceeding is the preferable procedure because the mere existence of this choice makes it a factual possibility that it is the preferable procedure. In the case at bar, as there will be virtually in every case, there will be some basis in fact for the submissions that a class proceeding will provide access to justice, behaviour modification, and judicial economy, which are the lens through which preferably procedure is analyzed. Thus, in every case there is always some basis in fact that a class proceeding is the preferable procedure and, practically speaking, the preferable procedure criterion would become a constant and not something to be proven if a plaintiff can move from showing some basis in fact for preferability to have proven preferability. Applying the some basis in fact test in this way would make the criterion a meaningless criterion because it always would be satisfied.

298 These examples demonstrate potential unfairness if the some basis in fact test were applied in the way suggested by defendants. However, the defendants' complaints of unfairness lose their validity because the some basis in fact test is not applied in the way condemned by them. Rather, the test is applied as a necessary but not sufficient condition for establishing the various criteria for certification. It is not applied as a necessary and sufficient condition.

299 If one returns to the fountainhead case of *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.), one sees that Chief Justice McLachlin did not make the move from some basis of fact being established to concluding that the criteria for certification had been satisfied. In the *Hollick* case there was some basis in fact for commonality, and she concluded that there were some common issues. However, in *Hollick*, she concluded that the preferable procedure criterion had not been satisfied after she analyzed the evidence through the lens of access to justice, behaviour modification, and judicial economy. In other words, while it was necessary for the plaintiff to show an evidentiary basis for a class procedure being the preferable procedure, establishing the evidentiary basis

was not sufficient in itself to satisfy the preferable procedure criterion.

300 In *Taub v. Manufacturers Life Insurance Co.*, [1998] O.J. No. 2694 (Ont. Gen. Div.), another seminal case about the some basis in fact test, Justice Sharpe stated at para. 4: "[T]here must, at the very least, be some basis in fact for the court to conclude that at least one other claim exists and some basis in fact for the court to assess the nature of those claims that exist that will enable to court to determine whether the common issue and preferability requirements are satisfied." Justice Sharpe said that there must be some basis in fact to determine whether the common issue and preferability requirements are satisfied; he did not say that the common issue and preferability requirements are satisfied if there is some basis in fact. Satisfaction of the some basis in fact test is necessary but not sufficient for the satisfaction of the various criteria.

301 That the some basis in fact test is a necessary but not sufficient condition for certification makes sense because the criteria for certification are not just factual matters. In so far as the criteria are factual, the plaintiff is more favourably treated than is the defendant. However, all the criteria are issues of mixed fact and law, and the legal and policy side of the class definition, commonality, preferability, and the adequacy of the representative plaintiff are matters of argument and not just facts, although there must be a factual basis for the arguments. While defendants may have to push the evidentiary burden up a steep hill, they are on a level playing field with the plaintiffs in arguing the law and policy of whether the various criteria have been satisfied.

302 Applying the some basis in fact test to the case at bar, Mr. McCracken must show that there is some basis in fact for his cause of action and some basis in fact for each of the certification criteria other than the first one. CN, however, if it is able to do so, may show that there is no evidentiary basis for the claims or the certification criteria. If the evidentiary basis is established, then whether the certification criteria have been satisfied remains a matter of argument between Mr. McCracken and CN on a level playing field

303 With this general background, I turn now to the five criteria for certification of Mr. McCracken's proposed class action.

Disclosure of Cause of Action

304 For the reasons set out earlier in these Reasons for Decision, I conclude that Mr. McCracken has satisfied the first criterion for certification. He has shown a cause of action for unjust enrichment and for breach of contract based on (a) express terms, (b) implied terms, and (c) terms implied by force of statute.

Identifiable Class

305 The definition of an identifiable class serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; (3) it describes who is entitled to notice: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Ont. Gen. Div.).

306 In defining class membership, there must be a rational relationship between the class, the causes of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive: *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (Ont. C.A.) at para. 57, rev'g [2004] O.J. No. 317 (Ont. Div. Ct.), which had aff'd [2002] O.J. No. 2764 (Ont. S.C.J.).

307 Class membership identification is not commensurate with the elements of the cause of action; there simply must be a rational connection between the class member and the common issue(s): *Sauer v. Canada (Minister of Agriculture)*, [2008] O.J. No. 3419 (Ont. S.C.J.) at para. 32, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Ont. Div. Ct.).

308 CN does not dispute that Mr. McCracken has identified a class that technically satisfies the requirements of the *Class Proceedings Act, 1992*. However, CN argued that the class definition was deficient because there was no evidence about first line supervisors in 56 job descriptions and therefore no basis in fact for including these first line supervisors as class members.

309 This argument, however, is fallacious because Mr. McCracken had established that was some basis in fact for his own cause of action and for his own job description, therefore, there is a sufficient evidentiary basis for him to submit that there was a group of similarly situated claimants with similar claims.

310 Mr. McCracken has provided some basis in fact to identify the persons who have a potential claim against CN. They are persons like him whom CN classifies as first line supervisors and who because of that classification (not job description) are not paid overtime.

311 In my opinion, the second criterion for certification has been satisfied.

Common Issues

General Principles

312 Section 1 of the *Class Proceedings Act, 1992* defines "common issues" as: (a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

313 For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim: *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at para. 18.

314 For an issue to be common, it cannot be dependent on individual findings of fact that have to be made with respect to each individual claimant: *Williams v. Mutual Life Assurance Co. of Canada*, [2000] O.J. No. 3821 (Ont. S.C.J.) at para. 39, aff'd [2001] O.J. No. 4952 (Ont. Div. Ct.), aff'd [2003] O.J. No. 1160 (Ont. C.A.) and [2003] O.J. No. 1161 (Ont. C.A.).

315 The focus of the analysis of whether there is a common issue is not on how many individual issues there might be but whether there are issues the resolution of which would be necessary to resolve each class member's claim and which could be said to be a substantial ingredient of those claims: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 55, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50 (S.C.C.), rev'g, (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.).

316 The fundamental aspect of a common issue is that the resolution of the common issue will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at para. 39.

317 For an issue to be common, it is not essential that the class members be identically situated vis-à-vis the opposing party or benefit from the successful prosecution of the action to the same extent: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at paras. 39-40.

318 The comparative extent of individual issues is not a consideration in the commonality inquiry, although it is a factor in the preferability assessment: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at

para. 65, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50 (S.C.C.), rev'g, (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.); *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 (S.C.C.) at para. 33.

319 The core of a class proceeding is the element of commonality; there must be commonality in the actual wrong that is alleged against the defendant and some evidence to support this: *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (Ont. S.C.J.) at para. 25; *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (Ont. S.C.J.) at para. 21.

320 The core of a class proceeding is the element of commonality; there must be commonality in the actual wrong that is alleged against the defendant and some evidence to support this: *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (Ont. S.C.J.) at para. 25; *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (Ont. S.C.J.) at para. 21.

Evolution of the Common Issues

321 In the case at bar, the list of proposed common issues evolved during the course of the argument of the certification motion.

322 Mr. McCracken initially proposed the following Revised List of Common Issues:

Common Issue One - Misclassification

1. Are the Class Members excluded from overtime eligibility under contract (express or implied) and/or under the *Canada Labour Code*, c. L-2, as amended?

Common Issue Two - Overall Breach and Misclassification

2. Did the Defendant breach its contracts of employment with the Class or was it unjustly enriched, by denying eligibility for overtime compensation to some or all Class Members whom CN classified as first line supervisors?

Common Issue Three - Breach of Contract

3.(a) What are the relevant terms of (express or implied or otherwise) of the Class Members' contracts of employment with the Defendant respecting: (i) classification; (ii) regular and overtime hours; (iii) holiday pay; and (iv) the recording of hours worked?

(b) Did the Defendant breach any of the foregoing terms? If so how?

Common Issue Four - Duties of the Defendant

4.(a) Did the Defendant have a contractual duty (express or implied) to take reasonable steps to ensure that Class Members were properly classified?

(b) If so, did the Defendant breach this duty?

(c) Did the Defendant have a statutory duty to take reasonable steps to ensure that Class Members were properly classified?

(d) If so, did the Defendant breach this duty?

(e) Did the Defendant have a duty to act in good faith in the performance of its contractual and/or statutory obligations to the Class and individual Class Members, including (but not limited to) a duty to take reasonable steps to ensure that Class Members were properly classified?

(f) If so, did the Defendant breach this duty?

(g) Did the Defendant owe a duty of care to the Class or each Class Member to ensure that individual Class Members were properly classified?

(h) If so, what is the standard of care?

(i) Did the Defendant fall below the standard of care? If so how?

Common Issue Five - Unjust Enrichment

5.(a) Was the Defendant enriched by (i) failing to compensate the Class Members with pay or overtime pay for hours worked in excess of their standard hours of work, or (ii) failing to compensate the Class Members with holiday pay?

(b) If the answer to question 5(a)(i) or (ii) is "yes," did the Class suffer a corresponding deprivation?

(c) If the answer to question 5(a)(i) and (b) is "yes," was there any juristic reason for the enrichment?

(d) If the answer to question 5(a)(ii) and (b) is "yes," was there any juristic reason for the enrichment?

Common Issue Six - Damages or other Relief

6.(a) If an answer to any of the foregoing common issues is in favour of the Class, what remedies are Class Members entitled?

(b) If an answer to any of the foregoing common issues is in favour of the Class, is the Defendant potentially liable on a class-wide basis? If "yes":

1. Can damages be assessed on an aggregate basis? If "yes":

a. Can aggregate damages be assessed in whole or in part on the basis of statistical evidence, including statistical evidence based on random sampling?

b. What is the quantum of aggregate damages owed to Class Members?

c. What is the appropriate method or procedure for distributing the aggregate damages award to Class Members?

Common Issue Seven - Punitive Damages

7.(a) Is the Class entitled to an award of aggravated, exemplary or punitive damages based upon the Defendant's conduct?

(b) If the answer to 7(a) is "yes," can that damage award be determined on an aggregate basis?

(c) If the answer to 7(b) is "yes," what is the appropriate method or procedure for distributing the aggregate aggravated, exemplary or punitive damage award to the Class?

323 This initial list of questions was premised on Mr. McCracken's submission that the court, at the common issues trial, could and should determine whether first line supervisors were properly or improperly classified as managers on a class-wide basis.

324 During the course of the argument of the certification motion, I expressed reservations about the commonality of some of the proposed common issues, and to focus the discussion about my concerns, I prepared an amended list of questions and asked for the parties' submissions. My amended list was prepared on the assumptions that the Court had jurisdiction over the subject matter and that Mr. McCracken had shown reasonable causes of action.

325 The Amended Revised List of Common Issues was as follows:

Common Issue One - Payment of Overtime Pay

1. Did the Class Members receive overtime pay and or holiday pay under the *Canada Labour Code*, c. L-2, as amended?

Common Issue Two - Breach of Contract

2.(a) What are the terms (express or implied or otherwise) of the Class Member's contracts of employment with the Defendant respecting: (i) classification; (ii) regular and overtime hours; (iii) holiday pay; and (iv) the recording of hours worked?

Common Issue Three - Duties of the Defendant

3.(a) Did the Defendant have a contractual duty (express or implied) to take reasonable steps to ensure that Class Members were properly classified?

(b) If so, did the Defendant breach this duty?

(c) Did the Defendant have a statutory duty to take reasonable steps to ensure that Class Members were properly classified?

(d) If so, did the Defendant breach this duty?

(e) Did the Defendant have a duty to act in good faith in the performance of its contractual and/or statutory obligations to the Class and individual Class Members to ensure that Class Members were properly classified?

(f) If so, did the Defendant breach this duty?

(g) Did the Defendant owe a duty of care to the Class or each Class Member to ensure that individual Class Members were properly classified?

(h) If so, what is the standard of care?

(i) Did the Defendant fall below the standard of care? If so how?

Common Issue Four - Unjust Enrichment

4.(a) Would the Defendant be enriched by (i) failing to compensate a Class Members with pay or overtime pay for hours worked in excess of his or her standard hours of work, or (ii) failing to compensate the Class Member with holiday pay?

(b) If the answer to question 4(a)(i) or (ii) is "yes," would the Class Member suffer a corresponding deprivation?

(c) If the answer to question 4(a)(i) and (b) is "yes," was there any juristic reason for the enrichment?

(d) If the answer to question 4(a)(ii) and (b) is "yes," was there any juristic reason for the enrichment?

Common Issue Five - Damages or other Relief

5. If the Defendant breached a duty or its contract or was unjustly enriched what remedies are available to the Class Member?

Common Issue Six - Punitive Damages

6. Would the Defendant's conduct justify an award of aggravated, exemplary or punitive damages?

326 With three reservations, Mr. McCracken adopted the Amended Revised List of Common Issues and asked that they be certified as common issues.

327 The first reservation was that Mr. McCracken urged the court that a common issue about the misclassification of the whole class should be certified as a common issue as initially submitted. The second reservation, which arose as a result of the discussion about the Amended Revised List of Common Issues, was that he submitted that there should be an additional common issue about how management status can be determined on a class-wide basis. The third reservation was that Mr. McCracken asked the Court to certify a common issue about the aggregate assessment of damages, which question had been removed in the Amended Revised List of Common Issues.

328 For its part, whether from the initial Revised List of Common Issues or from the Amended Revised List of Common Issues, CN disputes that any of the proposed questions are proper common issues.

329 CN submits that each question fails for one or more or all of the following reasons: (a) the question is not common to the Class; (b) it depends on individual findings of fact for each claimant; (c) it is not necessary to the resolution of each Class Member's claim; (d) its resolution would not significantly advance the litigation; and (e) it lacks a factual basis in the evidence.

Analysis of the Common Issues

Process of Elimination and Commentary

330 In my opinion, a process of elimination followed by some explanatory commentary reduces the size of the list of common issues from twenty-five to six certifiable questions.

331 From the initial Revised List of Common Issues, questions 1; 2; 3(a), (b); 4(a), (b), (c), (d), (e), (f), (g), (h), (i) and 7(a) are unacceptable as common issues on the grounds that these questions lack commonality or would depend on individual findings of fact for each claimant. In my opinion, these questions cannot be determined on a class-wide basis and rather require individual questions to be answered.

332 Recalling the discussion above about the some basis in fact test, as I attempted to demonstrate with my example about grade seven students, there are some questions that inherently require individual answers and not a collective answer. In the case at bar, the rights under Division I of Part III of the *Canada Labour Code* are not collective rights. As a group, first line supervisors are not entitled to the protections of the *Code*. Rather, first line supervisors are entitled to the protections of the *Code* as individuals, and their entitlements must be determined on an individual basis.

333 This is particularly true because how the *Canada Labour Code* determines whether a person is a manager (see the discussion above) depends upon who the person is as an individual in the organization (his or her role) and upon what he or she does as an individual in the organization (his or her potential and actual actions). The common label of being a first line supervisor tells almost nothing about entitlement under the *Code*.

334 My conclusion that proposed questions 1; 2; 3(a), (b); 4(a), (b), (c), (d), (e), (f), (g), (h), (i) and 7(a) lack commonality is supported by *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (Ont. S.C.J.), which was a proposed class action for unpaid overtime pay against an employer that, like CN, was subject to the *Code*.

335 In *Fresco*, unlike the case at bar, there was no issue that the plaintiff and the other Class Members were eligible to overtime pay. The problem in *Fresco* was that it was alleged that the defendant Canadian Imperial Bank of Commerce ("CIBC") had an illegal overtime policy that denied Class Members their wages for overtime work unless the work had been authorized. Justice Lax dismissed the motion for certification of the action as a class action. In the course of doing so, Justice Lax found that the central issue in the case could not be stated as a common issue because it lacked commonality. She concluded that the central issue, whether the employees had been unlawfully denied overtime pay, was an individual not a collective issue.

336 In *Fresco*, Justice Lax concluded that the CIBC's overtime policy, which required that overtime work be pre-approved, was not illegal, but for the purposes of discussing the common issue and the preferable procedure criteria, Justice Lax assumed that the policy was illegal. Notwithstanding that assumption, Justice Lax concluded that there was no asserted common issue capable of being determined on a class-wide basis that would sufficiently advance the litigation to justify certification. As Justice Lax analyzed the situation, the illegal policy was beside the crucial point which was whether CIBC had wrongfully denied Class Members their entitlement to overtime pay. The crucial point was not a point that could be assessed in common. At para. 62 of her judgment, Justice Lax stated that: "This evidence shows a variety of individual circumstances that give rise to unrelated bases for unpaid overtime claims that can only be resolved individually by considering the evidence of the affiant advancing the claim, the evidence of various other current and former CIBC employees who managed and/or worked with that affiant, and various records maintained on a non-centralized basis by CIBC."

337 In *Fresco*, the illegality of the policy, which might be said to be common, did not change the individual nature of the claims. At para. 70 of her judgment, Justice Lax stated that the central flaw in the plaintiff's case is that

instances of unpaid overtime occur on an individual basis. Much the same sort of thing may be said about the alleged illegality of CN's classifying the first line supervisors as managers. Ultimately, that illegality must be determined on an individual and not a common basis.

338 Moving on, from the initial Revised List of Questions, questions 4(e), (f), (g), (h) and (i) are unacceptable as common issues on the grounds that they are based on a cause of action that does not satisfy the first criterion for certification, which is to show a reasonable cause of action.

339 From the initial Revised List of Questions, questions 4(a), (b), (c), (d), (e), (f), (g), (h) and (i) are unacceptable on the grounds that the determination of the question is not necessary to the resolution of each Class Member's claim.

340 From the initial Revised List of Questions, questions 6 (b) and 7(b) and (c) are not acceptable on the grounds that an aggregate assessment of damages is not available in the circumstances of this case. (I will discuss the matter of an aggregate assessment further below.)

341 From the initial Revised List of Questions, question 7(a) is not acceptable because given the law about the availability of punitive damages, this question is not capable of being answered at the common issues trial. (I will discuss the matter of punitive damages further below.)

342 I turn now to the Amended Revised List of Questions.

343 From the Amended Revised List of Questions, questions 3(g), (h) and (i) are unacceptable as common issues on the grounds that they are based on a cause of cause that does not satisfy the first criterion for certification, which is to show a reasonable cause of action.

344 From the Amended Revised List of Questions, questions 3(a), (b), (c), (d), (e), (f), (g) and (i) are unacceptable on the grounds that the determination of the question is not necessary to the resolution of each Class Member's claim.

345 Save for the questions about an aggregate assessment of damages, I have not eliminated any questions from either list based on CN's objection that the question lacks a factual basis in the evidence. In this regard, I refer back to my discussion above about the evidentiary burden for certification. In my opinion, Mr. McCracken has met the low standard of showing that there is some basis in fact for his proposed common issues. I have eliminated questions for other reasons that establish that Mr. McCracken has not met the legal burden for satisfying the criteria for a common issue.

346 By way of explanation and commentary, little more needs to be said about the elimination of questions that lack commonality and that cannot be answered on a class-wide basis. These questions are by definition not common issues. In this regard, *Macleod v. Viacom Entertainment Canada Inc.*, [2003] O.J. No. 331 (Ont. S.C.J.), is an example, like the case at bar, where finding the answer to the question of whether there were implied terms of contract would require individual determinations and thus the question was not a common issue.

347 Little also needs to be said about the questions eliminated because they are based on a cause of action that has been found not to be reasonable.

348 I will defer the explanation and the commentary about the questions about an aggregate assessment of damages to later in these Reasons for Decision. For the moment, I will simply remove these questions from the list.

349 By way of explanation and commentary about removal of the question concerning punitive damages, I rely on my judgment in *Robinson v. Medtronic Inc.*, [2009] O.J. No. 4366 (Ont. S.C.J.), aff'd [2010] O.J. No. 3056 (Ont. Div. Ct.). I, however, have substituted a question, discussed below, about whether CN's conduct would justify an award of punitive damages.

The Approved Common Issues, Answers, and Commentary

350 With some refinements, with some more explanatory commentary, and subject to the matter of one additional question about how management status can be determined for FLSs on a class-wide basis, which question (Minimum Requirements for Manager Status) I will now add to the list, the above process of elimination yields, the list of six common issues set out below.

351 In my opinion, the following questions pass the test for certification as common issues; that is:

Common Issue One - Payment of Overtime Pay

Did the Class Members receive overtime pay under the *Canada Labour Code*, c. L-2, as amended?

Common Issue Two -Contract Terms

What are the terms by force of statute of the Class Members' contracts of employment with the Defendant respecting: (i) classification; (ii) regular and overtime hours; and (iii) the recording of hours worked?

Common Issue Three - Minimum Requirements of Manager Status at CN

In accordance with the meaning under s. 167 (2) of the *Canada Labour Code*, of "employees who are managers or superintendents or exercise management functions", what are the minimum requirements to be a managerial employee at CN?

Common Issue Four - Unjust Enrichment

Would the Defendant be unjustly enriched by failing to compensate a Class Member with pay or overtime pay for hours worked in excess of his or her standard hours of work?

Common Issue Five - Damages or other relief

If the Defendant breached a duty or its contract or was unjustly enriched what remedies are available to the Class Member?

Common Issue Six - Punitive Damages

Would the Defendant's conduct justify an award of aggravated, exemplary or punitive damages?

352 The refinements are to: (a) Common Issue One, where the words "and/or holiday pay" have been deleted; (b) Common Issue Two, where the title has been changed from "Breach of Contract" to "Contract Terms" and where the reference to holiday pay has been removed and where I have substituted the words "by force of statute" for the words "(express or implied or otherwise)"; and (c) Common Issue Four where clause 4(ii) has been removed and the series of questions collapsed into a single question.

353 All of the above questions are necessary to the resolution of each Class Member's claim. Indeed, as I will explain, four of the six questions can and should be answered before the common issues trial and these answers, which are readily available, would substantially advance the Class Member's litigation against CN.

354 The answers to the remaining two questions, questions two and six, are not readily available, but they are common issues that would substantially advance the litigation for both parties and they would establish the foundation for individual issue trials that would be productive and manageable and that would provide access to justice fairly to both parties to the litigation.

355 The answer to question one is already known. It is not disputed that CN did not pay overtime pay to the first line supervisors. CN believed it did not have to do so, because it classified the first line supervisors as managers, which status is really what this litigation is all about.

356 In *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Ont. Gen. Div.), Justice Winkler noted that a common issue of fact or law does not cease to be a common issue simply because the defendant concedes or admits the issue and that the issue should be included in the certification order in order to bind members of the Class, and, I would add, to bind the defendant and advance the litigation.

357 The answer to question two is also now known as a by-product of CN's motion under rule 20.01(3)(a), which questioned the court's subject matter jurisdiction. The answer to the question is that compliance with the overtime provisions of the *Code* is by force of statute an implied term of the contracts of employment between CN and the first line supervisors. Answering this question substantially advances the litigation and makes it unnecessary or moot to answer several factually or legally more difficult questions.

358 Questions four and five are subjunctive tense questions that are readily answered in the subjunctive. On the assumption that CN did not pay overtime pay when it was required to do so and on the assumption that CN's as yet unpleaded defence failed at the common issues trial, then the requirements for an unjust enrichment claim would be satisfied at the common issues trial and CN would have to disgorge its ill-gotten gains, once those gains had been calculated.

359 The answers to questions one, two, four and five advance the litigation but the answers are not determinative of the action because the heart of the matter remains whether the first line supervisors were or were not managers, which is unanswered.

360 Question six about whether CN's conduct would justify an award of aggravated, exemplary or punitive damages is another subjunctive question. It can be extracted from the larger questions of whether punitive damages should be awarded and the quantification of those punitive damages. Question six can be answered at the common issues trial, where a trial judge could determine whether or not CN's conduct warranted punitive damages on the assumption that it breached the *Code* by failing to pay overtime pay to those first line supervisors who were not managers, which fundamental issue would again remain to be decided.

361 However, in the case at bar, the quantum of punitive damages cannot be rationally determined at the common issues trial. As I explain in *Robinson v. Medtronic Inc.*, [2009] O.J. No. 4366 (Ont. S.C.J.), aff'd [2010] O.J. No. 3056 (Ont. Div. Ct.), an assessment of punitive damages requires an appreciation of: (a) the degree of misconduct; (b) the amount of harm caused; (c) the availability of other remedies; (d) the quantification of compensatory damages; and (e) the adequacy of compensatory damages to achieve the objectives or retribution, deterrence, and denunciation. These factors must be known to ensure that punitive damages are rational and to ensure that the quantum of punitive damages is not greater than necessary to accomplish its purposes. In the case at bar, these factors will not be ascertained until after the common issues trial and after the individual liability and quantum issues are

determined.

362 This brings the discussion to Common Issue Three - Minimum Requirements of Manager Status at CN which is the new question: "In accordance with the meaning under s. 167 (2) of the *Code*, of "employees who are managers or superintendents or exercise management functions" what are the minimum requirements to be a managerial employee at CN?"

363 Common Issue Three asks a meta-question, a question about another question, and it avoids the problems of commonality of that other question, which is about the status of a Class Members as a manager or non-manager on a class-wide basis. As I have already explained, I agree with CN that the status of the first line supervisors as managers for the purposes of the *Code* cannot be determined on a class-wide basis because whether a person is a manager is inherently an individual matter. However, I think that Common Issue Three, which is about the minimum standards for being a manager at CN, can be determined on a class-wide basis and can achieve a substantial advancement in the litigation for both the Class Members and for CN.

364 The determination of this question would not provide an answer to whether all the Class Members were or were not managers, but it would divide the whole class into three groups; namely; (1) Class Members who satisfy the minimum standards for being a manager at CN because of who they are and what they do; (2) Class Members who could not possibly satisfy the minimum standards for being a manager at CN; and (3) Class Members whose status as a manager at CN remained to be determined.

365 The *Class Proceedings Act, 1992* would provide the common issues judge with ample resources to address the remaining liability issues for the groups. The Act's resources ensure that the court has the means to conduct, manageable, cost-effective, and timely determinations of individual issues following the common issues trial: *Cassano v. Toronto Dominion Bank* (2007), 87 O.R. (3d) 401 (Ont. C.A.) at para. 62.

366 More precisely, s. 25 of the Act states:

> 25(1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,
>
> (a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;
>
> (b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and
>
> (c) with the consent of the parties, direct that the issues be determined in any other manner.
>
> (2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity.
>
> (3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,
>
> (a) dispense with any procedural step that it considers unnecessary; and

> (b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate
>
> (4) The court shall set a reasonable time within which individual class members may make claims under this section.
>
> (5) A class member who fails to make a claim within the time set under subsection (4) may not later make a claim under this section except with leave of the court.
>
> (6) Subsection 24 (9) applies with necessary modifications to a decision whether to give leave under subsection (5).
>
> (7) A determination under clause (1) (c) is deemed to be an order of the court.

367 Using the resources of s. 25 of the *Class Proceedings Act, 1992*, the individual claims of Class Members of the first group would be dismissed because it could quickly be determined that the members of this group are managers and not entitled to overtime wages. The claims of the Class Members of the second group would move on to individual issue trials to quantify the amount of their claims for overtime pay. The individual claims of the Class Members of the third group would move on to individual issues trials to determine both whether they individually were a manager and also, if not so, what was the quantification of the claim for overtime pay.

368 A thought experiment about what could occur at a common issues trial is helpful in explaining why Common Issue Three is a suitable common issue. At the common issues trial, just as they did for the purposes of this certification motion, the parties would lead evidence about what it is to be a manager at CN. This evidence would be tendered to reflect the legal standard and relevant criteria for determining managerial status as it has been developed by the case law, discussed above, about the *Canada Labour Code*.

369 Based on the evidence adduced by both parties, the common issues judge could articulate a test or measure appropriate for the context of CN's business enterprise. The test or measure of a minimum standard would not require that the powers and responsibilities of FLSs as managers be identical.

370 For example, the common issues judge might decide based on the evidence presented by the parties that a manager at CN is a person who performed any one of the following roles at CN: (a) a leadership position representing CN at collective bargaining; (b) regularly representing CN at discipline or grievance procedures; (c) setting and administering a budget in excess of $10 million; (d) controlling day-to-day operations at a site employing more than 12 employees; (e) supervising and reviewing the performance of more than 12 subordinates with the authority to hire and fire them; or (f) dealing with emergencies. Or the common issues judge might decide based on the evidence that a manager at CN performed at least two of those roles or some other measurement that applied the *Code* to the factual circumstances at CN.

371 It may be noted that while the answer to Issue Three would ultimately divide the Class into three groups, until the question was answered all FLSs would have common cause to prove that the minimum standards for being a manager at CN were set high and thus no FLSs qualified. That effort was demonstrated as a part of the certification motion, as was CN's determination to show that it was correct in classifying all FLSs as managers.

372 To return to the hypothetical example I used earlier in these Reasons for Decision, just as the question of what are the minimum requirements to pass from grade seven to grade eight may be stated as a class-wide question for all the students in the class, the question of the test or measure of who is a manager at CN can be stated on a

class-wide basis. Based on this test, all the Class Members could be divided into the three groups that I have described above and the common issues judge could use the considerable resources of the *Class Proceedings Act, 1992* to achieve manageable individual proceedings.

373 Interestingly, determining what are the minimum *indicia* for who is a manager at CN would be the means that the parties themselves would use to settle their dispute, if they were inclined to do so. To settle this case, the parties would first have come to terms on a test to divide the Class Members into those who were or were not managers. Then, the parties would use that test to determine which Class Members were entitled to overtime pay. Once the number of Class Members who were entitled to overtime pay was determined, the parties could come to an agreement about the quantum of overtime pay. The last question would be how to distribute that sum across the Class, which would largely be a matter for Mr. McCracken and Class Counsel to determine. The Court would also have to approve the fairness and reasonableness of the settlement. This approach to settlement was successfully used in *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (Ont. S.C.J.), an overtime pay case that was settled and not litigated.

374 In my opinion, the above list of six common issues satisfy the third criterion for certification of an action as a class proceeding.

Fresco and Fulawka and Commonality

375 Before concluding the discussion about common issues, it is necessary to make some additional comments about *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (Ont. S.C.J.), and [2010] O.J. No. 716 (Ont. S.C.J.), leave to appeal to the Div. Ct. granted, 2010 ONSC 2645 (Ont. Div. Ct.) of which there was a great deal of argument.

376 *Fresco*, *Fulawka*, and the case at bar share the circumstance that there was a great deal of contention and debate about whether the respective plaintiffs could state a common issue that would justify a class proceeding. As noted above, in *Fresco*, Justice Lax concluded that the plaintiff could not state a question with sufficient commonality. In *Fulawka*, as I will shortly explain in a little more detail, Justice Strathy distinguished *Fresco* and found several common issues that were appropriate for a class action. In the case at bar, I have found there to be several common issues that are appropriate for certification.

377 In arriving at my conclusions about commonality in the case at bar, I do not need to distinguish *Fresco*, with which I agree. The commonality analysis in *Fresco* is consistent with my own analysis. I simply certified a different list of questions as raising common issues and those questions avoid the commonality problems that troubled the plaintiff in *Fresco*.

378 I do, however, need to distinguish or disagree or reconcile my judgment with the judgment in *Fulawka* because Mr. McCracken relies on it as authority for the commonality of several questions that I have not certified. It is therefore necessary to resume the discussion and analysis of both *Fresco* and *Fulawka*. This discussion may begin by explaining how it is that Justice Strathy distinguished the *Fresco* case.

379 Both *Fresco* and *Fulawka* involved claims for unpaid overtime under the *Canada Labour Code*. There was no issue in either case about the eligibility of the class members for overtime, and both cases involved overtime policies that allegedly were being used in ways that were alleged to be unlawful and that were denying the employees overtime pay.

380 However, a major difference between the two cases was that in *Fresco*, Justice Lax found that a systemic class-wide wrong was neither pleaded nor shown to have some basis in fact. As described above, she therefore concluded that there were only individual claims lacking commonality for a class action. In contrast, in *Fulawka*, Justice Strathy found a pleaded cause of action in negligence and for breach of contract at a systemic level; *i.e.* at a class-

wide level, and these causes of action provided the commonality for the common issues that he certified. The existence of a viable claim for systemic wrongdoing provided the basis for Justice Strathy to distinguish the *Fresco* judgment.

381 In *Fulawka*, in arriving at his conclusion that there was a systemic wrongdoing, Justice Strathy concluded that it was not plain and obvious that the defendant bank did not have a duty of care to the class members. In the case at bar, I assumed this to be the case as well, but I went on to decide that there are policy reasons to negate the duty of care. That argument was not made in *Fulawka*, where the claim in negligence is discussed in two short paragraphs, but the argument was made in the case at bar, and the existence of the argument suggests that the case at bar is distinguishable from *Fulawka* on the grounds that there is no systemic wrongdoing in the case at bar upon which to base commonality on a class-wide basis.

382 Thus, I have a way to distinguish *Fulawka*, but to be candid and fair to Mr. McCracken's argument that the questions he posed do have sufficient commonality, I have to do better than rely on the fact that his claims for systemic negligence have been struck out.

383 I, therefore, will be more direct and say that I do not see anything in *Fulawka* that refutes the analysis in the case at bar that the alleged wrongdoing was not a class-wide wrongdoing but rather was a wrongdoing perpetrated at an individual level when a first line supervisor who was not a manager or performing managerial functions was permitted or required to do overtime work and was not paid for it by CN in accordance with the *Canada Labour Code*. In the case at bar, the wrongdoing, which depends on the individual status of the first line supervisor, occurs at an individual level and there is no basis for commonality. If I am wrong and *Fulawka* stands against my analysis, then I disagree with the reasoning in *Fulawka* to the extent that it applies to the case at bar.

Fresco and Fulawka and the Commonality of Misclassification Cases

384 Finally, before concluding this discussion about commonality and moving on to explain why an aggregate assessment of damages is not an appropriate common issue for the case at bar, I will briefly comment on the submissions of the parties about the *Fresco* and *Fulawka* cases and the suggestion that misclassification cases are inherently amenable to certification as class actions.

385 Justice Lax in *Fresco* in Justice Strathy in *Fulawka* remarked that overtime misclassification cases are amenable to certification. Their comments were *obiter*, and in any event, the comments cannot be taken to be a categorical assertion that each and every misclassification case is inevitably appropriate and certifiable as a class action.

386 As it happens, the overtime wage claims in the case at bar are going to be certified as a class proceeding. That is no guarantee that the next overtime wage claim will pass all the criteria for certification as a class proceeding.

Aggregate Assessment of Damages

387 Mr. McCracken asked that four questions involving an aggregate assessment of damages be certified as common issues. I have decided that these four questions cannot be certified as common issues. In this section, I will explain why. I have two reasons.

388 Subsection 24 (1) of the *Class Proceedings Act, 1992* provides that in certain circumstances, the court may determine the aggregate of a defendant's liability to class members, and Mr. McCracken requested that the common issues include the following four questions: (1) Is the Defendant potentially liable on a class-wide basis? (2) If yes, can damages be assessed on an aggregate basis? (3) If yes, can aggregate damages be assessed on the basis of statistical evidence, including statistical evidence based on random sampling? and (4) What is the appropriate measure or

procedure for distributing aggregate damages awarded to Class Members?

389 Mr. McCracken proposes an aggregate assessment of damages as a common issue based on a statistical analysis of a random sample of class members. The random sample would determine an average number of hours of uncompensated overtime for a first line supervisor.

390 CN's evidence from its expert witnesses was that the amount of overtime cannot be reasonably be determined in the aggregate.

391 It was CN's evidence that: (1) it would not be possible to gather accurate data; (2) if accurate data could be obtained, an aggregate assessment would still be subject to unacceptable error; (3) an aggregate assessment could not reasonably be conducted; and (4) distribution of an aggregate assessment on a *pro rata* basis would be unfair.

392 CN's expert, Dr. Colm O'Muircheartaigh, opined that: "it is not feasible to design and implement a survey of the members of the proposed class such that accurate and precise information can be obtained from them on their job responsibilities and the number of hours they may have worked in excess of 40 hours per week or 8 hours per day over the range of jobs they may have occupied and the periods of time during which they occupied them since July 5, 2002."

393 CN's other statistics expert, Dr. Elizabeth Becker, was also of the opinion that it would not be possible to gather accurate data in this case.

394 I accept, however, that Mr. McCracken submitted evidence from an expert in statistics that statistical random sampling can be used at the damages phase of this action and that Mr. McCracken has shown that there is some basis in fact that both an aggregate assessment and an averaged or proportional distribution could be efficiently and manageably conducted in this case. Under the law, I am compelled not to weigh the expert evidence at the certification hearing, and I must accept that Mr. McCracken's expert is correct and provides some basis in fact for an aggregate assessment of damages.

395 Further, I accept that if class-wide liability is a possibility, it is not objectionable that some individual class members would not be able to prove damages at individual trials. The Act anticipates in s. 24(3) that when a damages award is distributed, the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award.

396 I also accept that an aggregate assessment is a wonderful thing for the purposes of a class proceeding. If it is available, it virtually assures that a class proceeding will be the preferable procedure, and if it is available it provides great judicial economy. For what it is worth, I think, it would be a good thing if the common law substantively developed aggregate awards for mass wrongdoing.

397 The problem, however, remains that wishing for a wonderful thing does not make it so, and the requirements of the Act, which is a procedural statute, must be satisfied before there can be an aggregate assessment, so I turn to considering whether the preconditions for certifying an aggregate assessment as a common question have been satisfied in the case at bar.

398 My first reason for not certifying the above four questions is my opinion that the precondition set by s. 24 (1)(c) of the *Class Proceedings Act, 1992* for an aggregate assessment cannot be satisfied.

399 Subsection 24(1) of the *Class Proceedings Act, 1992* states:

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

400 In interpreting s. 24 (1), it needs to be kept in mind that the *Class Proceedings Act, 1992* is a procedural statute and it does not create substantive legal entitlements: *Bisaillon c. Concordia University*, [2006] 1 S.C.R. 666 (S.C.C.) at para. 22; *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.); *Hislop v. Canada (Attorney General)*, [2009] O.J. No. 1756 (Ont. C.A.) at para. 57, leave to appeal ref'd [2009] S.C.C.A. No. 264 (S.C.C.).

401 In the case law, very little attention has been given to s. 24(1)(c) and, therefore, it is necessary to investigate its origin and to analyze its meaning. This investigation may begin with Chapter 14 of the Ontario Law Reform Commissions' *Report on Class Actions* (Ministry of the Attorney General: Toronto, 1982), where the Commission explored monetary relief in class actions, the aggregate assessment of damages, and the distribution of monetary awards after an aggregate assessment had been made.

402 In its report at p. 532, the Commission said it would consider the question whether and, if so, in what circumstances, the total amount of the monetary relief that is owing to class members may properly be determined as a common issue.

403 The Commission, at p. 532 of its report, defined an aggregate assessment as a determination in a single proceeding of the total amount of monetary relief to which the class members are entitled where the underlying facts permit this to be done with an acceptable degree of accuracy.

404 A reading of the chapter reveals that what the Commission meant by referring to "the total amount of monetary relief to which the class members are entitled" was that it meant a fair and more or less accurate assessment of the extent of the defendant's actual liability to the class members. Thus, at p. 548, the Commission states that "the proposed question should be whether the proposed procedure strikes an appropriate balance between the risk of imposing liability upon defendants for an amount that exceeds the injury actually inflicted and the possibility of denying recovery to persons who have been injured."

405 At p. 549 of its report, the Commission states: "The fundamental question that must be answered concerns the reliability of aggregate assessment as a means of determining the defendant's monetary liability."

406 The Commission, which eventually recommended that aggregate assessments be authorized by class action legislation, saw the solution to any problems with aggregate assessment to be that of ensuring that the evidence was sufficient so that the court could come to a fair assessment of the extent of the defendant's liability. If such evidence was available, then it would advance the access to justice, behaviour modification, and juridical economy purposes of class proceedings to permit an aggregate assessment. At p. 549, the Commission stated:

> Commentators agree that the defendant should have the opportunity to argue that the questions of damages are so individualized that a "gross award" cannot be calculated or that the specific evidence introduced is too inadequate to be relied upon. If, however, on the facts of the particular case, the court finds neither of these argu-

ments persuasive, and concludes that the total liability of the defendant can be established by satisfactory evidence in common proceedings, it is argued that this is no more unfair to the defendant that the class treatment of other elements of liability.

407 Ultimately, in language that is quite similar to the language of s. s. 24(1) of the *Class Proceedings Act, 1992*, the Committee made its recommendation at p. 555 of its report and stated:

> Accordingly, the Commission recommends that, where monetary relief is claimed on behalf of members of the class [see now s. 24 (1)(a)], no questions of fact or law other than the assessment of monetary relief remained in order to be determined in order to establish the defendant's liability to some or all class members, [see now s. 24 (1)(b)] and the total amount of the defendant's liability, or part thereof, to some or all of the members of the class can be assessed without proof by individual class members with the same degree of accuracy as in an ordinary action, the court should determine the aggregate amount of the defendant's liability and give judgment for that amount [see now s. 24 (1)(c)].

408 As appears, in enacting s. 24 (1)(c), changes made by the legislature from the recommendation of the Commission include changing:

> the total amount of the defendant's liability, or a part thereof ... can be assessed... with the same degree of accuracy as in an ordinary action

to:

> the aggregate or a part of the defendant's liability... can reasonably be determined.

409 From this analysis, it appears to me that the intent of the legislature was to adopt a liberalized version of the recommendation of the Law Reform Commission as to the accuracy of the aggregate assessment of the defendant's liability. The legislature's version is more liberal than the Commission's recommendation because "reasonably be determined" seems to be more flexible and generous than "assessed with the same degree of accuracy as in an ordinary action."

410 If I am correct in this interpretation of s. 24(1)(c), then I am persuaded by the evidence and the arguments of CN that its liability to some or all Class Members cannot reasonably be determined without proof by individual Class Members. I am further persuaded that that the aggregate of CN's liability cannot reasonably be determined by the survey techniques for which there is some basis in fact. In addition to the numerous concerns raised by CN's expert witnesses, common sense would indicate that an aggregate assessment of overtime to be reasonably accurate would have to somehow take into account exigencies since July 5, 2002 such as the idiosyncratic effects of economic conditions, special projects, and emergencies on whether overtime was required or permitted for first line supervisors. To return to the language used by the Ontario Law Reform Commission in its report, the questions of damages are so individualized that a gross award cannot be calculated and the specific evidence introduced is too inadequate to be relied upon.

411 In *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Ont. Gen. Div.) at para. 19, Justice Winkler discussed whether an aggregate assessment of damages was available in a case about personal injury and property damage claims. He stated:

> These claims cannot "reasonably be determined without proof by individual class members" as required by section 24(1)(c). Furthermore, each individual claim will require proof of the essential elements of causation, which, in the words of 24(1)(b), is "a question of fact or law other than those relating to an assessment of damages".

> In addition, the assessment of damages in each case will be idiosyncratic. All of the usual factors must be considered in assessing individual damage claims for personal injury such as: the individual plaintiff's time of exposure to smoke; the extent of any resultant injury; general personal health and medical history; age; any unrelated illness; and any other individual considerations.

412 Much the same thing can be said about the case at bar. The claims for overtime pay cannot reasonably be determined without proof by individual Class Members that their status as non-managerial employees caused them an entitlement to overtime wages. Each individual claimant would require proof of whether or not he or she was a non-managerial employee. Then, while it is already known that they all were not paid overtime in accordance with the *Code*, the quantification of damages would be idiosyncratic and depend upon whether the particular first line supervisor worked in excess of the standard hours of work and, if so, whether the employee was required or permitted to do so.

413 My second reason for not certifying the above four questions is that the precondition set by s. 24(1)(b) of the *Class Proceedings Act, 1992* for an aggregate assessment also cannot be satisfied in the case at bar.

414 Under s. 24 (1), an aggregate assessment is available after liability has been established. An aggregate assessment provides a method to assess the quantum of damages on a global basis but not the fact of damages having occurred: *Chadha v. Bayer Inc.* (2001), 54 O.R. (3d) 520 (Ont. Div. Ct.) at para. 49, aff'd (2003), 63 O.R. (3d) 22 (Ont. C.A.), leave to appeal to S.C.C. ref'd, [2003] S.C.C.A. No. 106 (S.C.C.); *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (Ont. C.A.) at paras. 40 and 55, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346 (S.C.C.).

415 The aggregate damages provisions in s. 24 and the statistical evidence provisions in s. 23 cannot be utilized to show that class-wide injury can be proven as a common issue, nor can those provisions allow a plaintiff to avoid proof of class-wide injury, if he or she seeks an aggregate assessment of damages: *Irving Paper Ltd. v. Atofina Chemicals Inc.*, [2010] O.J. No. 2472 (Ont. S.C.J.) at para. 45.

416 However, for the purposes of certifying a common issue, the precondition of s. 24(1)(b) can be satisfied where potential liability can be established on a class-wide basis: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (Ont. C.A.) at paras. 46-48, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346 (S.C.C.); *Vezina v. Loblaw Cos.*, [2005] O.J. No. 1974 (Ont. S.C.J.) at para. 25.

417 In my opinion, however, in the case at bar, it cannot be determined at this juncture whether there is any potential for liability to be established on a class-wide basis. The case at bar is not a case where there is the possibility of determining that a breach of the employment contract has occurred across the class with just damages to be determined.

418 In the case at bar, the common issues trial will determine the circumstances when a breach of the employment contract would occur. Those circumstances, namely the situation of a first line supervisor not being a manager at CN and thus entitled to overtime pay, will be determined at the common issues trial, but the common issues trial will not determine whether there has been a breach of contract or class-wide liability or damages.

419 In effect, the common issues trial will determine the how but not the whether of breach of contract. In the case at bar, questions of fact or law associated with liability, namely questions about whether Class Members are not managers, will remain to be determined after the common issues have been determined. The questions that will remain after the common issues trial are not questions relating only to the assessment of monetary relief.

420 In the case at bar, damages will not be amenable to aggregate assessment at the conclusion of a common

issues trial. I hasten to add that this is not fatal to certification of a class proceeding, and in my opinion, the six questions discussed above will substantially advance the class proceeding.

421 An analogy will help explain why I think that the preconditions for an aggregate assessment cannot be satisfied in the case at bar. If a passenger ship sank due to the negligence of its captain and its 1,550 passengers were rescued but suffered personal injuries, there could be a common issue about the aggregate assessment of the passengers' claim for a refund of the cost of their tickets because there would be a potential class-wide liability for breach of a contract for a safe voyage. However, there could not be a common issue for an aggregate assessment of damages for the 1,550 personal injury claims because personal injury damages are inherently individual and would remain to be determined at individual trails. By analogy, in the case at bar, there is no class-wide breach of contract and the predicate for liability, that is, whether a first line supervisor is not a manager, is inherently personal, and there is no potential for it to be proven on a class-wide basis and the common issues trial will not decide on a class-wide basis whether there has been a breach of the employment contract.

422 Strictly speaking, it is for the common issues judge to determine whether the conditions for an aggregate assessment have been satisfied because it will be he or she who makes the assessment. Nevertheless, the practice has developed to certify questions about an aggregate assessment of damages where the court on the certification motion believes that there is a reasonable likelihood that the three conditions to s. 24(1) will be satisfied at trial. In the case at bar, I do not have the basis for that belief.

423 It is for these two reasons that I have not certified the above four questions as common issues.

Preferable Procedure

Introduction

424 For a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at paras. 73-75, leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 50 (S.C.C.).

425 Preferability captures the ideas of whether a class proceeding would be an appropriate method of advancing the claim and whether it would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (Ont. C.A.) at para. 69, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346 (S.C.C.); *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.).

426 The determination of preferable procedure involves two major tests. The first test is whether a class proceeding would be a fair, efficient, and manageable procedure. The second test is whether a class proceeding is preferable to any alternative method of resolving the class members' claims. See *Fischer v. IG Investment Management Ltd.*, [2010] O.J. No. 112 (Ont. S.C.J.).

427 In considering the preferable procedure criterion, the court should consider: (a) the nature of the proposed common issue(s); (b) the individual issues which would remain after determination of the common issue(s); (c) the factors listed in the Act; (d) the complexity and manageability of the proposed action as a whole; (e) alternative procedures for dealing with the claims asserted; (f) the extent to which certification furthers the objectives underlying the Act; and (g) the rights of the plaintiff(s) and defendant(s): *Chadha v. Bayer Inc.* (2001), 54 O.R. (3d) 520 (Ont. Div. Ct.) at para. 16, aff'd (2003), 63 O.R. (3d) 22 (Ont. C.A.), leave to appeal to S.C.C. ref'd, [2003] S.C.C.A. No. 106 (S.C.C.).

428 Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (Ont. C.A.) at para. 69, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346 (S.C.C.); *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.).

Evidentiary Background to the Preferable Procedure Dispute

429 There are two potential alternatives to class proceedings: (1) CN's internal dispute resolution process; and (2) the administrative process administered by Human Resources and Skills Development Canada.

430 CN offered evidence that it has an internal complaints process for its employees who may raise concerns with their immediate supervisor, with CN's Human Resources Department and confidentially with CN's Ombudsman. CN acknowledges, however, that its internal complaints process would not be a preferable procedure. Thus, a major issue to decide is whether the administrative process under the *Code* or a court action is the preferable procedure to determine the Class Members' claims.

431 Part III of the *Canada Labour Code* establishes an administrative process for the recovery of unpaid wages, including overtime pay. It is enforced by Human Resources Skills Development Canada ("HRSDC"). I have already outlined several features of this administrative process earlier in these Reasons for Decision.

432 To these features, I add the following. Under Part III of the *Code*, both inspectors and referees may expand their inquiries to multiple employees. The *Code* affords inspectors the power to investigate beyond the complaint of a single employee and the HRSDC inspectors in practice do conduct group investigations and audits, and there was evidence that CN was the subject of a group audit as a result of a complaint single employee. Referees possess jurisdiction to make a party to the appeal any person who, or group that, in the referee's opinion has substantially the same interest as one of the parties and could be affected by the decision.

433 There was evidence provided by CN that three FLSs had made complaints about overtime that had been investigated and adjudicated by HRSDC. In each case, HRSDC decided the FLS was properly excluded from the *Code* based on the employee's managerial status.

434 However, Mr. McCracken submits that existing employees, who are without the protection of being unionized, are reticent to use the administrative process under the *Code* because of fear of reprisal if they brought an individual proceeding against CN. He presented evidence that there was a power imbalance and that individual employees do not have the resources to pursue complaints and that Class Members would require the assistance of a lawyer. He presented evidence that HRSDC does not have the resources to proactively pursue prosecutions against employers who do not comply with the *Code*.

435 To quote his factum, Mr. McCracken provided evidence that the administrative process under the *Code* "are not a reasonable, workable, or viable alternative for resolving Class Members' claims." He provided evidence that the "HRSDC process is incapable of addressing a substantial portion of Class Members' claims."

436 Mr. McCracken presented evidence to support the proposition that the alternative procedure of proceedings before the officials and tribunals of the *Canada Labour Code* would not remedy the systemic problem of unpaid overtime and would likely not be used by employees still employed by CN.

437 Professor Fudge gave evidence for Mr. McCracken. It was her opinion that the range of enforcement mechanism under the *Code* were inadequate to ensure compliance with Part III of the *Code* and that there were insufficient resources dedicated to the enforcement mechanisms. She opined that employees may be discouraged from

complaining due to the associated costs and that the mechanisms in Part III of the *Code* were inadequate to protect employees against reprisals and that there was some evidence to suggest that fear of retaliation is of particular concern at CN.

438 Mr. McCracken relied on the opinion of Professor Harry Arthurs who was commissioned by the federal government in 2006 to prepare a report. In his report, *Fairness at Work, Federal Labour Standards for the 21st Century*, Professor Arthurs concluded that the *Code*'s enforcement system is inadequate and was not been used by employees.

439 Several of Mr. McCracken's deponents testified that they feared retaliation if they raised their grievances about overtime entitlements. Several deponents testified that they could not afford the costs of the administrative process under the *Code* and would be disadvantaged if they sought to pursue a claim without the assistance of a lawyer.

440 This evidence was matched by evidence from CN's affiants that they were not afraid of pursuing claims and by the evidence from the expert witnesses who conceded that there was no empirical evidence to support the alleged fear factor.

441 CN strongly denied the allegation that it operates in a "culture of fear" where employees do not enforce their employment rights because they are afraid of retaliation and reprisals. Several of CN's affidavits stated that he or she had have never been fearful of raising their concerns with their superior or upper management at CN.

442 Dr. Richard Chaykowski delivered an expert report for the certification motion. He was an expert witness for CN. It was his opinion that: "[t]he *Canada Labour Code* Part III and related regulations represent a reliable and effective means of accomplishing the government's objectives in regard to setting and achieving compliance with labour standards." He noted that there is no empirical research evidence that the current enforcement mechanisms are ineffective.

443 Professor, now Dean, Lorne Sossin also provided an expert opinion for CN. It was his opinion that Part III of the *Code* is a comprehensive and effective scheme enacted in the public interest. His opinion was that the mechanisms established under the *Code* represented Parliament's decision to promote and regulate fair, safe, health, and equitable environments and workplace practices through a comprehensive scheme. It was his view that the administrative process is more accessible, flexible, and responsive than the courts are in protecting employee rights. He disagreed with Professor Fudge who opined that the existing enforcement mechanisms and resources developed to enforcement were inadequate.

444 CN also countered Mr. McCracken's submissions with evidence to show that the administrative process under the *Code* was effective and had been used by CN employees, in both individual and group claims. It submitted that individual claims under the *Code* would be preferable to a class proceeding.

Analysis

445 At the outset of my analysis of the preferable procedure criterion, I wish to comment about what in my opinion is an unfortunate and unnecessary approach to preferable procedure that was used by Mr. McCracken and by CN in the case at bar.

446 It is my opinion that in the case at bar and in other cases an inappropriate use is made of the so-called filters to determine whether a class action would be the preferable procedure. The filters are access to justice, behaviour modification, and judicial economy, and these factors are sometimes used by the parties in a way that diverts attention from the appropriate and central concerns of whether a class proceeding would be a fair, efficient, and manage-

able procedure and whether a class proceeding is preferable to any alternative method of resolving the class members' claims.

447 The unfortunate trend is that plaintiffs with the aid of the some basis in fact standard of proof feel the need to prove that: (a) adjudicators other than judges of the Superior Court are inefficient and under-resourced bureaucrats who are incapable of providing access to justice, behaviour modification, and judicial economy; and (b) the defendant is a despicable villain who requires behaviour modification and who is using its corporate might to avoid being brought before the seat of justice.

448 As demonstrated by twenty-six volumes of motion records or compendiums, these trends played themselves out in the case at bar, where Mr. McCracken attacked and maligned the administrative regime established by Part III of the *Canada Labour Code*. The goal, apparently, was to show that an underutilized administrative process under the *Code* was such a failure that it could not be a preferable procedure.

449 He also attacked the behaviour and the reputation of CN with the apparent goals of showing that: (a) CN was a ruthless, mean, powerful, and revengeful employer that needed behaviour modification; (b) CN and others like it needed to taught a lesson; and (c) CN could only be brought to justice through a class proceeding that would provide Class Members "collective strength and anonymity".

450 CN took the bait, and through the evidence of many affiants and of Dr. Richard Chaykowski and Dean Sossin, it spent a great deal of effort defending the availability, efficacy, advantages, resources, and fairness of the administrative process under the *Code*. And through the evidence of its own lay and expert witnesses, CN presented itself as an honourable employer who did not ruthlessly resort to reprisals nor seek to avoid having its employees have access to justice. Paragraphs 462 and 473 of CN's first factum are examples of the resulting argument. They state:

> 462. The advantages to an employee of the administrative wage recovery procedure under Part III of the *Code* are numerous: it is free; HRSDC will conduct the required investigation and issue orders without charge to the employee; in the event of dispute a quasi-judicial hearing is held, where costs may be awarded (but are virtually never awarded to the employer); and the resulting orders may be summarily filed and are enforceable as any court order. Similar advantages in proceedings under the *Employment Standards Act* rendered the class proceeding not to be a preferable procedure for the recovery of wages.
>
> 473. Moreover, there is no basis in fact to suggest a fear of retaliation at CN for the assertion of rights at CN. The only evidence of any actual possible reprisal concerns the Plaintiff's demotion to a unionized position following the commencement of this action. However, as demonstrated above in this Factum, the demotion was not an issue of reprisal, but rather a response to the fact that McCracken, a second level supervisor - more senior than an FLS - had breached the trust that CN places in its senior managers by not raising his concerns with CN senior management prior to launching the class action.

451 I do not propose to take the bait, because without in any way disparaging the work being done by the inspectors and referees under Part III of the *Canada Labour Code*, and without having to determine whether big corporate employers in general or CN in particular are rapacious villains, and whether the Class Members are cowering and intimidated victims of reprisals, furtively and anonymously seeking access to justice not available to them from the administrative process under the *Code*, it is plain to me that Mr. McCracken's class action with its six common issues coupled with the resources of s. 25of the *Class Proceedings Act, 1992*, would be the preferable procedure for resolving the claims of the 1550 Class Members.

452 The class action as it has now been structured will be manageable. It will provide access to justice and judicial economy and it will provide behaviour modification if that ultimately proves to have been necessary.

453 Like all of the criteria for certification, the preferable procedure criterion does not present a high hurdle for a plaintiff particularly when the resources of the *Class Proceedings Act, 1992* are added to the mix. In some types of case, the preferable procedure criterion, is no hurdle at all because it will be obvious just from the pleadings that a class proceeding would be the only way to provide access to justice, behaviour modification, and judicial economy.

454 The effort to vilify the defendant as an element of the preferable procedure criteria is often not necessary and it sometimes gets in the way of advancing or settling the action because the defendant who might be prepared to acknowledge liability for a civil misdeed may not be so ready to settle a claim of moral or criminal misconduct that would besmirch its reputation.

455 Proving behaviour modification is often unnecessary because in some cases, the defendant did not intend to do wrong and was not trying to get away with anything. For instance, in the case at bar, Mr. McCracken would have satisfied the preferable procedure criteria without showing some basis in fact that CN was a despicable boss that required behaviour modification.

456 If I were to assume that CN acted in good faith and had no intent to exploit, intimidate, or oppress the first line supervisors but simply made a mass mistake in thinking that the first line supervisors were managers, behaviour modification would not be a necessary ingredient for justifying a class action. The class action would still be preferable to the administrative process under the *Code* because a class action would provide access to justice and judicial economy for a mass mistake in an efficient and manageable way. The *Class Proceedings Act, 1992* was designed precisely to address mass wrongdoing.

457 I conclude, therefore, that Mr. McCracken has satisfied the preferable procedure criterion of the test for certification.

Representative Plaintiff

Introduction

458 The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all of the class members as against the defendant: *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 (Ont. S.C.J.) at paras. 36-45; *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 (Ont. S.C.J.) at para. 40, aff'd [2003] O.J. No. 4708 (Ont. C.A.).

459 Provided that the representative plaintiff has his or her own cause of action, the representative plaintiff can assert a cause of action against a defendant on behalf of other class members that he or she does not assert personally, provided that the causes of action all share a common issue of law or of fact: *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 (Ont. S.C.J.) at para. 22, leave to appeal granted, [2002] O.J. No. 2135 (Ont. S.C.J.), varied (2003), 64 O.R. (3d) 208 (Ont. Div. Ct.) at paras. 41, 48, varied [2003] O.J. No. 2218 (Ont. C.A.); *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (Ont. S.C.J.) at paras. 71-77; *Voutour v. Pfizer Canada Inc.*, [2008] O.J. No. 3070 (Ont. S.C.J.); *LeFrancois v. Guidant Corp.*, [2008] O.J. No. 1397 (Ont. S.C.J.) at para. 55.

460 Whether the representative plaintiff can provide adequate representation depends on such factors as: his or her motivation to prosecute the claim; his or her ability to bear the costs of the litigation; and the competence of his or her counsel to prosecute the claim: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at para. 41.

461 CN submits that Mr. McCracken's attitude towards his fellow Class Members, as evidenced by an e-mail to his now former co-workers, suggests that he is not an appropriate representative of the proposed Class, may not vigorously pursue Class Members' interests, and does not appreciate the responsibilities of his role, which is akin to that of a fiduciary.

Evidentiary Background to the Dispute about the Representative Plaintiff

462 Before his resignation, Mr. McCracken sent an e-mail message to Claude Mongeau, Chief Executive Officer of CN. In his message, Mr. McCracken accused his supervisors and managers, some of whom are putative Class Members, at the Toronto Rail Traffic Control Centre, of inadequate leadership, a lack of teamwork, and failing to provide positive feedback.

463 On the day of his resignation from CN, Mr. McCracken sent an e-mail to all CN Rail Traffic Controllers, Senior Managers and Chief Train Dispatchers in Toronto, some 80 persons, including 23 putative Class Members.

464 In his e-mail message, Mr. McCracken accused Rich Desforges, a former first line supervisor and now a second line supervisor of lying and duplicity in failing to support the class action out of fear of harming his career. He refers to Crystal Garbut, a first line supervisor, as a "snake" and as "Old Teary Eyed" and says that she is incompetent and negligent in performing her duties.

465 It was an ill-tempered and self-indulgent departing shot.

466 Mr. Deforges intends to opt-out if the action is certified, and Ms. Garbut does not know if she will remain a Class Member if the action is certified.

Analysis

467 In my opinion, it is an overstatement for CN to suggest, as it does, that Mr. McCracken's animosity towards several members suggests that he will not fairly and adequately represent the whole class.

468 What Mr. McCracken did was rude and unprofessional, and while he ought not to have let his emotions have the better of him, in my opinion, his conduct does not warrant disqualifying him as a representative plaintiff. As Chief Justice McLachlin noted in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) at para. 41, the proposed representative plaintiff need not be typical of the class nor the best possible representative.

469 But for his verbal indiscretions aimed at some identified Class Members, there would be little to suggest that Mr. McCracken has not been able to carry out his responsibilities as a representative plaintiff or that he would not be able to carry out those responsibilities in the future for the class.

470 Mr. McCracken may have personality conflicts with several class members, but he has no conflict of interest in the sense that his claim or position in the class action is adverse in interest to those of the other Class Members.

471 Mr. McCracken was astute enough to hire seasoned class action counsel who are determined to establish overtime wage claims as appropriate for certification as a class action and to prosecute the litigation notwithstanding the resistance of equally seasoned and determined defence counsel.

472 I, therefore, conclude that Mr. McCracken is a suitable representative plaintiff.

The Litigation Plan

473 CN made a fulsome attack on Mr. McCracken's litigation plan. That plan, however, was based on the supposition that all of Mr. McCracken's causes of action and all his common issues would be certified, which is not what has occurred.

474 It is not necessary for me to discuss CN's objections because, I think, Mr. McCracken must go back to the drawing board and prepare a new litigation plan based on the outcomes of the motion and cross-motion.

475 Given the structure of the class action that will go forward, I do not foresee any insurmountable problem that would prevent a suitable litigation plan being drafted. I regard the outcome as producing a manageable proceeding.

476 In these circumstances, I grant certification subject to the condition that a litigation plan be settled, which I will do by case conference or by motion if necessary.

Conclusion

477 For the above reasons, I grant CN's motion in part and I dismiss it in part.

478 I grant Mr. McCracken's motion for certification with qualifications and conditions.

479 The parties may settle the terms of the court's certification order at a case conference, if necessary.

480 If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Mr. McCracken's submissions within 20 days of the release of these Reasons for Decision, followed by CN's submissions within a further 20 days.

481 I would appreciate it if the costs submissions would address the fact that Rule 57.01(4) provides that nothing in that rule or rules 57.02 to 57.07 affects the authority of the court to award or refuse to award costs in respect of a particular issue or part of a proceeding and to what I said in *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, [2008] O.J. No. 2276 (Ont. S.C.J.) at paras. 20-25, rev'd on other grounds, [2009] O.J. No. 1874 (Ont. Div. Ct.), which was that in awarding costs under Ontario's *Class Proceedings Act, 1992*, the court should not only be sensitive to whether the class proceeding was a test case, raised a novel point of law, or involved a matter of public interest, but the court should also keep in mind the purposes of the Act and be prepared to exercise its discretion about costs creatively and flexibly using all of the discretionary tools available. This may mean developing some hybrid and complex orders that preserve access to justice, including ordering costs in the cause or deferring an award of costs.

482 I thank counsel for their hard and superb work in assisting the Court in deciding the Rule 21 motion and the certification motion.

483 Orders accordingly.

Schedule "A"

Excerpts from the Canada Labour Code

With respect to Mr. McCracken's claim and to the issue of whether the Superior Court has subject matter jurisdiction, the most pertinent sections of the *Canada Labour Code* are as follows:

Definitions

3. (1) In this Part [Part I],

"employee" means any person employed by an employer and includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations

Definitions

166. In this Part [Part III],

"employer" means any person who employs one or more employees; "general holiday" means New Year's Day, Good Friday, Victoria Day, Canada Day, Labour Day, Thanksgiving Day, Remembrance Day, Christmas Day and Boxing Day and includes any day substituted for any such holiday pursuant to section 195;

"inspector" means any person designated as an inspector under section 249; "order" means any order of the Minister [of Labour] made pursuant to this Part or the regulations;

"overtime" means hours of work in excess of standard hours of work; "standard hours of work" means the hours of work established pursuant to section 169 or 170 or any regulations made pursuant to section 175;

"wages" includes every form of remuneration for work performed but does not include tips and gratuities;

Application of Part

167. (1) This Part [Part III] applies

(a) to employment in or in connection with the operation of any federal work, undertaking or business other than a work, undertaking or business of a local or private nature in Yukon, the Northwest Territories or Nunavut;

(b) to and in respect of employees who are employed in or in connection with any federal work, undertaking or business described in paragraph (a);

(c) to and in respect of any employers of the employees described in paragraph (b);...

Non-application of Division I to certain employees

(2) Division 1 does not apply to or in respect of employees who

(a) are managers or superintendents or exercise management functions; or

(b) are members of such professions as may be designated by regulation as professions to which Division I does not apply.

Saving more favourable benefits

168. (1) This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part.

Standard hours of work

169.(1) Except as otherwise provided by or under this Division

(a) the standard hours of work of an employee shall not exceed eight hours in a day and forty hours in a week; and

(b) no employer shall cause or permit an employee to work longer hours than eight hours in any day or forty hours in any week.

. . . . .

Maximum hours of work

171. (1) An employee may be employed in excess of the standard hours of work but, subject to sections 172, 176 and 177, and to any regulations made pursuant to section 175, the total hours that may be worked by any employee in any week shall not exceed forty-eight hours in a week or such fewer total number of hours as may be prescribed by the regulations as maximum working hours in the industrial establishment in or in connection with the operation of which the employee is employed.

Overtime pay

174. When an employee is required or permitted to work in excess of the standard hours of work, the employee shall, subject to any regulations made pursuant to section 175, be paid for the overtime at a rate of wages not less than one and one-half times his regular rate of wages.

Definition of "employed in a continuous operation"

191. In this Division, the expression "employed in a continuous operation" refers to employment in...

(b) any operations or services concerned with the running of trains, planes, ships, trucks and other vehicles, whether in scheduled or nonscheduled operations;....

Holiday work in continuous operation employment

198. An employee employed in a continuous operation who is required to work on a day on which the employee is entitled under this Division to a holiday with pay

(a) shall be paid, in addition to his regular rate of wages for that day, at a rate at least equal to one and one-half times his regular rate of wages for the time that the employee worked on that day;

(b) shall be given a holiday and pay in accordance with section 196 at some other time, which may be by way of addition to his annual vacation or granted as a holiday with pay at a time convenient to both the employee and the employer; or

(c) shall, where a collective agreement that is binding on the employer and the employee so provides, be paid in accordance with section 196 for the first day on which the employee does not work after that day.

Holiday work for managers, etc.

199. Notwithstanding sections 197 and 198, an employee excluded from the application of Division I under subsection 167(2) who is required to work on a day on which the employee is entitled under this Division to a holiday with pay shall be given a holiday and pay in accordance with section 196 at some other time, which may be by way of addition to his annual vacation or granted as a holiday with pay at a time convenient to both the employee and the employer.

Complaint to inspector for unjust dismissal

240. (1) Subject to subsections (2) and 242(3.1), any person

(a) who has completed twelve consecutive months of continuous employment by an employer,... may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

. . . . .

Where complaint not settled within reasonable time

241(3) Where a complaint is not settled under subsection (2) within such period as the inspector endeavouring to assist the parties pursuant to that subsection considers to be reasonable in the circumstances, the inspector shall, on the written request of the person who made the complaint that the complaint be referred to an adjudicator under subsection 242(1),

Reference to adjudicator

242. (1) The Minister may, on receipt of a report pursuant to subsection 241(3), appoint any person that the Minister considers appropriate as an adjudicator to hear and adjudicate on the complaint in respect of which the report was made, and refer the complaint to the adjudicator along with any statement provided pursuant to subsection 241(1).

. . . . .

Where unjust dismissal

242(4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dis-

missed, the adjudicator may, by order, require the employer who dismissed the person to

(a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;

(b) reinstate the person in his employ; and

(c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

Decisions not to be reviewed by court

243. (1) Every order of an adjudicator appointed under subsection 242(1) is final and shall not be questioned or reviewed in any court.

No review by certiorari, etc.

(2) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain an adjudicator in any proceedings of the adjudicator under section 242.

Enforcement of orders

244.(1) Any person affected by an order of an adjudicator under subsection 242(4), or the Minister on the request of any such person, may, after fourteen days from the date on which the order is made, or from the date provided in it for compliance, whichever is the later date, file in the Federal Court a copy of the order, exclusive of the reasons therefore.

Idem

(2) On filing in the Federal Court under subsection (1), an order of an adjudicator shall be registered in the Court and, when registered, has the same force and effect, and all proceedings may be taken thereon, as if the order were a judgment obtained in that Court.

Civil remedy

246.(1) No civil remedy of an employee against his employer is suspended or affected by sections 240 to 245.

Payment of wages

247. Except as otherwise provided by or under this Part, an employer shall

(a) pay to any employee any wages to which the employee is entitled on the regular pay-day of the employee as established by the practice of the employer; and

(b) pay any wages or other amounts to which the employee is entitled under this Part within thirty days from the time when the entitlement to the wages or other amounts arose.

Inquiries

248. (1) The Minister [of Labour] may,

(a) for any of the purposes of this Part, cause an inquiry to be made into and concerning employment in any industrial establishment; and

(b) appoint one or more persons to hold the inquiry.

Inspectors

249.(1) The Minister [of Labour] may designate any person as an inspector for the purposes of this Part.

Powers of inspectors

(2) For the purposes of this Part and the regulations, an inspector may

(a) inspect and examine all books, payrolls and other records of an employer that relate to the wages, hours of work or conditions of employment affecting any employee;

(b) take extracts from or make copies of any entry in the books, payrolls and other records mentioned in paragraph (a);

(c) require any employer to make or furnish full and correct statements, either orally or in writing, in such form as may be required, respecting the wages paid to all or any of his employees, and the hours of work and conditions of their employment;

(d) require an employee to make full disclosure, production and delivery to the inspector of all records, documents, statements, writings, books, papers, extracts therefrom or copies thereof or of other information, either orally or in writing, that are in the possession or under the control of the employee and that in any way relate to the wages, hours of work or conditions of his employment; and

(e) require any party to a complaint made under subsection 240(1) to make or furnish full and correct statements, either orally or in writing, in such form as may be required, respecting the circumstances of the dismissal in respect of which the complaint was made.

Evidence in civil suits precluded

(7) No inspector, and no person who has accompanied or assisted the inspector in carrying out the inspector's duties and functions, shall be required to give testimony in any civil suit or civil proceedings, or in any proceeding under section 242 with regard to information obtained in carrying out those duties and functions or in accompanying or assisting the inspector, except with the written permission of the Minister.

Payment order

251.1(1) Where an inspector finds that an employer has not paid an employee wages or other amounts to which the employee is entitled under this Part, the inspector may issue a written payment order to the employer, or, subject to section 251.18, to a director of a corporation referred to in that section, ordering the employer or director to pay the amount in question, and the inspector shall send a copy of any such payment order to the employee at the employee's latest known address.

Where complaint unfounded

(2) Where an inspector concludes that a complaint of non-payment of wages or other amounts to which an employee is entitled under this Part is unfounded, the inspector shall so notify the complainant in writing.

Appeal

251.11 (1) A person who is affected by a payment order or a notice of unfounded complaint may appeal the inspector's decision to the Minister, in writing, within fifteen days after service of the order, the copy of the order, or the notice.

Appointment of referee

251.12(1) On receipt of an appeal, the Minister shall appoint any person that the Minister considers appropriate as a referee to hear and adjudicate on the appeal, and shall provide that person with

(a) the payment order or the notice of unfounded complaint; and

(b) the document that the appellant has submitted to the Minister under subsection 251.11(1).

. . . . .

Referee's decision

(4) The referee may make any order that is necessary to give effect to the referee's decision and, without limiting the generality of the foregoing, the referee may, by order,

(a) confirm, rescind or vary, in whole or in part, the payment order or the notice of unfounded complaint;

(b) direct payment to any specified person of any money held in trust by the Receiver General that relates to the appeal; and

(c) award costs in the proceedings.

Order final

(6) The referee's order is final and shall not be questioned or reviewed in any court.

No review by certiorari, etc.

(7) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain a referee in any proceedings of the referee under this section.

Records to be kept

252.(2) Every employer shall make and keep for a period of at least thirty-six months after work is performed the records required to be kept by regulations made pursuant to paragraph 264(a) and those records shall be available at all reasonable times for examination by an inspector.

Offences and punishment

256. (1) Every person who

(a) contravenes any provision of this Part or the regulations, other than a provision of Division IX, subsection 252(2) or any regulation made pursuant to section 227 or paragraph 264(a),

(b) contravenes any order made under this Part or the regulations, or

(c) discharges, threatens to discharge or otherwise discriminates against a person because that person

(i) has testified or is about to testify in any proceedings or inquiry taken or had under this Part, or

(ii) has given any information to the Minister or an inspector regarding the wages, hours of work, annual vacation or conditions of work of an employee, is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars.

Idem

(2) Every employer who contravenes any provision of Division IX or any regulation made pursuant to section 227 is guilty of

(a) an offence punishable on summary conviction and liable to a fine not exceeding ten thousand dollars; or

(b) an indictable offence and liable to a fine not exceeding one hundred thousand dollars.

Idem

(3) Every employer who

(a) refuses or fails to keep any record that by subsection 252(2) or any regulation made under paragraph 264(a) the employer is required to keep, or

(b) refuses to make available for examination by an inspector at any reasonable time any such record kept by the employer, is guilty of an offence and liable on summary conviction to a fine not

exceeding one hundred dollars for each day during which any such refusal or failure continues.

Procedure

257.(1) A complaint or information under this Part may relate to one or more offences by one employer in respect of one or more of his employees.

Limitation period

(2) Proceedings in respect of an offence under this Part may be instituted at any time within but not later than three years after the time when the subject-matter of the proceedings arose.

Order to pay arrears of wages

258.(1) Where an employer has been convicted of an offence under this Part in respect of any employee, the convicting court shall, in addition to any other punishment, order the employer to pay to the employee any overtime pay, vacation pay, holiday pay or other wages or amounts to which the employee is entitled under this Part the non-payment or insufficient payment of which constituted the offence for which the employer was convicted.

Reinstatement of pay and position

(2) Where an employer has been convicted of an offence under this Part in respect of the discharge of an employee, the convicting court may, in addition to any other punishment, order the employer

(a) to pay compensation for loss of employment to the employee not exceeding such sum as in the opinion of the court is equivalent to the wages that would have accrued to the employee up to the date of conviction but for such discharge; and

(b) to reinstate the employee in his employ at such date as in the opinion of the court is just and proper in the circumstances and in the position that the employee would have held but for such discharge.

When inaccurate records kept

(3) In determining the amount of wages or overtime for the purposes of subsection (1), if the convicting court finds that the employer has not kept accurate records as required by this Part or the regulations, the employee affected shall be conclusively presumed to have been employed for the maximum number of hours a week allowed under this Part and to be entitled to the full weekly wage therefor.

Civil remedy

261. No civil remedy of an employee against his employer for arrears of wages is suspended or affected by this Part.

Regulations

264. The Governor in Council may make regulations for carrying out the purposes of this Part and, without restricting the generality of the foregoing, may make regulations

(a) requiring employers to keep records of wages, vacations, holidays and overtime of employees and of other particulars relevant to the purposes of this Part or any Division thereof;

Motion granted with qualifications and conditions; cross-motion granted in part.

FN* Additional reasons at *McCracken v. Canadian National Railway* (2010), 100 C.P.C. (6th) 334, 2010 ONSC 6026, 2010 CarswellOnt 8330 (Ont. S.C.J.).

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2010 CarswellOnt 2038, 2010 ONSC 2019, 93 C.P.C. (6th) 106

2010 CarswellOnt 2038, 2010 ONSC 2019, 93 C.P.C. (6th) 106

Ramdath v. George Brown College of Applied Arts & Technology

KATRINA RAMDATH and ZSOLT KOVESSY (Plaintiffs) and THE GEORGE BROWN COLLEGE OF APPLIED ARTS AND TECHNOLOGY (Defendant)

Ontario Superior Court of Justice

G.R. Strathy J.

Heard: February 9-10, 2010
Judgment: April 8, 2010
Docket: CV-O8-363847 CP

Counsel: Victoria Paris, Erica Buschmann for Plaintiff / Moving Party

Robert B. Bell, Michael C. Smith, Allessandra V. Nosko for Defendant / Respondent

Subject: Civil Practice and Procedure; Public; Corporate and Commercial; Torts

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Identifiable class

Plaintiffs brought class action against college, alleging that course calendar misrepresented benefits of international business management program and falsely stated it would enable them to obtain three industry designations — Plaintiffs brought motion for certification — Motion granted — Class was real and existing, as all 119 students in three classes of September 2007, January 2008 and September 2008 had been identified — Majority of class members were international students, many from China and India — Given that college was in Ontario, students came to Ontario to study and live, and contract was performed in Ontario, it was hard to imagine that either international students and college would have been contemplating suit in China, India or any other jurisdiction — There was real and substantial connection to Ontario and no such connection to any other single jurisdiction — Procedural fairness did not require proof beyond any doubt that each class member would receive actual notice of action and right to opt out — Hypothetical failure of another state to observe principles on assumption of jurisdiction and recognition of foreign judgments should not preclude Ontario court from taking jurisdiction — This was only realistic way to provide access to justice — Class members who withdrew from program should be given opportunity to prove reasons for withdrawal and establish damages — Fact that some class members ultimately attained designations only went to damages sustained — Possibility that some class members did not rely on representation merely meant that they might not be able to prove damages.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certifi-

cation — Plaintiff's class proceeding — Common issue or interest

Plaintiffs brought class action against college, alleging that course calendar misrepresented benefits of international business management program and falsely stated it would enable them to obtain three industry designations — Plaintiffs brought motion for certification — Motion granted — Proposed common issues relating to negligent misrepresentation, breach of contract, and under Consumer Protection Act, were all similar to those certified in other cases — Proposed common issues relating to each cause of action were central to each class member's claim, were well suited for resolution of class-wide basis, and their resolution would advance claims of all members of class — Case was particularly appropriate for certification as representations were made in documentary form, were uniform in nature, were likely provided to all class members, and were likely to have had some impact on decision-making of class members — Proposed common issues on damages were not appropriate for certification because they were not capable of resolution on common basis — Individual circumstances would have to be examined to determine damages reasonably recoverable as result of breach of contract, misrepresentation or statutory breach — Aggregate assessment of damages was not appropriate — It was not necessary to have common issue on administration of recovery or prejudgment interest.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Preferable procedure

Plaintiffs brought class action against college, alleging that course calendar misrepresented benefits of international business management program and falsely stated it would enable them to obtain three industry designations — Plaintiffs brought motion for certification — Motion granted — College's proposal that joinder would be preferable was impractical given class size with inclusion of international students — Many of individual issues raised by college as overwhelming common issues were premised on class members receiving contradictory information about designations from other sources — College would have to show that any particular student knew such contradictory information — Need for individual assessment of damages was not bar to certification — Class action would provide access to justice to vulnerable group of students, many from different lands and cultures, who might lack individual resources, initiative and sophistication to pursue legal action on their own — Claims were relatively modest and could be more efficiently pursued in single case-managed action — Class proceeding would fulfil goal of judicial economy by addressing important aspects of college's liability at outset — College's proposal for bifurcation was attempt to turn action into opt-in class action by requiring each class member to establish claim prior to resolution of common issues — Proposal would waste judicial and private resources if common issues were decided against class — Class proceeding was preferable procedure.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Fair and adequate representation

Plaintiffs brought class action against college, alleging that course calendar misrepresented benefits of international business management program and falsely stated it would enable them to obtain three industry designations — Plaintiffs brought motion for certification — Motion granted — Proposed representative plaintiffs would vigorously and capably prosecute claim on behalf of class — Plaintiffs were students in program, in September 2007 and January 2008 respectively, and were actively involved in issues that were subject of this action, serving as advocates for class-mates before commencement of action — Plaintiffs fell within class definition and understood their duties as representative plaintiffs — Plaintiffs had no conflict with other members of class — Members of third class, starting in September 2008, did not require separate representation — Should it prove necessary or desirable to add representative plaintiff on behalf of this group, plaintiffs could bring motion to do so — There should be separate representative on behalf of non-resident class members, as they had unique interests on administrative and substantive matters.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Litigation plan

Plaintiffs brought class action against college, alleging that course calendar misrepresented benefits of international business

management program and falsely stated it would enable them to obtain three industry designations — Plaintiffs brought motion for certification — Motion granted — Plaintiffs' litigation plan proposed multi-faceted notice plan with notice of certification being disseminated by mail, email, posting on websites and in common areas on college campus, and publishing in college's student newspaper — Given substantial amount of information already collected by plaintiffs, college and college recruiters, it would be possible to develop notice program that accomplishes required goals — Framework proposed by plaintiffs was broadly acceptable — Notice plan would likely be refined and approved on motion to approve notice of certification — Litigation plan was work in progress that would be refined as action progressed — Plaintiffs' counsel had confirmed that her firm's retainer would continue after resolution of common issues on its current terms — Litigation plan was approved.

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Canadian Imperial Bank of Commerce v. Deloitte & Touche (2003), 2003 CarswellOnt 1814, 33 C.P.C. (5th) 127, 172 O.A.C. 59 (Ont. Div. Ct.) — considered

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Cloud v. Canada (Attorney General) (2004), 2004 CarswellOnt 5026, 73 O.R. (3d) 401, 192 O.A.C. 239, 27 C.C.L.T. (3d) 50, [2005] 1 C.N.L.R. 8, 2 C.P.C. (6th) 199, 247 D.L.R. (4th) 667 (Ont. C.A.) — considered

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Fresco v. Canadian Imperial Bank of Commerce (2009), 2009 C.L.L.C. 210-032, 71 C.P.C. (6th) 97, 2009 CarswellOnt 3481 (Ont. S.C.J.) — considered

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Generally — referred to

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

Generally — referred to

s. 5 — pursuant to

s. 5(1) — considered

s. 5(1)(b) — referred to

s. 5(1)(d) — referred to

s. 5(1)(e) — considered

s. 6 — considered

s. 6 ¶ 1 — referred to

s. 8 — referred to

s. 12 — referred to

s. 24(1) — referred to

s. 25 — considered

s. 25(2) — referred to

Competition Act, R.S.C. 1985, c. C-34

Generally — referred to

Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A

Generally — referred to

Pt. III — considered

s. 2 — considered

s. 14 — referred to

s. 14(1) — referred to

s. 14(2) — referred to

s. 15 — referred to

s. 18 — referred to

s. 18(1) — referred to

s. 18(2) — referred to

s. 18(3) — referred to

s. 18(11) — referred to

s. 18(15) — referred to

Ontario Colleges of Applied Arts and Technology Act, 2002, S.O. 2002, c. 8, Sched. F

s. 2(1) — considered

s. 2(2) — considered

Rules considered:

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

R. 5.02 — referred to

R. 17.02 — referred to

R. 17.02(h) — referred to

R. 17.02(o) — referred to

R. 76 — referred to

MOTION by plaintiffs for certification of class action against college.

***G.R. Strathy J.*:**

1 This is a motion for certification of a proposed class action, pursuant to s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*C.P.A.*") The plaintiffs are former students in the International Business Management Program (the "Program") at The George Brown College of Applied Arts and Technology ("George Brown"). They claim that the course calendar misrepresented the benefits of the Program and falsely stated that it would enable them to obtain three industry designations in addition to a college certificate.

2 The Program was eight months long and was first offered at George Brown in September, 2007. This action is brought on behalf of all students who registered in the Program beginning in September, 2007 (the "First Class"), January, 2008 (the "Second Class") and September, 2008 (the "Third Class") (collectively the "Class" or "Class Members").

I. Background

3 The Plaintiff Zsolt Kovessy lives in Toronto, Ontario. He enrolled in the Program in September 2007 and successfully completed it in April 2008, having previously obtained a post-graduate Business Management Certificate from George Brown.

4 The Plaintiff Katrina Ramdath lives in Mississauga, Ontario. She enrolled in the Program in January 2008, and successfully completed it in August, 2008. Before registering in the Program, Ms. Ramdath had completed the International Trade Certificate and the Advanced International Trade Certificate at George Brown.

5 George Brown was established under s. 2 (1) of the *Ontario Colleges of Applied Arts and Technology Act*, 2002, S.O. 2002, c. 8, Sch. F. Subsection 2(2) of that statute states that the objects of each college include offering a comprehensive program of career-oriented, post-secondary education and training to assist individuals in finding and keeping employment. In carrying out these objects, colleges may enter into partnerships with business, industry and other educational institutions.

6 George Brown's relationships with industry organizations, and the ability of its students to obtain desirable employment qualifications, clearly make it an attractive and cost-effective educational choice for job-focused students. For those wishing to pursue a career in international business management, the Program offered access to some important industry qualifications.

7 There are a number of associations in the international business management industry in Canada including: the Forum for International Trade Training ("FITT"); the Canadian Society of Customs Brokers ("CSCB"); and the Canadian International Freight Forwarders Association ("CIFFA") (collectively, the "Industry Associations"). Each Industry Association awards designations to those who complete certain courses of study, which the individual association either offers itself or approves from outside providers. The designations are: the Certified International Trade Professional (CITP), awarded by FITT; the Certified Customs Specialist (CCS), awarded by the CSCB; and, the Certificate in International Freight Forwarding (CIFF), awarded by CIFFA (collectively, the "Industry Designations").

8 The plaintiffs say that the Industry Designations are highly sought-after qualifications that provide an entry into careers in the field of international business management in Canada and internationally and that they enrolled in the Program because they understood it would provide them with an opportunity to obtain those designations.

9 George Brown described the Program in the print and on-line versions of its course calendar as follows:

> **Our Program**
>
> The field of international trade can seem as large and complex as the world itself. Encompassing disciplines such as strategic planning, law, finance, logistics and marketing, attaining a mastery of global trade can seem a daunting challenge. This International Business Management post-graduate program simplifies the complex field of international business with dynamic and interactive teaching methods, including case analysis and guest speakers. The International Business

Management post-graduate program provides students with the opportunity to complete three industry designations/certifications in addition to the George Brown College Graduate Certificate. (emphasis added) The three industry designations/certifications include:

Certified International Trade Professional (C.I.T.P. designation)

Certified Customs Specialist (CCS)

Certificate in International Freight Forwarding (CIFFA, recognized and approved by Federation of International Freight Forwarding Associations).

10 Under the heading "Required Courses", the calendar described the George Brown courses that were apparently necessary in order to obtain the Industry Designations:

Required Courses

C.I
.T.
P.
DE
SI
GN
AT
IO
N

BU International Trade Law
S4
030

BU Global Entrepreneurship
S4
031

BU International Trade Logistics
S4
032

BU International Trade Logistics II
S4
033

BU International Trade Finance
S4
034

BU International Marketing
S4
035

BU International Market Entry and Distribution
S4
036

BU International Trade Management
S4

037

CU
ST
O
MS
CO
UR
SE
S
BU Customs Procedures I
S4
040
BU Customs Procedures II
S4
041

CI
FF
A
CO
UR
SE
S
BU Introduction to Freight Forwarding I
S4
038
BU Introduction to Freight Forwarding II
S4
039

11 The courses offered by George Brown were described in a fashion that was similar to the courses offered or required by the Industry Associations.

12 The calendar also contained a statement in the "Admission Requirements" section to the effect that the tuition fees did not cover the costs of "textbooks, association memberships or association examinations."

13 The plaintiffs say that they relied on the statements in the printed and on-line calendars and understood them to mean that at the end of their course of studies they would obtain the three Industry Designations as well as a George Brown certificate. They allege that at the time they enrolled in the Program, George Brown had made no arrangements with the Industry Associations and that no arrangements were in place by the time the First Class and the Second Class graduated. They claim that they would not have enrolled in the Program if they had known that it was not accredited by the Industry Associations and that they could not obtain the Industry Designations simply by completing the Program.

14 The plaintiffs state that at some point in 2008 students learned that they would not automatically receive the Industry Designations on completing the Program and that they would have to pay additional fees, complete additional courses or examinations and/or submit proof of work experience in order to obtain them. They claim that after students complained, and a meeting was held with students in the Second Class in July of 2008, George Brown amended its on-line calendar to substan-

tially correct the alleged misrepresentations. The amendment read as follows, with deletions being struck out and additions denoted by underlining:

> The field of international trade can seem as large and complex as the world itself. Encompassing disciplines such as strategic planning, law, finance, logistics and marketing, attaining a mastery of global trade can seem a daunting challenge. This International Business Management post-graduate program at George Brown College simplifies the complex field of international business with dynamic and interactive teaching methods, including case analysis and guest speakers. ~~The International Business Management post-graduate program provides students with the opportunity to complete three industry designations/certifications in addition to the George Brown College Graduate Certificate.~~
>
> The International Business Management post-graduate program can also prepare students to pursue three industry designations / certifications in addition to the George Brown College Graduate Certificate if they choose to do so. All of these industry designations / certifications require additional exams and / or related work experience to qualify. Please check out their official websites listed below to find out the detailed requirements set by the granting bodies of these designations / certifications.
>
> The three industry designations/certifications include: Certified International Trade Professional (C.I.T.P. designation offered by FITT (www.fitt.ca)
>
> Designations offered by Canadian Society of Custom Brokers (www.cscb.ca) ~~Certified Customs Specialist (CCS)~~
>
> Certificate in International Freight Forwarding (CIFFA, recognized and approved by Federation of International Freight Forwarding Associations (www.ciffa.com)
>
> **Note**
>
> The qualification requirements for each designation / certificate are set by the granting body, not George Brown College. In order to qualify [sic] any of those designations / certifications, you need to follow the process listed on their website and meet all the requirements applicable to you.

15 By the time the Third Class graduated, George Brown had arrangements in place with some of the Industry Associations, but not with all of them.

16 The plaintiffs claim that they relied to their detriment on the description of the Program in the calendar and they assert a cause of action for negligent misrepresentation. They also claim that George Brown breached its contract to provide the Industry Designations as part of the educational services it agreed to supply to students in the Program. Finally, the plaintiffs claim that George Brown engaged in unfair practices prohibited by s. 14 and 15 of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A ("the *Consumer Protection Act 2002*").

The Case on behalf of George Brown

17 I will discuss later in these reasons some of the evidence tendered on behalf of George Brown. To give context to that evidence, I will explain the primary grounds on which George Brown opposes certification.

18 First, it says that the plaintiffs' claim is essentially for negligent misrepresentation, which makes it unsuitable for certification because the individual issues, including Class Members' knowledge and understanding of the alleged misrepresentations, will make a class action unmanageable. I will discuss this under the "preferable procedure" analysis under s. 5(1)(d) of the *C.P.A.*

19 Second, George Brown says that 78 of the 119 members of the Class are international students who are not resident in Canada. It has adduced evidence, discussed below, with a view to showing that a judgment of this court in a class action would not be recognized in India and China, the homelands of many Class Members. It says that non residents should not be included in the Class because the court cannot be satisfied that its judgment would foreclose litigation in those jurisdictions. I will discuss this issue when I discuss the "identifiable class" requirement under s. 5(1)(b) of the *C.P.A.*

20 Third, it says that the Class is overly broad because it includes (a) those beyond the jurisdiction of the court; (b) those who enrolled after the course calendar was amended in response to student complaints; (c) those who failed or withdrew from the Program; (d) those who subsequently obtained some or all of the Industry Designations from the Industry Associations; and (e) those who had actual knowledge of the work experience, course work and examinations which the three different Industry Associations required before the Industry Designations could be granted, but who enrolled in the Program because they sought the George Brown College Graduate Certificate offered in the calendar. I will discuss this complaint under the "identifiable class" requirement as well.

II. The Test for Certification

21 The test for certification is set out at section 5(1) of the *C.P.A.*:

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

22 The provisions of s. 5(1) should be generously construed so as to promote access to justice, judicial efficiency and behaviour modification, as envisioned by the *C.P.A.*: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) ("*Cloud*") at paras. 37-39, leave to appeal denied, [2005] S.C.C.A. No. 50 (S.C.C.); *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) ("*Hollick*") at paras. 14-16; *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (Ont. C.A.) ("*Pearson*") at paras. 3, 44, leave to appeal denied [2006] S.C.C.A. No. 1 (S.C.C.).

23 The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiffs' claim. The evidentiary requirement for certification is low - the plaintiffs need only show "some basis in fact" for each of the certification requirements in s. 5(1), other than the requirement in s. 5(1)(a) that the pleading discloses a cause of action: *Hollick*, at paras. 16, 25; *Boulanger v. Johnson & Johnson Corp.*, [2007] O.J. No. 179 (Ont. S.C.J.) at para. 20,

leave to appeal denied, [2007] O.J. No. 1991 (Ont. Div. Ct.), supplemental reasons, [2007] O.J. No. 2043 (Ont. S.C.J.) and [2007] O.J. No. 2766 (Ont. S.C.J.).

24 While a decision on certification is very much dependent on the circumstances of the particular case, there is precedent for certification of class actions for breach of contract, negligent misrepresentation, and breach of the *Consumer Protection Act 2002* in the context of educational institutions. It will be of assistance to examine these decisions as they involve many of the issues that arise in this case.

25 The first case in Ontario is *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63, [1998] O.J. No. 2786 (Ont. Gen. Div.), ("*Mouhteros v. DeVry*"), a decision of Winkler J., as he then was. The plaintiff was a former student of a private, for-profit post-secondary educational institution that operated four Canadian campuses, one in Alberta and three in Ontario. The plaintiff alleged that the school misrepresented the quality of its programs and the marketability of its graduates. The proposed class would have included all persons who attended the institution between 1990 and 1996, some 17,000 people. The plaintiff alleged multiple misrepresentations, made by some 76 field representatives, 46 admissions officers, and in numerous television, print and direct mailing advertisements. The plaintiff pleaded negligent misrepresentation and breach of contract, among other causes of action.

26 Winkler J. did not certify the action as a class action. He found, first, that the class definition was over-inclusive because it included students who successfully completed their programs, were satisfied with their education, and went on to find appropriate employment. It also included persons who enrolled regardless of whether they relied on the alleged misrepresentations and who would have no claim for relief.

27 Winkler J. also found that, while misrepresentation might constitute a common issue in a class proceeding, the misrepresentations in that case were numerous, were made in various forms over an extended period of time and their impact and consequences would depend on circumstances peculiar to each student. He stated, at para. 23:

> .. in the present case, the various representations were published by the defendant in 67 different television commercials and 30 different newspaper advertisements, or were made verbally by some 122 admissions officers over a six-year period. The nature of the representations made in DeVry's advertising and promotions, the question of whether the representations were false and misleading, and whether they were made negligently or fraudulently will vary according to the content of the advertisement or the statements made by the admissions officer, the time at which it was published or communicated, the program of study undertaken by each individual student, and the conditions then extant at each of the DeVry campuses.

28 On the "preferable procedure" aspect of the certification test, Winkler J. concluded that while a class proceeding might promote access to justice, it would not foster judicial economy. He concluded, at paras. 30 and 31, that the common issues in the case before him would be "subsumed by the plethora of individual issues" and that all of the criteria in s. 6 of the *C.P.A.* came into play:

> Assuming that the misrepresentation issues identified above were capable of a common resolution, such resolution would be but the beginning, and not the end of the litigation. With respect to the claim for misrepresentation in tort, the plaintiff must prove reasonable reliance on a misrepresentation negligently made. Reliance is an essential element of the tort. The question of reliance must be determined based on the experience of each individual student, and will involve such evidentiary issues as how the student heard about DeVry, whether the student saw any of the advertisements and if so, which ones, what written representations were made to the student prior to enrollment, whether the student met with an admissions officer, and whether the student relied on some or all of these in deciding to enroll in DeVry. The inquiry will not end there, however. If the class members are able to demonstrate reliance, they must show that they relied to their detriment. Damages will require individual assessment. In that regard, the court must consider the program of study entered into, the student's performance in the program, the field in which employment was sought, the length of the job search, any assistance in the search provided by DeVry, the class members prior education and employment history, and

> the nature of the employment, if any, obtained by the class member. These issues are in addition to the numerous questions surrounding the nature of the representations and whether they were negligently and fraudulently made, as enunciated above.
>
> The presence of individual issues will not be fatal to certification. Indeed, virtually every class action contains individual issues to some extent. In the instant case, however, what common issues there may be are completely subsumed by the plethora of individual issues, which would necessitate individual trials for virtually each class member. Each student's experience is idiosyncratic, and liability would be subject to numerous variables for each class member. Such an class action would be completely unmanageable.

29 Winkler J. concluded that certification would ultimately result in a multitude of individual trials, which would completely overwhelm any advantages to be obtained from the trial of the few common issues. Proceedings in the Small Claims Court or under the simplified procedure rules would promote greater judicial economy.

30 *Hickey-Button v. Loyalist College of Applied Arts & Technology* (2006), 211 O.A.C. 301, [2006] O.J. No. 2393 (Ont. C.A.) ("*Hickey-Button*") is a decision of the Court of Appeal, reversing a decision of the Divisional Court [2004 CarswellOnt 8812 (Ont. Div. Ct.)] (unreported, November 2, 2004) and of the certification motion judge ((2003), 31 C.P.C. (5th) 171, [2003] O.J. No. 811 (Ont. S.C.J.)) and certifying a class action brought on behalf of nursing students at Loyalist. The action claimed that students in the nursing program in 1997 and 1998 were offered what was called the "Queen's option," which would allow students entering the program to obtain a nursing degree from Queen's University in four years. The "Queen's option" was referred to in material provided to the students prior to their enrolment. The plaintiff alleged that no such option was available and claimed damages for breach of contract and negligent misrepresentation. Loyalist acknowledged that the material it provided to students could be considered to contain representations, but said that negligent misrepresentation could only be determined on a student-by-student basis, based on what each student was told and what reliance, if any, the student placed on that information. As in the case before me, the college claimed that additional information or representations were made to students, in other documentation and communications and in information sessions, that would have qualified the representation about the "Queen's option."

31 Doherty J.A., who gave the judgment of the Court of Appeal, found that there were properly pleaded causes of action for breach of contract and negligent misrepresentation. The proposed classes consisted of students who had entered into a nursing program in each of two years. Doherty J.A. found that the class description was appropriate - at paras. 48-51:

> The class contemplated by Ms. Hickey-Button consists of her and the other twenty-two persons who entered the nursing diploma course at Loyalist in the fall of 1997. The class contemplated by Ms. Potter consists of her and fifty-six students who entered the nursing diploma course in the fall of 1998.
>
> A class of persons is identifiable for the purposes of s. 5(1)(b) if that class is described by objective criteria that can identify its members without reference to the ultimate merits of the action. There must also be some rational relationship between the described class and common issues: *Hollick v. Toronto (City)*, *supra*, at para. 19; *Cloud v. Attorney General of Canada*, *supra*, at para. 45: *Pearson v. Inco Ltd.* (2005), 261 D.L.R. (4th) 629 at para. 57 (Ont. C.A.).
>
> The appellants have used readily discernible objective criteria to describe the classes of persons that each proposes to represent. The classes are described by reference to enrolment in a specific course at a specific time at a specific educational institution. There cannot be any difficulty in identifying the persons who qualify for membership. The classes described by the appellants are the antithesis of an open-ended or undefined class.
>
> There is also a close link between the described classes and the common issues. The appellants contend that all members of the class entered into a contract with Loyalist that included the "Queen's" option and that Loyalist breached that contract in respect of each of the students. Further, it is alleged that Loyalist owed a duty of care to all members of the class and breached that duty in negligently making false statements as to the availability of the "Queen's" option.

32 Doherty J.A. found that common issues arose out of both the breach of contract and the negligent misrepresentation claims. Those common issues were similar to the issues the plaintiffs propose in this action. In answer to the complaint, which had been accepted by the Divisional Court, that reliance would have to be established on a student-by-student basis, Doherty J. observed that reliance was not a necessary requirement of the breach of contract claims. He also said that the existence of individual issues was not a barrier to certification, referring to *Cloud*, at paras. 73-75.

33 In the preferable procedure analysis, Doherty J.A. found that a class action would satisfy the objectives of the *C.P.A.*, as summarized in *Cloud* at paras. 73-75, and *Pearson* at para. 67. He noted that it is important to examine what the common issues are and to consider their significance in the resolution of the overall action: "The more numerous the common issues in the litigation, and the more central those issues are to the outcome of the litigation, the stronger will be the argument for a class proceeding." He said, at para. 55:

> An examination of the common issues and, in particular, the significance of those issues to the overall action will play a key role in deciding whether a class proceeding is a preferable procedure. The more numerous the common issues in the litigation, and the more central those issues are to the outcome of the litigation, the stronger will be the argument for a class proceeding: *Inco*, *supra*, paras. 69-74. I have already outlined the numerous common issues raised in these proceedings. I have also indicated that in my view those common issues are central to the outcome of this litigation. If the appellants cannot succeed on those common issues, the action will fail. It is only if the appellants are successful on those issues that various individual issues specific to each student, such as damage-related issues, will have to be determined.
>
> The number of common issues raised by the appellants and their significance to the litigation makes this a case where it can be said that a class proceeding is a "preferable" procedure. The interests of judicial economy would be well served by addressing the common issues in a single class proceeding rather than in a number of individual actions.

34 I will return to this observation shortly, because one of the fundamental submissions of counsel on behalf of George Brown in this case is that the common issues are only peripheral to the resolution of the claims of the Class and the real guts of the case are in the individual issues. Similar objections were voiced, and rejected, in *Hickey-Button*.

35 *Olar v. Laurentian University* (2003), 37 C.P.C. (5th) 129, [2003] O.J. No. 2756 (Ont. S.C.J.), aff'd (2004), 6 C.P.C. (6th) 276, [2004] O.J. No. 3716 (Ont. Div. Ct.) was a similar sort of case. The plaintiff complained that a statement in the university's calendar misrepresented the ability of an engineering student to transfer to a third year engineering program at another Ontario university after having completed two years of university at Laurentian. In denying certification, Patterson J. relied on the decision at first instance in *Hickey-Button*, which he described, at para. 30, as factually similar. He found that there would be significant individual issues remaining after the determination of the common issues.

36 In *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (Ont. S.C.J.), 2008 CanLII 1539, supplemental reasons [2008] O.J. No. 3340 (Ont. S.C.J.) and [2008] O.J. No. 3341 (Ont. S.C.J.) ("*Matoni v. C.B.S.*"), the plaintiffs in a proposed class action asserted that the college had failed to inform them that the program for dental hygienists had not been certified by the appropriate professional body. Graduates of the program were allegedly not automatically qualified to write the eligibility examination or might find their ability to practice delayed. Claims were made in breach of contract, negligent misrepresentation and breach of the *Consumer Protection Act, 2002*, among others. Hoy J. found that these claims were properly pleaded and that it was not plain and obvious that they could not succeed. The proposed class, which was composed of all persons who had enrolled in the program after a specific date, was found to be acceptable, notwithstanding that some members of the class might ultimately be unable to prove damages. Hoy J. noted that class members might in any event be entitled to nominal damages for breach of contract and that proof of actual damages was not required under the *Consumer Protection Act, 2002*.

37 Hoy J. was not prepared to certify the action on the basis of the causes of action in contract, negligent misrepresentation, breach of collateral warranty, breach of the *Competition Act*, R.S. 1985, c. C-34 and breach of the *Business Practices*

Act, R.S.O. 1990, c. B.18. She found that the individual issues would overwhelm the common issues and that the action would be unmanageable and would not result in judicial economy. The "plethora" of individual issues that would have to be proven after the common issues trial would mean that access to justice would not be promoted in any meaningful way. She found, however, that the claim under the *Consumer Protection Act, 2002* disclosed a cause of action that did not require proof of misrepresentation and permitted damages to be recovered on an objective basis, which would likely be formulaic and simple. If the claimants were successful, there would be no need to proceed with the claims in negligence or breach of contract.

38 I will return to these decisions in my discussion of the common issues and also in considering whether a class action is the preferable procedure for the resolution of the common issues.

III. Application of the Test for Certification

(a) Cause of Action

39 The principles applicable to the cause of action requirement, which are well-known and not in dispute, were recently summarized by Lax J. in *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531, 71 C.P.C. (6th) 97 (Ont. S.C.J.):

> (a) no evidence is admissible for the purposes of determining the section 5(1)(a) criterion;
>
> (b) all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proved and thus assumed to be true;
>
> (c) the pleading will be struck out only if it is plain, obvious and beyond doubt that the plaintiff cannot succeed and only if the action is certain to fail because it contains a radical defect;
>
> (d) matters of law which are not fully settled by the jurisprudence must be permitted to proceed; and,
>
> (e) the pleading must be read generously to allow for inadequacies due to drafting frailties and the plaintiff's lack of access to key documents and discovery information.

40 Certification is decidedly *not* a test of the merits of the action. The question for a judge on a certification motion is not "will it succeed as a class action?", but rather "can it *work* as a class action?"

41 George Brown acknowledges the pleadings disclose causes of action in breach of contract, negligent misrepresentation and breach of the *Consumer Protection Act, 2002*. I agree and my reasons will be brief.

42 The plaintiffs say that the description of the Program in the calendar was part of the offer of educational services made by George Brown to students, which was accepted by the Class Members and that it was a contractual term that they would obtain the Industry Designations if they completed the Program. The plaintiffs say that George Brown breached the contract by not providing the Industry Designations.

43 A number of cases have found that university calendars can be regarded as contractual documents: *Hickey-Button*, at para. 47; *Acadia University v. Sutcliffe*, [1978] N.S.J. No. 680, 30 N.S.R. (2d) 423 (N.S. C.A.) at para. 13; *Matthews v. Memorial University of Newfoundland*, [1994] N.J. No. 446 (Nfld. T.D.) at para. 14; *Bell v. St. Thomas University*, [1992] N.B.J. No. 608, 97 D.L.R. (4th) 370 (N.B. Q.B.) at. p. 7. Claims for breach of contract were considered to have been properly pleaded in *Hickey-Button* and *Matoni v. C.B.S.* The pleading in this case discloses a cause of action for breach of contract.

44 The requirements for a claim of negligent misrepresentation were set out by the Supreme Court of Canada in *Queen v.*

Cognos Inc., [1993] 1 S.C.R. 87 (S.C.C.) at para. 33:

> (a) there must be a duty of care based on a "special relationship" between the representor and the representee;
>
> (b) the representation in question must be untrue, inaccurate or misleading;
>
> (c) the representor must have acted negligently in making the representation;
>
> (d) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and,
>
> (e) the reliance must have been detrimental to the representee in the sense that damages resulted.

45 Similar pleadings were considered to disclose a cause of action in *Matoni v. C.B.S.* The pleadings here disclose a cause of action based on negligent misrepresentation in the calendar.

46 The plaintiffs assert that the agreement between George Brown and the Class was a "consumer transaction" within the *Consumer Protection Act, 2002* and that the statements in the brochure were false, misleading or deceptive representations, which amounted to unfair practices under that statute giving rise to a right of rescission or damages. In *Matoni v. C.B.S.*, Hoy J. concluded that the plaintiffs had properly pleaded a cause of action under the *Consumer Protection Act, 2002*. The same holds true here.

(b) Identifiable Class

47 Section 5(1)(b) of the *C.P.A.* requires that there be "an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant." The purpose of the class definition is to: (a) identify those persons with a potential claim for relief against the defendant; (b) define the parameters of the lawsuit so as to identify who will be bound by its result; and (c) describe who is entitled to notice of the lawsuit: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913, 27 C.P.C. (4th) 172 (Ont. Gen. Div.) at para. 10; *Hollick*, at para. 20. Plaintiff's counsel submits that the following are the characteristics of an identifiable class:

> (a) membership in the class should be determinable by objective criteria that do not depend on the outcome of the litigation: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.) ("*Western Canadian*") at para. 38;
>
> (b) the class criteria should bear a rational relationship to the common issues asserted by all class members: *Western Canadian*;
>
> (c) the class must be bounded and not of unlimited membership: *Hollick*, at para. 17;
>
> (d) there is a further obligation, although not onerous, to show that the class is not unnecessarily broad and could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issues: *Hollick*, at paras. 20, 21;
>
> (e) membership in a class may be defined by those who make claims in respect of a particular event or alleged wrong, without offending the rule against the class description being dependent on the outcome of the litigation: *Attis v. Canada (Minister of Health)*, [2007] O.J. No. 1744, 46 C.P.C. (6th) 129 (Ont. S.C.J.) at para. 56, aff'd 2008 ONCA 660, [2008] O.J. No. 3766 (Ont. C.A.); and
>
> (f) a proper class definition does not need to include only those persons whose claims will be successful: *Frohlinger*

v. Nortel Networks Corp., [2007] O.J. No. 148, 40 C.P.C. (6th) 62 (Ont. S.C.J.) at paras. 23-28.

48 In this case, the Class is comprised of 119 students in the three classes. The names of all Class Members have been identified. The majority of the Class Members were international students and many were from China and India.

49 There is no doubt that the Class is real and existing. A group of concerned students existed prior to the commencement of this action. While George Brown has produced evidence that some members of the proposed Class were satisfied with the education they received and have no present intention of making a claim, they will be entitled to opt out if the action is certified.

50 The proposed Class is similar to that certified in *Hickey-Button*, which Doherty J.A. described in the extract I referred to earlier as "the antithesis of an open-ended or undefined class."

51 George Brown submits that the class definition proposed by the plaintiffs is overly broad, for three reasons, which I shall deal with in the following order:

> (a) the Court lacks jurisdiction over a significant number of putative Class Members and the Class includes persons who will not be bound by any result in the proceeding;
>
> (b) the Class includes persons who failed to complete the Program, and accordingly have no claim for relief against George Brown as well as persons who do not share a connection to the common issues;
>
> (c) the Class includes persons who may not have relied on the representations in the course calendars, and who have obtained the Industry Designations, and accordingly have no connection to the proposed common issues.

(a) The jurisdiction issue

52 George Brown submits that this action should not be certified, at least with respect to 65% of the Class who are international students, because "[The] evidence shows the proposed class action will not have preclusive effect in the countries where former international students reside." It says that this would result in procedural unfairness because international students who are not happy with the outcome in this action would have the ability to take a "second bite" at George Brown in their home countries.

53 The evidence of Mr. Kohli, George Brown's Program Advisor, is that 78 of the 119 students enrolled in the Program were international students who came from India, China, Japan, Turkey, Brazil, Russia, South Korea, Syria, Thailand, and Mexico. The largest numbers were from India (22) and China (11). George Brown has recruiting agents in many of these countries.

54 Mr. Kohli's evidence is also to the effect that many of the students in the Program chose to pursue one of the three Industry Designations and would have benefited from the Program as a result.

55 Mr. Kohli deposes that in order to assess each student's claim it will be necessary to conduct an inquiry into the student's actual knowledge about the content of the Program. The international students may have obtained information about the Program from a variety of sources, including George Brown's website, the calendar or conversations with George Brown or a recruitment agent. He says that it would also be necessary to determine each student's knowledge of the requirements of the Industry Organizations, whether the student relied on the calendar description, whether the student took steps to mitigate damages and what damages he or she actually incurred. He says that the website calendar was changed for the 2008/2009 year (i.e., before the Third Class) and that four students applied to the Program after the change in wording. Some 15 students withdrew from the Program before completing it and an additional 8 students did not graduate. He says that there were ample

opportunities for the students to obtain additional information about the Program and the Industry Designations, including information sessions for applicants as well as during orientation sessions at the commencement of classes and throughout the school year.

56 George Brown tenders the evidence of Shabbir Wakhariya, a lawyer practicing in India, who expresses the opinion that a judgment in a class action is not likely to preclude litigation in India if the plaintiff establishes that he or she did not receive notice of the class action and could not exercise his or her right to opt out. He expresses the opinion that, because India's rule for representative actions require a plaintiff to "opt in" an Indian court would likely conclude that it would offend natural justice to deem Indian residents to be Class Members regardless of whether they receive actual notice and would refuse to recognize a class action judgment in the absence of such notice. Mr. Wakhariya acknowledges that there is no precedent for this issue in India, one way or another.

57 In addition, Mr. Wakhariya opines that because Class Members may have received many representations, in addition to the representations in the calendar, there is a risk of multiple actions and inconsistent results. He says that the Indian judicial process is notoriously slow and lawsuits may not reach trial for 15 to 20 years. It could take many years for the Indian courts to deal with the preclusive effect of a Canadian judgment and "decades" before decisions on the merits were reached by these courts.

58 Finally, Mr. Wakhariya expresses the opinion that with a population of over a billion and no central registry of residents, it would be almost impossible to locate individual members of the Class living in India without a residence address.

59 Evidence is also given by Mr. Steve Liyun Kou, a lawyer practicing in the People's Republic of China (the "PRC"). Mr. Kou expresses the opinion that an order or judgment of a Canadian court in this proceeding would not be recognized or enforced in the PRC and would not be given preclusive effect. He states that he is not aware of any precedent in China for the enforcement of a judgment in a class proceeding.

60 George Brown does not dispute that there is a real and substantial connection between Ontario and the claims of the international students. It could hardly do so. George Brown has a real presence here, it is based here and it carries on business here. It engaged agents in the foreign jurisdictions to solicit international students to come to Ontario to go to school at George Brown. The students came to Ontario to study, resided here during their eight month course and their contracts with George Brown were performed in Ontario. There is no question that an Ontario court would have jurisdiction over a claim by an international student if brought against George Brown as an ordinary civil action. George Brown says this is not enough. It says that it is not even enough if the international students were given adequate notice of these proceedings, perhaps even individual personal notice. Mr. Kou, the expert on the law of China, expresses the opinion that the P.R.C. simply would not recognize the Court's judgment. Mr. Wakhariya, the expert in the law of India, suggests that an Indian court would only recognize this Court's judgment if the Indian Class Member received actual notice of the proceedings and an opportunity to opt out.

61 There is no evidence that any Class Member has brought an action in any jurisdiction other than Ontario. Given the evidence about the glacial pace of civil justice in India, the likelihood of an action being prosecuted in that jurisdiction seems somewhat remote. The same probably holds true in China. These comments do not dispose of the issue, of course.

62 In a typical civil action, where the defendant is a non-resident, the court is required to consider whether there is a "real and substantial connection" between the defendant and the jurisdiction. The test has recently been re-formulated by the Court of Appeal in *Van Breda v. Village Resorts Ltd.*, 2010 ONCA 84, [2010] O.J. No. 402 (Ont. C.A.) ("*Van Breda*"). In that case, the Court of Appeal simplified the test that it had previously articulated in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (Ont. C.A.). The focus remains on the connections of the defendant to the forum and the connection of the plaintiff's claim to the forum. If the case falls within one of the sub-rules in 17.02 of the *Rules of Civil Procedure* (other than sub-rule (h), "damage sustained in Ontario" and sub-rule (o), "necessary and proper party"), jurisdiction will be presumed to exist.

63 In a class action that involves non-residents, a further question arises, namely whether the court has jurisdiction over the claims of class members who are outside the jurisdiction. This is important, because in Ontario's opt-out regime, a judgment in a class action will bind all members of the class and will prevent them from suing for the same relief in Ontario or any other jurisdiction, assuming that a foreign court will respect and enforce the judgment of the Ontario court. It thus becomes necessary to determine the conditions under which an Ontario court can assume jurisdiction over non-resident class members. While national or international classes have been approved in several decisions of this court (see, for example: *Robertson v. Thomson Corp.* (1999), 43 O.R. (3d) 161, [1999] O.J. No. 280 (Ont. Gen. Div.); *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173, [1999] O.J. No. 1662 (Ont. S.C.J.); *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219, [2000] O.J. No. 3392 (Ont. S.C.J.); *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (Ont. S.C.J.)), this appears to be the first case in which evidence has actually been submitted asserting that the court's judgment would lack preclusive effect in a foreign jurisdiction. Fortunately, there is considerable guidance to be found in the decision of the Court of Appeal in *Parsons v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321, [2005] O.J. No. 506 (Ont. C.A.) ("*Currie*"), to which I shall refer in a moment.

64 Counsel for George Brown relies on the decision of the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, [1990] S.C.J. No. 135 (S.C.C.) ("*Morguard*"), stating in his factum that " ... jurisdiction follows recognition. Recognition and enforcement of an Ontario judgment in foreign jurisdictions is not solely an issue for foreign courts, as has previously been held, but it is an important consideration for Ontario Courts at the outset of the proceeding." (relying also on *Robertson v. Thomson Corp.*, above, at para. 48 and *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331, [1995] O.J. No. 2592 (Ont. Gen. Div.)).

65 In *Morguard*, the Supreme Court noted the private international law rule that there be a "substantial connection" with the forum before a court exercises jurisdiction over the case and that where such connection exists the courts of other jurisdictions will recognize the judgment of the forum. The Supreme Court held that the same general principle applies to the recognition by the courts of one province of the judgment of a court of a sister province. While the Supreme Court said that the exercise of jurisdiction and recognition can be regarded as "correlative" (paras. 26 and 42), it did so in the context of emphasizing that the court exercising jurisdiction must have regard to the principles of "order and fairness," including "acting through fair process and with properly restrained jurisdiction." (at para. 42). I do not read *Morguard* as stating that "jurisdiction follows recognition." If it were true that "jurisdiction follows recognition," Ontario courts would be deprived of jurisdiction in cases where there is an obvious real and substantial connection to Ontario. The defendant could simply point to another country that would not recognize a potential judgment in order to oust the court's jurisdiction, regardless of the unreasonableness of that refusal. This is clearly not what the Supreme Court intended. I regard the quoted passage as affirming that if a court exercises jurisdiction over non-residents based on a real and substantial connection, and does so having regard to order and fairness, its decision ought to be respected and enforced in other jurisdictions, both as a matter of private international law and, in the case of the decisions of courts of other provinces, Canadian constitutional law.

66 The issue of the enforcement of a foreign class action judgment in Ontario was addressed by the Court of Appeal in *Currie*. In that case, the court refused to give preclusive effect to a judgment implementing a settlement of a class action suit in Illinois, which purported to bind Canadian and other international class members who had not opted out. The court held that before enforcing a foreign class action judgment, it is necessary to consider whether the foreign court had an appropriate basis for assuming jurisdiction and whether the rights of Ontario residents were adequately protected.

67 Sharpe J.A., who gave the judgment of the Court, noted at para.15. that there are strong policy reasons favouring the fair and efficient resolution of interprovincial and international class action litigation and this requires courts to recognize class action judgments that are based on the proper exercise of jurisdiction. He observed, however, that class actions have unique features, one of which is the involvement of the "unnamed, non-resident class plaintiff" who, unlike the plaintiff in a typical lawsuit, does not come to Ontario asking for access to our courts and thereby attorning to our courts' jurisdiction. Sharpe J.A. suggested that a court considering the enforcement of a foreign class action judgment must look to the real and substantial connection test and the principles of order and fairness from the perspective of the party against whom enforcement is sought - i.e., the absentee plaintiff. One aspect of this analysis would be to examine whether it would be reasonable for that person to expect that his or her rights would be determined by the foreign court. He gave the example of an Ontario

resident who engages in a cross-border transaction, such as buying goods from a foreign mail order merchant or purchasing securities over a foreign stock exchange - that person might reasonably expect that claims in relation to those transactions could be litigated in the foreign jurisdiction. Where there is no such contact between the plaintiff and the foreign jurisdiction, the court must nonetheless look to whether there is a real and substantial connection between the subject matter of the class action litigation and the foreign jurisdiction. In the case before the Court of Appeal, McDonald's had its head office in Illinois and the allegedly wrongful activity occurred in the United States. Sharpe J.A. referred to the observations of Cumming J. in *Wilson v. Servier Canada Inc.*, above, that Ontario courts have certified national class actions "if there is a real and substantial connection between the subject-matter of the action and Ontario" in the expectation that "other jurisdictions on the basis of comity should recognize the Ontario judgment" (at para. 22).

68 Another aspect of the analysis is to examine whether the procedures adopted in the "foreign" jurisdiction were:

> ... sufficiently attentive to the rights and interests of the unnamed non-resident class members. Respect for procedural rights, including the adequacy of representation, the adequacy of notice and the right to opt out, could fortify the connection with [the foreign] jurisdiction and alleviate concerns regarding unfairness. [at para. 25]

69 In the context of the case before him, Sharpe J.A. stated, at para. 25:

> Given the substantial connection between the alleged wrong and Illinois, and given the small stake of each individual class member, it seems to me that the principles of order and fairness could be satisfied if the interests of the non-resident class members were adequately represented and if it were clearly brought home to them that their rights could be affected in the foreign proceedings if they failed to take appropriate steps to be removed from those proceedings. (at para. 25)

70 He concluded, at para. 30, that a three part test should apply to the recognition of a foreign class action judgment:

> In my view, provided (a) there is a real and substantial connection linking the cause of action to the foreign jurisdiction, (b) the rights of non-resident class members are adequately represented, and (c) non-resident class members are accorded procedural fairness including adequate notice, it may be appropriate to attach jurisdictional consequences to an unnamed plaintiff's failure to opt out. In those circumstances, failure to opt out may be regarded as a form of passive attornment sufficient to support the jurisdiction of the foreign court. I would add two qualifications: First, as stated by LaForest J. in *Hunt v. T & N plc.*, above at p. 325, "the exact limits of what constitutes a reasonable assumption of jurisdiction" cannot be rigidly defined and "no test can perhaps ever be rigidly applied" as "no court has ever been able to anticipate" all possibilities. Second, it may be easier to justify the assumption of jurisdiction in interprovincial cases than in international cases: see *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 at paras. 95-100 (C.A.).

71 In this case, looked at from the perspective of both the international students and George Brown, there would be every reason for both to expect that claims arising from their relationship would be litigated in Ontario. Given that George Brown is based in Ontario, the students came to college in Ontario and lived in Ontario, and the contract was performed in Ontario, it is hard to imagine that either party would have contemplated that George Brown would be sued in China, India or any one of the other foreign jurisdictions if the relationship broke down. There is, in any event, a real and substantial connection with Ontario and there is no such connection with any other single jurisdiction. The second factor, respect for procedural rights, including adequate representation of non-resident Class Members, is an issue that must be addressed and I will deal with it under the question of the representative plaintiffs and the litigation plan. The notice aspect of procedural fairness can also be addressed in dealing with the litigation plan.

72 I do not accept the proposition that procedural fairness in this case requires satisfying myself beyond any doubt that each member of the Class will receive actual notice of the action and of his or her right to opt out. This is not a requisite of a purely provincial or interprovincial class action and it could make effective international class actions a practical impossibility. Nor do I accept the proposition that the court should not exercise jurisdiction over non-resident class members where

there is evidence that a particular foreign jurisdiction might not recognize a class action judgment either altogether (as is said to be the case in China) or in the absence of actual notice (as is said to be the case in India). The hypothetical failure of another state to observe the generally accepted principles of private international law in connection with the assumption of jurisdiction and the recognition of foreign judgments should not preclude an Ontario court from taking jurisdiction in a class action involving its residents, provided the conditions set out in *Currie* are met: see the observations of Cumming J. in *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219, [2000] O.J. No. 3392 (Ont. S.C.J.) at para. 28, leave to appeal refused (2000), 52 O.R. (3d) 20 (Ont. Div. Ct.), app. for leave to appeal dismissed, [2001] S.C.C.A. No. 88 (S.C.C.); see also *Wilson v. Servier Canada Inc.* (2003), [2003] O.J. No. 157 (Ont. S.C.J.) at para. 22. Nor should another state's views of the requirements of natural justice (particularly in the context of what appears to be a "representative action" regime as opposed to a true class action regime) be allowed to dictate what is required for procedural fairness in an Ontario class action.

73 I should add that, based on Mr. Wakhariya's evidence concerning the Indian system of civil justice, where it is said that proceedings can take 15 to 20 years if not "decades", it seems highly unlikely that a disgruntled class member would sue George Brown in India in any event. Nor should we assume that an Indian court will not ultimately recognize a decision in a foreign opt-out class action, made on appropriate jurisdictional grounds, and giving due regard to considerations of order, fairness and comity. An unanswered question, and one that would be particularly relevant to many inter-jurisdictional class actions, is whether an Indian (or Chinese) court would even take jurisdiction over the plaintiff's claim, given the factual nexus between that claim and Ontario. If an Indian court would not accept jurisdiction, then it matters not whether India would recognize the binding effect of an Ontario judgment on an Indian class member as the effect would be the same in either case.

74 I was referred to an interesting article by John P. Brown, "Seeking Recognition of Canadian Class Action Judgments in Foreign Jurisdictions: Perils and Pitfalls" (Mar. 2008), 4 Can. Class Action Rev. 220-257, which addresses a serious concern that some countries, particularly some European countries, may not recognize and enforce Canadian class action judgments. The author notes that this may be a particular concern for defendants who settle such actions, only to find that they can be successfully sued in foreign jurisdictions because those courts will not recognize the decision. He notes that some European countries take the view that opt-out class actions violate fundamental principles of consent and "violate the principle that one should only become a claimant by asking to bring a claim and not by remaining silent" (p. 221).

75 Mr. Brown's article contains the following suggestion, at p. 235:

> Canadian courts should be slow to certify worldwide classes. Jurisdiction should take into account recognition. Purporting to assume jurisdiction over proposed foreign class members, without considering whether the resulting judgment will be recognized for the benefit of, or against, a foreign class member outside of Canada, will lead to uncertainty and conflicting decisions. By any measure this is not in the best interests of the class. Nor, ultimately, is it in the interests of any of the other parties to the action.

76 The article commends the draft *Guidelines for Recognizing and Enforcing Foreign Judgments for Collective Redress* (the "Guidelines"), developed by a task force of the Consumer Litigation Committee of the International Bar Association, and released in October, 2007. Mr. Brown was the chair of that task force. Chief Justice Winkler and two Ontario lawyers were members of the eight person working group.

77 Counsel for George Brown submits that certification of a class that includes non-residents in this case would not meet the requirements of the Guidelines. While the Guidelines are in draft form for discussion purposes only, they are clearly the product of careful thought. They have, perhaps not surprisingly considering the composition of the task force, a strong Ontario flavour. I have attached the articles of the Guidelines, without the commentary, as an appendix to these reasons. They are obviously a very useful contribution to the debate of these issues.

78 The Guidelines stress, as does *Currie*, the importance of procedural fairness to absent claimants in opt-out jurisdictions. Article 4.04 points to the need to give individual notice by direct mail or similar means "wherever practical."

79 George Brown relies on Article 1 of the Guidelines, the full text of which is as follows:

Article 1 Jurisdiction

1.01 It is appropriate for a court issuing a judgment for collective redress to have assumed jurisdiction to do so provided that, in addition to existing rules for recognition and enforcement, it was reasonable for the court to expect that its judgment would be granted preclusive effect by the jurisdictions in which claimants not specifically named in the proceedings would ordinarily seek redress.

1.02 It is reasonable for a court issuing a collective redress judgment to expect its judgment to be given preclusive effect in respect of Absent Claimants by the jurisdictions in which the Absent Claimants reside if:

(i) the results obtained for Absent Claimants are not patently inadequate in the circumstances

(ii) the interests of Absent Claimants have been adequately represented; and

(iii) absent Claimants have been given adequate notice of the proceedings and an opportunity to opt out.

1.03 When there are multiple fora which are otherwise appropriate jurisdictions for a collective redress action, the forum or fora in the best position to process claims from an administrative standpoint, to have access to evidence and witnesses, and to facilitate adequate representation of the claimants and other parties should assume jurisdiction. Multi-jurisdictional court to court communication and cooperation should be implemented as needed for this purpose.

80 Relying on Article 1.01, George Brown says that the court should not assume jurisdiction over international students, at least those in India and the PRC, because the evidence "establishes that it is not reasonable for the court to expect that its judgment would be granted preclusive effect by Courts in India and the PRC." Moreover, it says that the plaintiffs have failed to demonstrate that the rights of non-resident Class Members will be adequately represented and that they will be accorded procedural fairness.

81 The Guidelines were adopted by the International Bar Association in October 2008, more than three years after the Court of Appeal's decision in *Currie*. There is nothing in them, in my respectful view, at odds with *Currie*, which is, of course, binding on me.

82 Article 1.01 asks the court to consider whether it is reasonable to expect that its judgment would be given preclusive effect by jurisdictions in which foreign class members "would ordinarily seek redress." It is interesting to note that the article uses the words "would ordinary seek redress" as opposed to the words "jurisdictions in which the absent claimants reside," which is used in Article 1.02. It seems to me that this requires that one ask, not "where do the absent class members reside?", but rather "where would the absent class members ordinarily seek redress?" It is far more likely that foreign Class Members would ordinarily seek redress against George Brown in Canada (where George Brown is located, where they attended school and where the contract was performed), rather than in their homelands.

83 The Guidelines suggest, in Article 1.02, that the test is an objective one of the certifying court's reasonable expectations of preclusivity, provided the results are not "patently inadequate" and proper representation and procedural fairness have been observed. If these have been provided, and the court has properly assumed jurisdiction under articles 1.01 and 1.03, then the certifying court can reasonably expect that other courts, including the court in the jurisdiction where absent class members reside, will recognize and give preclusive effect to its judgment. This, moreover, is in-keeping with my interpretation of the ratio in *Morguard* on this issue, namely that the court can reasonably expect other countries to give effect to its judgments where it has a real and substantial connection to the subject matter of the litigation and gives regard to concerns of order and fairness.

84 It is clear from the evidence of George Brown's experts in foreign law that there is no legal precedent, in either India or the PRC, for the recognition, or non-recognition of the class action decisions of the courts of other jurisdictions. If the Guidelines are intended, as they say they are, to state "minimum internationally accepted standards" to be followed by courts issuing judgments in class proceedings, and to be considered by courts of other jurisdictions in determining whether such judgments will be recognized, why should I assume that the courts of India, of the PRC, or of any other jurisdiction will refuse to observe those minimum standards? To echo the observations of Cumming J. in *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219, [2000] O.J. No. 3392 (Ont. S.C.J.), referred to above, at para. 28, if this court properly has jurisdiction over absent plaintiffs and the defendants, why should it decline to hear the case because another jurisdiction refuses to accede to the accepted norms of international law and, in particular, the principle of comity?

85 George Brown refers to the decision of the United States District Court in *Alstom SA Securities Litigation, Re*, 253 F.R.D. 266 (U.S. S.D. N.Y. 2008) in which the plaintiff sought to certify the claims of a class of persons who purchased the shares in the United States as well as all U.S., Canadian, French, English or Dutch persons or entities who purchased or otherwise acquired Alstom securities in foreign markets. The Court declined to certify a class including French persons because it found that the plaintiff had failed to demonstrate that French courts would more likely than not recognize and give preclusive effect to the court's judgment. That decision was distinguished and not followed in a subsequent decision of the same court: *Vivendi Universal S.A. Securities Litigation, Re* [, Richard J. Holwell J. (U.S. S.D. N.Y. March 31, 2009)], 2009 WL 855799, a securities fraud class action. In so doing, the court noted the difficulty in determining, before the fact, the preclusive effect of its judgment in another jurisdiction and declined to speculate on how French law might develop or might regard the notice given to class members. It concluded, at p. 16:

> As a result, Rule 23 [of the *Federal Rules of Civil Procedure*] requires only that the Court make a reasoned prediction as to the likely preclusive effect of its judgment on absent class members and evaluate the risk of non-recognition together with all factors relevant to determining whether a class action is superior to other available methods for adjudicating the controversy.

86 In evaluating the risk of non-recognition in India and China, I observe that George Brown essentially says that I should not certify a class that includes members from China and India because of the cumulative effect of the following risks:

- a particular Class Member does not opt-out;
- the claim is ultimately decided in favour of George Brown or in some other manner adverse to that Class Member;
- the Class Member commences legal action in his or her homeland;
- the court in the homeland takes jurisdiction;
- the court of the homeland declines to give preclusive effect to a judgment of this court, granted on the basis of internationally-accepted jurisdictional foundations, with appropriate protection of the rights of non-residents; and
- the claim is decided against George Brown by the court of the homeland.

87 Applying the approach of *Vivendi*, it seems to me that the cumulative effect of these risks, while not zero, is insufficient to outweigh the many good reasons why the court can and should take jurisdiction, including the evidence that it is the only realistic way to provide access to justice for many international Class Members. Applying the approach of *Morguard*, *Wilson v. Servier Canada Inc.*, and the International Bar Association *Guidelines*, as long as this Court follows international norms for taking jurisdiction, and is concerned for order and fairness, it is entitled to expect that other countries will recognize its orders. In this case, the jurisdictional factors almost exclusively point to Ontario, and it is unlikely that any Class Member would commence a proceeding in any other jurisdiction. It is appropriate for this Court to take jurisdiction over non-

resident Class Members in these circumstances, particularly where the Class Members are as easily identifiable as in this case. It is a separate concern, however, whether the Class is defined too broadly for the common issues.

(b) Overbroad class

88 George Brown's second objection to the class definition centres around the complaint that the Class is too broad because it includes members who do not share the common issues.

89 First, George Brown says that 23 of the putative Class Members either withdrew from the Program or failed to graduate from the Program and they therefore have no cause of action, presumably because they suffered no damages: *Mouhteros v. DeVry*, above, at para. 18, *Dumoulin v. Ontario*, [2005] O.J. No. 3961, 19 C.P.C. (6th) 234 (Ont. S.C.J.) at paras. 13-14. George Brown submits that there is no evidence that any of these students withdrew from the Program or failed to graduate for any reason relating to the Industry Designations.

90 The fact that a Class Member may ultimately not succeed in establishing damages is not a ground for refusing to include him or her in the Class. Class Members may have withdrawn from the Program for a variety of reasons, including the realization that they would not receive an Industry Designation on graduation. This appears to have been the case with a number of members who were included in the class in *Matoni v. C.B.S.*, above, at para. 90. Class Members in this case should be given an opportunity to prove the reasons for their failure to complete the Program.

91 George Brown also says that some of the putative Class Members have no connection to at least some of the common issues because:

- 42 obtained the CIFF designation;
- 25 obtained a FITT equivalency transcript;
- 3 have obtained the FITT Diploma; and
- 1 has obtained the CITP designation.

92 The fact that some Class Members ultimately attained one of the Industry Designations, by whatever means and at whatever cost, goes only to the damages that he or she sustained.

93 George Brown says that the four students who enrolled in the Program after the website was corrected in 2008 should be excluded from the Class. The Plaintiffs' answer is that (a) there is no evidence that those students saw the web-site or that this corrected the previous misrepresentation, which had remained in the printed copy of the calendar in any event; and (b) the fact that some members of the Class may not have a claim is not fatal to the Class definition. I agree.

94 Finally, George Brown says that the Class includes people who did not rely on the representation in the calendar, either because they were not aware of the representation or because they obtained the correct information through other sources. It says the proposed Class definition is not rationally connected to the proposed common issues.

95 As Cullity J. noted in *Taylor v. Canada (Minister of Health)*, [2007] O.J. No. 3312, 285 D.L.R. (4th) 296 (Ont. S.C.J.) at para. 62, the possibility that some class members will be unable to prove damages is a necessary result of the requirement that the class definition cannot be merits-based.

96 In summary, then, I find the Class definition acceptable.

(c) Common Issues

97 The common issues are at the core of a class action. It is through the resolution of the common issues that a class action achieves the goals of access to justice, judicial efficiency and behavior modification. The principles applicable to the common issues analysis are well-established and not in dispute. The plaintiff puts forward the following general principles:

> (a) the *CPA*'s common issues requirement is a "low bar": *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (2009), 96 O.R. (3d) 252, [2009] O.J. No. 1874 (Ont. Div. Ct.) at para. 31;
>
> (b) common issues need not determine liability and need only be issues of fact or law which will move the litigation forward and avoid duplication: *Quiznos*;
>
> (c) it is not essential that the class members' claims be identical or even that the common issues predominate over non-common issues, but only that the claims share a "substantial common ingredient": *Western Canadian*, at para. 39;
>
> (d) the fact that there may remain substantial individual issues after the resolution of the common issues does not preclude certification: *Cloud*, at para. 53;
>
> (e) a purposive approach is to be taken when analyzing common issues. The underlying question is whether allowing the action to proceed as a class action will avoid duplication of fact-finding or legal analysis;
>
> (f) an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim;
>
> (g) it is not essential that the class members be identically situated with respect to the opposing party;
>
> (h) it is not necessary that the resolution of the common issues would be determinative of each class member's claim. *Western Canadian*, at para. 39.

98 In *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, [2010] O.J. No. 113 (Ont. S.C.J.), I set out the following propositions about the common issues analysis:

> A: The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, above, at para. 39.
>
> B: The common issue criterion is not a high legal hurdle, and an issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: *Cloud v. Canada (Attorney General)*, above, at para. 53.
>
> C: There must be a basis in the evidence before the court to establish the existence of common issues: *Dumoulin v. Ontario*, above, at para. 25; *Fresco v. Canadian Imperial Bank of Commerce*, above, at para. 21. As Cullity J. stated in *Dumoulin v. Ontario*, at para. 27, the plaintiff is required to establish "a sufficient evidential basis for the existence of the common issues" in the sense that there is some factual basis for the claims made by the plaintiff and to which the common issues relate.
>
> D: In considering whether there are common issues, the court must have in mind the proposed identifiable class. There must be a rational relationship between the class identified by the Plaintiff and the proposed common issues: *Cloud v. Canada (Attorney General)*, above at para. 48.

E: The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim: *Hollick v. Toronto (City)*, above, at para. 18.

F: A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class: , [1996] B.C.J. No. 734, 48 C.P.C. (3d) 28 (S.C.), aff'd 2000 BCCA 605, [2000] B.C.J. No. 2237, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.

G: With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class: *Western Canadian Shopping Centres Inc. v. Dutton*, above, at para. 40, *Ernewein v. General Motors of Canada Ltd.*, above, at para. 32; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43, [2009] S.J. No. 179 (C.A.), at paras. 145-146 and 160.

H: A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant: (2000), 51 O.R. (3d) 54, [2000] O.J. No. 3821 (S.C.J.) at para. 39, aff'd [2001] O.J. No. 4952, 17 C.P.C. (5th) 103 (Div. Ct.), aff'd [2003] O.J. No. 1160 and 1161 (C.A.); *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110, 27 C.P.C. (5th) 155, (S.C.J.), aff'd [2003] O.J. No. 3918, 39 C.P.C. (5th) 151 (Div. Ct.).

I: Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis: *Chadha v. Bayer Inc.*, [2003] O.J. No. 27, 2003 CanLII 35843 (C.A.) at para. 52, leave to appeal dismissed [2003] S.C.C.A. No. 106, and *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2008 BCSC 575, [2008] B.C.J. No. 831 (S.C.) at para. 139.

J: Common issues should not be framed in overly broad terms: "It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient": *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39 at para. 29.

99 The plaintiff has set out fifteen common issues, which are grouped in relation to the three causes of action asserted, damages and administration of the claim. I will discuss these in turn.

Negligent Misrepresentation

100 The proposed common issues are:

1. Was George Brown in a special relationship with the Class Members?

2. Did George Brown make representations to the Class Members that it would provide the Class Members with the opportunity to complete the three Industry Designations in addition to the George Brown College Graduate Certificate?

3. If such representations were made, were they untrue, inaccurate or misleading? If so, was George Brown negligent in making the representations?

101 The plaintiff in this case relies on a single representation that is in written form (in the calendar and on the web). It is reasonable to conclude that, being contained in the course calendar, it was likely communicated to every member of the

Class. Most students would read the calendar description. The prominence given to the Industry Designations in the calendar would suggest that it was a significant representation. The evidence before me supports this conclusion.

102 The representation common issues have been carefully tailored and are very similar to those identified by Doherty J.A. in *Hickey-Button*, at para. 44. These issues are substantial ingredients of each Class Member's claim and their resolution would advance the claims of all members of the Class.

103 While I expect that each Class Member would have to establish that he or she was aware of the alleged misrepresentation and relied on it in enrolling in the Program, as a condition of recovery under this cause of action, the importance of the calendar as a contractual document, and of the Industry Designations to most students enrolling in the Program, could give rise to a presumption of reasonable reliance. For this reason, and because the same representation was made to all Class Members, this case is at the positive end of the spectrum of misrepresentation cases that are appropriate for certification. As Cullity J. noted in *Murphy v. BDO Dunwoody LLP* (2006), 32 C.P.C. (6th) 358, [2006] O.J. No. 2729 (Ont. S.C.J.), single misrepresentations will be more amendable to certification than those in which there are multiple statements made in different forms over a lengthy time period. This case is not dissimilar to *Lewis v. Cantertrot Investments Ltd.* (2005), 24 C.P.C. (6th) 40, [2005] O.J. No. 3535 (Ont. S.C.J.), in which Cullity J. certified a class action brought on behalf of some 120 condominium unit owners, alleging that the condominium declaration, the budget and a sales flyer provided to buyers prior to purchase contained misrepresentations about monthly assessment and maintenance fees. It was acknowledged that the questions of reasonable reliance would have to be dealt with on an individual basis, but that did not detract from the fact that the resolution of the common issues would advance the claim of every class member. Here, as in that case, the representations were made in documentary form, were uniform in their nature, were likely provided to all Class Members, and were of a kind that were likely to have had some impact on the decision-making of the Class Members. These circumstances make this case particularly appropriate for certification.

104 In reaching this conclusion, I have taken into account the submission of counsel for George Brown that some students may have obtained information about the Industry Designations from other sources, including the Industry Associations, discussions with George Brown and information sessions that were held with students at the beginning of each session. This could be said in almost every case involving misrepresentation. It is not necessary that a common issue resolves the class members' claims, provided it advances the resolution. That is the case here. In this regard, the observations of the Divisional Court in *Canadian Imperial Bank of Commerce v. Deloitte & Touche* (2003), 172 O.A.C. 59, [2003] O.J. No. 2069 (Ont. Div. Ct.), at para. 35 are particularly apt:

> ... even though reliance and causation are significant individual issues, that does not preclude the certification of a class proceeding, as determined in cases such as *Western Canadian Shopping Centres*, supra, and *Carom v. Bre-X Minerals Ltd.* (C.A.), supra at 252, 255. Unlike *Bre-X*, this is not a case where there were many representations to many parties over a long period of time. Even though reliance was a significant individual issue there, a class proceeding was still certified. Here, there are two sets of representations found in the two financial statements. While the reliance of each Original Lender on those representations will have to be determined at some point, it will only be after a determination of significant common issues with respect to liability - particularly the existence of a duty of care to the Original Lenders, the standard of care for auditors, the determination whether there were material misstatements in the financial statements, and whether the misstatements were made negligently or recklessly. All of these are significant common issues, requiring extensive documentary and oral evidence and, with respect to the standard of care issues, expert evidence. There are other common issues as well, including elements of damages and champerty and maintenance. Resolution of these issues is very important to the course of the litigation, as success in respect of the common issues will significantly advance the litigation for the proposed class members, while if those issues are decided in favour of the defendants, the litigation will come to an end.

Consumer Protection Act, 2002

105 The proposed common issues are:

4. Did George Brown breach Part III of the *Consumer Protection Act?*

5. If so, what remedy, if any, are the Class Members entitled to under the *Act*?

6. Does the Class, or any portion thereof, require, and is it entitled to, a declaration waiving the notice provisions of section 18 of the *Consumer Protection Act*?

106 Part III of the *Consumer Protection Act, 2002* prohibits "unfair practices", which include false, misleading or deceptive representations (s. 14(1), (2)). The statute provides that any agreement entered into by a consumer after a person has engaged in an unfair practice may be rescinded and the consumer is entitled to damages (s. 18(1)). Where rescission is not possible, the consumer is entitled to recover the amount by which the consumer's costs of the goods or services exceeds the value of the goods or services to the consumer as well as damages (s. 18(2)). The Court may award exemplary or punitive damages in addition to any other remedy (s. 18(11)).

107 The consumer is required to give notice within one year of entering into agreement, prior to the commencement of the action, if he or she is seeking the remedy of rescission or damages *in lieu* (s. 18(3)). The court may disregard this requirement "if it is in the interest of justice to do so" (s. 18(15)).

108 As Hoy J. noted in *Matoni v. C.B.S.*, at para. 149, the determination of whether a representation is false, misleading or deceptive can be made on an objective basis. Moreover, a consumer invoking s. 18 of the *Consumer Protection Act, 2002* does not have to establish that he or she relied on the representation or was induced to enter the contract based on the representation (see *Matoni v. C.B.S.*, at para. 155).

109 The common issues proposed by the plaintiff under the *Consumer Protection Act, 2002* in this case are, for all practical purposes, identical to those certified by Hoy J. in *Matoni v. C.B.S.* As in that case, the determination of common issue 4, asking whether George Brown breached the statute by engaging in unfair practices, raises common issues of fact and law. So too does common issue 5 dealing with remedies. While rescission might not be available to students who completed the course, it could be available to those who withdrew. Common issue 6 raises the issue of whether notice can be waived in the circumstances and whether the notice given by the plaintiff can be given on behalf of the Class.

110 The common issues under this heading are ideally suited for resolution on a class-wide basis. While the damages suffered by each student pursuant to s. 18(2) *may* have to be determined on an individual basis, this is not a bar to certification: see *C.P.A.* s. 6(1).

111 George Brown suggests that the *Consumer Protection Act, 2002* is not applicable to non-resident plaintiffs, but s. 2 provides that the act applies to a consumer transaction if the consumer "or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place." It is obvious that George Brown is located in Ontario and that the contract was performed in Ontario.

Breach of Contract

112 These common issues ask:

7. Was the relationship between George Brown and the Class Members a contractual relationship?

8. If the answer to question #7 is yes, did the contract include a term by which George Brown agreed to provide the Class Members with the opportunity to complete the three Industry Designations in addition to the George Brown College Graduate Certificate?

9. If the answer to question #8 is yes, did George Brown breach that contract?

113 The contractual common issues are very similar to those identified by Doherty J.A. in *Hickey-Button*, at para. 41. As in that case, their resolution is central to the claim of the Class. As Doherty J.A. noted in that case at para. 42, proof of reliance is not required in the contract claim. These common issues are appropriate for certification.

Damages

114 The proposed common issues are:

10. Are the Class Members entitled to damages?

11. If so, do such damages include:

(a) the cost of tuition, English as a second language ("ESL") course and exam fees, books, travel, accommodation, living expenses, visa fees and immigration consultant fees;

(b) loss of income;

(c) delayed entry to the workplace;

(d) loss of competitive advantage;

(e) the cost of additional Industry Association fees for courses and examinations; and/or

(f) costs incurred to adjust, extend or renew visas for residency, study and work in Canada?

12. If so, can damages be determined on an aggregate basis on behalf of the Class? If so, what is the quantum of those damages?

13. Is George Brown's conduct deserving of punitive or exemplary damages?

115 In my view, these common issues are not appropriate for certification primarily because they are not capable of resolution on a common basis. There is no value in the certification of common issue 10, which simply asks whether the plaintiffs are entitled to damages. This issue offends the rule against stating issues in the most general terms: *Rumley v. British Columbia* [2001 CarswellBC 2166 (S.C.C.)], above, at para. 29. If George Brown is liable for breach of contract or breach of the *Consumer Protection Act*, then it is *prima facie* liable for damages, although the damages may be purely nominal in some cases. Answering the question does nothing to advance the resolution of the claims of the Class as it will be necessary to examine the circumstances of each Class Member to determine whether he or she sustained damages.

116 With respect to common issue 11, the plaintiffs say that damages incurred by Class Members could include such things as tuition fees, loss of income, the costs of memberships in the Industry Associations and the other items identified under this heading. In the case of international students, additional costs such as visas, travel costs and increased tuition costs could have been incurred. All this may be true, but I do not see how the entitlement to particular heads of damage can be determined in common for all Class Members. The circumstances of each individual will have to be examined to determine the damages that are reasonably recoverable as a result of the breach of contract, misrepresentation or statutory breach.

117 Section 18(2) of the *Consumer Protection Act, 2002* provides that where an agreement has been entered into after a person has engaged in an unfair practice, it may be rescinded but where rescission is not possible the consumer "is entitled to recover the amount by which the consumer's payment under the agreement exceeds *the value that the goods or services have to the consumer*, or to recover damages, or both ... [emphasis added]." I do not see how the value of the services to the consumer can be determined except by individual inquiry. The inability to acquire the Industry Designations will have different values for different students, depending on their particular career goals, experience and objectives.

118 Although aggregate damages have been stated as a common issue in some cases, it is not necessary to do so because the trial judge has jurisdiction to do so where it is found that the conditions in s. 24(1) have been satisfied: *Healey v. Lakeridge Health Corp.* (2006), 38 C.P.C. (6th) 145, [2006] O.J. No. 4277 (Ont. S.C.J.) at para. 102; *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (Ont. C.A.) at para. 59. That section provides:

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

119 In *Markson v. MBNA Canada Bank* the Court of Appeal found that an aggregate assessment of damages would overcome the difficulty of identifying which members of the class had suffered damages as a result of the defendant's conduct. It determined that, due to the importance of the issue, it should be stated as a common issue (at para. 59).

120 I am not at all satisfied that it is appropriate to state a common issue of aggregate assessment in this case and as it is not necessary, I do not propose to do so. It can properly be left to the trial judge.

121 The plaintiff also puts forward the entitlement to punitive damages as a common issue. It may be appropriate to award punitive damages where the conduct of defendant is aimed at the class as a whole: *Robinson v. Medtronic Inc.*, [2009] O.J. No. 4366 (Ont. S.C.J.). In this case, however, it will only be possible to assess the defendant's liability for punitive damages after individual assessments of damages have been made. The punitive damages claim is not appropriate as a common issue.

Administration/Interest

122 These questions are:

> 14. Should George Brown pay the costs of administering and distributing any recovery? If so, in what amount?
>
> 15. Should George Brown be ordered to pay prejudgment interest? If so, how is prejudgment interest to be calculated and what interest rate will apply?

123 It is not necessary to have a common issue such as question 14, dealing with the administration of recovery. There is authority under s. 12 and s. 25(2) of the *C.P.A.* to give directions concerning the resolution of the issues remaining after the determination of common issues in favour of the class.

124 A common issue as to prejudgment interest was certified in *Bondy v. Toshiba of Canada Ltd.* (2007), 39 C.P.C. (6th) 339, [2007] O.J. No. 784 (Ont. S.C.J.) at paras. 54-56. Other cases have also done so: *Barbour v. University of British Columbia*, 2007 BCSC 800, [2007] B.C.J. No. 1216 (B.C. S.C.); *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (Ont. S.C.J.); *Robinson v. Medtronic Inc.*, above; *Smith v. National Money Mart Co.*, [2007] O.J. No. 46, 37 C.P.C. (6th) 171 (Ont. S.C.J.). As individual trials will likely be required to assess damages in this case, prejudgment interest is not an appropriate common issue: see *Fischer v. IG Investment Management Ltd.*, 2010 ONSC 296, [2010] O.J. No. 112 (Ont. S.C.J.) at para. 193.

(d) Preferable Procedure

125 Section 5(1)(d) of the *C.P.A.* requires the court to consider whether a class proceeding would be the preferable procedure for the resolution of the common issues. In *Markson v. MBNA Canada Bank*, above, Rosenberg J.A. summarized the approach to this question, at paras. 69 -70:

> (1) The preferability inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice and behaviour modification;
>
> (2) "Preferable" is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute; and,
>
> (3) The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole.
>
> As I read the cases from the Supreme Court of Canada and appellate and trial courts, these principles do not result in separate inquiries. Rather, the inquiry into the questions of judicial economy, access to justice and behaviour modification can only be answered by considering the context, the other available procedures and, in short, whether a class proceeding is a fair, efficient and manageable method of advancing the claim.

126 As was stated in *Pearson*, at para. 67: "[T]he preferability requirement can be met even where there are substantial individual issues; the common issues need not predominate over the individual issues."

127 George Brown raises three principal arguments under the preferable procedure heading. First, it says that when international students are excluded, the class is small enough that joinder under Rule 5.02 of the *Rules of Civil Procedure*, R.R.O. 1990, reg. 194, would be more practical and manageable than a class action. Second, it says that there are numerous individual issues that will "overwhelm" the common issues. Third, and as an alternative, it suggests that if the action is certified, the proceedings should be "bifurcated" and the individual issues should be considered ahead of the common issues. I will examine each of these arguments in turn.

(a) Joinder

128 George Brown's proposal for joinder is based on the proposition that, after the international students are excluded from the Class, its size would be small enough to warrant joinder of plaintiffs under Rule 5.02 of the *Rules of Civil Procedure*: *Western Canadian Shopping Centres Inc. v. Dutton*, at paras. 42, 59; *Nieberg (Litigation Guardian of) v. Simcoe County District School Board* (2004), 48 C.P.C. (5th) 164, [2004] O.J. No. 2524 (Ont. S.C.J.) at paras. 49-53; *Politzer v. 170498 Canada Inc.*, [2005] O.J. No. 5224, 20 C.P.C. (6th) 288 (Ont. S.C.J.) at para. 41. It says that when these students are excluded, and the students who did not graduate are winnowed out, the Class could be as small as 10 students and these could easily sue individually in the Small Claims Court or under the simplified procedure of Rule 76, or could be joined in a single action.

129 As I have explained, a class proceeding is capable of accommodating both the Ontario resident Class Members and the 78 international students in a way that protects the interests of all Class Members as well as George Brown. Since the Class will include international students, it is my view that its size makes joinder impractical. Joinder would most definitely not be a preferable procedure for the non-resident Class Members, many of whom have returned to their homes abroad. The inability to resolve the common issues in an effective way in either the Small Claims Court or Rule 76 proceedings makes a class action preferable to either of these alternatives.

(b) Overwhelming individual issues

130 George Brown says that the common issues only bite around the edges of the real issues and that each Class Member will still be required to give evidence as to his or her actual knowledge of the alleged misrepresentation, will have to prove that they relied on the misrepresentation and will have to prove damages. Individual trials will still be required and the individual issues will overwhelm any efficiency obtained by resolution of the common issues. George Brown says that the individual issues, for each Class Member, will include whether the person:

- read the course calendar;
- read the George Brown College web site;
- spoke to a representative of George Brown College prior to applying or registering for the Program;
- attended any of the orientation sessions offered by George Brown College to students of the Program;
- had knowledge of the requirements to obtain the Industry Designations at any material time;
- contacted the Industry Associations at any material time;
- intended to pursue the Industry Designations, or any one of them;
- had the work experience required to obtain the Industry Designations, or any one of them;
- reasonably relied on any representation made by George Brown College;
- understood any representation made by George Brown College to be false, misleading or untrue;
- had actual knowledge, at the time the representation was made, that affected his or her understanding of such representation;
- had actual knowledge, at the time the representation was made, that rendered the representation plain and unambiguous;
- has a potential misrepresentation claim with respect to individual statements or representations, which will not be resolved by the class proceeding;
- completed the Program;
- suffered damages or detrimental reliance;

- paid fees to George Brown College in an amount that exceeded the fair value of the services received; and

- mitigated their damages, if any.

131 George Brown says that all these issues must be determined in order to resolve the plaintiffs' claims and that the negligent misrepresentation claim will "inevitably break down into individual proceedings." The breach of contract claim, so it says, requires a causal nexus between the breach of the contractual term and the behaviour of the individual class member - that is, it must be shown that the breach of contract was causative of damages.

132 As Lax J. noted in *Griffin v. Dell Canada Inc.*, above, at para. 90, the complaint that the individual issues will "overwhelm" the common issues and will make the proceedings "unmanageable" is a familiar refrain from defendants on contested certification motions and it is certainly one that has been echoed by the court in many cases. In *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, [2010] O.J. No. 113 (Ont. S.C.J.), I declined to certify claims for misrepresentation and false advertising in relation to a class of several million consumers who purchased over 100 different sunscreen products over an eight year class period as a result of alleged misrepresentations made in various formats on product labels, advertisements and websites. That was a case, like other misrepresentation claims that have been denied certification, where the individual issues truly overwhelmed the common issues.

133 As I noted earlier, the claim in *Mouhteros v. DeVry* was denied certification for this very reason. There were scores, if not hundreds, of statements made to thousands of students over a six year period. Winkler J. found that the individual issues would be overwhelming.

134 *Matoni v. C.B.S.* was a similar sort of case. While the class was considerably smaller, approximately 200 students over a two year period, different representations were made to members of the class and some of the statements were oral and some were written. There were material differences in the contract documentation given to students over the class period and the plaintiffs relied upon both express and implied contract terms. Hoy J. distinguished *Hickey-Button*, at paras. 109 - 111, on the basis that in that case, unlike the case before her, the plaintiff relied on common written material provided to all class members. Hoy J. found that the individual issues (apart from those arising from the *Consumer Protection Act, 2002* claim) would overwhelm the common issues. The case before me is much closer to *Hickey-Button* than it is to *Matoni v. C.B.S.* or *Mouhteros v. DeVry*.

135 In *Hickey-Button*, the alleged misrepresentation about the "Queen's option" had been made in written material provided to students, including the course calendar, as well as in oral form at various information sessions. It was argued that individual inquiries would have to be made to determine the content of the representations made to each student and the reliance, if any, placed on the representations. As noted earlier, in answer to the assertion that reliance might have to be determined on an individual basis, Doherty J.A. stated, at para. 43:

> It is, however, no answer to a contention that common issues exist to demonstrate that there are some issues that are not common to all parties of the class. In most actions where certification is sought, there will be both common and individual issues: *Cloud, supra*, at paras. 73-75.

136 In this case, the plaintiff relies on a single representation, made in the course calendar in printed form and on the George Brown website. The language used in both media was the same. The web version of the calendar was amended in July, 2008 but the printed calendar was not. The representation was clearly important to students wishing to enroll in the Program and the calendar is an important contractual document. George Brown has produced no other contractual document that might contradict the representation. It is a reasonable conclusion that the calendar would be read by every student before enrolling in the Program.

137 In considering the preferable procedure issue I must ask myself: "What are the common issues and how significant are they in the resolution of the action? How important are they in relation to the claims as a whole?": see *Hickey-Button* at

para. 55; *Matoni v. C.B.S.* at para. 171. I must also ask whether a class action would be a fair, efficient and manageable way of advancing the claim, having regard to the goals of the *C.P.A.*

138 In this case, the proposed common issues as to misrepresentation and breach of contract are very similar to the issues in *Hickey-Button* and many of the complaints made by the defendant in this case are the same as those made in *Hickey-Button*. The claims of negligent misrepresentation, breach of contract and breach of the *Consumer Protection Act, 2002* all hinge on the legal effect of the statements made in the calendar and whether those statements were inaccurate or misleading. As in *Hickey-Button*, the resolution of those issues in favour of George Brown would likely put an end to the action. The resolution of one or more of those issues in favour of the plaintiffs will not put an end to the action, but it would substantially advance the claim of every Class Member.

139 Many of the individual issues posited by George Brown are premised on the assumption that Class Members may have received contradictory information about the Industry Designations from other sources, presumably prior to entering into a contract with George Brown. This is, of course, possible, but the obvious purpose of the calendar was to provide information to prospective students about how George Brown's courses would equip them to find employment in the international business management industry. Students could reasonably expect such information to be accurate and would have little need to confirm it from other sources. The onus will be on George Brown to show, in any particular case, that the student knew or ought to have known of information that would contradict or qualify the representation made by George Brown.

140 Some of the individual issues raised by George Brown go to damages. The need for individual assessments of damages is specifically not a barrier to certification: see *C.P.A.* s. 6.1. The fact that some students may have ultimately obtained an Industry Designation may go to damages or mitigation, but it does not make it inappropriate to include them in the Class.

141 Looking at the preferability analysis having regard to the goals of the *C.P.A.*, a class action will provide access to justice to a vulnerable group of students, many of whom are from different lands and cultures. Class Members may lack the individual resources, initiative and sophistication to pursue legal action on their own and may be intimidated by the legal process. Their claims are relatively modest, and while they might be individually pursued in the Small Claims Court or under the Simplified Procedure, they can be more efficiently managed in a single action case managed by a single judge. The prospect that the international students might pursue George Brown in their homelands, seems very remote and, from the evidence, such litigation would likely be unproductive and expensive.

142 A class proceeding would also fulfill the goal of judicial economy by addressing important aspects of George Brown's liability at the outset. A multiplicity of legal proceedings would be a drain on court resources.

143 George Brown says that there is no need for concern about behaviour modification in this case, because it responded appropriately to student complaints and it made necessary changes to the course calendar. As Doherty J.A. said in *Hickey-Button*, however, at para. 58, accountability is the first step towards behavior modification and a class action requires wrongdoers to account for their behavior, not simply to correct it. As he also pointed out, the goal of behaviour modification is particularly important in the case of public institutions.

George Brown's Proposal for Bifurcation

144 George Brown proposes that if this action is certified, the proceedings should be bifurcated and there should be discovery and trial of individual liability issues before trial of the common issues. It says that that the claims advanced in this action cannot be resolved without the determination of numerous individual issues including those identified earlier in this section. It advances the following reasons:

> (a) while not converting the proceeding to an opt-in class action, this approach will require somewhat more than passive attornment to the jurisdiction, providing greater certainty and procedural fairness to both non-resident Class Members and George Brown College alike;

(b) a number of the outstanding individual issues are threshold issues, the determination of which will serve to further refine the overly broad class definition;

(c) resolution of the individual issues prior to the proposed common issues is in the interests of efficient case management; and

(d) resolution of the individual issues will afford the proposed common issues a greater degree of commonality, such that they may become substantial elements of each class member's claim.

145 George Brown argues that this approach will allow the court to determine the appropriate class definition, the scope of the plaintiff's claims, the appropriate factual issues and, in some cases, entitlement to damages "on a full factual record."

146 It says that the following factors support this position:

- the issues of liability and the threshold individual issues are clearly separate from the issues of remedies and the proposed common issues;

- separation will result in the saving of time and expense by all parties;

- the overall timeframe of the proceeding will not be unduly lengthened by this approach;

- causation issues are confined to issues of liability. The quantum of each class member's damages, if any, can be determined through the use of claim forms or other procedures, to be ordered by the trial judge;

- credibility issues, if any, will arise predominantly in determining issues of liability;

- the proposed approach will afford the parties and the Court a better appreciation of the nature and extent of each class member's claim, including the extent of any alleged damages;

- facilities are available to permit the expeditious resolution of individual and common issues, and issues of liability and damages, and the Court may make any orders necessary to expedite the proceeding; and

- there is a good chance that the determination of threshold individual issues and the issue of liability will put an end to the action.

147 George Brown submits that the Court has jurisdiction to bifurcate the process in this fashion, pursuant to s. 12 of the *C.P.A.*, and refers to the observations of Perell J. in *Peter v. Medtronic Inc.*, [2009] O.J. No. 4364 (Ont. S.C.J.) at paras. 16-18; see also, *Air Canada v. WestJet Airlines Ltd.*, [2005] O.J. No. 5512, 20 C.P.C. (6th) 141 (Ont. S.C.J.)) and *Bourne v. Saunby* (1993), 23 C.P.C. (3d) 333, [1993] O.J. No. 2606 (Ont. Gen. Div.), referred to therein. These latter cases were ordinary civil actions and there is no doubt that in such proceedings the court has jurisdiction to separate the determination of issues such as liability and damages. The *C.P.A.* contemplates that there will be a bifurcation of the resolution of the common issues and the individual issues, but the clear expectation, expressed in s. 25, is that the resolution of the common issues will precede the resolution of the individual issues. It may be appropriate in some cases to bifurcate the common issues, as Perell J. did in *Peter v. Medtronic Inc.*, where doing so would promote efficiency and economy. George Brown's proposal in this case is vastly different from what was done in *Peter v. Medtronic Inc.*. It wants to put the individual issues cart before the common issues horse.

148 Part of the logic of George Brown's unusual proposal is that it would permit non-resident class members to be heard

at an early stage, thereby increasing the likelihood that the court's judgment will be recognized in the country where each member ordinarily resides. As I have concluded the court can properly assume jurisdiction over the claims of absent class members, and that its judgment should be given preclusive effect elsewhere, this argument in favour of bifurcation is not persuasive.

149 George Brown refers to so-called "Lone Pine Orders" in the United States (*Lore v. Lone Pine Corp.* [(Wichmann J.) (U.S. N.J. Super. L. November 18, 1986, 1986 WL 637507)] in which case management orders have been made in mass tort litigation requiring some individual evidence as to causation and the fact of loss prior to discovery and the common issues trial; see also *Acuna v. Brown & Root Inc.*, 200 F.3d 335 (U.S. C.A. 5th Cir. 2000). To the best of my knowledge, these cases have never been considered in Canada and no Canadian court has ever made such an order in a class proceeding.

150 George Brown is really trying to turn this action into an opt-in class action by requiring each Class Member to come forward and establish his or her entitlement to claim prior to the resolution of the common issues. This proposal stands class proceedings on their head and would result in a waste of judicial and private resources if the common issues were ultimately decided against the Class. It may be the case that, in an exceptional circumstance, the court's jurisdiction under s. 12 of the C.P.A. would permit the determination of some or all individual issues before the common issues, but I have some difficulty in contemplating what those circumstances might be. I see no reason to do so in this case.

151 In summary, therefore, it is my conclusion that a class proceeding would be the preferable procedure for the resolution of the common issues, would promote the goals of the *C.P.A.* and would provide a process for the resolution of the remaining individual issues, notably damages, in an efficient and cost-effective manner.

(e) Representative Plaintiff

152 Section 5(1)(e) of the *C.P.A.* requires that I be satisfied that there is a representative plaintiff or defendant who:

> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying Class Members of the proceeding, and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other Class Members.

153 I must be satisfied that the proposed plaintiff will vigorously and capably prosecute the claim on behalf of the Class: see *Campbell v. Flexwatt Corp.* (1997), 15 C.P.C. (4th) 1, [1997] B.C.J. No. 2477 (B.C. C.A.), application for leave to appeal dismissed, [1998] S.C.C.A. No. 13 (S.C.C.); *Western Canadian Shopping Centres Inc. v. Dutton*, above, at para. 41. I must also be satisfied that plaintiff's counsel is qualified to advance the proceeding on behalf of the Class. This is part of the court's supervisory jurisdiction in class actions: see *Poulin v. Ford Motor Co. of Canada Ltd./Ford du Canada Ltée*, [2006] O.J. No. 4625, 35 C.P.C. (6th) 264 (Ont. S.C.J.) at para. 88.

154 Ms. Ramdath was a student in the Second Class and Mr. Kovesst was a student in the First Class. They have been actively involved in the issues that are the subject of this action, serving as advocates on behalf of their class-mates before the commencement of this action. They fall within the class definition and they understand their duties as representative plaintiffs. I am satisfied that they would fairly and adequately represent the Class. There is no suggestion that they have any conflict with other members of the Class.

155 While George Brown complains that there is no proposed plaintiff who was a student in the Third Class, I am not satisfied that members of this group require separate representation. Should it prove necessary or desirable to add a representative plaintiff on behalf of this group, the plaintiffs may bring a motion to do so.

156 I do consider that, for the reasons expressed in *Currie* and discussed above, there should be a separate representative on behalf of non-resident Class Members. These persons have unique interests concerning several matters, including purely administrative issues such as notice and communication, as well as substantive matters such as damages. They may have incurred substantially greater costs to attend George Brown, including higher tuition, visas, transportation and residence costs. Their voice should be separately heard in the action itself and in any discussions of settlement.

157 George Brown says that the plaintiffs' litigation plan is deficient because (a) the notification program is inadequate; (b) there is an erroneous assumption that damages can be assessed following a common issues trial; and (c) it envisages that the proposed class will cease to be represented following the common issues trial, leaving them without counsel. I will deal with each of these issues.

158 Since a class action in Ontario will bind all Class Members who do not opt out, notice of certification requires careful consideration. It is particularly important where, as here, the proposed class includes non-residents. The plaintiffs' litigation plan proposes a multi-faceted notice plan with notice of certification being disseminated:

(b) by mail and e-mail to the last known address of Class Members as shown on George Brown's records;

(c) by e-mail to the addresses of Class Members known to the plaintiffs;

(d) by posting on the website of plaintiffs' counsel;

(e) by posting on George Brown's website;

(f) by posting on the "Facebook" website;

(g) by publishing in the George Brown Student newspaper;

(h) by posting in common areas of George Brown, including the student lounge and lunch room; and

(i) by delivery by plaintiffs' counsel to any person who requests it.

159 The plaintiffs also propose that if a number of notices are returned as undeliverable a consultant will be retained to locate the addressees.

160 George Brown says that the proposed notification program is inadequate for three reasons. First, it erroneously assumes that George Brown has current contact information for each Class Member. Second, it assumes that a consultant will be able to locate Class Members for whom the parties lack current contact information. The evidence before the Court indicates that a significant number of Class Members may be very difficult, if not impossible, to locate in countries such as India and China. Third, it says that the notification program cannot guarantee that the requirements of natural justice and due process will be met with respect to absent claimants and, as a result, there remains an issue of whether this Court can properly take jurisdiction over the proposed Class.

161 George Brown says that it does not have home country address information for 16 of the 78 Class Members who were international students, and none of those 16 updated their addresses with a Canadian address after graduation. It says that it has incomplete home country information for 13 international students, but those students have updated their address information with Canadian addresses after graduation. The plaintiffs' counsel says that her firm has been in contact with 56 out of 78 students in the First Class and the Second Class.

162 George Brown says that the proposed notification program is also unnecessarily broad and its cost is out of proportion to the claims. There is no evidence before the Court to suggest that the proposed Class Members are still students of George Brown. Posting the notice of certification on the George Brown website and in the common areas of George Brown, and publishing the notice of certification in the George Brown student newspaper, will not result in Class Members receiving notice of the proceeding, but rather risks harm to George Brown's reputation for no reason.

163 For the reasons set out in *Currie*, the notice plan is critical. There must be a fair and robust notice plan which should include actual notice, whether by mail or e-mail or other form of publication, to the extent reasonably possible and practical. The experience of most graduates of universities and colleges is that these institutions can be remarkably adept and persistent in tracking their alumni when they wish to raise funds. I expect that, with the substantial amount of information already collected, in the hands of the plaintiffs and George Brown and its recruiters, it will be possible to develop a notice program that accomplishes these goals. I also expect that, working together with the common objective of ensuring that, to the extent practical, every Class Member receives actual notice of the proceedings, the court and the parties will be able to devise a satisfactory notice program. I note that both the plaintiffs and the defendant have an interest in ensuring that all class members receive actual notice of this proceeding. The framework proposed by the plaintiffs is, broadly speaking, acceptable. Some of its components can safely be deleted, I expect, if other aspects are enhanced. It will be refined and approved on the motion to approve the Notice of Certification.

164 George Brown says that the litigation plan is flawed because it assumes that the court will award damages if the common issues are determined in the plaintiffs' favour. It says that individual issues will have to be determined before George Brown's liability is resolved. This may be a valid criticism of the plan, but it does not mean that the plan fails this certification requirement. As has been said many times, the litigation plan is a work in progress that will be refined as the action progresses.

165 George Brown says that the litigation plan is deficient because it purports to terminate the representation of Class Members by class counsel after the common issues trial. As Lax J. recently pointed out in *Glover v. Toronto (City)* (2009), 70 C.P.C. (6th) 303, [2009] O.J. No. 1523 (Ont. S.C.J.) at para. 94, this is problematic:

> In a class proceeding, a client does not have a right to choose his or her lawyer or have a right to terminate the retainer. If a class member is dissatisfied with counsel of record, he or she may opt out of the class, but by the time [the] proceeding reaches the stage of individual assessments, that time will have long passed. In my opinion, *class counsel cannot unilaterally choose to terminate representation, but is bound to represent those class members who wish to pursue individual claims on the same basis as the retainer agreement provides until the class member or the court directs otherwise. It seems to me that the proposed abandonment of class members following the determination of common issues is completely at odds with the fiduciary duty that a lawyer has to a client, which includes the duty of loyalty. It is also completely at odds with the goals of class proceedings.*
>
> [citations omitted, emphasis added]

166 Counsel for the plaintiffs has confirmed that her firm's retainer will continue after the resolution of the common issues on its current terms.

167 Subject to the foregoing observations, the plaintiffs are suitable representatives of the Class and the litigation plan is approved.

V. Conclusion

168 For these reasons, and subject to the modifications I have made, this action will be certified as a class proceeding. Counsel shall prepare an order, in the form contemplated by s. 8 of the *C.P.A.* If they are unable to agree on the form of order a case conference may be arranged. If the parties are unable to agree on the costs of the motion, written submissions may be

delivered to me care of Judges' Administration. Counsel shall agree on a timetable for the filing of costs submissions.

Motion granted.

APPENDIX

Proposed Common Issues

Negligent Misrepresentation

1. Was George Brown in a special relationship with the Class Members?

2. Did George Brown make representations to the Class Members that it would provide the Class Members with the opportunity to complete the three Industry Designations in addition to the George Brown College Graduate Certificate?

3. If such representations were made, were they untrue, inaccurate or misleading? If so, was George Brown negligent in making the representations?

Consumer Protection Act 2002

4. Did George Brown breach Part III of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A (the "*Act*")?

5. If so, what remedy, if any, are the Class Members entitled to under the *Act*?

6. Does the Class, or any portion thereof, require, and is it entitled to, a declaration waiving the notice provisions of section 18 of the *Act*?

Breach of Contract

7. Was the relationship between George Brown and the Class Members a contractual relationship?

8. If the answer to question #6 is yes, did the contract include a term by which George Brown agreed to provide the Class Members with the opportunity to complete the three Industry Designations in addition to the George Brown College Graduate Certificate?

9. If the answer to question #7 is yes, did George Brown breach that contract?

Damages

10. Are the Class Members entitled to damages?

11. If so, do such damages include:

a) the cost of tuition, English as a second language ("ESL") course and exam fees, books, travel, accommodation, living expenses, visa fees and immigration consultant fees;

b) loss of income;

c) delayed entry to the workplace;

d) loss of competitive advantage;

e) the cost of additional Industry Association fees for courses and examinations; and/or

f) costs incurred to adjust, extend or renew visas for residency, study and work in Canada?

12. If so, can damages be determined on an aggregate basis on behalf of the Class? If so, what is the quantum of those damages?

13. Is George Brown's conduct deserving of punitive or exemplary damages?

Administration/Interest

14. Should George Brown pay the costs of administering and distributing any recovery? If so, in what amount?

15. Should George Brown be ordered to pay prejudgment interest? If so, how is prejudgment interest to be calculated and what interest rate will apply?

APPENDIX

Guidelines for Recognizing and Enforcing Foreign Judgments for Collective Redress

[Note: Commentary not included]

Article 1 - Jurisdiction

1.01 It is appropriate for a court issuing a judgment for collective redress to have assumed jurisdiction to do so provided that, in addition to existing rules for recognition and enforcement, it was reasonable for the court to expect that its judgment would be granted preclusive effect by the jurisdictions in which claimants not specifically named in the proceedings would ordinarily seek redress.

1.02 It is reasonable for a court issuing a collective redress judgment to expect its judgment to be given preclusive effect in respect of Absent Claimants by the jurisdictions in which the Absent Claimants reside if:

(i) the results obtained for Absent Claimants are not patently inadequate in the circumstances

(ii) the interests of Absent Claimants have been adequately represented; and

(iii) Absent Claimants have been given adequate notice of the proceedings and an opportunity to opt out.

1.03 When there are multiple fora which are otherwise appropriate jurisdictions for a collective redress action, the forum or fora in the best position to process claims from an administrative standpoint, to have access to evidence and witnesses, and to facilitate adequate representation of the claimants and other parties should assume jurisdiction. Multi-jurisdictional court to court communication and cooperation should be implemented as needed for this purpose.

Article 2 - Permissible Causes of Action

2.01 A judgment for collective redress based on the causes of action listed below should be enforced, if the judgment otherwise satisfies these Guidelines.

(i) Tort, delicts or wrongful acts

(ii) Contract

(iii) Securities

(iv) Product liability

(v) Violation of Human rights

Other causes of action, including statutory, constitutional and anti-trust causes of action, should be considered on an individual basis and enforcement should not be refused simply on the grounds that the claim isnovel or unique.

Article 3 - Permissible Types of Damages And/Or Relief

3.01 A judgment for collective redress awarding the types of damages listed below should be enforced if the amounts awarded are not patently unreasonable.

(i) Pecuniary Damages

(A) Out of pocket expenses

(B) Wage losses

(C) Costs of medical and related care

(ii) Non-Pecuniary Damages

(A) Compensatory damages for pain and suffering

(B) Anticipated future wage losses

(C) Anticipated costs of future medical and related care

(iii) Economic damages

(iv) Punitive/Exemplary Damages

3.02 A judgment for collective redress granting declaratory relief may be recognized provided it does not adversely interfere with the sovereignty of the jurisdiction in which it is to be enforced.

Article 4 - Required Procedural Rights and Protections

4.01 A court should be satisfied before enforcing a judgment for collective redress from another jurisdiction that the principles of natural justice and due process were adequately addressed by the court issuing the judgment.

4.02 "Representative" claimants eligible to commence an action for collective redress may include individuals, corporations, partnerships and government appointed agents or ombudsmen and may be brought for the benefit of or on behalf of other individuals, corporations or partnerships.

4.03 A judgment for collective redress should reflect that the following criteria have been satisfied:

(i) the pleadings disclosed a permissible cause of action (see Article II above);

(ii) there is an identifiable group of claimants that are represented by the representative claimant;

(iii) the claims of the claimants raised common or collective issues;

(iv) an action for collective redress was the preferable procedure for the resolution of the common issues; and

(v) there is a representative who fairly and adequately represented the interests of the group of claimants.

4.04 A judgment for collective redress should include provisions that address and protect the procedural rights of all claimants including (i) the representative claimant(s) named in the action, (ii) claimants who were permitted to opt into an action, and (iii) Absent Claimants, i.e. those claimants who were included in the action as a result of the governing legislation and who did not take active steps to opt-out of the action. Without limiting the generality of the foregoing, these should include the provisions set out below.

(i) Claimants should be provided with due and adequate notice of the significant stages of the proceedings which resulted in the judgment. Wherever practical individual notice by direct mail or similar means should be considered.

(ii) Claimants should be given a reasonable opportunity to be heard at each such stage either in writing and/or orally and either in person or through a representative.

(iii) Claimants should be given the right to opt out of the proceeding and an adequate period of time to do so.

Article 5 - Permissible Costs Awards

5.01 An award of costs or counsel fees on any of the bases listed below in a judgment for collective redress should be enforced unless the amount awarded is patently unreasonable.

(i) Costs awarded on a time and materials basis

(ii) Conditional costs

(iii) Contingency fees

(iv) Disbursements

2010 CarswellOnt 2038, 2010 ONSC 2019, 93 C.P.C. (6th) 106

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2009 CarswellOnt 1985, 70 C.P.C. (6th) 303, 176 A.C.W.S. (3d) 947

2009 CarswellOnt 1985, 70 C.P.C. (6th) 303, 176 A.C.W.S. (3d) 947

Glover v. Toronto (City)

GERALD CLAYTON GLOVER, LINDA GLOVER, CACHITA WHITE by her Estate Representative CLARENCE WHYTE, CLARENCE WHYTE, ANNA RADA by her Estate Representative SONIA RADA, SONIA RADA, ADELINE DAVIDSON by her Estate Representative THOMAS DAVIDSON AND THOMAS DAVIDSON (Plaintiffs) and CITY OF TORONTO and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO (Defendants)

Proceeding under the Class Proceedings Act, 1992

Ontario Superior Court of Justice

Lax J.

Heard: September 16-18, 2008
Judgment: April 15, 2009
Docket: Toronto 05-CV-299031CP

Counsel: William V. Sasso, Sharon Strosberg for Plaintiffs

Robert W. Traves, Cheryl M. Woodin, Leslie Mendelson, Mark Skuce for City of Toronto

Kim Twohig, Lise G. Favreau for Her Majesty the Queen in Right of Ontario

Subject: Civil Practice and Procedure; Public; Torts

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Pleadings disclose cause of action

Residents, visitors, staff and neighbours of seniors home became ill, and 23 residents died — Ontario's public health lab used ELISA test and did not find Legionnaire's disease — When autopsy tests from deceased residents found Legionnaire's, Toronto Public Health offered treatment to staff and residents and shut down cooling tower and ventilation system for testing — Lab obtained Binax test kits and confirmed Legionnaire's, and samples from cooling tower matched samples from deceased — Plaintiffs commenced class action against city and province for negligence, breach of contract and declarations — Plaintiffs brought motion for certification — Certification order would issue once counsel satisfied concern as to litigation plan — Statement of claim disclosed cause of action against city and province — Pleading of declaration that defendants were negligent and liable for damages was superfluous and added nothing to action, since same issues were raised by claim for negligence — Claim for declaration for vicari-

ous liability was not duplicative, but was not well pleaded since it did not specify for whom city was vicariously liable, so leave was granted to amend — Pleading made out adequate claim for breach of contract, pleading that each resident entered into residence contract with city, which required city to reasonably maintain premises — Constituent elements of tort of negligence against province for use of ELISA test were adequately pleaded or could be readily inferred from allegations of fact.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Identifiable class

Residents, visitors, staff and neighbours of seniors home became ill, and 23 residents died — Ontario's public health lab used ELISA test and did not find Legionnaire's disease, but autopsy tests on deceased residents found it — Toronto Public Health offered treatment to staff and residents and tested cooling tower and its ventilation — Lab confirmed Legionnaire's through Binax test, and matched to samples from cooling tower — Plaintiffs commenced class action against city and province for negligence, breach of contract and declarations — Plaintiffs brought motion for certification — Certification order would issue once counsel satisfied concern as to litigation plan — Class definition was appropriate — Plaintiffs proposed class of persons excluding defendants' employees who, between Sept. 1 and Oct. 13, 2005, lived, worked or visited at seniors home or within 3 km radius of it, and contracted Legionnaire's disease or Pontiac fever — Epidemiological investigation of class period identified total of 135 people infected, of which 38 were confirmed cases of Legionnaire's, while rest were probable cases of Legionnaire's or its milder form, Pontiac fever — Possibility that some class members would not be able to prove that they contracted either disease or, if they did, that it was from cooling tower source was no reason to reject class definition — Proposed class period was appropriate since there was evidence that first probable case could have been contracted as early as Sept. 1 — Class definition and period could not be defined more narrowly without arbitrarily excluding some potential members.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Common issue or interest

Residents, visitors, staff and neighbours of seniors home became ill, and 23 residents died — Ontario's public health lab used ELISA test and did not find Legionnaire's disease, but autopsy tests on deceased residents found it — Toronto Public Health offered treatment to staff and residents and tested cooling tower and its ventilation — Lab confirmed Legionnaire's through Binax test, and matched to samples from cooling tower — Plaintiffs commenced class action against city and province for negligence, breach of contract and declarations — Plaintiffs brought motion for certification — Certification order would issue once counsel satisfied concern as to litigation plan — Common issues were whether city and province owed duty of care, and if so, whether they breached standard of care, and whether city breached contract — Existence of issues as to city's conduct in design, maintenance and testing of cooling tower had basis in fact and could be resolved on class-wide basis — Meaning of term in standard contract between seniors home and resident could be dealt with at common issues trial — Plaintiffs did not need to provide evidence that province's alleged delay in diagnosis caused harm, since causation and damages were individual issues — Focus of proposed common issues was conduct of defendants, and their resolution would eliminate need for separate adjudication on issues of duty and standard of care — Proposed common issue as to aggregate damages was not appropriate since causation would be individual issue.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Preferable procedure

Residents, visitors, staff and neighbours of seniors home became ill, and 23 residents died — Ontario's public health lab used ELISA test and did not find Legionnaire's disease — When autopsy tests from deceased residents found Legionnaire's, Toronto Public Health offered treatment to staff and residents and shut down cooling tower and ventilation system for testing — Lab obtained Binax test kits and confirmed Legionnaire's, and samples from cooling tower matched samples from deceased — Plaintiffs commenced class action against city and province for negli-

gence, breach of contract and declarations — Plaintiffs brought motion for certification — Certification order would issue once counsel satisfied concern as to litigation plan — Enormous costs of marshalling necessary expert evidence would be deterrent to pursuing individual actions and would defeat objective of access to justice — Avoiding expensive, repetitive and time-consuming individual litigation with potential for conflicting findings advanced goal of judicial economy — Damage claims were likely to be modest, and most class members would likely find it uneconomical to pursue individual claims — Class proceeding had procedural advantages of discovery and case management — Individual causation and damages issues did not present overwhelming obstacles, being less complex than in other certified actions — Only class proceeding had potential to achieve goal of behaviour modification, by encouraging those responsible to take greater care, although goal had little applicability against province, which had already shifted to Binax test use.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Fair and adequate representation

Residents, visitors, staff and neighbours of seniors home became ill, and 23 residents died — Ontario's public health lab used ELISA test and did not find Legionnaire's disease, but autopsy tests on deceased residents found it — Toronto Public Health offered treatment to staff and residents and tested cooling tower and its ventilation — Lab confirmed Legionnaire's through Binax test, and matched to samples from cooling tower — Plaintiffs commenced class action against city and province for negligence, breach of contract and declarations — Plaintiffs brought motion for certification — Certification order would issue once counsel satisfied concern as to litigation plan — Proposed plaintiffs were estate representatives for residents who had died, one of whom was also probable case of Legionnaire's himself — Proposed plaintiffs also included superintendent of next-door building who was ill with Legionnaires, and his wife — Son's and superintendent's more difficult issues of causation as non-residents of home did not raise conflict of interest with other class members, since representative plaintiffs need not be typical of class — Since differences did not impact common issues, they did not create conflict of interest — Reading transcripts of plaintiffs' affidavits and cross-examinations generously, proposed plaintiffs other than superintendent and wife understood they were representing class and had basic understanding of nature of claim — All other proposed plaintiffs had sufficient understanding and motivation to vigorously and capably prosecute claim.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Litigation plan

Residents, visitors, staff and neighbours of seniors home became ill, and 23 residents died — Ontario's public health lab used ELISA test and did not find Legionnaire's disease, but autopsy tests on deceased residents found it — Toronto Public Health offered treatment to staff and residents and tested cooling tower and its ventilation — Lab confirmed Legionnaire's through Binax test, and matched to samples from cooling tower — Plaintiffs commenced class action against city and province for negligence, breach of contract and declarations — Plaintiffs brought motion for certification — Certification order would issue once counsel satisfied concern as to litigation plan — Proposed litigation plan provided sufficient detail of steps necessary to reach trial of common issues and dissemination of notice — Plan terminated representation of proposed class members at doorstep of individual assessment, with provision that class counsel had option to represent some class members in pursuing individual claims — Unexplained abandonment of class members at crucial juncture was deeply problematic, and provision raised troubling questions as to how counsel would decide to exercise option — In class proceeding, client did not have right to choose own lawyer or terminate retainer, and so class counsel could not unilaterally choose to terminate representation — Class counsel was bound to represent those class members who wished to pursue individual claims — Proposed abandonment of class members following determination of common issues was at odds with counsel's fiduciary duty — Counsel could address this issue at case conference, whether by amendment to plan or otherwise.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Conflicts of interest

Residents, visitors, staff and neighbours of seniors home became ill, and 23 residents died — Ontario's public health lab used ELISA test and did not find Legionnaire's disease — When autopsy tests from deceased residents found Legionnaire's, Toronto Public Health offered treatment to staff and residents and shut down cooling tower and ventilation system for testing — Lab obtained Binax test kits and confirmed Legionnaire's, and samples from cooling tower matched samples from deceased — Plaintiffs commenced class action against city and province for negligence, breach of contract and declarations — Plaintiffs brought motion for certification — Certification order would issue once counsel satisfied concern as to litigation plan — Representative plaintiffs who were not residents of home did not have any conflict of interest with resident members class — Proposed plaintiffs were estate representatives for residents who had died, one of whom was also probable case of Legionnaire's himself — Representative plaintiffs also included superintendent of next-door building who was ill with Legionnaires, and his wife — Son's and superintendent's different and more difficult issues of causation did not raise conflict of interest with other class members, since representative plaintiff need not be typical of class — Since differences did not impact common issues, they did not affect ability to adequately and fairly represent class and did not create conflict of interest.

Cases considered by *Lax J.*:

Andersen v. St. Jude Medical Inc. (2003), 2003 CarswellOnt 3478, 38 C.P.C. (5th) 122, 67 O.R. (3d) 136 (Ont. S.C.J.) — referred to

Andersen v. St. Jude Medical Inc. (2005), 2005 CarswellOnt 318 (Ont. Div. Ct.) — referred to

Anderson v. Wilson (1999), 36 C.P.C. (4th) 17, 44 O.R. (3d) 673, 1999 CarswellOnt 2073, 175 D.L.R. (4th) 409, 122 O.A.C. 69 (Ont. C.A.) — referred to

Arabi v. Toronto Dominion Bank (2007), 2007 CarswellOnt 8294, 233 O.A.C. 275, 53 C.P.C. (6th) 135 (Ont. Div. Ct.) — referred to

Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172, 1998 CarswellOnt 4645, 83 O.T.C. 1 (Ont. Gen. Div.) — followed

Cassano v. Toronto Dominion Bank (2007), 47 C.P.C. (6th) 209, 87 O.R. (3d) 401, 2007 ONCA 781, 2007 CarswellOnt 7341, 230 O.A.C. 224, (sub nom. *Cassano v. Toronto-Dominion Bank*) 287 D.L.R. (4th) 703 (Ont. C.A.) — considered

Cassano v. Toronto Dominion Bank (2008), 2008 CarswellOnt 1729, 2008 CarswellOnt 1730 (S.C.C.) — referred to

Cloud v. Canada (Attorney General) (2004), 2004 CarswellOnt 5026, 73 O.R. (3d) 401, 192 O.A.C. 239, 27 C.C.L.T. (3d) 50, [2005] 1 C.N.L.R. 8, 2 C.P.C. (6th) 199, 247 D.L.R. (4th) 667 (Ont. C.A.) — referred to

Cloud v. Canada (Attorney General) (2005), 2005 CarswellOnt 1866, 2005 CarswellOnt 1867, 344 N.R. 192 (note), [2005] 1 S.C.R. vi (note), 207 O.A.C. 400 (note) (S.C.C.) — referred to

Dumoulin v. Ontario (2005), 2005 CarswellOnt 4544, 19 C.P.C. (6th) 234, 48 C.L.R. (3d) 72 (Ont. S.C.J.) — considered

Elliott v. Canadian Broadcasting Corp. (1993), 52 C.P.R. (3d) 145, 16 O.R. (3d) 677, 24 C.P.C. (3d) 143, 22 Admin. L.R. (2d) 272, 1993 CarswellOnt 492, 108 D.L.R. (4th) 385 (Ont. Gen. Div.) — referred to

Fehringer v. Sun Media Corp. (2002), 27 C.P.C. (5th) 155, 2002 CarswellOnt 3569 (Ont. S.C.J.) — referred to

Fehringer v. Sun Media Corp. (2003), 2003 CarswellOnt 3841, 39 C.P.C. (5th) 151 (Ont. Div. Ct.) — referred to

Ford v. F. Hoffmann-La Roche Ltd. (2005), 74 O.R. (3d) 758, 12 C.P.C. (6th) 252, 2005 CarswellOnt 1095 (Ont. S.C.J.) — referred to

Heward v. Eli Lilly & Co. (2007), 39 C.P.C. (6th) 153, 2007 CarswellOnt 611, 47 C.C.L.T. (3d) 114 (Ont. S.C.J.) — referred to

Heward v. Eli Lilly & Co. (2008), 2008 CarswellOnt 3837, 56 C.P.C. (6th) 309, 91 O.R. (3d) 691, 239 O.A.C. 273, 295 D.L.R. (4th) 175, 58 C.C.L.T. (3d) 99 (Ont. Div. Ct.) — referred to

Hollick v. Metropolitan Toronto (Municipality) (2001), (sub nom. *Hollick v. Toronto (City)*) 56 O.R. (3d) 214 (headnote only), (sub nom. *Hollick v. Toronto (City)*) 205 D.L.R. (4th) 19, (sub nom. *Hollick v. Toronto (City)*) [2001] 3 S.C.R. 158, (sub nom. *Hollick v. Toronto (City)*) 2001 SCC 68, 2001 CarswellOnt 3577, 2001 CarswellOnt 3578, 24 M.P.L.R. (3d) 9, 13 C.P.C. (5th) 1, 277 N.R. 51, 42 C.E.L.R. (N.S.) 26, 153 O.A.C. 279 (S.C.C.) — referred to

Hoy v. Medtronic Inc. (2001), 94 B.C.L.R. (3d) 169, 2001 BCSC 1343, 12 C.P.C. (5th) 370, 2001 CarswellBC 3286, [2001] B.C.J. No. 1968 (B.C. S.C. [In Chambers]) — referred to

Hoy v. Medtronic Inc. (2003), [2003] 7 W.W.R. 681, 2003 CarswellBC 1290, 2003 BCCA 316, 183 B.C.A.C. 165, 301 W.A.C. 165, 14 B.C.L.R. (4th) 32 (B.C. C.A.) — referred to

Hunt v. T & N plc (1990), 1990 CarswellBC 216, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), (sub nom. *Hunt v. Carey Canada Inc.*) [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, (sub nom. *Hunt v. Carey Canada Inc.*) 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 1990 CarswellBC 759, 4 C.C.L.T. (2d) 1 (S.C.C.) — referred to

Lau v. Bayview Landmark Inc. (2004), 50 C.P.C. (5th) 113, 2004 CarswellOnt 2710, 71 O.R. (3d) 487 (Ont. S.C.J.) — considered

Lavier v. MyTravel Canada Holidays Inc. (2008), 2008 CarswellOnt 4088, 59 C.P.C. (6th) 57 (Ont. S.C.J.) — referred to

Lavier v. MyTravel Canada Holidays Inc. (2009), 2009 CarswellOnt 1688 (Ont. Div. Ct.) — referred to

LeFrancois v. Guidant Corp. (2008), 2008 CarswellOnt 2073, 56 C.P.C. (6th) 268 (Ont. S.C.J.) — considered

LeFrancois v. Guidant Corp. (2008), 2008 CarswellOnt 3566, 65 C.P.C. (6th) 32 (Ont. S.C.J.) — considered

Macleod v. Viacom Entertainment Canada Inc. (2003), 28 C.P.C. (5th) 160, 2003 CarswellOnt 305 (Ont. S.C.J.) — referred to

Markson v. MBNA Canada Bank (2007), 43 C.P.C. (6th) 10, 2007 ONCA 334, 2007 CarswellOnt 2716, 282 D.L.R. (4th) 385, 32 B.L.R. (4th) 273, 224 O.A.C. 71, 85 O.R. (3d) 321 (Ont. C.A.) — considered

Mignacca v. Merck Frosst Canada Ltd. (2008), 2008 CarswellOnt 8813 (Ont. S.C.J.) — referred to

Peter v. Medtronic Inc. (2007), 50 C.P.C. (6th) 133, 2007 CarswellOnt 7975 (Ont. S.C.J.) — referred to

Peter v. Medtronic Inc. (2008), 2008 CarswellOnt 2759, 55 C.P.C. (6th) 242 (Ont. Div. Ct.) — referred to

R. v. Neil (2002), 317 A.R. 73, 284 W.A.C. 73, 168 C.C.C. (3d) 321, 6 Alta. L.R. (4th) 1, 6 C.R. (6th) 1, [2002] 3 S.C.R. 631, 2002 CarswellAlta 1301, 2002 CarswellAlta 1302, 2002 SCC 70, (sub nom. *Neil v. R.*) 218 D.L.R. (4th) 671, [2003] 2 W.W.R. 591, 294 N.R. 201 (S.C.C.) — referred to

Rumley v. British Columbia (2001), 95 B.C.L.R. (3d) 1, 9 C.P.C. (5th) 1, [2001] 11 W.W.R. 207, 157 B.C.A.C. 1, 256 W.A.C. 1, 275 N.R. 342, 205 D.L.R. (4th) 39, [2001] 3 S.C.R. 184, 2001 SCC 69, 2001 CarswellBC 2166, 2001 CarswellBC 2167, 10 C.C.L.T. (3d) 1 (S.C.C.) — referred to

Sauer v. Canada (Minister of Agriculture) (2008), 2008 CarswellOnt 5081 (Ont. S.C.J.) — referred to

Sauer v. Canada (Minister of Agriculture) (2009), 246 O.A.C. 256, 2009 CarswellOnt 680 (Ont. Div. Ct.) — referred to

Serhan v. Johnson & Johnson (October 16, 2006), Doc. M33963 (Ont. C.A.) — referred to

Serhan Estate v. Johnson & Johnson (2004), 49 C.P.C. (5th) 283, 2004 CarswellOnt 2809, 11 E.T.R. (3d) 226, (sub nom. *Serhan (Estate Trustee) v. Johnson & Johnson)* 72 O.R. (3d) 296 (Ont. S.C.J.) — referred to

Serhan Estate v. Johnson & Johnson (2006), 2006 CarswellOnt 3705, 28 C.P.C. (6th) 83, (sub nom. *Serhan (Trustee of) v. Johnson & Johnson)* 85 O.R. (3d) 665, 269 D.L.R. (4th) 279, 213 O.A.C. 298, 24 E.T.R. (3d) 265 (Ont. Div. Ct.) — referred to

Serhan Estate v. Johnson & Johnson (2007), 2007 CarswellOnt 2150, 2007 CarswellOnt 2151, [2007] 1 S.C.R. x (note), (sub nom. *Johnson & Johnson v. Serhan)* 369 N.R. 397 (note), (sub nom. *Johnson & Johnson v. Serhan)* 234 O.A.C. 398 (note) (S.C.C.) — referred to

Smith v. National Money Mart Co. (2007), 2007 CarswellOnt 29, 29 E.T.R. (3d) 199, 37 C.P.C. (6th) 171 (Ont. S.C.J.) — considered

Smith v. National Money Mart Co. (2007), 2007 CarswellOnt 2177, 30 E.T.R. (3d) 163 (Ont. Div. Ct.) — referred to

Tiboni v. Merck Frosst Canada Ltd. (2008), 60 C.P.C. (6th) 65, 2008 CarswellOnt 4523, 295 D.L.R. (4th) 32 (Ont. S.C.J.) — referred to

Vezina v. Loblaw Cos. (2005), 2005 CarswellOnt 1942, 17 C.P.C. (6th) 307 (Ont. S.C.J.) — referred to

Ward-Price v. Mariners Haven Inc. (2004), 3 C.P.C. (6th) 116, 2004 CarswellOnt 2238, 71 O.R. (3d) 664 (Ont. S.C.J.) — considered

Western Canadian Shopping Centres Inc. v. Dutton (2001), (sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere)* 201 D.L.R. (4th) 385, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, 272 N.R. 135, 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, [2001] 2 S.C.R. 534 (S.C.C.) — followed

2009 CarswellOnt 1985, 70 C.P.C. (6th) 303, 176 A.C.W.S. (3d) 947

Statutes considered:

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

Generally — referred to

s. 5(1) — considered

s. 5(1)(a) — considered

s. 5(1)(b) — considered

s. 5(1)(c) — considered

s. 5(1)(d) — considered

s. 5(1)(e) — considered

s. 24(1) — referred to

s. 25 — referred to

Family Law Act, R.S.O. 1990, c. F.3

Generally — referred to

s. 61 — referred to

Homes for the Aged and Rest Homes Act, R.S.O. 1990, c. H.13

Generally — referred to

Rules considered:

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

R. 21.01(1)(b) — referred to

MOTION by plaintiff for certification of class action against city and province following outbreak of Legionnaire's disease at seniors home.

***Lax J.*:**

1 In September and October, 2005, there was an outbreak of Legionnaire's disease at the Seven Oaks Home for the Aged in Toronto. Seven Oaks is a long-term care facility owned and operated by the defendant City of Toronto ("Toronto"). The cause of the outbreak was ultimately determined to be *Legionella pneumophila* which was found in

the cooling tower located on the roof at Seven Oaks. A total of 135 were infected: 70 residents, 21 visitors, 39 staff and 5 members of the community who lived or worked near Seven Oaks. Twenty-three residents died. The Legionnaires' outbreak was the first time since SARS in 2003 that Ontario faced the threat of an illness that could not be easily or quickly identified. For the first 10 days, the cause of the outbreak was unknown.

2 Investigation of the outbreak was managed by Toronto Public Health ("Toronto") which was assisted by the Central Public Health Laboratory of the Ontario Ministry of Health and Long Term Care ("Ontario"). The plaintiffs bring this action against Toronto and Ontario. They move to certify it as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992 c. 6. They seek to represent a class of persons (except Toronto or Ontario's employees) who lived, worked or visited at Seven Oaks or within a three kilometre radius of Seven Oaks between September 1, 2005 and October 13, 2005 and contracted Legionnaires' disease or Pontiac fever. In the proposed class action, the plaintiffs assert causes of action for negligence, breach of contract and declarations.

3 The plaintiffs allege that Toronto was negligent and in breach of contract because it failed to prevent the growth of Legionella in the cooling tower, resulting in the dissemination of *Legionella pneumophila* into Seven Oaks and the neighbourhood. They claim that as a result of Toronto's alleged negligence, class members were infected with Legionnaires' disease or Pontiac Fever and became ill or died.

4 The Central Public Health Laboratory was responsible for testing urine samples collected from residents and others in order to identify the cause of the outbreak. The plaintiffs allege that Ontario was negligent because it failed to use the correct test on the urine samples to identify the cause of the outbreak in a timely manner. In particular, the claim alleges that Ontario was negligent in using the 'ELISA' or in-house test to test for Legionnaires' disease and that it ought to have used the Binax test. The plaintiffs claim that as a result of Ontario's alleged negligence, class members did not receive timely appropriate treatment for Legionnaires' disease.

5 Subject to a serious concern I have about the litigation plan which will need to be addressed, I have concluded that this is an appropriate case for certification.

Background

6 *Legionella pneumophila* is a ubiquitous aquatic organism that causes 90% of the cases of the disease known as Legionellosis. Legionellosis takes two forms: a) Legionnaires' disease: a severe form of infection that causes pneumonia with symptoms of breathing problems, fever, chest pains and coughing: b) Pontiac fever: a milder respiratory illness that resembles acute influenza with symptoms of fever, muscle and joint aches, headache, cough, nausea and sore throat. Legionnaires' disease can be fatal for the elderly.

7 Infection is not transmitted from person to person, but is contracted by inhaling small droplets of water or aerosols containing *Legionella pneumophila*. Aerosolized bacteria are carried by wind currents from the source and are emitted into the atmosphere. It is an environmental disease. The most probable incubation period is two to ten days. The incubation period for Pontiac fever is much shorter, about four to sixty hours.

8 Beginning on October 1, 2005, urine samples of ill residents and staff members were submitted for testing to the Central Public Health Laboratory. ELISA urine antigen tests for Legionella were conducted. All samples came back negative. On October 6, 2005, cultures from autopsy lung tissues from three deceased residents tested positive for *Legionella pneumophila serogroup 1*. Based on the October 6, 2005 test results, Toronto Public Health announced that the likely cause of the outbreak was Legionnaire's disease. It offered prophylactic antibiotic treatment to all staff and residents. It ordered Seven Oaks to shut down its cooling tower and ventilation system for testing.

9 On October 21, 2005, *Legionella pneumophila serogroup 1* was positively identified as the source of the outbreak based on test results which matched samples from the cooling tower with samples of the cultured lung tissues

from the deceased residents. Toronto Public Health issued a press release that explained how the disease spread. The press release stated:

> Lab tests showed that the cooling tower contained the same legionella bacterium found in samples taken from residents. An air intake is located near the cooling tower. Droplets containing the bacterium were spread through the Home by the air handling system. The disease then affected a vulnerable population of elderly residents as well as staff and visitors.

10 The ELISA test did not detect *Legionella pneumophila serogroup 1* in either the autopsy lung tissues or in the urine samples that were submitted for testing. Subsequently, the Central Public Health Laboratory obtained Binax test kits from hospitals in the United States on October 12, 2005, which confirmed *Legionella pneumophila* in the urine samples of the proposed representative plaintiffs, Anna Rada, Cachita White, Adeline Davidson and Gerald Glover. Anna, Cachita and Adeline were residents of Seven Oaks. Anna and Adeline died. Gerald and Cachita were hospitalized. The proposed representative plaintiff, Clarence Whyte is the son of Cachita White. Neither test confirmed *Legionella pneumophila* in his urine samples, although he was hospitalized with symptoms consistent with Legionnaires' disease.

11 Following the outbreak, the provincial government convened an expert panel to investigate the matter. The panel produced a report entitled "*Report Card: Progress in Protecting the Public's Health*" (the "Walker Report"). Its purpose was to assess the response to the outbreak.

Certification Requirements

12 Section 5(1) of the CPA sets out the criterion for the certification of a class proceeding. The language is mandatory. The court is required to certify the action as a class proceeding where the following five-part test for certification is met:

> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff;
>
> (c) the claims of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff who,
>
> > (i) would fairly and adequately represent the interests of the class,
> >
> > (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> >
> > (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

13 The defendants vigorously contested certification on numerous grounds that are now familiar in contested class proceedings, including an overly broad class definition, lack of commonality, a failure to demonstrate that a class action is the preferable procedure and lack of evidentiary support for the certification requirements, in particu-

lar the proposed common issues.

14 The plaintiffs relied on affidavits from the proposed representative plaintiffs and produced the opinion evidence of Dr. Janet Stout, a microbiologist and Associate Professor and Director of the Special Pathogens Laboratory at the University of Pittsburgh. Dr. Stout has studied Legionnaires' disease for 25 years and has published widely on the subject. The defendants challenged the sufficiency of Dr. Stout's evidence and delivered responding affidavits from Dr. Paul Edelstein, Dr. Thomas Marrie and Dr. Donald Low. They are each experts in infectious diseases. Dr. Edelstein has particular expertise in Legionnaires' disease. The defendants criticized Dr. Stout's opinion on a number of grounds and ask me to conclude that there is no evidence or no admissible evidence to raise common issues against either defendant.

15 The plaintiffs have an evidentiary burden to show "some basis in fact" for each of the certification requirements other than the requirement in section 5(1)(a) that the claim discloses a cause of action. "Some basis in fact" is an elastic concept and its application can be vexing. It is sometimes easier to articulate what it isn't, rather than what it is. It is not a requirement to show that the action will probably or possibly succeed. It is not a requirement to show that a *prima facie* case has been made out. It is not a requirement to show that there is a genuine issue for trial.

16 These thresholds do not have to be met on a certification motion as there is no assessment of the merits at the certification stage. Certification is a procedural motion focusing on the form of the action. As such, the court is required to assess whether there is a cause of action, shared by an identifiable class, from which common issues arise that can be resolved in a fair, efficient and manageable way that will advance the proceeding and achieve access to justice, judicial economy and the modification of the behaviour of wrongdoers: *Sauer v. Canada (Minister of Agriculture)*, [2008] O.J. No. 3419 (Ont. S.C.J.) at para.14, leave to appeal to Div. Ct. refused, (Ont. Div. Ct.).

17 The essential issue to be resolved in this action is whether one or both defendants were negligent. I use that term loosely for the moment. If this action is certified, the plaintiffs will seek to prove at a common issues trial that Toronto owed a duty of care to the class in relation to the design, maintenance and testing of the cooling tower at Seven Oaks. They will seek to prove that Ontario owed a duty of care to the class, including those whose urine was tested at the Central Public Health Laboratory. They will seek to prove that both defendants breached a duty of care and that their conduct fell below the standard of care. On this motion, the plaintiffs have no obligation to do this. They are only required to show by some evidence that these issues can be resolved on a class-wide basis and that if they are set down for trial, their resolution will significantly advance the proceeding.

5(1)(a) - Disclosure of a Cause of Action

18 The test under s. 5(1)(a) is well settled and identical to the test under rule 21.01(1)(b) of the *Rules of Civil Procedure*. The following principles apply to the determination of the issue of whether the pleadings disclose a cause of action under s. 5(1)(a):

- no evidence is admissible for the purposes of determining the s. 5(1)(a) criterion: *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, [2001] 3 S.C.R. 158 (S.C.C.) at para. 25.

- all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proven and thus assumed to be true;

- the pleading will be struck out only if it is plain, obvious and beyond doubt that the plaintiff cannot succeed and only if the action is certain to fail because it contains a radical defect: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 41, leave to appeal to S.C.C. refused, [2005] 1 S.C.R. vi (note) (S.C.C.).

• matters of law not fully settled in the jurisprudence must be permitted to proceed: *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (Ont. S.C.J.) at para. 17(e).

• the pleading must be read generously to allow for inadequacies due to drafting frailties and the plaintiffs' lack of access to key documents and discovery information: *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), at 980; *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (Ont. C.A.), at 679.

Toronto

19 Toronto does not dispute that there is a properly pleaded cause of action in negligence against it. It raises two issues. It disputes the plaintiffs' submission that the claim for declaration is a cause of action and denies that there is a properly pleaded claim in contract.

20 The declaratory relief sought by the plaintiffs in this case consists of a declaration that (i) the defendants were negligent and liable for damages, and (ii) a declaration that the defendants are vicariously liable in damages, although it is not specified for whom they are said to be vicariously liable.

21 A declaration is not a cause of action *per se*, but a remedy granted by a court when a plaintiff has established a breach - or a threatened breach - of his or her rights. Declarations are the relief sought, not causes of action: *Elliott v. Canadian Broadcasting Corp.* (1993), 16 O.R. (3d) 677 (Ont. Gen. Div.), at 696; see also, L. Sarna, *The Law of Declaratory Judgments*, 3rd ed. (Toronto: Carswell, 2007) at 1.[FN1]

22 In support of their inclusion of "declarations" as a cause of action, the plaintiffs rely on *Smith v. National Money Mart Co.*, [2007] O.J. No. 46 (Ont. S.C.J.) at paras. 22-25, 37 C.P.C. (6th) 171, leave to appeal refused, [2007] O.J. No. 2160, 30 E.T.R. (3d) 163 (Ont. Div. Ct.) and *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321 (Ont. C.A.) at paras. 41 and 49. In both cases, the plaintiffs sought declarations that the fees charged by the defendant constituted a criminal rate of interest and that the agreements that they entered into with the defendant were therefore void. Declaratory relief was the only available means for enforcing the right asserted.

23 In this case, the plaintiffs have sued the City for negligence (an actual cause of action), and seek a remedy in damages. I agree with the submission of Toronto that the pleading of declaration that the defendants were negligent is superfluous and adds nothing to this action in the way of common issues. Any common issues raised by the pleading that the defendants were negligent and liable to pay damages are the very same issues raised by a pleading for a declaration that the plaintiff was negligent and liable for damages.

24 The claim for a declaration for vicarious liability in damages is not duplicative, but it is not well pleaded. Leave to amend is granted.

25 The thrust of the breach of contract claim is that Toronto failed to perform its contractual and statutory obligations to provide a safe and healthy environment for residents. It is pleaded that each resident class member, including three representative plaintiffs who were residents at Seven Oaks, entered into a standard form residence contract with Toronto, which expressly or implicitly required Toronto to maintain the premises, including the cooling tower and other systems to a standard reasonably required in the circumstances and that Toronto failed to do this. I am satisfied that the pleading makes out an adequate claim for breach of contract.

Ontario

26 The nub of the claim against Ontario is its alleged negligent use of the ELISA test. Ontario disputes that the plaintiffs have sufficiently pleaded a claim in negligence against it and submits that pleas of breach of a standard of care and proximity are lacking. The claim makes the following allegations:

• the plaintiffs and class members were in a position of special reliance on the Central Public Health Laboratory to identify the cause of the outbreak.

• Ontario knew or should have known that the plaintiffs and class members would continue to be exposed to *Legionella pneumophila* and would not receive the most effective treatment until Legionnaires' disease was identified as the cause of the outbreak.

• Serogroup 1 is the most common and dangerous subtype of *Legionella pneumophila*. Ontario owed a duty of care to the plaintiffs and class members to identify Serogroup 1. It knew or ought to have known that the ELISA test failed to identify this subtype.

• Ontario was negligent in failing to discontinue use of the ELISA test and implement the Binax test. But for Ontario's failure to identify Legionnaires' disease earlier in the outbreak, the plaintiffs and class members would have received timely and effective antibiotic therapy tailored to Legionnaires' disease.

• Severely ill class members were not given Rifampin which is recommended for treatment of Legionnaires' disease.

• Class members and family class members have suffered loss and damage.

27 In my opinion, the constituent elements of the tort of negligence have been adequately pleaded or can be readily inferred from the allegations of fact.

5(1)(b) - Class Definition

28 Section 5(1)(b) requires that "there be an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant." The purpose of a class definition is (a) to identify persons with a potential claim; (b) define who will be bound by the result; and (c) describe who is entitled to notice: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913, 27 C.P.C. (4th) 172 (Ont. Gen. Div.) at para.10.

29 The plaintiffs propose the following class definition:

Those persons who, in the Class Period, (excluding any of Toronto's and Ontario's employees) lived, worked or visited at Seven Oaks or within a radius of three kilometres of Seven Oaks, and contracted Legionnaires Disease or Pontiac Fever.

30 As well, there is a family class defined as:

A family member of a Class Member as defined by section 61 of the *FLA*.

31 The class period is defined as the period between September 1, 2005 and October 13, 2005.

32 Toronto Public Health conducted an epidemiological investigation of the outbreak that covers the period September 1 to October 13. The plaintiffs rely upon this for the purpose of defining class membership and class period. The epidemiological investigation identified a total of 135 people who were infected during the outbreak, including 70 residents, 39 staff, 21 visitors and 5 people who lived or worked near Seven Oaks. Once staff members are excluded, the class size is 97. Of this group, 38 were identified as cases of confirmed Legionnaires' disease. The remainder were either probable cases of the disease or were cases of probable Pontiac fever.

33 The defendants rely on evidence from Dr. Edelstein that the classification of affected persons for epidemiological purposes is not equivalent to the requirement to prove on a balance of probabilities that a particular individual was in fact infected with Legionnaires' disease by bacteria emanating from the Seven Oaks cooling tower. First, they point out that Legionella is ubiquitous and there were other Legionella sources in proximity to Seven Oaks, for example, the Shoniker building next door. The proposed representative plaintiff Gerald Glover was the superintendent of the Shoniker building and responsible for weekly inspections of its cooling tower, which was found to also have the Legionella bacteria, although it did not match the strain found in the Seven Oaks cooling tower.

34 Second, they argue that absent laboratory confirmation of Legionnaires' disease, it is likely that certain of the proposed class members actually contracted an unrelated illness, with similar clinical symptoms. For example, they say, the proposed representative plaintiff Clarence Whyte appears to fall into this category, as testing in his case was consistently negative for Legionnaires' disease.

35 They submit that the number of people who in fact contracted Legionnaires' disease from Seven Oaks will be much lower because there will be people within the proposed class who contracted the disease from somewhere else and because there will be people within the proposed class who, while they may have been sick with symptoms consistent with Legionnaires' disease, did not in fact contract the illness at all. They particularly object to the inclusion of Pontiac fever as there is no reliable laboratory test to diagnose it.

36 None of these arguments persuade me that the class definition as it relates to membership is improper. There is a basis in fact for believing that each of the representative plaintiffs may have contracted Legionnaires' disease from the Seven Oaks cooling tower. The fact that there may be another source for Legionnaires' disease is a matter to be pleaded in defence. That some class members will be unable to prove that they contracted either disease or, if they did, that it was from the cooling tower is not a reason to reject the class definition. A proper class definition does not need to include only those persons whose claims will be successful. As Cullity J. stated in *Tiboni*:[FN2]

> [78] ... In any class action involving claims in tort for personal injury or economic loss, it is possible that the claims of some class members will be unsuccessful. This is virtually ordained by the authorities that preclude merits-based definitions.

37 As to class period, Dr. Edelstein expressed the opinion that transmission began later than September 1 and ended earlier than October 13. However, his opinion is based on when the first *confirmed* case of Legionnaires' disease occurred and he does not take account of any cases of Pontiac fever. Allowing for the possibility that incubation periods can run longer than ten days as Dr. Edelstein acknowledged, the proposed class period is appropriate as there is evidence to show that the first case of probable Legionnaires' disease could have been contracted as early as September 1 if the incubation period was slightly longer than the norm. The shorter class period proposed by the defendants would satisfy the standard of medical certainty, but exclude some potential class members who might be able to satisfy the civil standard of proof on a balance of probabilities.

38 I agree with the plaintiffs that the proposed class definition and class period cannot be defined more narrowly without arbitrarily excluding some potential class members. The definition includes a type of harm (contracted Legionnaires' disease or Pontiac fever), but it is not overly broad compared to the interest that class members have in common. A proposed class definition that lacked this qualifier could well be criticized as too broad. The inclusion of community members does not trouble me. There is evidence that community members were infected. If they contracted Legionnaires' disease or Pontiac fever during the class period, they have the same interest in the resolution of common issues as visitors and residents. Each could advance an individual claim. On the record before the court, there is a basis in fact for concluding that for the proposed class period, class members have a claim against the defendants for which there would be common issues rationally connected to the class.

39 I think the wording of the class definition can be improved and will be clearer to potential class members if it read:

> Those persons (excluding employees of the City of Toronto and the Province of Ontario) who, lived, worked or visited at Seven Oaks Home for the Aged, 7 Neilson Road, Toronto, Ontario or within a radius of three kilometers, between September 1 2005 and October 13, 2005, and who contracted Legionnaires Disease or Pontiac Fever.

40 The definition of the family class can also be improved. It should track the language of section 61 of the *Family Law Act*, R.S.O. 1990, c. F.3 and specifically identify the relationships to a class member.

41 Subject to these comments, I accept the proposed class definition.

5(1)(c) - Common Issues

42 For an issue to be common, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim: *Hollick*, at para. 18. An issue will not be common if its resolution is dependent upon individual findings of fact that have to be made with respect to each individual claimant. *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110, 27 C.P.C. (5th) 155 (Ont. S.C.J.), aff'd, 39 C.P.C. (5th) 151 (Ont. Div. Ct.). The underlying question is whether the resolution of a proposed common issue will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 (S.C.C.) at para. 39.

43 The common issues criterion is not a high legal hurdle, but a plaintiff must adduce some basis in fact to show that issues are common: *Hollick*, at para. 25. An issue can be common even if it makes up a very limited aspect of the liability question and although many individual issues remain to be decided after its resolution: *Cloud*, at para. 53. It is not necessary that the answers to the common issues resolve the action or even that the common issues predominate. It is sufficient if their resolution will significantly advance the litigation so as to justify the certification of the action as a class proceeding.

44 The plaintiffs ask the court to certify the following common issues:

> 1. Did Toronto owe a duty of care to the Class Members in relation to the design, maintenance and testing of the Cooling Tower at Seven Oaks Home for the Aged? If so, what was the standard of care? Did Toronto breach the standard of care? Was Toronto negligent and/or in breach of contract? If so, when and how?
>
> 2. Did Ontario owe a duty of care to the Class Members including those whose urine was tested at CPHL? If so, did Ontario breach the standard of care? Was Ontario negligent and if so, when and how?
>
> 3. Can the damages of the Class Members be determined, in whole or in part, on an aggregate basis? If so, who should pay what amount, to whom and why?
>
> 4. Should one or both of the defendants pay punitive damages to the Class Members and Family Class Members, and if so, in what amount?
>
> 5. Should one or both of the defendants pay prejudgment interest to the Class Members and Family Class Members, and if so, at what annual rate?
>
> 6. Should one or both of the defendants pay to administer and distribute any monetary judgment and/or the

cost of determining eligibility and/or the individual issues? If so, who should pay what costs, why, in what amount and to what extent?

45 The most significant of the common issues are Issues 1 and 2. In argument, the plaintiffs agreed that they do not require the negligence question and are content that it be deleted. As causation and damages are likely to be individual issues, a composite negligence question is inappropriate.

46 The defendants dispute that questions of duty and standard of care can be addressed on a class-wide basis. They say that different duties may be owed at different times to different class members or may not be owed at all. I do not find this argument persuasive. Common issues include common but not necessarily identical issues of law that arise from common but not necessarily identical facts. The *Class Proceedings Act* gives the court the flexibility to deal with differentiation among class members. The trial judge has the power to adopt a nuanced approach and create subclasses when this is necessary: *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184 (S.C.C.) at paras. 31-32.

47 The defendants' other objections to the certification of these common issues turn largely on the evidentiary requirement. This is addressed below.

Common Issue 1

48 Dr. Stout provided her opinion that the circumstances of the outbreak as described in the October 21 press release from Toronto Public Health strongly suggest that Toronto failed to implement reasonable maintenance and monitoring procedures in accordance with accepted industry standards (the "ASHRAE Guidelines") to minimize and control *Legionella pneumophila* in the cooling tower.

49 Toronto criticized Dr. Stout's opinion because "it lacks a sufficient factual basis." The Walker Report concluded that Toronto's maintenance of the cooling tower was acceptable. Toronto submits that this is "the only factual information about the City's conduct." I disagree. Dr. Stout's opinion was informed by the factors described in the press release and her expert knowledge of how Legionella develops, spreads, and can be controlled. It is true that her opinion is based on circumstantial evidence, but this is perfectly admissible evidence. The weight accorded to it depends on the strength of the inference that can be drawn from it and this is a task for the trier of fact: Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 2nd ed. (Markham: Butterworths, 1999) at §2.78.

50 Toronto contends that there continues to be "vigorous debate within the expert community about where Legionnaires' disease comes from." This surely is an issue for trial. On this motion, there is more than sufficient evidence to show that the source of this outbreak was the cooling tower at Seven Oaks and that Legionella was dispersed thorough an air intake valve located near the tower. There is evidence that as a result of the outbreak at Seven Oaks, some residents, visitors, staff and community members contracted or probably contracted Legionnaires' disease or Pontiac fever and became ill or died. Even without Dr. Stout's opinion, there is a basis in fact for the existence of issues that can be resolved on a class-wide basis to address Toronto's conduct in its design, maintenance and testing of the cooling tower at Seven Oaks.

51 I also reject Toronto's submission that I cannot certify the breach of contract claim as a common issue. The plaintiffs have produced evidence of a standard form contract between Seven Oaks and the representative plaintiff, Anna Rada. It incorporates a Residents' Bill of Rights as set out in the *Homes for the Aged and Rest Homes Act*, R.S.O. 1990, c. H.13, which the plaintiffs plead and rely on. Item 18 of the Bill of Rights, which forms part of the contract provides: "Every resident has the right to live in a safe and clean environment."

52 The plaintiffs will argue at trial that this is a contractual term to provide clean, uncontaminated air. Whether this term is found to be express or implied can be dealt with at a common issues trial because it applies to all resi-

dents and does not depend upon the individual knowledge, understanding or circumstances of each class member as in *Arabi v. Toronto Dominion Bank* (2007), 233 O.A.C. 275, 53 C.P.C. (6th) 135 (Ont. Div. Ct.) and *Macleod v. Viacom Entertainment Canada Inc.*, [2003] O.J. No. 331, 28 C.P.C. (5th) 160 (Ont. S.C.J.). See also, *Lavier v. My-Travel Canada Holidays Inc.*, [2008] O.J. No. 2753, 59 C.P.C. (6th) 57 (Ont. S.C.J.) at para. 123, rev'd on other grounds, (Ont. Div. Ct.).

Common Issue 2

53 The negligence claim against Ontario has two parts: if Ontario had identified Legionnaires' disease earlier,

(i) fewer people would have contracted the disease; and

(ii) the representative plaintiffs and potential class members would have received appropriate treatment earlier.

54 Dr. Stout's evidence is that Serogroup 1 is by far the most common and dangerous pathogen causing Legionnaires' disease and that to the knowledge of the Central Public Health Laboratory, the Binax test was specifically developed for rapid identification of this subtype through a urine sample. There would appear to be no dispute in the evidence that early and appropriate antibiotic treatment reduces both disease severity and mortality and that Legionnaires' disease treatment delay adversely affects patient outcomes.

55 Ontario criticized Dr. Stout's "speculative statement" that the delay in identifying the cause of the outbreak caused an increase in morbidity and mortality. It produced evidence from Dr. Low and Dr. Marrie that an earlier diagnosis of Legionnaires' disease would have made no difference because the treatment for Legionnaires' disease and community acquired pneumonia ("CAP") are the same if physicians followed relevant guidelines for treating CAP. The Walker Report, on which Ontario relies, found nothing to criticize in the treatment that patients received. Thus, Ontario submits that even if it were found that Ontario fell below the standard of care in initially using the ELISA test, the plaintiffs have not put forward any evidence that this alleged failure was the cause of any damages or harm class members may have suffered.

56 There are two responses to this submission. First, the plaintiffs are not required to produce evidence on each element of a cause of action pleaded. One cannot give meaning to the concept that the criterion in section 5(1)(a) is to be satisfied without evidence, but then require the plaintiffs to produce evidence for each of the material facts alleged. Second, whether or not the delay caused harm to any class member is dependent on proof of causation and damages, which Ontario asserts are individual issues. The plaintiffs are only required to show some basis in fact for the existence of common issues.

57 Ontario has acknowledged that there was a 5-day delay in identifying Legionnaires' disease in the samples tested by the Central Public Health Laboratory and that it did not initially use the Binax test. The epidemiological curve in the Walker Report shows a sharp decrease in the number of new cases after October 1 (the first day the Central Public Health Laboratory received urine samples) but the same curve shows that some people could have been infected after October 1 based on an incubation period of 2 to 10 days.

58 I do not have to decide whether a court would conclude that Ontario has duties to some or all class members, but the facts presented by the case raise the question of whether Ontario knowingly or carelessly put class members into harm's way when the Central Public Health Laboratory failed to identify Legionnaires' disease on October 1. The cooling tower was not shut down until on or after October 6 and until then, there was continued exposure. As Legionella is carried by wind currents into the atmosphere, it is not known precisely when the risk of transmission ended. Toronto's expert, Dr. Edelstein, concluded that the transmission period likely ended October 1, but this is a question to be resolved at trial and not on this motion.

59 The focus of proposed common issues 1 and 2 is the conduct of the defendants. The answers to them are not dependent upon findings of fact that would have to be made with respect to each class member. Their resolution will eliminate the need for each class member to separately have these issues adjudicated. All class members share an interest in determining whether they are owed a duty of care and whether either defendant fell below a standard of care. No class member can prevail without showing this: *Rumley*, at paras. 27 and 34; *Cloud* at paras. 51-53, 65 and 66. The evidence shows that there is a basis in fact for the court to conclude that these issues can be resolved on a class-wide basis. The submissions of the defendants essentially addressed the weight to be accorded the evidence, and in particular, the opinion evidence of Dr. Stout. While the expert evidence adduced by the defendants may ultimately lead a court to conclude that the defendants have no liability for the outbreak or its consequences, this is not a matter that can be resolved on this motion.

60 Issues of duty, standard of care and breach of the standard of care have been certified as common issues in many other class proceedings where the essential ingredient of commonality was the defendant's alleged negligence.[FN3] As in those cases, a finding with respect to the duty of care and the breach would significantly advance this proceeding. There is of course the possibility, often ignored by the defendants on a certification motion, that they will be successful, bringing an end to the proceeding.

61 I approve common issues 1 and 2, amended to read:

> 1. Did Toronto owe a duty of care to the Class Members or any subclass or subclasses in relation to the design, maintenance and testing of the Cooling Tower at Seven Oaks Home for the Aged? If so, what was the standard of care? Did Toronto breach the standard of care? Was Toronto in breach of contract to residents of Seven Oaks? If so, when and how?
>
> 2. Did Ontario owe a duty of care to the Class Members or any subclass or subclasses including those whose urine was tested at CPHL? If so, what was the standard of care? Did Ontario breach the standard of care?

Common Issue 3

62 Common Issue 3 raises the question whether aggregate damages should be certified as a common issue. Strictly speaking, it is not necessary to state this as a common issue as this determination is made by the common issues trial judge. It has become the practice to do this if the court is satisfied that that there is a reasonable likelihood that the preconditions in s. 24(1) of the Act can be satisfied: *Vezina v. Loblaw Cos.*, [2005] O.J. No. 1974, 17 C.P.C. (6th) 307 (Ont. S.C.J.) at para. 25; *Serhan Estate v. Johnson & Johnson* (2006), 85 O.R. (3d) 665 (Ont. Div. Ct.) at para. 139; *Cassano v. Toronto Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401 (Ont. C.A.) at para. 45, leave to appeal to S.C.C. refused, (S.C.C.).

63 These conditions are (a) monetary relief is claimed on behalf of some or all class members; (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

64 This issue was addressed in *Bywater* where Winkler J. (as he then was) said at para. 18:

> In my view, the case at bar is not appropriate for an aggregate assessment of damages. The action advances claims for personal injury, property damage and claims under the *Family Law Act*. These claims cannot, "reasonably be determined without proof by individual class members" as required by s. 24(1)(c). Furthermore, each individual claim will require proof of the essential element of causation, which, in the words of 24(1)(b), is

"a question of fact or law other than those relating to an assessment of damages".

65 In my view, this is a case like *Bywater* where causation will be an individual issue. The amount of damages claimed by each class member will vary in accordance with their individual circumstances. Proof of loss will be individual. As I do not believe that there is any reasonable likelihood that conditions (b) and (c) can be met, proposed common issue 3 should not be included as a common issue.

66 Common issues 4, 5 and 6 were not seriously challenged and have been included as common issues in other cases: *Tiboni*, at para. 95; *Cassano*, at para. 72. I believe it is appropriate to include them in the issues to be tried.

67 The plaintiffs have satisfied this criterion for certification.

5(1)(d) - Preferable Procedure

68 This criterion requires a consideration of the extent to which the resolution of the common issues will achieve the three objectives of the *Class Proceedings Act*: access to justice, judicial economy and behaviour modification. It has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members. The preferability requirement can be met even where there are substantial individual issues to be resolved after the common issues trial as the preferability analysis is a quantitative and not a qualitative inquiry. The court is to assess the importance of the common issues in relation to the claim as a whole: *Cloud*, at paras. 73 - 75.

69 The core submission of the defendants is that the nature, complexity and difficulty of the individual issues will outweigh or overwhelm common issues such that the resolution of the common issues in favour of the plaintiffs would not advance the litigation to contribute in any meaningful way to the three goals of the Act. The only proposed alternative to a class proceeding is individual litigation. The defendants suggest that it would be feasible that those wishing to purse individual claims could proceed thorough the Simplified Procedure or the Small Claims Court. They submit that the policy objectives of access to justice and judicial economy are better served by these existing and available procedures.

70 In my opinion, this submission overlooks the enormous costs of marshalling the expert evidence that would be required to pursue this as an individual action. This is borne out by the evidence filed on this motion. The defendants emphasized the complexity of the medical evidence that would be required for individual trials. Clearly, this would be a deterrent to pursuing an individual action and would defeat the objective of access to justice. This result would immunize the defendants from liability for purely economic reasons. In contrast, the fixed costs of litigating the important common issues of duty of care, standard of care and breach will be shared among class members if the action is certified. These issues need only be litigated once, which improves access to justice: *Hollick*, at para. 15. As well, expensive, repetitive and time-consuming individual litigation with the potential for conflicting findings is avoided, advancing the goal of judicial economy.

71 The damage claims in this action are likely to be very modest. Close to half of the claims belong to quite elderly individuals: the average age of confirmed cases of Legionnaires' disease was 84.5 years; the median age of probable cases of Legionnaires' disease was 73 years. It is likely that most class members would find it uneconomical to pursue an individual claim. Moreover, a class proceeding has the procedural advantages of discovery and case management. These are not available in an action in the Small Claims Court or under the Simplified Procedure.

72 In *Cassano*, Chief Justice Winkler reminded us that section 25 of the CPA confers broad jurisdiction on the common issues trial judge to fashion procedures to facilitate the determination of individual claims where damages cannot be assessed in the aggregate as I expect will be the case here. As he noted, "the resolution of individual issues

is an essential element of many class proceedings and is crucial if there is to be an advancement of the goal of access to justice" (para.63). Otherwise, the goals of class proceedings will not be realized.

73 It bears repeating that idiosyncratic and difficult issues of causation and damages did not prevent certification in *Bywater*, *Cloud* and *Rumley* and in numerous other cases of medical complexity such as *St. Jude, Medtronic*, *Tiboni* and *LeFrancois*. Similar arguments as to the significance and difficulty of the individual issues were made and rejected in these cases. I believe that this case is quite a bit less challenging in respect of the individual issues that will remain. As Legionnaires' disease is a reportable disease, a great deal of the evidence, including medical evidence, that will be necessary to adjudicate the individual claims is already available. Toronto Public Health took active steps to identify potential cases at the time and investigated all reported cases. I do not see the individual causation and damage issues presenting the overwhelming obstacles predicted by the defendants.

74 The nature and complexity of the causation and damages issues in the individual claims are not similar to those faced in *Dumoulin v. Ontario*, [2005] O.J. No. 3961, 19 C.P.C. (6th) 234 (Ont. S.C.J.). There, the court expressed concern about proving causation and damages in claims for exposure to toxic mould by occupants of a court house over a five year period because the health consequences of exposure to mould were matters of considerable scientific and medical controversy. Consequently, there was no scientifically-justified basis for treating the proposed class members as having a common disorder with a common cause. Unlike *Dumoulin*, there is a scientific basis for treating the proposed class members as having a common disorder with a common cause. Moreover, this is a focused class with a small number of members whose harm is alleged to have occurred over a short period of time.

75 The 1982 *Report of the Ontario Law Reform Commission on Class Actions* recognized at p. 269 that "mass accident" cases would be based primarily on common law negligence and were appropriate for class treatment, notwithstanding the individual issues that would remain:

> ... although the Commission recognizes that, in the majority of cases, individual assessment of damages will be required, an expanded class action procedure could achieve economies for both the parties and the courts by determining in one proceeding the same basis factual and legal issues that would have to be litigated several times, and deferring individual issues for subsequent resolution.

76 Finally, only a class proceeding has the potential to achieve the goal of behaviour modification. The elderly are at greater risk of developing Legionnaires' disease when exposed to *Legionella pneumophila*. A successful prosecution of this action will encourage those who are responsible for their well-being to take greater care in preventing an outbreak, which can have serious consequences for them and for others who are exposed. I agree that behaviour modification is not a driving feature of the claim against Ontario as following the outbreak the Central Public Health Laboratory started using the Binax test as well as the ELISA test to screen for Legionnaires' disease. Currently it only uses the Binax test as the supply of antibodies required to produce the ELISA test is unavailable. However, a class proceeding will meet the other objectives of the CPA. I find that a class proceeding is a fair, efficient and manageable method of advancing the claim and is the preferable procedure to resolve the claims of class members.

5(1)(e) - a Representative Plaintiff with a Workable Litigation Plan

Representative plaintiffs

77 Gerald Glover, Cachita White, Clarence Whyte, Anna Rada and Adeline Davidson ask to be appointed representative plaintiffs for the primary class consisting of persons who contracted Legionnaires' disease or Pontiac fever during the class period. Cachita White, Anna Rada and Adeline Davidson were residents of Seven Oaks. Each was diagnosed with Legionnaires' disease. Only Cachita survived the disease. Anna died on October 6, 2005. Adeline died on October 28, 2005. Cachita died of other causes in October 2007. Clarence Whyte is Cachita's son and

was a regular visitor at Seven Oaks. He is listed as a "probable case of Legionnaire's disease" in the epidemiological study compiled by Toronto Public Health.

78 Gerald Glover was the superintendent at the Shoniker building, a residential building for senior citizens located next door to Seven Oaks. On October 5, 2005, Gerald became extremely ill and was hospitalized. Subsequent testing confirmed that he was infected with Legionnaires' disease. Linda Glover is his wife. Sonia Rada, Clarence Whyte and Thomas Davidson bring the action as estate representatives. Ms Rada, Mr. Davidson and Ms Glover bring derivative claims under the *Family Law Act*, R.S.O. 1990, c. F.3.

79 The defendants objected to the suitability of the proposed representative plaintiffs for two reasons: (i) the non-resident members of the class, including Mr. Glover and Mr. Whyte, have or may have a conflict of interest with the resident members of the class and (ii) none of the proposed representative plaintiffs have adequate knowledge of the action and an adequate understanding of the role and responsibilities of a representative plaintiff.

80 As to the first objection, the defendants argue that because Mr. Glover and Mr. Whyte have different and more difficult issues of causation to contend with than do resident members of the class, this raises a conflict of interest. I do not accept this argument. A representative plaintiff need not share every characteristic of every member of the class or be typical of the class: *Western Canadian Shopping Centres* at para. 41. As well, if the differences between the situation of the representative plaintiff and the class members do not impact on the common issues, then the differences do not affect the plaintiff's ability to adequately and fairly represent the class and they do not create a conflict of interest: *Hoy v. Medtronic Inc.*, 94 B.C.L.R. (3d) 169, [2001] B.C.J. No. 1968 (B.C. S.C. [In Chambers]) at paras. 83-85, aff'd, 14 B.C.L.R. (4th) 32 (B.C. C.A.). The fact that these plaintiffs may face more difficult issues of causation does not impact on their ability to represent the class on the common issues.

81 As to the second objection, the proposed representative plaintiffs have each sworn affidavits attesting to their understanding of the major steps in the class action and the responsibilities of a representative plaintiff. They each depose that they are willing to perform these responsibilities. As a result of their cross-examinations, the defendants put their ability to do this in issue.

82 I have carefully reviewed the affidavits and the cross-examination transcripts of each of the proposed representative plaintiffs. In my opinion, it is incumbent on the court to read the transcripts generously. Cross-examination can be an intimidating experience for litigants, particularly those who are unsophisticated. Before concluding on the suitability of a proposed representative, the court must ensure that the questions asked by cross-examining counsel have been put clearly and fairly.

83 Whether a proposed representative plaintiff can provide adequate representation was addressed by Chief Justice McLachlin in *Western Canadian Shopping Centres* at para 41:

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

84 In order to be satisfied that a proposed representative will vigorously and capably prosecute the interests of the class, I would expect a representative to have, as a minimum, an understanding that they are representing a class and a basic understanding of the nature of the claim. I am satisfied that with the exception of Mr. and Mrs. Glover, the proposed representatives more than satisfy this criterion. I am also satisfied that each has the motivation to vigorously and capably prosecute the claim. It is not an objection to their adequacy that none had reviewed the Walker

Report or the affidavits of the defendants' experts. When read in context, their evidence on cross-examination demonstrates a sufficient understanding of this action and of their roles in it.

85 Unfortunately, Mr. and Mrs. Glover do not cross this threshold. They appear to have no appreciation that they are representing a class. Nor do they understand the nature of the plaintiffs' complaints against Toronto and Ontario. Both thought the claim was about late notice of the outbreak and that they are involved in the litigation to further their individual interests. I am not persuaded that either is a suitable representative plaintiff.

86 I appoint Cachita White, Anna Rada and Adeline Davidson by their respective estate representatives as representatives for class members. I appoint Sonia Rada and Thomas Davidson as representative plaintiffs for family class members.

Litigation Plan

87 The proposed litigation plan provides sufficient detail of the steps that will be necessary to reach a trial of common issues as well as the dissemination of notice. Should the common issues trial be determined in favour of the plaintiffs, the court will be asked to appoint an Administrator who will, *inter alia*, determine eligibility of class membership, and to appoint a Referee(s) to review any issues as to eligibility and to conduct damages assessments for some class members. The common issues judge will be asked to give directions as to a hearing or hearings for the adducing of generalized evidence about the nature of Legionnaires' disease and Pontiac fever and other topics which shall be applicable to all references.

88 The plan contemplates the possibility of categorizing and assigning a minimum damage assessment in accordance with a grid, but it also contemplates that there will be hearings of individual issues before a Referee(s). So, for example, if the common issues trial judge decides that causation is an individual issue, there will be hearings before a Referee and the trial judge will give directions as to whether and when the Referees' hearings may be in writing or when a hearing with oral evidence is necessary depending on the nature and the complexity of the claim. The plan proposes that all individual issues will be decided by a Referee(s). The court will be asked to authorize the Referees to hold hearings to allow class members to adduce general and expert evidence which may be applicable to some or all individual hearings.

89 Finally, the plan contemplates that the defendants will be participants at each stage of the adjudication of any individual issues, including class membership eligibility, hearings on causation, and damages assessments. Notably absent, however, is class counsel. The litigation plan terminates the representation of proposed class members at the doorstep of individual assessments. As individual assessments of relatively modest claims are likely to be necessary in this class proceeding, the unexplained abandonment of class members at this crucial juncture is deeply problematic.

90 Under the heading, "Class Counsel Fees and Administration Expenses", the plan provides that the court will be asked to fix the amount of class counsel fees and to direct the Administrator and defendants to pay the fees "out of the monies recovered or owing" as a first charge and to fix the costs of the Administrator and the Referees and to order payment by the defendants as a second charge. It then provides:

> 68. Class counsel's retainer does not include representation of each individual Class Member or Family Class Member in pursuing their claims after the determination of the common issues. However, Class counsel will make every effort to secure representation for those Class members who request legal assistance, including the option to represent some Class Members and Family Class Members in pursuing their claims.

91 This provision raises a number of troubling questions. How will any class member be able to adduce general and expert evidence, including evidence about the nature of Legionnaires' disease and Pontiac fever at a hearing

before the Referee without legal representation? What is the basis on which class counsel will decide whether to exercise "the option" to represent some class and family members, but not others? Is it contemplated that class counsel can choose to pursue the economically viable claims and abandon the rest? If class counsel does not exercise "the option", but is successful in securing legal representation for those class members who request it, what will be the arrangement for the sharing of fees? Is any lawyer likely to accept a retainer on behalf of a class member when class counsel fees are to be a first charge on any amount recovered or owing?

92 There is little doubt that if this action is certified, a solicitor-client relationship will exist between counsel for the representative plaintiffs and the members of the class. Justice Nordheimer addressed this issue in *Ward-Price v. Mariners Haven Inc.* (2004), 71 O.R. (3d) 664 (Ont. S.C.J.):

> [7] ... I have earlier expressed the view that there is no solicitor and client relationship between counsel for the representative plaintiff and members of the proposed class prior to the certification of the action as a class proceeding - see *Pearson v. Inco* (2001), 57 O.R. (3d) 278 (S.C.J). At the same time, it seems to me that it is indisputable that a solicitor and client relationship must exist between counsel for the representative plaintiff and the members of a class once the membership of the class has been fixed. At that point, counsel for the representative plaintiff is clearly counsel to the class as certified with all the duties and obligations that arise under a solicitor and client relationship with respect to the class members including the obligation to represent the class members "resolutely and honourably".

93 Justice Nordheimer was analyzing the nature of the relationship between class counsel and class members after certification, but before the expiry of the opting out period. In *Lau v. Bayview Landmark Inc.*, 71 O.R. (3d) 487 (Ont. S.C.J.), Cullity J. held that this analysis applied, *a fortiori*, where the opting out period has expired.

94 In a class proceeding, a client does not have a right to choose his or her lawyer or have a right to terminate the retainer. If a class member is dissatisfied with counsel of record, he or she may opt out of the class, but by the time this proceeding reaches the stage of individual assessments, that time will have long passed. In my opinion, class counsel cannot unilaterally choose to terminate representation, but is bound to represent those class members who wish to pursue individual claims on the same basis as the retainer agreement provides until the class member or the court directs otherwise. It seems to me that the proposed abandonment of class members following the determination of common issues is completely at odds with the fiduciary duty that a lawyer has to a client, which includes the duty of loyalty: *R. v. Neil*, [2002] 3 S.C.R. 631 (S.C.C.). It is also completely at odds with the goals of class proceedings. Earlier I made reference to Chief Justice Winkler's remarks in *Cassano* and I repeat them here: "the resolution of individual issues is an essential element of many class proceedings and is crucial if there is to be an advancement of the goal of access to justice". I am not satisfied that this goal can be achieved under the litigation plan that has been put forward.

95 At the hearing, plaintiffs' counsel provided me with a supplementary brief of authorities which includes the litigation plans in *LeFrancois* and *Tiboni* and the supplemental reasons of Cullity J. in *LeFrancois v. Guidant Corp.* In that case, the plaintiffs were successful in having the action certified if satisfactory amendments were made to the plaintiffs' litigation plan. The defendants challenged the adequacy of the amendments and the hearing of the certification motion resumed.

96 In supplemental reasons, reported at [2008] O.J. No. 2402 (Ont. S.C.J.), Cullity J. describes the plaintiffs' revised litigation plan as consisting of two documents of which one - a Revised Compensation Plan - is a schedule to the other and incorporated in it. Unfortunately (and I believe inadvertently), the document provided to me purporting to be the *LeFrancois* litigation plan bears no resemblance to this. Nonetheless, I have reviewed both plans, which I presume were given to me as precedents. As far as I can tell, neither plan has a comparable provision to the one in issue here. If the court has approved a litigation plan with a similar provision, I am not aware of it.

97 I therefore invite counsel to address this issue. Upon being satisfied of the concern I have raised, whether by amendment to the plan or otherwise, a certification order will issue in accordance with these reasons. Unless one of the parties requires a hearing, I am content to have this addressed at a case conference at which time a schedule for costs submissions can also be settled.

Order accordingly.

FN1 "The declaratory judgment is a judicial statement confirming or denying a legal right of the applicant. Unlike most rulings, the declaratory judgment merely declares and goes no further in providing relief to the applicant than stating his rights."

FN2 *Tiboni v. Merck Frosst Canada Ltd.* (2008), 295 D.L.R. (4th) 32 (Ont. S.C.J.), leave to appeal to Div. Ct. refused, (Ont. S.C.J.).

FN3 *Andersen v. St. Jude Medical Inc.* (2003), 67 O.R. (3d) 136 (Ont. S.C.J.), leave to appeal to Div. Ct. refused, *Andersen v. St. Jude Medical Inc.* (Ont. Div. Ct.); *Peter v. Medtronic Inc.*, [2007] O.J. No. 4828, 50 C.P.C. (6th) 133 (Ont. S.C.J.), aff'd 55 C.P.C. (6th) 242 (Ont. Div. Ct.); *Heward v. Eli Lilly & Co.*, [2007] O.J. No. 404, 39 C.P.C. (6th) 153 (Ont. S.C.J.), aff'd (2008), 91 O.R. (3d) 691 (Ont. Div. Ct.); *LeFrancois v. Guidant Corp.*, [2008] O.J. No. 1397, 56 C.P.C. (6th) 268 (Ont. S.C.J.); *Serhan Estate v. Johnson & Johnson* (2004), 72 O.R. (3d) 296 (Ont. S.C.J.), aff'd (2006), 85 O.R. (3d) 665 (Ont. Div. Ct.), leave to appeal to *Serhan v. Johnson & Johnson* (October 16, 2006), Doc. M33963 (Ont. C.A.), leave to appeal to S.C.C. refused, [2007] 1 S.C.R. x (note) (S.C.C.).

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2009 CarswellOnt 7874, 66 B.L.R. (4th) 222

Silver v. Imax Corp.

Marvin Neil Silver and Cliff Cohen, Plaintiffs and IMAX Corporation, Richard L. Gelfond, Bradley J. Wechsler and Francis T. Joyce, Defendants

Ontario Superior Court of Justice

K. van Rensburg J.

Judgment: December 14, 2009
Docket: CV-06-3257-00

Counsel: A.D. Lascaris, W. Sasso, M. Robb, J. Strosberg, for Plaintiffs

R.P. Steep, D.M. Peebles, for Defendants / Proposed Defendants

Subject: Corporate and Commercial; Civil Practice and Procedure; Securities; Torts

Securities --- Trading in securities — Civil liability for secondary market disclosure

Public company sold and leased theatre systems — In February, 2006, company announced in press release that it completed 14 theatre installations in fourth quarter of 2005 and expected to meet its full year earnings guidance for 2005 — Company filed 2005 Form 10-K and issued press release announcing decision to explore sale or merger — In August, 2006, company issued press release noting that no buyer was interested in acquiring company at valuation sought by board of directors and that company was responding to informal inquiry from US Securities and Exchange Commission regarding its use of multiple element arrangement accounting — Company stated that it had recognized revenue in fourth quarter of 2005 on ten installations in theatres which did not open in that quarter, but this was in accordance with generally accepted accounting principles (GAAP) — Company's share price dropped 40 percent — In 2007, company restated 2005 financial statements, acknowledging it erred in recognizing revenue for theatre systems that were not completely installed and that it had not complied with GAAP — Shareholders brought motion for leave under s. 138.8 of Securities Act to proceed with statutory cause of action for secondary market misrepresentation — Motion granted in part; leave granted to pursue action against all proposed defendants except two external directors — Action was brought in good faith and shareholders had reasonable possibility of success at trial — Shareholders had personal financial interest in action and asserted altruistic reasons for commencing action — Claim on its face pleaded all of elements of cause of action — Restatement was evidence of misrepresentation alleged in claim — It was uncontested that respondents were directors of company at material time and would be liable for misrepresentations in Form 10-K unless statutory defence was available — Evidence concerning reasonable investigation defence was not sufficient to preclude possibility of success at trial — In respect of chief financial officer and Vice-President, Finance, there was reasonable possibility on evidence that shareholders would succeed in

establishing that they authorized, permitted or acquiesced in release of documents containing misrepresentation — Circumstances may have called for closer scrutiny on part of audit committee members by reason of their positions, responsibilities and knowledge — Two outside directors that were not on audit committee had limited role in respect of company's financial reporting — Expert reliance defence did not apply to alleged misrepresentations which originated with company.

Cases considered by *K. van Rensburg J.*:

Ainslie v. CV Technologies Inc. (2008), 93 O.R. (3d) 200, 2008 CarswellOnt 7227, 304 D.L.R. (4th) 713 (Ont. S.C.J.) — considered

Ainslie v. CV Technologies Inc. (2009), 2009 CarswellOnt 934 (Ont. S.C.J.) — referred to

BCE Inc., Re (2008), (sub nom. *Aegon Capital Management Inc. v. BCE Inc.*) 383 N.R. 119, 71 C.P.R. (4th) 303, 52 B.L.R. (4th) 1, (sub nom. *Aegon Capital Management Inc. v. BCE Inc.*) 301 D.L.R. (4th) 80, 2008 SCC 69, [2008] 3 S.C.R. 560, 2008 CarswellQue 12595, 2008 CarswellQue 12596 (S.C.C.) — considered

Benson v. Third Canadian General Investment Trust Ltd. (1993), 1993 CarswellOnt 166, 14 O.R. (3d) 493, 13 B.L.R. (2d) 265 (Ont. Gen. Div. [Commercial List]) — distinguished

Cadrin c. R. (1998), 1998 CarswellNat 2851, 1998 CarswellNat 2502, [1999] 3 C.T.C. 366, (sub nom. *Cadrin v. Ministre du Revenu national*) 240 N.R. 354, (sub nom. *Cadrin v. R.*) 99 D.T.C. 5079 (Fr.) (Fed. C.A.) — considered

Caputo v. Imperial Tobacco Ltd. (2002), 25 C.P.C. (5th) 78, 2002 CarswellOnt 3270 (Ont. Master) — considered

Carom v. Bre-X Minerals Ltd. (1998), 41 B.L.R. (2d) 246, 43 C.C.L.T. (2d) 310, 41 O.R. (3d) 780, 27 C.P.C. (4th) 73, 1998 CarswellOnt 4285 (Ont. Gen. Div.) — considered

Chan v. Canada (Minister of Employment & Immigration) (1995), 128 D.L.R. (4th) 213, 187 N.R. 321, [1995] 3 S.C.R. 593, 1995 CarswellNat 1276, 1995 CarswellNat 1277 (S.C.C.) — considered

Chandler v. Sun Life Financial Inc. (2006), 35 C.C.L.I. (4th) 43, 2006 CarswellOnt 683, 14 B.L.R. (4th) 171 (Ont. S.C.J. [Commercial List]) — considered

CW Shareholdings Inc. v. WIC Western International Communications Ltd. (1998), 39 O.R. (3d) 755, 160 D.L.R. (4th) 131, 1998 CarswellOnt 1891, 38 B.L.R. (2d) 196 (Ont. Gen. Div. [Commercial List]) — distinguished

Epstein v. First Marathon Inc. / Société First Marathon Inc. (2000), 2000 CarswellOnt 346, 2 B.L.R. (3d) 30, 41 C.P.C. (4th) 159 (Ont. S.C.J.) — considered

J. (A.) v. Cairnie Estate (1993), [1993] 6 W.W.R. 305, 105 D.L.R. (4th) 501, 17 C.C.L.T. (2d) 1, 88 Man. R. (2d) 43, 51 W.A.C. 43, 1993 CarswellMan 116 (Man. C.A.) — considered

J. (A.) v. Cairnie Estate (1994), 19 C.C.L.T. (2d) 306 (note), 109 D.L.R. (4th) vii (note), 170 N.R. 160 (note), 100 Man. R. (2d) 296 (note), 91 W.A.C. 296 (note), [1994] 2 W.W.R. lxiv (S.C.C.) — referred to

Kerr v. Danier Leather Inc. (2005), 205 O.A.C. 313, 2005 CarswellOnt 7296, 261 D.L.R. (4th) 400, 11 B.L.R.

(4th) 1, 77 O.R. (3d) 321 (Ont. C.A.) — followed

Pente Investment Management Ltd. v. Schneider Corp. (1998), 113 O.A.C. 253, (sub nom. *Maple Leaf Foods Inc. v. Schneider Corp.*) 42 O.R. (3d) 177, 1998 CarswellOnt 4035, 44 B.L.R. (2d) 115 (Ont. C.A.) — referred to

People's Department Stores Ltd. (1992) Inc., Re (2004), (sub nom. *Peoples Department Stores Inc. (Bankrupt) v. Wise*) 326 N.R. 267 (Eng.), (sub nom. *Peoples Department Stores Inc. (Bankrupt) v. Wise*) 326 N.R. 267 (Fr.), 4 C.B.R. (5th) 215, [2004] 3 S.C.R. 461, 2004 SCC 68, 2004 CarswellQue 2862, 2004 CarswellQue 2863, (sub nom. *Peoples Department Stores Inc. (Trustee of) v. Wise*) 244 D.L.R. (4th) 564, 49 B.L.R. (3d) 165 (S.C.C.) — considered

R. v. Lifchus (1997), 118 C.C.C. (3d) 1, 216 N.R. 215, 150 D.L.R. (4th) 733, 1997 CarswellMan 392, 1997 CarswellMan 393, 9 C.R. (5th) 1, 118 Man. R. (2d) 218, 149 W.A.C. 218, [1997] 3 S.C.R. 320, [1997] 10 W.W.R. 570 (S.C.C.) — considered

Richardson Greenshields of Canada Ltd. v. Kalmacoff (1995), 22 O.R. (3d) 577, 80 O.A.C. 98, 123 D.L.R. (4th) 628, 18 B.L.R. (2d) 197, 1995 CarswellOnt 324 (Ont. C.A.) — considered

RJR-Macdonald Inc. c. Canada (Procureur général) (1995), (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General)*) 127 D.L.R. (4th) 1, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General)*) [1995] 3 S.C.R. 199, 1995 CarswellQue 119, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General)*) 100 C.C.C. (3d) 449, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General)*) 62 C.P.R. (3d) 417, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General)*) 31 C.R.R. (2d) 189, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 187 N.R. 1, 1995 CarswellQue 119F (S.C.C.) — followed

Silver v. Imax Corp. (2008), 2008 CarswellOnt 4087 (Ont. S.C.J.) — referred to

Tremblett v. S.C.B. Fisheries Ltd. (1993), 116 Nfld. & P.E.I.R. 139, 363 A.P.R. 139, 1993 CarswellNfld 52 (Nfld. T.D.) — considered

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16

Generally — referred to

s. 134(1) — considered

s. 246(2) — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

s. 122(1) — referred to

s. 122(1)(a) — referred to

s. 122(1)(b) — considered

s. 239 — referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 1 — referred to

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

Generally — referred to

s. 5(1) — considered

s. 5(1)(a) — considered

Income Tax Act, S.C. 1970-71-72, c. 63

Generally — referred to

s. 227.1(3) [en. 1980-81-82-83, c. 140, s. 124(1)] — considered

Private Securities Litigation Reform Act of 1995, 109 Stat. 737

Generally — referred to

Securities Act, R.S.O. 1990, c. S.5

Generally — referred to

Pt. XVIII — considered

Pt. XXIII.1 [en. 2002, c. 22, s. 185] — referred to

s. 1(1) "material fact" — considered

s. 1(1) "misrepresentation" — considered

s. 1(1) "misrepresentation" (a) — considered

s. 1.1 [en. 1994, c. 33, s. 2] — considered

s. 75(1) — referred to

s. 75(2) — referred to

s. 77 — referred to

s. 78 — referred to

s. 78(2) — referred to

s. 78(3) — referred to

s. 130 — considered

s. 138.1 "document" [en. 2002, c. 22, s. 185] — considered

s. 138.1 "expert" [en. 2002, c. 22, s. 185] — referred to

s. 138.1 "influential person" [en. 2002, c. 22, s. 185] — referred to

s. 138.1 "responsible issuer" (a) [en. 2002, c. 22, s. 185] — considered

s. 138.3 [en. 2002, c. 22, s. 185] — considered

s. 138.3(1) [en. 2002, c. 22, s. 185] — considered

s. 138.3(1)(a) [en. 2002, c. 22, s. 185] — considered

s. 138.3(1)(b) [en. 2002, c. 22, s. 185] — considered

s. 138.3(1)(c) [en. 2002, c. 22, s. 185] — considered

s. 138.4 [en. 2002, c. 22, s. 185] — considered

s. 138.4(1) [en. 2002, c. 22, s. 185] — referred to

s. 138.4(3) [en. 2002, c. 22, s. 185] — considered

s. 138.4(6) [en. 2002, c. 22, s. 185] — considered

s. 138.4(6)(a)(i) [en. 2002, c. 22, s. 185] — considered

s. 138.4(6)(a)(ii) [en. 2002, c. 22, s. 185] — considered

s. 138.4(6)(a) [en. 2002, c. 22, s. 185] — considered

s. 138.4(7) [en. 2002, c. 22, s. 185] — considered

s. 138.4(7)(a)-138.4(7)(k) [en. 2002, c. 22, s. 185] — referred to

s. 138.4(7)(b) [en. 2002, c. 22, s. 185] — considered

s. 138.4(7)(c) [en. 2002, c. 22, s. 185] — considered

s. 138.4(7)(d) [en. 2002, c. 22, s. 185] — considered

s. 138.4(7)(e) [en. 2002, c. 22, s. 185] — considered

s. 138.4(7)(f) [en. 2002, c. 22, s. 185] — considered

s. 138.4(7)(h) [en. 2002, c. 22, s. 185] — considered

s. 138.4(7)(i) [en. 2002, c. 22, s. 185] — considered

s. 138.4(7)(j) [en. 2002, c. 22, s. 185] — considered

s. 138.4(11) [en. 2002, c. 22, s. 185] — considered

s. 138.5 [en. 2002, c. 22, s. 185] — considered

s. 138.5(1) [en. 2002, c. 22, s. 185] — considered

s. 138.5(2) [en. 2002, c. 22, s. 185] — considered

s. 138.5(3) [en. 2002, c. 22, s. 185] — considered

s. 138.6 [en. 2002, c. 22, s. 185] — referred to

s. 138.7 [en. 2002, c. 22, s. 185] — considered

s. 138.7(2) [en. 2002, c. 22, s. 185] — considered

s. 138.8 [en. 2002, c. 22, s. 185] — considered

s. 138.8(1) [en. 2002, c. 22, s. 185] — considered

s. 138.8(1)(a) [en. 2002, c. 22, s. 185] — considered

s. 138.8(1)(b) [en. 2002, c. 22, s. 185] — considered

s. 138.8(2) [en. 2002, c. 22, s. 185] — considered

s. 138.8(3) [en. 2002, c. 22, s. 185] — considered

Securities Exchange Act of 1934, 15 U.S.C. 2B; 48 Stat. 881

Generally — referred to

s. 10(b) — referred to

s. 13 — referred to

s. 15(d) — referred to

Rules considered:

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

Generally — referred to

R. 21 — considered

R. 39.03 — referred to

Rules of Practice, R.R.O. 1980, Reg. 540

R. 75 — referred to

Regulations considered:

Securities Act, R.S.O. 1990, c. S.5

General, R.R.O. 1990, Reg. 1015

s. 3 — referred to

Words and phrases considered

good faith

. . . I interpret "good faith" in the context of s. 138.8 [of the *Securities Act*, R.S.O. 1990, c. S.5], to require the plaintiffs to establish that they are bringing their action in the honest belief that they have an arguable claim, and for reasons that are consistent with the purpose of the statutory cause of action and not for an oblique or collateral purpose. "Good faith" involves a consideration of the subjective intentions of the plaintiffs in bringing their action, which is to be determined by considering the objective evidence.

MOTION by shareholders for leave under s. 138.8 of *Securities Act* to proceed with statutory cause of action for secondary market misrepresentation.

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

I. Overview and Summary

A. Background

1 IMAX Corporation ("IMAX" or the "Company") is a public company that sells and leases its 3D theatre systems, which are installed in customers' theatres throughout the world. Its shares are listed on the TSX and NASDAQ.

2 On February 17, 2006 IMAX issued a press release announcing: (a) that it had completed a record 14 theatre installations in the fourth quarter of 2005, ("Q4 2005"); (b) that it expected to meet or exceed Its full year earnings guidance for 2005 of US$0.35 to $0.38 in net earnings per share ("EPS"); and (c) that it would release its fourth quarter and full year financial results on March 9th.

3 On March 9, 2006, IMAX filed its Form 10-K containing its 2005 annual financial statements, with the U.S. Securities and Exchange Commission (the "SEC") and on SEDAR[FN1], and issued a press release reporting on its earnings and revenues. IMAX reported revenues of $144,930,000, including theatre system revenues of $97,753,000, with net earnings of $0.40 per share for the year ended December 31, 2005, an increase of 62% over the previous year. IMAX issued a second press release announcing the decision of its board of directors (the "Board") to explore strategic alternatives, including a sale or merger.

4 Five months later, on August 9, 2006, IMAX issued another press release reporting on its second quarter results, noting that, although the process was ongoing, there was presently no buyer interested in acquiring the Company at a valuation sought by the Board.

5 The press release also indicated that that the Company was in the process of responding to an informal inquiry from the SEC regarding the timing of its revenue recognition, and in particular its use of multiple element arrangement accounting to recognize revenue on theatre systems that were not yet open, including theatres where the 3D screen had not yet been installed.

6 The following day IMAX's share price dropped 40%.

7 In 2007, IMAX restated its financial statements for a number of years, including 2005 (the "Restatement"). The Restatement acknowledged that the Company had erred in recognizing revenue for theatre systems that were not completely installed, and that the Company had not complied with GAAP (generally accepted accounting principles)[FN2]. Theatre system revenues of US$17.5 million (and net earnings of US$9.7 million) had been prematurely recorded in fiscal 2005.

8 In this proposed class action, it is alleged that IMAX misrepresented that: (a) its revenue for fiscal 2005 met or exceeded the Company's previously issued earnings guidance; (b) it had complied with GAAP; and (c) it had completed 14 theatre system installations in Q4 2005. The misrepresentations are alleged to have been made in IMAX's Form 10-K (including its Annual Report) and the February and March 2006 press releases.

9 The respondents (the defendants and proposed defendants) assert that this is an action about an accounting error that occurred without their fault or negligence, and in reliance on the advice of IMAX's auditors PriceWaterhouseCoopers LLP ("PwC").

10 The plaintiffs are two Ontario residents who purchased shares in IMAX on the TSX. They are suing for the devaluation in their shares which they allege was due to the alleged misrepresentations. Their individual losses are estimated at $1,503.87 for Cliff Cohen and $4,441.13 for Neil Silver.[FN3] The plaintiffs propose to represent a global class of IMAX shareholders who acquired shares on the secondary market on or after February 17, 2006 (the date of the first press release) and continued to hold such shares on August 9, 2006 (the date of the correcting press release).

11 The plaintiffs are suing IMAX, Richard Gelfond and Bradley Wechsler, who are its two Chief Executive Officers ("CEOs"), and Francis ("Frank") Joyce, who was Chief Financial Officer ("CFO") at the time of the alleged misrepresentations. The claims against these parties are for negligence, negligent and reckless misrepresentation, conspiracy, and punitive damages.

12 The plaintiffs also propose to pursue a claim for secondary market misrepresentation under Part XXIII.1 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5 (the "OSA"), which provides a statutory cause of action to shareholders of reporting issuers. These provisions (commonly referred to as Bill 198) came into force on December 31, 2005.[FN4]

13 The statutory claim permits a shareholder to sue a reporting issuer and certain others (including its directors and officers) when there has been a misrepresentation in its secondary market disclosure. Liability follows proof of the misrepresentation, without the need to prove reliance, subject to certain statutory defences. In this case, the principal defences relied on by the respondents are "reasonable investigation" and "expert reliance". The onus of proof of such statutory defences is on the defendants.

14 The plaintiffs propose to assert the statutory claim against the named defendants as well the remaining directors of IMAX and Kathryn Gamble, who was the Vice-President, Finance and Controller at the time of the alleged misrepresentations.

15 Statutory claims for secondary market misrepresentation are subject to certain limitations, including the requirement for leave of the court before such an action can be pursued and a cap on damages that applies to the issuer and to individual defendants, except in certain circumstances. The plaintiffs in this case confine their claim to the damages limit of $25,000 against all of the individual respondents except Gelfond, Wechsler, Joyce and Gamble against whom the claim is not capped.

B. Issues to be Determined

16 There are three motions before the court. This decision is in respect of the first of these motions that were argued together in December 2008, with additional attendances and written submissions in May and July 2009. (There is no requirement for such motions to be heard together, however counsel proposed and the court agreed to proceed in such a manner.)

17 In the first motion, the plaintiffs seek leave under s. 138.8 of the OSA to proceed with the statutory cause of action contained in s. 138.3. Leave is mandatory if the plaintiffs establish that the action is brought in good faith and there is a reasonable possibility of success at trial.

18 This is the first case in Ontario in which the court has been asked to grant leave in such an action. My main task on this motion will be to interpret and apply the leave requirement of s. 138.8 of the OSA.

19 The statutory leave test involves a preliminary consideration of the merits of the action. In this regard, the parties filed more than 30 volumes of materials, consisting of affidavits, expert reports and public and non-public documents. A substantial part of these lengthy reasons is devoted to a review of the evidence, in order to determine whether the plaintiffs have a reasonable possibility of success in pursuing the statutory claims at trial.

20 In the second motion, the plaintiffs seek certification of this action as a class proceeding pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "CPA"). A third motion, brought by the respondents, is under Rule 21 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, as amended, and seeks to strike parts of the common law claims as pleaded by the plaintiffs, as failing to disclose a cause of action. This third motion is properly considered part of the determination of the sufficiency of the pleading of the cause of action under s. 5(1)(a) of the

CPA in the certification motion.

21 Separate reasons are being released at the same time as these reasons on the Rule 21 and certification motions.

C. Decision on the Leave Motion

22 For the reasons that follow, leave is granted to the plaintiffs to proceed with their claim for misrepresentation in the secondary market under s. 138.3 of the OSA against the defendants IMAX, Gelfond, Wechsler and Joyce and each of the proposed defendants Copland, Braun, Leebron, Girvan and Gamble.

23 I am satisfied that the action is brought in good faith and that the plaintiffs have a reasonable possibility of success at trial in pursuing the statutory claims against all such parties.

24 Leave is not granted to pursue the action against the proposed defendants Utay and Fuchs, as I am not satisfied that the plaintiffs have a reasonable possibility of success at trial in their statutory claims against these individuals.

25 As I will explain below, "reasonable possibility of success at trial" sets a relatively low threshold for a plaintiff seeking leave to proceed with an action, and whether it has been crossed in a particular case will depend on the evidence that the parties put before the court. This decision was reached after considering all of the evidence the parties put forward at this stage, as to the alleged misrepresentations and the defences asserted by the respondents. I will describe this evidence at some length below. This decision, however, does not amount to a final determination of the facts or of the merits of the statutory claim and should not be interpreted as such.

II. The Proceedings, the Claim and the Statutory Cause of Action

26 The Statement of Claim was issued in September 2006. There have been several changes to the pleading, resulting in a Fresh Statement of Claim (the "Claim") that was delivered shortly before the hearing of the leave and certification motions. While the Claim has not been formally amended (an amendment is part of the relief sought by the plaintiffs and is addressed in the certification reasons), the allegations in the proposed pleading, that includes both the common law claims against the named defendants and the statutory claims against the defendants and proposed defendants, were considered for the purpose of the leave, Rule 21, and certification motions.

A. The Parties

27 IMAX was incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("CBCA"), and has its head office in Mississauga, Ontario and executive offices in New York City. At all material times IMAX was a reporting issuer under the OSA, and its shares were listed for trading on the TSX. IMAX securities were also listed for trading on NASDAQ.

28 IMAX, together with its wholly-owned subsidiaries, is one of the world's leading entertainment technology companies, specializing in digital and film-based motion picture technologies and large-format two-dimensional and three-dimensional film presentations. Its principal business is the design, manufacture, sale and lease of projection systems based on proprietary and patented technology for large-format, 15-perforation film frame, 70 mm. format theatres, including commercial theatres, museums and science centers, and destination entertainment sites. The Company does not own IMAX theatres, but licenses the use of its trademarks along with the sale or lease of its equipment.[FN5]

29 The remaining defendants and the proposed defendants are all current and former officers and/or directors of IMAX as follows:

- Richard Gelfond and Bradley Wechsler were at all material times, and remain, the co-CEOs of IMAX and co-chairs of the Company's Board;

- Frank Joyce was the CFO of the Company from March 2001 to August 2006;

- Kathryn Gamble was IMAX's Vice President ("VP"), Finance and Controller from July 2001 to November 27, 2006;

- Kenneth Copland has been a director of IMAX since 1999, and has been the chair of its audit committee since 2004;

- Neil Braun has been a director of IMAX since 2003, and at all material times was a member of the audit committee;

- David Leebron has been a director of IMAX since 2003, and at all material times was a member of its audit committee;

- Garth Girvan has been a director of IMAX since 1994. Although not formally a member of the audit committee at the relevant time, he regularly attended audit committee meetings;

- Michael Fuchs was a director of IMAX from May of 1996 to June 1999, and from October, 2002 until April 2006; and

- Marc Utay has been a director of IMAX since 1996.

30 Mr. Gelfond, Mr. Wechsler and Mr. Joyce are identified in the Claim as the "Individual Defendants" and they are named together with the Company as defendants to the common law claims asserted therein.

31 The plaintiffs seek leave to proceed with the statutory claim against the defendants as well as all of the remaining individuals who are named as respondents to the leave motion (the "Proposed Defendants").

32 The plaintiff Cliff Cohen is an individual residing in Toronto, who purchased 300 common shares of IMAX on the TSX on August 1, 2006. He sold his shares at a loss on August 28, 2006.

33 The plaintiff Marvin Neil Silver purchased 500 shares of IMAX on August 3, 2006.

34 Mr. Cohen and Mr. Silver seek to represent a class of plaintiffs described in the Claim as:

> [A]ll persons, other than Excluded Persons, who acquired securities of IMAX during the Class Period and who held some or all of those securities at the close of trading on the TSX and NASDAQ on August 9, 2006, or such other definition as may be approved by the court.

"Excluded Persons" is defined in the Claim as:

> IMAX's subsidiaries, affiliates, officers, directors, senior employees, legal representatives, heirs, predecessors,

successors and assigns, and any member of the defendants' families and any entity in which any of them has or had during the Class Period any legal or de facto controlling interest.

"Class Period" is defined as:

[T]he period from and including the opening of trading on the TSX and NASDAQ on February 17, 2006 to and including the close of trading on the TSX and NASDAQ on August 9, 2006.

B. The Factual Allegations in the Claim

35 In this section, I shall set out the factual allegations as they are pleaded in the Claim, which I can do relatively briefly. Then, in the next section of these reasons, I will set out the evidence that was presented for the purposes of the motions before the court. It is this evidence that will form the factual foundation for whether to grant leave for the statutory cause of action.

36 In their Claim, the plaintiffs allege that IMAX and the Individual Defendants made certain misrepresentations concerning the Company's earnings in 2005 and compliance with GAAP, in particular with respect to the number of theatre systems installed by the Company during Q4 2005, and the revenue recognized for such theatre systems. It is alleged that the misrepresentations were made in its Form 10-K[FN6] (which contained its Annual Report with audited financial statements for 2005) filed with the SEC for the fiscal year 2005 and in press releases issued by the Company in February and March 2006.

37 The plaintiffs allege that on March 10, 2005, IMAX issued a press release in which it estimated that its 2005 EPS, calculated in accordance with GAAP, would be US$0.35 to US$0.38, an increase from its earlier estimate of US$0.32 per share.

38 On February 17, 2006, IMAX issued a press release confirming that it expected to meet its 2005 EPS guidance, and stating that, during Q4 2005, the Company completed 14 theatre installations, a record for a single quarter, with 34 theatre systems installed in the full year. The press release indicated that the Company expected to report revenues in the range of $145-150 million for 2005.

39 On March 9, 2006, IMAX filed its Form 10-K, in which Messrs. Gelfond, Wechsler and Joyce certified that the Annual Report represented fairly, in all material respects, IMAX's financial condition. The 10-K was also signed by or on behalf of each IMAX director and by Kathryn Gambie as Vice-President, Finance and Controller and Principal Accounting Officer.

40 The Annual Report reported revenue of US$49,310,000 and EPS of US$0.29 per share in Q4 2005. For the fiscal year 2005 revenue of US$144,930,000, and EPS of US$0.40 per share were reported. IMAX theatre systems revenue of US$97,753,000 was reported for the fiscal year 2005.

41 The Management's Discussion and Analysis ("MD&A") contained in the Annual Report also stated that ten theatre systems installed by IMAX in 2005 were scheduled to open in the first and second quarters of 2006.

42 The Claim alleges that on March 9th IMAX issued a press release repeating the EPS reported in the Annual Report. In a second press release on the same date, IMAX announced that its board of directors had begun a process to explore strategic alternatives to enhance shareholder value, including the sale or merger of the Company with another entity offering strategic opportunities for growth.

43 On August 9, 2006 IMAX issued a press release that announced, among other things, that it was responding

to an informal inquiry from the SEC regarding its timing of revenue recognition, including its application of multiple element arrangement ("MEA") accounting in its revenue recognition for theatre systems.

44 The press release noted that under IMAX's MEA accounting, revenues associated with different elements of a theatre system contract are segregated and can be recognized in different periods. The press release stated that IMAX had recognized revenue in Q4 2005 on ten theatre installations in theatres which did not open in that quarter, and in seven of those cases revenue associated with the screen element of the system was deferred until the final screen was installed. Of these seven, three theatres had their screens completed in the first quarter of 2006, two in the second quarter and screens in the remaining two theatres had either since been completed or were expected to be completed over the remainder of 2006. The value associated with the elements other than the screen elements of those system installations was recognized in the fourth quarter when they were substantially completed. IMAX further stated that it believed that its 2005 accounting was in accordance with GAAP.

45 The August 9th press release also disclosed that there was no buyer then willing to acquire the Company at the valuation sought by IMAX's board of directors.

46 On August 10th, the price of IMAX's shares fell to $6.44 on the TSX and US$5.73 on NASDAQ, a drop of more than 40% from the previous day.

47 The plaintiffs allege that the decrease in IMAX's share price after August 9, 2006 resulted from the announcement that day that IMAX had recognized revenue in Q4 2005 in relation to ten theatre systems that did not open during that quarter and that it had applied MEA accounting to the revenue arising from the sate of those systems. The plaintiffs allege that such revenue recognition practices violated GAAP.

48 The Claim also asserts that IMAX's application of MEA accounting did not fairly present the Company's 2005 financial results and was not consistent with its accounting practices in prior years. It is alleged that the application of MEA accounting resulted in the overstatement of revenues, gross earnings, net earnings, retained earnings and EPS as reported in IMAX's 2005 annual financial statements.

C. Review of the Evidence (For Part Two of the Statutory Leave Test)

49 What follows is a review of the evidence adduced in the motion for leave, with respect to the alleged misrepresentations, the knowledge and participation of the respondents, and the defences of reasonable investigation and expert reliance. The purpose of this review is to determine whether or not the test for granting leave, as described later in these reasons, has been satisfied.

50 The review of the evidence is organized according to the following topics:

1. IMAX's revenues under its contracts for the sale and lease of theatre systems;

2. The applicable accounting standards for recognition of theatre system revenues;

3. IMAX's historical practices and policies for recognition of theatre system revenues, including its internal policies disclosed in its annual statements;

4. The investigation of an anonymous posting in Q3 2005 alleging fraud in IMAX's recognition of revenue on a theatre system installation in New Delhi, India (the "Delhi Post");

5. IMAX's 2005 year-end accounting, including the progress of theatre system installations in Q4 2005, incen-

tives to customers and contract amendments and the revenue recognition process followed by IMAX management;

6. The PwC audit and the application of MEA accounting to Q4 2005 theatre system revenues during the audit process;

7. The announcement of results in the February 17, 2006 press release;

8. The March 1, 2006 audit committee meeting and the Board's approval of the 2005 financial statements;

9. Information unknown to PwC regarding the status of theatre system installations in Q4 2005;

10. The 2005 10-K filing, the March 9, 2006 press releases and IMAX's pursuit of strategic alternatives;

11. The SEC inquiry letter;

12. The August 9, 2006 press release;

13. The Restatement; and

14. Expert evidence as to IMAX's accounting: the Rosen reports.

1. Revenue from Sales and Leases of IMAX Theatre Systems

51 The point of departure is to understand the source of [MAX theatre system revenues under its contracts for the sale and lease of theatre systems.

52 IMAX derives revenue from the sale and lease of its theatre systems, film production, distribution and post-production services, digital re-mastering of films, and theatre operations. The sale and lease of theatre systems is IMAX's most important line of business. In the years between 2001 and 2005 (prior to the Restatement), revenue from theatre systems accounted for between 55% and 67% of IMAX's reported revenue.

53 In its 2005 Form 10-K IMAX identified its theatre systems as its "primary products" as follows:

> The Company's primary products are its large-format theatre systems. IMAX theater systems traditionally include a unique rolling loop 15/70-format projector that offers superior image quality and stability; a 6-channel, digital sound system delivering up to 12,000 watts; a screen with a proprietary coating technology; a digital theatre control system and extensive theatre planning, design and installation services. Theater systems are also leased or sold with a license for the use of the IMAX brand.

54 IMAX supplies its theatre systems to customers on a long-term lease basis or pursuant to a purchase agreement. While there are differences between the two types of agreements and indeed the accounting for sales and leases, such differences are not material to the issues in these proceedings, and IMAX's lease agreements and purchase agreements for theatre systems will be referred to collectively as "Contracts".

55 IMAX customers generally contract to acquire a "System", defined in the Contracts to consist of (a) a Projection System; (b) a Sound System; (c) a Screen; and (d) a Glasses Cleaning Machine.

56 The 2005 Form 10-K describes IMAX screens as follows:

> Screens in IMAX theatres are as large as one hundred or more feet wide and eight stories tall and the Company believes they are the largest cinema screens in the world. Unlike standard cinema screens, IMAX screens extend to the edge of a viewer's peripheral vision to create immersive experiences which, when combined with the Company's superior sound system, make audiences feel as if they are a part of the on-screen action in a way that is more intense and exciting than in traditional theatres, a critical part of *The* IMAX *Experience*. [Emphasis in original].

57 In these proceedings, the special IMAX 3D screen was referred to as the "silver screen". IMAX 3D theatre systems cannot be operated commercially without a silver screen.

58 Typically, an IMAX customer (referred to in the Contract as the "Buyer" or "Client") renovates or builds a theatre that the customer owns, and IMAX delivers its equipment and then supervises its installation. The customer is required to provide a "fully complete" or "fully prepared" theatre, ready for installation of the System. The date a theatre opens to the public is largely within the control of the customer, but a Contract may specify a date by which the customer shall open the theatre to the public.

59 Schedule A to the Contracts, "Specifications of System, Installation Testing and Training Services", provides that, "installation will only commence upon receipt of the pre-installation checklist, as provided by the IMAX project manager, confirming satisfactory completion of the auditorium and projection room in accordance with Schedule B".

60 Schedule B, "Electrical, Mechanical and Acoustical Requirements to be Provided by the Client", provides that, prior to the commencement of installation, the theatre itself, projection room and equipment rooms are required to be in a satisfactory state of completion, and that installation will not commence until all services as called for are operational on a full-time basis. A checklist follows with the note, "Installation will not commence until the building completion checklist has been returned complete".

61 IMAX Contracts generally also require IMAX to fine tune and align the projection and sound systems, and to train the customer's staff in the operation of the IMAX equipment at the time of installation. Generally, the Contracts also oblige IMAX to supply and to supervise the installation of a glasses cleaning machine to clean the special eyeglasses used to view the 3D films shown by the IMAX System.

62 The Contracts typically provide for three major sources of revenue: (1) initial upfront rental fees or purchase price payments, (2) ongoing additional or lease payments (a percentage of theatre revenue in excess of specified minimums), and (3) maintenance fees.

63 The initial payments vary depending on the type and location of the System, and are generally paid to the Company in installments commencing on the signing of the Contract, with the final installment tied to the "Date of Acceptance", defined as the earliest of (a) the date on which IMAX certifies to the client and the client is in agreement that the training of personnel, installation and run-in testing of the System is complete; (b) the date on which the theatre is opened to the public; and (c) a specified date. That is, the final installment for the purchase or upfront rental of the System is to coincide with its installation.

64 IMAX's recognition of revenue from the initial payments on 14 theatres, ten of which were not yet open to the public in Q4 2005, is the focus of these proceedings.

2. Accounting Standards for Recognition of Theatre System Revenues

65 A number of GAAP accounting standards applicable to revenue recognition were referred to by Kenneth Copland, chair of IMAX's audit committee, in his Affidavit, and are relevant to this case.

66 In general, GAAP stresses the importance of revenue as a measure used to evaluate an entity's performance. The Canadian Institute of Chartered Accountants ("CICA") Handbook, as quoted by the plaintiffs' expert Lawrence Rosen, notes that recognition of revenue in the appropriate period is important because "the amount of revenue generated by an enterprise during the period is an important indicator of the level of the enterprise's activity. This information assists the users of financial statements in assessing the enterprise's performance".[FN7]

67 In order to measure the performance of an entity as consistently and accurately as possible, accounting principles concern themselves with identifying the "complete business cycle" associated with particular revenues, on the premise that revenues should be recognized when they are realized or realizable, and when they have been earned, generally by way of the revenue-producing entity having done what it is being paid to do.[FN8]

(a) SAB 101 and 104

68 In December 1999, the SEC published as interpretive guidance in applying GAAP to revenue recognition in financial statements, Staff Accounting Bulletin No. 101 "Revenue Recognition in Financial Statements" ("SAB 101").[FN9] The guidance was released "due, in part, to the large number of revenue recognition issues that registrants encounter", noting that over half of financial reporting frauds identified in a study of public companies between 1987 and 1997 involved overstating revenue.[FN10]

69 SAB 101 provides that revenue should not be recognized until it is "realized or realizable and earned", or when all of the following criteria are met: (i) persuasive evidence of an arrangement exists; (ii) delivery has occurred or services have been rendered; (iii) the seller's price to the buyer is fixed or determinable; and (iv) collectibility is reasonably assured."

70 With respect to the element of "delivery", SAB 101 further provides:

> A seller should substantially complete or fulfill the terms specified in the arrangement in order for delivery or performance to have occurred. When applying the substantially complete notion, the staff believes that only inconsequential or perfunctory actions may remain incomplete such that the failure to complete the actions would not result in the customer receiving a refund or rejecting the delivered products or services performed to date. In addition, the seller should have a demonstrated history of completing the remaining tasks in a timely manner and reliably estimating the remaining costs.
>
> If an arrangement requires the delivery or performance of multiple deliverables, or "elements", the delivery of an individual element is considered not to have occurred if there are undelivered elements that are essential to the functionality of the delivered element because the customer does not have the full use of the delivered element.

71 The concepts of "substantial completion" and the identification of "inconsequential or perfunctory actions", as well as, in the context of multiple deliverables, whether individual elements are essential to the functionality of the delivered elements, are significant to the accounting decisions giving rise to these proceedings.

72 SAB 101 emphasizes the importance of disclosure of a company's revenue recognition policies including where transactions have multiple elements:

> Because revenue recognition generally involves some level of judgment, the staff believes that a registrant should always disclose its revenue recognition policy. If a company has different policies for different types of

> revenue transactions, including barter sales, the policy for each material type of transaction should be disclosed. *If safes transactions have multiple elements, such as a product and service, the accounting policy should clearly state the accounting policy for each element as well as how multiple elements are determined and valued*
>
> [Emphasis added].

73 These provisions were repeated in SAB 104[FN11] dated December 17, 2003, which revised certain provisions of SAB 101. In respect of multiple-element arrangements, SAB 104 notes:

> Some revenue arrangements contain multiple revenue-generating activities. The staff believes that the determination of the units of accounting within an arrangement should be made prior to the application of the guidance in this SAB Topic by reference to the applicable accounting literature.

This excerpt of SAB 104 then footnotes Issue No. 00-21, *Revenue Arrangements with Multiple Deliverables* ("EITF 00-21")[FN12].

(b) EITF 00-21

74 In 2003, the Emerging Issues Task Force of the Financial Accounting Standards Board[FN13] adopted EITF Issue No. 00-21 ("EITF 00-21") to provide guidance for accounting by a vendor for arrangements under which it will perform multiple revenue-generating activities. EITF 00-21 addresses "how to determine whether an arrangement involving multiple deliverables contains more than one unit of accounting".

75 EITF 00-21 also states:

> This Issue does not address when the criteria for revenue recognition are met or provide guidance on the appropriate revenue recognition convention for a given unit of accounting...The timing of revenue recognition for a given unit of accounting will depend on the nature of the deliverable(s) composing that unit of accounting (and the corresponding revenue recognition convention and whether the general conditions for revenue recognition have been met.

76 EITF 00-21 provides that revenue arrangements with multiple deliverables should be divided into separate units of accounting if the deliverables in the arrangement meet the following criteria:

> (a) the delivered item(s) has value to the customer on a standalone basis. That item(s) has value on a standalone basis if it is sold separately by any vendor or the customer could resell the delivered item(s) on a standalone basis. In the context of a customer's ability to resell the delivered item(s),...this criterion does not require the existence of an observable market for that deliverable(s);
>
> (b) there is objective and reliable evidence of the fair value of the undelivered item(s); and
>
> (c) if the arrangement includes a general right of return relative to the delivered item, delivery or performance of the undelivered item(s) is considered probable and substantially in control of the vendor.

77 EITF 00-21 also provides guidance as to the measurement and allocation of the arrangement consideration, generally requiring the arrangement consideration to be allocated to the separate units of accounting based on their relative fair values.

78 EITF 00-21 also provides, "a vendor should disclose (a) its accounting policy for recognition of revenue

from multiple-deliverable arrangements (for example, whether deliverables are separable into units of accounting) and (b) the description and nature of such arrangements, including performance-, cancellation-, termination-, or refund-type provisions".

79 As Mr. Rosen notes, "EITF No. 0021 does not address revenue recognition for the units, but only whether individual components can be accounted for on a separate, individual unit basis. The further step of whether and when to record revenue is governed by GAAP for revenue recognition."[FN14]

80 The evidence is that IMAX management had initially recognized all revenues on 14 theatre systems in Q4 2005 on the basis that the remaining obligations were "inconsequential and perfunctory" (applying SAB 104), and that PwC could not agree with this assessment. PwC recommended that the Company consider MEA accounting, that is the application of EITF 00-21, resulting in the treatment of the screen as a separate unit of accounting.

81 The application of EITF 00-21 is important in the context of these proceedings, as IMAX, in its Restatement, acknowledged that it had erred in applying MEA accounting, that is, in treating the silver screen as a separate unit of accounting and recognizing all remaining revenue for its theatre system installations in 2005, and that it had failed to disclose a change in its accounting for theatre system revenues.

3. IMAX's Historical Practices and Policies for Recognition of Theatre System Revenues

82 The respondents contend that there was no change in accounting policies in Q4 2005, and that the MEA accounting that was applied to theatre system revenues at that time was the application of an existing policy and procedure to changed circumstances. At this stage I will review the evidence respecting IMAX's historical practices and policies with respect to the recognition of theatre system revenues, and how such practices and policies were described by IMAX in its Form 10-Ks and in communications to regulators leading up to the 2005 year end accounting.

(a) IMAX's Internal Accounting Policies

83 In 2005 IMAX had in place three accounting policies related to the recognition of revenue for theatre systems, all dated December 1, 2004. The first, entitled "Policy No. 19: Revenue — Systems" provided in part as follows:

> The Company recognizes revenues from sales-type leases upon installation of the theatre system. Revenue associated with a sales-type lease is recognized when all of the following criteria are met: persuasive evidence of an agreement exists; the price is fixed or determinable; and collection is reasonably assured.
>
> The timing of installation of the theatre system is largely dependent on the timing of the construction of the customer's theatre. Therefore, while revenue for theatre systems is generally predictable on a long-term basis, it can vary from quarter to quarter or year to year depending on the timing of installation.
>
> . . .
>
> Revenue from sales of theatre systems is recognized when all of the following criteria are met: persuasive evidence of an agreement exists; the price is fixed or determinable; title passes to the customer; installation of the system is complete; and collection is reasonably assured.

84 IMAX's Policy 19-A, "Revenue-System Leases", repeated the same policy as above with respect to sales-type leases of theatre systems.

85 IMAX's Policy 19-B, "Revenue — System Sales", stated:

> Revenue from sales of theatre systems is recognized when all of the following criteria are met: persuasive evidence of an agreement exists; the price is fixed or determinable; title passes to the customer; installation of the system is complete; and collection is reasonably assured.
>
> In determining that installation is complete for purposes of recognizing revenue for sales of IMAX theatre systems, the Company requires that the following criteria be met:
>
> • IMAX technology department concludes that the installation is complete, meeting full working standards according to contract provisions and system specifications.
>
> • All substantial issues which were raised by the client and which IMAX acknowledges and is in agreement with have been resolved.
>
> • The installed theatre system complies with all material terms of the contract, including the installation of the:
>
> • Projection unit;
>
> • Sound system;
>
> • Screen system; and,
>
> • 3D glasses system and cleaning system.

86 In a memo dated December 1, 2005, from Kathryn Gamble, IMAX's VP Finance and Controller to Frank Joyce, CFO entitled "Revenue recognition policy compliance"[FN15], Ms Gamble described IMAX's revenue recognition policy as follows:

> The Company recognizes revenue from sales-type leases upon installation of the theatre system when all of the following criteria are met: persuasive evidence of an agreement exists; the price is fixed and determinable; and collection is reasonably assured.

87 The memo went on to describe three guidelines followed by the Company for determining whether a particular theatre installation is "complete", including that the installed theatre system complies with all material terms of the contract, including the installation of the projection system, sound system, screen system, and 3D glasses system and cleaning system. The memo also noted that, "in the past, outstanding items such as the glass cleaning machine or the use of a white sheet [the non-3D screen] were evaluated and deemed inconsequential to the overall installation".

88 Ms Gamble's memo referred to a "certificate of acceptance" as evidence that "all substantial issues which were raised by the client and which IMAX acknowledges and is in agreement with have been resolved". The form of the certificate of acceptance used by IMAX at the material time provided for IMAX to certify the completion of the IMAX theatre system installation and run-in testing and for the customer to certify its acceptance. (Certificates of acceptance were obtained from the customers in respect of the 14 theatre installations in Q4 2005, although in some cases they were qualified by reference to outstanding obligations.)

89 In December 2005, as a result of recommendations following the investigation of an anonymous posting to Yahoo! containing allegations concerning improper revenue recognition on a theatre installation in New Delhi, India in Q3 2005 (see paras. 104 to 118 below regarding the Delhi Post), IMAX's general counsel, Robert Lister, recommended changes to the Company's revenue recognition policies for theatre system installations.

90 As a result, IMAX produced a new document, "IMAX Revenue Recognition Guidelines",[FN16] which was approved by PwC in January 2006. The new guidelines repeated the revenue recognition criteria set out in Policy 19, and went on to state:

> In determining whether the installation process is substantially complete for purposes of recognizing revenue for sales-type leases and sales of the Company's theatre systems, management requires that the following criteria be met:
>
> • The Company's Technology department concludes that the installation is substantially complete, meeting full working standards according to system specifications;
>
> • All substantial issues which were raised by the client that the Company acknowledges and is in agreement with have been resolved;
>
> • Any remaining obligations are inconsequential or perfunctory (as considered in the indicators below); and,
>
> • All material obligations of the contract and all material components of the installed theatre system as defined in the contract are substantially complete.
>
> The Company would consider the following indicators (which are not meant to be dispositive or all-inclusive) in assessing whether certain tasks or activities are likely to be inconsequential or perfunctory:
>
> • Failure to complete such tasks or activities would not likely result in the customer receiving a refund or rejecting the delivered product.
>
> • Failure to complete such tasks or activities are not essential to the functionality of the theatre system.
>
> • The Company has a demonstrated history of completing such tasks or activities in a timely manner, and can reliably estimate the remaining costs.
>
> • The skills or equipment required to complete such tasks or activities are not specialized and are readily available in the marketplace.
>
> • The time required to complete such tasks or activities are not lengthy.
>
> • The timing of the payment obligation for the remaining portion of the sales price is not coincident with completing performance of such tasks or activities.
>
> Each installation requires individual evaluation to determine if it is substantially complete.
>
> [Emphasis in original.]

91 None of IMAX's internal policies and procedures applicable to revenue recognition for theatre systems in

force at the material time refers to EITF 00-21, or the possibility of accounting for IMAX theatre system sales and sales-type leases as arrangements with multiple elements. Indeed, in a memo on Revenue Recognition prepared for review by Mr. Lister in the course of the Delhi Post investigation, Mr. MacNeil (Vice President, Tax and Special Projects) stated, "Under EITF 00-21, a typical IMAX contract is viewed as a single unit of accounting as the equipment and installation are not currently separable after applying EITF 00-21. Under SAB 104, the arrangement revenue is deferred and recognized as the Installation is performed".[FN17]

(b) Disclosure of Revenue Recognition for Theatre Systems in IMAX's Annual Statements

92 Prior to 2000, IMAX recognized revenue on the sales and leases of its theatre systems "upon delivery of the system" to the customer. In 2000, IMAX announced that it was revising its revenue recognition policy to accord with SAB 101 such that it began recognizing revenue related to the sale and lease of theatre systems at the time when the theatre system "installation is complete". That change in accounting resulted in IMAX taking a US$54.5 million charge against its earnings in its financial statements for the year 2000.[FN18]

93 As part of its continuous disclosure review program, the OSC carried out an issue-oriented review of issuers' accounting practices relating to revenue recognition, and in this regard corresponded with IMAX in 2000, 2001 and 2005.

94 In a letter to the OSC dated October 1, 2001, Mr. Joyce confirmed that IMAX recognized theatre system revenues at the time installation is complete and he described the event signifying the completion of installation, the point at which revenue is recognized as: "once the Imax supervisor in charge of the installation process certifies that the installation, run-in testing and training are complete. The Company's agreements typically call for customer agreement to the Company certification, further stipulating that such agreement will not be unreasonably withheld or delayed."[FN19]

95 In each Form 10-K from 2001 to 2004, IMAX disclosed that revenue recognition for theatre systems occurred "when the installation of the theatre system is complete" or "upon installation of the theatre system", and was subject to the following conditions: (a) persuasive evidence of an agreement exists; (b) the price is fixed or determinable; and (c) collection is reasonably assured.

96 Although EITF 00-21 came into effect on July 1, 2003, and according to Mr. Joyce, IMAX's former CFO, and Mr. Copland, the chair of its audit committee, IMAX adopted EITF 00-21 at that time, the 2003 Form 10-K makes no mention of the application of EITF 00-21 or MEA accounting to theatre system sales or leases.

97 IMAX first disclosed its application of MEA accounting in its 2004 Form 10-K in respect of film licenses and settlement revenue (occasions on which IMAX negotiates the termination of an agreement with a customer who is unable to proceed with the installation of a contracted theatre) as follows:

> On occasion, the Company will include film licenses or other specified elements as part of system sales or lease agreements. When separate prices are listed in a multiple element arrangement, these prices may not be indicative of the fair values of those elements because the prices of the different components of the arrangements may be modified through negotiation although the aggregate consideration may not. Revenues under these arrangements are allocated based upon the estimated relative fair values of each element.
>
> In the normal course of its business, the Company will have customers who, for a number of reasons are unable to proceed with theatre construction or wish to modify the terms of an existing arrangement. There is typically deferred revenue involved with these arrangements representing initial cash payments in advance of the default, settlement or modification of the arrangement. Pursuant to the policies discussed above, the total consideration to be received in these situations is allocated to each individual element of the settlement or modification ar-

rangement based on the relative fair values of each element.

Upon allocation of value to each element, each element is accounted for based on applicable revenue recognition criteria.[FN20]

98 On March 14, 2005, Mary Ruby, Senior Vice President, Legal Affairs, responded to a letter from the OSC advising that IMAX had been selected for a full review of its continuous disclosure record, including a specific request that the Company identify "which of the Company's revenue streams contain multiple elements, and how the Company recognizes revenue in these circumstances". Ms Ruby's response in substance repeated the passage noted above from the Company's 2004 10-K. She made no reference to the application of MEA accounting in respect of theatre system revenues. Her response was copied to Mr. Joyce and Mr. Lister.

99 In its 2005 Form 10-K (filed in March 2006), IMAX for the first time described an MEA accounting approach to its revenue recognition for theatre systems:

The Company's system sales and lease transactions typically involve the delivery of several products and services, including the projector, projection screen and sound system, supervision of installation, training of theater personnel, and advice on theater design and custom assemblies. In addition, on occasion, the Company will include film licenses or other specified elements as part of these transactions.

When the elements of theater systems meet the criteria for treatment as separate units of accounting, the Company generally allocates revenue to each element based on its relative fair value. Revenue allocated to an individual element is recognized when revenue recognition criteria for that element is met.

. . .

The Company recognizes revenue from sales and sales type leases when the installation of the respective theatre system element is substantially complete and all of the following criteria are met: persuasive evidence of an agreement exists; the price is fixed or determinable; and collection is reasonably assured.

100 In his Affidavit, Mr. Copland asserted that this wording did not reflect any change in IMAX's accounting policy with respect to the recognition of revenue for theatre systems in 2005, but was an "enhancement to disclosure". In fact, he contended that the Company had applied MEA accounting to theatre systems even before 2003. He stated:

The change in the wording of the Company's accounting policies surrounding revenue recognition on sales and sales type leases did not result in a change of policy to how IMAX recognized revenue compared to previous periods. The Company believed that these changes further enhanced its disclosure relating to these policies and their interactions.

The Company adopted the consensus reached in EITF 00-21 effective in its quarter beginning July 1, 2003. Prior to this effective date, the Company followed the multiple element arrangement guidance in SAB 101, Revenue Recognition in Financial Statements and the related FAQ document. Where the Company negotiated a customer arrangement (including a sale or lease of a projection system) that had multiple elements within it, the Company allocated value to each individual element based on separation criteria with relative fair values supported by verifiable objective evidence. After separation, each individual element was then accounted for separately based on applicable revenue recognition criteria.[FN21]

101 Mr. Copland's description of a consistently applied accounting policy for the recognition of theatre system revenues is contradicted by other evidence in this motion.

102 In addition to the absence of any reference to MEA accounting for theatre systems in the Company's internal policies and procedures, and until 2005 in its Form 10-K disclosures, under cross-examination, Ms Gamble and Mr. Joyce acknowledged that prior to Q4 2005, IMAX had never applied EITF 00-21 to a theatre system installation[FN22]. In its report to the audit committee dated March 1, 2006, PwC noted that, "previously, such accounting had only been applicable to multiple elements in lease terminations and bundled contracts that included film licenses".[FN23]

103 The SEC considered this as a change as well. As stated by the SEC's Division of Corporate Finance in a September 20, 2006 letter to IMAX's Interim CFO:

> Confirm that you are now accounting for these [theatre system sales and lease] arrangements pursuant to EITF 00-21, Revenue Arrangements for Multiple Deliverables and, as we do not see similar disclosure in your 2004 10-K, *tell us the period in fiscal 2005 when you changed your revenue recognition policy*.[FN24]
>
> [Emphasis added.]

4. The Delhi Post

104 The issue of revenue recognition on IMAX theatre systems was raised in an anonymous posting to Yahoo! on November 10, 2005, that was emailed to the CEOs of IMAX and the SEC (the "Delhi Post'). This occurrence, in Q4 2005, and the investigations that followed internally at IMAX, are relevant to the conduct and knowledge of the respondents in this case in relation to the year-end accounting and in particular the recognition of revenue on theatre systems.

105 The Delhi Post was titled "SEC to Investigate Fraud at IMAX" and alleged, among other things, that, in order to achieve its "numbers", IMAX was "faking system installations before quarter ends", and "paying customers to fake installs and sign documents for auditors", and that this had been done specifically with respect to an installation in Delhi, India in Q3 2005.

106 The CEOs notified in-house counsel, Mr. Lister and Mr. Copland, in his capacity as chair of the audit committee, about the email, and IMAX Board members were advised, as were PwC and external legal counsel.

107 The audit committee met on November 14, 2005 and again on November 28th. Ultimately there were two investigations: Mr. Lister investigated and reported to the Board, and Jeffrey Vance, Manager Business Operations, and the individual responsible for the independent testing of internal controls under Sarbanes-Oxley[FN25], was directed by the audit committee to independently assess the Company's internal accounting functions. The two CEOs, Mr. Joyce and Ms Gamble were excluded from the investigations.

108 Mr. Lister reported on December 7, 2005[FN26] that there was no evidence of any kind that supported the allegations in the Delhi Post. There was no fraud, and there was no SEC investigation. Mr. Lister concluded that there was nothing "fake" or misleading about the Delhi installation, and that none of the installations recognized in 2005 were achieved by paying customers to "fake installs". He did note however that there were four deals in negotiation where incentives had been offered to clients, but observed that such incentives were fully transparent, documented and provided for as expense items in deal margin analyses.

109 In his report Mr. Lister observed that the Company's Policy 19-B, dealing with revenue recognition in connection with system sales, had a "small number of inaccuracies", making it not wholly consistent with the Company's actual policy as articulated in its public filings. He noted that, in particular, Policy 19-B (a) required that system installation be complete to recognize revenue when Company policy called for "substantial completion", (b)

required an "installed theatre system" to include a screen system, when Company policy and practice suggested that only the screen frame is a material part of the system agreement, not the actual screen skin; and (c) required an installed theatre system to include a 3D glasses system and cleaning system when Company policy and practice suggest these are perfunctory or routine items and not a material part of the system agreement. Mr. Lister recommended the revision of Policy 19-B "to make it consistent with the Company's actual (disclosed) revenue recognition policy".

110 In Mr. Vance's report to the audit committee dated December 7, 2005[FN27], there is no conclusion as to whether there had been any wrongdoing with respect to premature recognition of theatre system revenue on the Delhi installation. Mr. Vance noted that "final determination of the appropriateness of GAAP interpretation rests with PwC".

111 Mr. Vance's report also made recommendations about IMAX's accounting practices. He stated, "For each contract spanning a quarter-end in 2005, as well as on a go-forward basis for all installations spanning quarter or year-ends, the CFO and VP Finance, Controller will document their judgment of what is perfunctory in the context of each installation." He noted that IMAX's Policy 19-B was in the process of being amended to reflect the important role of management's judgment with respect to revenue recognition and the determination of the point of substantial completion.

112 Mr. Copland, as chair of the audit committee, provided a memo to the Board dated December 14, 2005[FN28]. He concluded, "The Audit Committee is of the unanimous view that there is no evidence that the Company has been involved in any of the fraudulent or wrongful conduct as alleged in the Posting." He adopted the conclusions and recommendations from the Lister report, however with less detail.

113 Mr. Copland's memo to the Board included the observation that "the Company's internal controls and reporting structure appear well-designed to discover these types of accounting fraud should they have occurred". This memo was faxed to audit partner Lisa Coulman at PwC, on December 20th.

114 A third review was undertaken by PwC itself. It reviewed the internal reports that had been prepared, as well as a package put together by the Company which included a customer acceptance document, the report of the installer and other documents relevant to the Delhi installation.[FN29] PwC concluded, having considered the facts, that IMAX's decision to recognize revenue in Q3 2005 for Delhi was appropriate.[FN30]

115 Although not raised in their affidavits, the respondents ultimately rely on the Delhi Post as part of their "reasonable investigation" defence — that is, allegations about improper revenue recognition had been raised, and according to the respondents, properly investigated and resolved, with the result that each respondent was reassured about the propriety of the Company's revenue recognition practices as IMAX headed into its year-end accounting for 2005.

116 The plaintiffs assert that the investigations were inadequate as there is no indication that they went beyond the Company's internal documentation or that anyone outside the Company was contacted to confirm any information.

117 What is clear is that the Delhi Post and its investigation took place during Q4 2005, coincident with the period of time when several theatre installations had been budgeted to be completed, and when revenue recognition for theatre installations was a key concern within IMAX. As a result, there was a heightened awareness among IMAX management and Board members of the importance of properly accounting for theatre system revenues.

118 As Mr. Gelfond observed under cross-examination, particular attention was given to ensuring a proper process in the directors' minds and PwC because of the Delhi Post. With respect to the revenue recognition process

followed for year-end 2005, he stated:

> Because of the posting on their message board by the anonymous source, the issue of ensuring a proper process was followed in 2005 was on all directors' minds and very much on PwC's mind. So, an enormous amount of thought and energy went into preparing those financial statements by our staff, by PwC. I remember seeing a binder, probably, you know, almost a foot thick or maybe thicker. There was a lot of contact between our Audit Committee, they were very involved, and PwC and the finance staff...I am referring more specifically to the Audit Committee. But because we have a relatively small board, and everyone was aware of the level of analysis that PwC was going through, again, my general recollection is that our board paid a lot of attention to this.[FN31]

5. The 2005 Year-end Accounting

119 At the close of the third quarter of 2005, IMAX had generated EPS of only $0.11 for 2005, meaning that in order to achieve the lower end of the 2005 EPS guidance published in March 2005, it would have to generate more than twice as much EPS in the fourth quarter as it had generated in the first three quarters combined. There was a significant concern about meeting revenue targets in Q4 2005.

120 This part of the reasons contains a summary of the evidence relevant to the 2005 year-end accounting internally at IMAX; that is, the status of theatre system installations that were occurring in Q4 2005, arrangements that were made with customers to encourage the acceptance of installations by year-end, and the process that was followed by IMAX personnel in ultimately deciding to recognize revenue on 14 theatre system installations.

(a) The Progress of Theatre System Installations in Q4 2005

121 The IMAX department responsible for supervising theatre system installations is "Theatre Operations". In late 2005, Mark Welton, who directed the department, provided periodic email reports, summarizing the status of Q4 installations, to a number of people within the Company, including the CEOs, Mr. Lister, and Mr. Joyce, Ms Gamble and Mr. MacNeil in the finance department[FN32].

122 The emails emphasized the importance of completing as many installations as possible to meet the Company's projections, and reflected a concern with how delays in the installation of the theatre systems would affect earnings.

123 The emails disclosed that there were issues for a number of the installations, in particular in respect of delayed construction of theatre buildings. The intention was to commission some theatre systems with temporary power and a 2D white screen only; in some cases, the silver screen would be erected and then taken down. One theatre was identified as a "demonstration" theatre only, by reason of its temporary location, and was not to open to the public. The emails also identified the amount of gross margin that IMAX could expect to recognize on its 2005 financial statements with respect to each theatre.

124 Senior management also received updates from the finance department in the form of "business affairs reports", specifically identifying the impact on the Company's financial statements that would result from particular installations falling to later periods, and how those results compared to IMAX's earnings guidance to investors. The updates circulated in Q4 2005 indicated that, in order for IMAX to achieve its budgeted numbers for 2005, it needed to install almost as many theatres in the final quarter as it had in the first three quarters of 2005 combined.

125 According to the plaintiffs, the information communicated in the emails and updates demonstrates that the situation was urgent — unless revenue could be recognized on a significant number of the theatres that were not yet complete and would not open until the following year, IMAX would be unable to meet its projections. The emails

also disclose the actual status of completion of each installation up to December 31, 2005.

126 Each of the Individual Defendants and the respondent Gamble was included in the distribution of the emails[FN33]. Accordingly, there is evidence that each of these respondents was aware of the true status of the theatre system installations.

(b) Customer Incentives and Contract Amendments

127 Toward the end of 2005, IMAX's business people made arrangements providing concessions to a number of its theatre system customers. These arrangements or "side agreements" were largely verbal until PwC, during the audit process, requested IMAX to reduce them to writing, in the form of amending agreements.

128 In some cases the Contract with a particular customer included an installation date, while in others there was no deadline. Installation was dependent on the completion of the theatre building, which was largely beyond IMAX's control.

129 IMAX offered financial incentives to certain customers for their acceptance of installation in Q4 2005. These consisted of the deferral of the final installments due on installation in respect of: the Lark International Multimedia Limited installation in Hong Kong("Lark") in the sum of US$720,000; the Suvar-Kazan Company Ltd. installation in Kazan, Russia ("Kazan") in the sum of US$180,000; the Evergreen Vintage Aircraft Inc. installation in McMinnville, Oregon ("McMinnville") in the sum of US$340,000 and the Jafif Penhos Elias installation in Interlomas, Mexico ("Interlomas") in the sum of US$435,000, and the payment of marketing support or other payments in respect of Lark (US$39,490), Kazan (US$31,000), Interlomas (US$25,000) and McMinnville (US$50,000).[FN34]

130 While the CEOs and Mr. Joyce suggested in their cross-examinations that there were other business reasons for the side agreements and that they were typical business arrangements, IMAX did not receive any real benefit from the concessions other than the customer's agreement to accept installation of the system before the end of Q4 2005.[FN35]

131 Mr. Vance, in a February 7, 2005 note to Ms Gamble, Mr. Joyce and Mr. MacNeil during the PwC audit process, cautioned, "I think [PwC will] be looking very closely at the rationale for the inducements in light of all the facte surrounding the installations" and observed in respect of the marketing payments, "This has not been a normal business practice in prior periods".[FN36]

132 The plaintiffs contend that IMAX departed from its usual practices in Q4 2005 in providing financial incentives to customers to accept installation of their theatre systems by year end, with the result that actual revenues which were supposed to have been received on installation were postponed, and additional costs were incurred. They argue that this is evidence of IMAX's determination to recognize more revenue than it would have been entitled to recognize under its existing Contracts and the proper application of its internal accounting policies, so as to meet its aggressive earnings guidance.

133 Apart from contending that the side agreements served a function other than as an incentive to accept system installation before year end, the respondents rely on the fact that PwC gave a clean audit opinion knowing the full details of the agreements IMAX had negotiated with its customers.

(c) The Revenue Recognition Process

134 IMAX management is responsible for establishing and maintaining adequate internal control over the Company's financial reporting.[FN37]

135 The management representation letter from IMAX to PwC, as part of its annual reporting, confirms that IMAX is responsible for its financial statements, including establishing and maintaining an effective system of internal control over financial reporting and that the Company is responsible for the proper recording of transactions in the accounting records and for reporting financial information in conformity with GAAP.[FN38]

136 The decision-making team for IMAX's Q4 2005 revenue recognition consisted of Mr. Joyce (who was a certified public accountant and CFO), Ms Gamble (a chartered accountant and VP, Finance and Controller) and Mr. MacNeil (Vice President, Tax and Special Projects, who was regarded as the GAAP expert on the team).

137 According to Ms Gamble, revenue recognition became more complex in the fourth quarter of 2005. There were "more factors to consider", since ten of the 14 theatres were not yet open.

138 Ms Coulman of PwC, as the engagement leader on the IMAX audit team, met with Mr. Copland as chair of the audit committee in January 2006, after the report on the Delhi Post. She told Mr. Copland that they needed to be "very clear on the accounting for each of the transactions in the fourth quarter that they were going to recognize revenue on." In her examination she stated:

> ...We needed to understand, on each one of those, what were the remaining obligations. And we needed to understand the company's judgment on whether those remaining obligations were perfunctory or inconsequential. They can only recognize revenue on a particular item if the remaining obligations are perfunctory or inconsequential.[FN39]

139 In his affidavit, Mr. Copland[FN40] described the revenue recognition process for Q4 2005 as follows:

> In 2005, the Company's management evaluated the system arrangements for the purposes of revenue recognition based upon an analysis of whether any remaining installation items were either inconsequential or perfunctory to recognition (which included final screen installation). Effectively, this was the same method used in prior periods whereby, for convenience, everything was assessed at the same time given that the installation of all components were typically installed at the same time. The Company undertook and completed an evaluation of each individual installation in the Fourth Quarter of 2005 where the theatre itself was not open.
>
> Based upon these evaluations, the Company's management submitted its findings and opinion to PwC as support for its proposed revenue recognition decisions in 2005 as part of the year end process.

140 Ms Gamble described the process of preparing a preliminary report for PwC concerning revenue recognition on the 14 installations in question.

141 The people at IMAX that were involved in the preparation of the preliminary report were Gamble, Joyce and MacNeil, as well as three chartered accountants that reported to Kathryn Gamble. Mr. Vance, whom Ms Gamble described as the Company's "control guru", had a dotted line report to the audit committee, to help look objectively at management's information gathering.

142 IMAX's analysis took the form of revenue recognition or transaction memos (also referred to as "installation reports") for each theatre system installation in Q4 2005, that went through several iterations. The transaction memos were prepared by Mr. MacNeil, incorporating comments from Mr. Joyce, Ms Gamble, Mr. Vance and Mr. Lister. According to Mr. Joyce, the intention of the memos was to present all known facts relating to the installations; that is, to gather all the data.[FN41]

143 The first iterations of the transaction memos consisted of a single summary page. According to Ms Gamble, they were provided to PwC in mid-January and over a four week period went through several iterations and were expanded to three pages.[FN42] PwC considered the initial versions of the memos as "not fulsome enough".[FN43]

144 IMAX management decided to recognize revenue on 14 theatre installations in Q4 2005. In each case where there were remaining obligations at the end of the quarter, such as the installation of the silver screen, the glasses cleaning machine and customer training, such obligations were characterized as perfunctory and inconsequential.

145 It appears that this is the approach that management had taken with respect to such outstanding obligations in the past[FN44], including in respect of the recognition of revenue on the New Delhi installation in Q3 2005[FN45], notwithstanding the wording of the Company's internal policies on revenue recognition.

146 When asked to explain the "inconsequential and perfunctory" analysis under cross-examination, Mr. Joyce stated, "I just know that the installation of a final screen was almost always considered inconsequential and perfunctory because we had done it so many times before, and in our view, there wasn't a doubt as to whether we could do it again."[FN46]

6. The PwC Audit

147 This part of the reasons reviews the evidence respecting PwC's audit of IMAX's proposed financial statements for 2005. It is during this process that IMAX, on the advice of PwC, decided to apply MEA accounting to its theatre system revenues, which resulted in a deferral of certain revenues for incomplete obligations.

(a) The Transaction Memos

148 According to Ms Gamble, there were many conversations and meetings between IMAX and PwC personnel in the United States and Canada, and legal opinions were obtained on some of the agreements with customers.

149 After IMAX management put together a summary of projector, screen and sound systems that had been sold separately, PwC asked them to quantity the labour and money required to complete the remaining work on each theatre system.

150 PwC reviewed files for each theatre, including the Contracts and the terms of the amending agreements, which it requested to be put in writing. During the process, PwC showed IMAX a calculation of the remaining obligations as a factor of total costs (which estimated the remaining cost to complete in some cases at 15 and 16% (Kazan and Lark) and remaining hours to complete as 30% for Kazan and 40% for McMinnville. PwC also did independent confirmations, contacting the customer in writing in five cases.[FN47]

151 Mr. Vance reviewed the transaction memos on February 7 and 8, 2006 and raised his concerns in writing with Mr. MacNeil, Mr. Joyce and Ms Gamble.[FN48] He asked about the marketing support payment in relation to Kazan, noting that it had not been a normal business practice in prior periods. He raised a concern about the Lark theatre system possibly violating SAB 104 for revenue recognition in that the product may have been delivered for demonstration purposes. Mr. Vance asked: "What response does the company have to the suggestion that the $39,000 was an incentive to get the system in a temporary location in 2005 since the original site would not be ready in time?" With respect to McMinnville, he questioned the marketing allowance and whether concessions were offered to all theatres, and in respect of all theatres not open by year end, he questioned the number of hours remaining to complete the installations in comparison to total installation hours. Ms Gamble described Mr. Vance as playing the role of "devil's advocate" when he expressed these concerns. There is no evidence of any written response or whether the specific issues raised by Mr. Vance were in fact addressed by IMAX management with PwC.

152 The final versions of the transaction memos were sent to PwC on February 10, 2006. Ms Gamble admitted that she did not look at EITF 00-21 in preparing the first draft of the transaction memos; in fact, she indicated that she had only ever read a little subsection.[FN49] The transaction memos appear to address the factors relevant to SAB 104, and do not reference or address the criteria for accounting for multiple elements under EITF 00-21.

153 The transaction memos were available to members of the Board. According to Mr. Gelfond, Board members were provided with a binder containing details surrounding every installation.[FN50]

(b) The Application of MEA Accounting to Q4 2005 Theatre System Revenues During the Audit Process

154 According to Ms Coulman, during its audit, PwC was uncomfortable with the position IMAX management had taken on a number of the theatre system installations. Of the 14 installations, there were seven installations that only had a white sheet and not the silver 3D screen.

155 PwC disagreed with IMAX's judgment that the remaining obligations were inconsequential and perfunctory to the overall transaction, when considering the criteria under SAB 104.

156 Ms Coulman described the process of arriving at the decision to apply MEA accounting as follows:

> Q. 241: So, based upon your understanding of the facts as you knew them at that time, and your reading of this portion of SAB 104 and whatever other accounting literature you considered pertinent, you were troubled by the manner in which IMAX was recognizing revenue in respect of those theatres you mentioned in the fourth quarter?
>
> A: initially, yes.
>
> Q. 242: I take it from your statement initially, that you changed your view at some stage; is that correct?
>
> A.: Well, after we had conversations with them that we could not accept their judgment call on the fact that the screen sheets were inconsequential to the overall theatre system, we then told them that they needed to consider multiple element arrangement accounting under EITF 00-21.
>
> Q. 243: When you say "needed to consider" what do you mean, exactly, that they needed to review EITF or that they should begin to apply it?
>
> A.: They had applied and were applying [it] in other situations. We, therefore, suggested to them that they needed to consider in these situations, that [it] was applicable.
>
> . . .
>
> Q. 307: So, we were talking about a discussion that you had with Mr. Copland at the end of January or early February, I think you said. What was the next conversation you had with representatives of (MAX about the revenue recognition policies that you or anybody else from PwC had and that you can specifically recall?
>
> A.: So, at the beginning of February, we pushed back on the inconsequential concept and asked the company to consider the application of 00-21. They came back and said that they had determined that the screen was a separate unit of accounting under 00-21, and, therefore, they were going to bifurcate the

> screen from the overall revenue and record a journal entry to leave the screen, and the revenue associated with that screen on the balance sheet and record the balance of the revenue for the projector, the sound system and the glasses cleaning machine in the December period.
>
> . . .
>
> Q. 328: So, could you, once more, explain to me what changed in the accounting position of the company, which caused you to have an adequate level of comfort that you could sign the audit opinion?
>
> Mr. Pepall [counsel for PwC]: We are now being specific to the theatre installations?
>
> Q.: I think so, yes.
>
> A.: So, by deferring the unit of accounting defined as the screen, on the balance sheet, the remaining obligations related to the other units of accounting that have been recognized, became...the company proposed that those remaining obligations were perfunctory and inconsequential. We were able to accept that, because the indicators on those remaining obligations related to the projector system, sound system and glasses cleaning machine, appeared to be inconsequential and perfunctory.

157 According to Ms Coulman's account, IMAX management did not offer a specific explanation for why they considered the installation of the silver screen to be perfunctory and inconsequential, and PwC "continued to push back to them to say that [it] could not find their position acceptable because they felt that the items listed had not been fully thought through".[FN51] Ms Coulman described IMAX's initial response to PwC's "push-back" as follows:

> So, after they...we pushed back on the inconsequential concept around the systems they were taking. *They withdrew and came back to us at the beginning of February and said that their revenue, as recognized, was their final position.* We, then, had internal meetings to discuss their position and after those internal meetings, we phoned the client back and told them that we could not accept their position that the remaining obligations were inconsequential and perfunctory and that they should consider multiple element arrangement accounting. They then proceeded to take our statement under advisement. They went back and did consider multiple element arrangements and proposed to us that the screens would be identified under the accounting...would be identified and the revenue associated with those screens would be deferred on the balance sheet and the remaining revenue would be taken in the quarter. So, they then proceeded to book an adjustment to their accounts around the seven systems that had screens that were not installed.[FN52]
>
> [Emphasis added.]

158 Ms Coulman's evidence suggests that IMAX had taken a "final position" in early February 2006, that it would recognize revenue on all 14 theatres, based on the conclusion that all remaining obligations were inconsequential and perfunctory.

159 PwC disagreed with the Company's "perfunctory and inconsequential" analysis, in particular in relation to the failure to install the 3D screens. PwC suggested that IMAX consider MEA accounting, and IMAX management came back and proposed to defer revenue on the screens and to recognize all of the remaining revenue in the quarter. This required IMAX to book an adjustment for the systems that had screens that were not installed.

160 Ms Coulman's evidence is clear that it was the responsibility of IMAX management to decide whether to apply MEA accounting to elements of the theatre system, which would have involved a consideration of EITF 00-21 in determining which elements could be accounted for separately.

161 While Mr. Copland's affidavit (at para. 61) describes the criteria under EITF 00-21 considered by IMAX in concluding that the screen was a separate unit of accounting (an identical explanation was initially provided by IMAX in response to SEC and OSC inquiries in 2006), no contemporaneous documents were offered in evidence to demonstrate the EITF 00-21 analysis performed by IMAX management, as described by Mr. Copland, or at all. The transaction memos prepared for PwC and revised during the audit process do not address the criteria relevant to MEA accounting, and continue to deal with revenue recognition on the entire theatre system.

162 It is the respondents' evidence that there was ongoing communication between management and PwC on revenue recognition issues between January 2006 and the time of the Board's approval of the 2005 Form 10-K however the respondents refused to produce written communications by PwC to management during the 2005 audit raising questions about revenue recognition on Q4 2005 theatre systems, or seeking information on those installations.[FN53]

7. The February 17, 2006 Press Release

163 On February 17, 2006, one week after the final transaction memos were transmitted to PwC, and before PwC had signed off on its audit, IMAX issued a press release. The press release stated that, during Q4 2005, the Company "completed" 14 theatre installations, a record for a single quarter, with 34 theatre systems installed in the full year, and that the Company expected to report revenues approximately in the guided range of $145-150 million for 2005. (With the adjustments following the application of MEA accounting, revenues were in fact reported at $144.9 million.) The press release indicated that the results were based on preliminary financial data and subject to final closing of the Company's books and records.

164 The statement in the press release that the Company had completed 14 theatre installations in Q4 2005 was untrue, notwithstanding that Mr. Copland under cross-examination asserted that the statement was accurate under the "then definition" of "completed".[FN54] According to the respondents' evidence, by the time the press release was issued, the Company had decided to apply MEA accounting because PwC did not accept its "substantial completion" analysis. Under any definition that may have been applicable at the time, IMAX had not in fact "completed" 14 theatre installations.

165 Mr. Wechsler admitted reading and approving the press release. Both he and Mr. Gelfond were quoted in the press release. Mr. Joyce acknowledged that he must have read the release and that he would have had input into the number of installations they believed happened at that point.

8. The Board's Approval of the 2005 Financial Statements

166 This part of the reasons reviews the evidence concerning the review and approval of IMAX's 2005 financial statements by the IMAX audit committee and Board, and in particular the communications with IMAX management and PwC. The information that was provided to the audit committee members and Mr. Girvan, and then to the full Board, including the extent to which they were aware of the disagreement between IMAX management and PwC, is relevant in the assessment of whether each individual conducted a "reasonable investigation".

(a) The March 1, 2006 Audit Committee Meeting

167 The first audit committee meeting of 2006 took place on March 1, 2006.

168 At the meeting, Ms Coulman presented PwC's Preliminary Report to the Audit Committee for the year ended December 31, 2005.[FN55] The report noted: "As of the writing of this report February 23, 2006, we have not completed all the audit procedures that are required to finalize our audit opinions", and that the report would remain

unsigned until the financial statements were filed.

169 PwC stated:

> During our audit, we spent a considerable amount of time reviewing the company's support for the accounting for the 14 system installations recorded in the 4th quarter. Our focus was mainly on the post installation obligations of ten installed systems where the theatre had not opened to the public by December 31, 2005. Management considered its positions with reference to both its internal revenue recognition guideline and SAB 104.
>
> . . .
>
> Management concluded that all of its post-installation obligations are inconsequential or perfunctory. Accordingly revenues on the systems were initially fully recognized by management.
>
> Upon final review of the facts and circumstances around these transactions, we indicated to management that we believe certain of the obligations to be consequential and not perfunctory. Accordingly, the preferred accounting treatment for these installations was to first identify any elements which could be accounted for separately under multiple element accounting guidance. Any such separable elements are required to be fair valued, and, if undelivered, revenue and costs relating to these elements would be deferred until the element was delivered. For separation of elements to occur, specified criteria must be met under applicable accounting standards.
>
> This accounting treatment has been adopted by the Company and thus two material elements have been identified and deferred: the screen; and for one customer, a contingent obligation to reinstall the system in another location. Based on the identification of these two elements, the Company has deferred the screen system in seven of the ten installations, and the reinstallation obligation in one of the ten. This resulted in management recording an adjustment to defer revenue of $0.8 million and costs of $0.6 million resulting in gross margin impact of 0.2 million.
>
> After the deferral of these two elements, management has concluded for the ten installations that the remaining obligations on the delivered elements are inconsequential or perfunctory, and has therefore recognized revenue on these elements.

170 PwC also concluded that during the year, the Company did not adopt any new accounting policies. The report stated:

> During the year, the Company did not adopt any new accounting policies. However the fact pattern concerning post installation obligations of installed theatre systems led to the application of multiple element arrangement accounting to theatre system revenues. Previously, such accounting had only been applicable to multiple elements in lease terminations and bundled contacts that included film licenses. The 2005 accounting involves the application of an existing accounting standard and the Company's accounting policy to changed circumstances. It is therefore not considered a change in accounting policy.

171 IMAX management provided a Q4 2005 Review Package to the Audit Committee,[FN56] which was was presented at the March 1st meeting by Ms Gamble. She included a chart showing the status of the installations for each theatre in respect of which revenue was to be recognized in Q4 2005, indicating that in certain cases revenue would be deferred on the screen and frame, which were not yet installed, until Q1 2006. She also briefly listed the remaining obligations that were "Performatory/Inseque" [*sic*], consisting in most cases of final alignment, sound tuning and training, and with respect to Lark, "weights, lens, possible relocation". Ms Gamble calculated that the effect of carving out the screen element was to reduce recognized revenues by $850,977.

172 Mr. Vance also made a presentation at the March 1st audit committee meeting, entitled "SOX Update".[FN57] As part of his report Mr. Vance noted a "significant deficiency" in the area of system installations, impacting on system revenue and system cost of sales as follows:

> During the year-end audit, PwC recommended a change from single element accounting to multiple elements accounting to reflect the changed facts and circumstances surrounding the Company's system installation process. This adjustment was contemplated after management had completed its identified process and had finalized its revenue recognition numbers, and as a result, was required to be considered as a control exception under Sarbanes-Oxley. The overall impact of the adjustment was a margin impact of $219,000, which was not material to both the Q4 and the annual results. The impact of this deficiency was also not material in any other quarter.

173 Mr. Braun and Mr. Leebron were members of the audit committee together with Mr. Copland, its chair.

174 Mr. Braun saw the audit committee's role as to supervise, ask questions and have a healthy skepticism about what the experts present and what management presents.[FN58] Mr. Braun had expressed the view that PwC's advice was on occasion too conservative, including the assessment that revenue should not be recognized on the screen where the silver screen had not been installed.[FN59] Mr. Braun was adamant that no one at the meeting discussed the fact that revenues should not be recognized on any of the installations until they were complete.[FN60]

175 Mr. Leebron recalled that the audit committee was aware that there had been a difference of opinion between IMAX management and the auditors about whether all the revenue on the 14 installations should be recognized and that since PwC's advice and opinion, which were independent and more conservative, had been accepted they were satisfied. They did not consider a possible third approach of not recognizing revenue on systems where the silver screen had not been installed.[FN61]

176 Mr. Copland recalled that he had discussions with PwC personally about the 14 installations in the last quarter of 2005. After management had initially proposed to recognize revenue on all of the installations, PwC came back and had discussions with management in which he was involved.[FN62]

177 Although he was no longer a member of the audit committee, Mr. Girvan, a Board member and corporate lawyer whose firm acted for IMAX, regularly attended the audit committee meetings. He did not recall whether he was in attendance at the March 1st meeting, however he did review the package and saw PwC's comments about revenue recognition on the theatre systems. His evidence was that he did not have any comments because the treatment was acceptable to PwC.[FN63]

178 Mr. Girvan indicated that there were many discussions about revenue recognition both at audit committee meetings and meetings of the full Board over the years because it is so complex, however that had not raised any concern on his part about the possible manipulation of revenue recognition.[FN64]

179 The draft financial statements were presented to the IMAX Board on March 8th by the finance department and PwC, and by Mr. Copland as chair of the audit committee.[FN65] After discussion, the Board approved the release of the 2005 financial statements with the lesser recognition of revenue dictated by the application of MEA.[FN66]

180 As part of the 2005 Annual Report, management assessed the effectiveness of the Company's internal control over financial reporting and concluded that such internal control over financial reporting was effective as of that date and that there were no material weaknesses in internal control.[FN67] PwC also confirmed that it had audited IMAX's internal control over financial reporting and concluded that the Company maintained effective internal control over financial reporting as of December 31, 2005.[FN68]

9. Information Unknown to PwC re: Status of Theatre System Installations

181 The plaintiffs assert that PwC did not have important relevant information at the time that they advised IMAX to consider MEA accounting, and in giving a clean audit opinion for the Company's 2005 financial statements. They rely on an admission from audit partner Lisa Coulman that this may well have affected the advice that was given.

182 The respondents assert that PwC's advice to IMAX to apply MEA accounting was made on a full appreciation of all relevant facts respecting the theatre system installations in Q4 2005. PwC had a good understanding of IMAX's business; as a result of the extensive communications between management and the audit team in early 2006, PwC was aware of what was occurring at each location, as reflected in the transaction memos, including agreements with customers that provided for marketing support payments and deferred installment payments.

183 The emails that were exchanged between management in Q4 2005 provide evidence of the status of the installations. These emails reflect certain information about the theatres that was not contained in the transaction memos (or in the report of management provided to the audit committee at its March 1st meeting).

184 For example, for Kazan, ultimately the silver screen was not installed until October 19, 2006, and theatre construction at the end of 2005 was at a stage where there was no roof on the building.[FN69]

185 For Lark, the transaction memo does not disclose that the system had been installed in a temporary location as a "demonstration theatre" because the customer had not complied with its obligation to identify a permanent location for the first theatre system under a multi-system Contract. The memo refers to a "contingent" obligation to move the theatre. In his examination, Mr. Joyce described the reinstallation as an "option". In her report to the audit committee, Ms Gamble referred to the system's "possible relocation". The emails make it clear however that the requirement to move the system from its temporary location and to reinstall it in a permanent location was a certainty.[FN70]

186 The transaction memos for Interlomas, Mexico, McMinnville, Oregon and Lodz, Poland do not disclose that the construction of the buildings in which the theatre systems were installed had not been completed. The Interlomas memo refers to an expected opening date of May 2006 as the expected completion date "for the rest of the mall in which the theatre resides", but does not say anything about the state of completion of the theatre building. The Lodz and McMinnville memos make no reference to the fact that the building in each case was incomplete, to the fact that there was only a temporary power supply or to the white screen being taken down upon installation. All of these concerns had been identified in the emails on December 6th as the "major installation risks" for the quarter "due to the fact that the buildings [were] not complete",[FN71]

187 Ms Coulman was asked in her examination whether there were any remaining obligations that PwC was not made aware of by IMAX, that might have affected its audit opinion for 2005.

188 According to Ms Coulman, during the Restatement process in the spring of 2007, PwC first reviewed the emails and became aware of additional obligations that the Company might have around certain of the theatre system installations. She recalled that the installation of some of the systems was not as complete as PwC had been led to believe. She recalled specifically that they were made aware of the fact that it was snowing in the theatre in Kazan, and that the temperature of the theatre was below zero. During the Restatement process she was told by Mr. Vance of a side letter for the Lark theatre, postponing certain payments until the theatre had been moved to another location, which did not occur until 2007. There were other obligations PwC became aware of that she could not recall.[FN72]

189 Ms Coulman acknowledged that these were facts that came to light subsequent to the signing of a clean audit opinion that could have impacted her assessment of the judgments made by the Company. Ultimately however PwC did not have to revisit its 2005 audit opinion, because IMAX decided to change its accounting policy. While PwC has withdrawn its audit opinion for 2005, in fact, it has been superceded.[FN73]

10. The 2005 10-K Filing, the March 9, 2006 Press Releases and IMAX's Pursuit of Strategic Alternatives

190 On March 9, 2006, IMAX issued two more press releases, as well as its 2005 10-K. The 2005 10-K was filed with SEDAR and with the SEC. In the 2005 10-K, IMAX stated that:

(a) it had installed 10 theatre systems in 2005 that were scheduled to open in the first and second quarters of 2006;

(b) it had earned revenue of US$144.9 million, of which US$97.8 million was attributable to theatre system sales and leases;

(c) it had "recognized revenue on 38 theatre systems which qualified as either sales or sales type leases in 2005 versus 22 theatre systems in 2004";

(d) the Company's management had assessed the effectiveness of its internal controls over financial reporting, as at December 31, 2005, and had concluded that such internal control over financial reporting was effective as of that date. Additionally, based on the Company's assessment, the Company determined that there were no material weaknesses in its internal control over financial reporting as of December 31, 2005; and

(e) its financial statements had been prepared in accordance with U.S. GAAP.

191 IMAX issued two press releases on March 9, 2006. The first (the "Earnings Release") reported on the Company's earnings in 2005 and Q4 2005, stating that the Company had earnings of $0.40 per share, versus guidance of $0.35-$0.40 per share, that IMAX had completed a record number of 14 theatre installations in the fourth quarter and a total of 34 theatre installations for the full year, and that the Company's total revenues were $144.9 million, as compared to $136.0 million reported for the prior year, systems revenue was $97.8 million versus $86.6 million in the prior year, with revenue recognized on 38 theatre systems in fiscal 2005, versus 22 in 2004. The press release also attached IMAX's Condensed Consolidated Statements of Earnings for both 2005 and Q4 2005, and Consolidated Balance Sheets as at December 31, 2005.

192 Both the Earnings Release, and a second March 9, 2009 press release (the "Strategic Alternatives Release"), contained a statement by IMAX that it intended to explore a possible sale or merger of the Company. The Strategic Alternatives Release stated that IMAX had announced that day that its Board had decided to begin a process to explore strategic alternatives to enhance shareholder value, including, but not limited to, the sale or merger of the business with another entity offering strategic opportunities for growth. The company had retained Allen & Company and UBS Investment Bank as financial advisers in this process.

193 The evidence is that in early 2005, IMAX had been approached, without solicitation, by several prospective buyers. External investment banking advisers were retained, and the possibility of a change of control transaction was discussed in July 2005 with the Board.[FN74]

194 There had been no active discussion of a sale or merger during the remainder of 2005 and into early 2006.[FN75] On February 23, 2006, the investment bankers retained by IMAX made a presentation to the Board with a plan to market IMAX to potential investors.[FN76] At some point in the process, between April 2005 and March 8, 2006, UBS and Allen & Company had provided guidance to the Company as to the value that might be

obtained in any transaction.[FN77]

195 The plaintiffs assert that a number of the Individual Defendants and respondents stood to profit significantly from a sale of IMAX, particularly if the Company were sold at a premium to the trading price of its shares. Mr. Wechsler owned (jointly and on his own) 2,682,800 shares and 1,150,000 options to purchase IMAX shares; Mr. Gelfond owned roughly two million shares and options; Mr. Utay owned over one million shares; Mr. Fuchs held between 46,000 and 58,000 options in 2005; and Mr. Joyce owned approximately 150,000 stock options.

196 In the period following the March 9, 2006 announcement, IMAX's financial advisers prepared a package to be delivered to potential acquirers, containing non-confidential, non-proprietary information. From the group of persons who received that package, a smaller group of approximately 40 or 50 potential investors expressed interest, signed a confidentiality agreement and received a Confidential Information Memorandum on IMAX.[FN78]

197 Of the 40 to 50 potential investors who expressed an interest, approximately 12 made "non-binding expressions of interest" in or around early May 2006. Most of those interested parties undertook a preliminary due diligence process beginning in mid-May. Some of those parties brought accounting advisers with them to the due diligence sessions and specifically sought to speak to IMAX's auditors. Others wished to discuss IMAX's accounting with Mr. Joyce and other finance staff.[FN79]

198 A representative of at least one potential investor took the steps necessary to review PwC's working papers in relation to IMAX, which contained, among other things, the Delhi Post. That potential acquirer asked PwC specific questions about IMAX's revenue recognition policy.[FN80]

199 Ultimately, the process came down to approximately three potential acquirers in July and early August. These parties made conditional offers, subject to due diligence, but by early August 2006, it had become apparent to the Board that the interest expressed would not translate into a deal at the price that the Board was seeking.[FN81]

11. The SEC inquiry Letter

200 On June 20, 2006, IMAX received a letter from the SEC indicating that it wished to conduct telephone interviews with Mr. Joyce and Mr. MacNeil to discuss "the company's revenue recognition policies and practices, whether there were any changes to those policies and practices in the fourth quarter of 2005, and, if so, what was the nature of those changes and the reason(s) for them."[FN82]

201 The telephone interviews requested by the SEC were conducted in or about the first half of July 2006.[FN83] The June 20th letter was also provided to the potential investors who remained interested in acquiring IMAX at the time it was received.[FN84]

12. The August 9, 2006 Press Release

202 On August 9, 2006, IMAX issued a press release which stated, in relevant part, that the Company was in the process of responding to an informal inquiry from the SEC regarding the Company's timing of revenue recognition, including its application of MEA accounting in its revenue recognition for theatre systems. The press release stated:

> Under multiple element arrangement accounting, the revenues associated with" different elements of an IMAX theatre system contract are segregated and can be recognized in different periods. The Company recognized revenue in the fourth quarter of 2005 on 10 theatre installations in theatres which did not open in that quarter, and in seven of those cases, revenue associated with the screen element of the system was deferred until the final screen was installed. Of these seven installations, three theatres had their screens completed in the first quarter of 2006, two in the second quarter of 2006, and screens in the remaining two theatres have either since been

> completed or are expected to be completed over the remainder of 2006. The value associated with the elements other than the screen elements of those system installations was recognized in the fourth quarter when they were substantially completed. The Company believes its application of the above accounting policy is, and has historically been, in accordance with GAAP, and the Company's position is supported by its auditors, PricewaterhouseCoopers LLP. This accounting policy has similarly been applied to one theatre installation in the second quarter of 2006, where revenue associated with the screen element has been deferred to a future period. The Company is cooperating in this inquiry.[FN85]

203 The August press release also disclosed that the Company had not succeeded in finding a buyer at the price sought by the Board, but that efforts to sell the Company continued.

204 The plaintiffs contend that, in the context of its previously disclosed revenue recognition policy stating that it recognized revenue on theatre system installations on the completion of those installations, and in the absence of any disclosure of a change in IMAX's revenue recognition policy, the representations respecting the number of theatre installations completed in Q4 2005, its financial results for 2005 and that its statements complied with GAAP, created the impression that IMAX had performed substantially better in the relevant period than it had.

205 The plaintiffs assert that that impression was corrected by the August 9th disclosure that in fact IMAX had not installed the 3D screens in seven of the 14 allegedly complete installations in Q4 2005.

206 Following issuance of the August 9, 2006 press release, the trading price of IMAX's securities suddenly declined. On August 9, 2006, the closing price for IMAX's securities was US$9.63 on the NASDAQ and C$10.77 on the TSX. On August 10th, IMAX's securities closed at US$5.73 on NASDAQ and C$6.44 on the TSX, representing a single day decline of approximately 40%. Over the next ten trading days, IMAX's stock closed at between US$4.85 and $6.05 on NASDAQ, and between C$5.43 and $6.51 on the TSX.[FN86]

13. The Restatement

207 The 2006 10-K containing the Restatement[FN87] was signed by all of the respondents, except for Gamble and Joyce, who were no longer employed by IMAX, and Fuchs who had ceased to be a director. The Restatement had the effect of shifting certain theatre systems revenues from the period in which they were previously reported to subsequent periods. A total of 16 installations were shifted between reported quarters within their originally reported years and 14 installations were shifted between fiscal years. Nine of the 16 installations that shifted within fiscal years and ten of the 14 that shifted between fiscal years were installations originally recognized in 2005.[FN88]

208 The Restatement is evidence that IMAX had erred in its annual report for 2005, both in its revenue recognition for theatre systems and in its statement that the financial statements complied with GAAP. Accordingly, the Restatement is evidence of the misrepresentations alleged in the Claim.

209 The plaintiffs also rely on a number of statements in the Restatement as admissions that there were weaknesses in the Company's internal controls that contributed to the errors that were made.

210 The Restatement identified that there were a number of material weaknesses in the Company's internal control over financial reporting, and stated in part with respect to the application of GAAP and revenue recognition for theatre system sales and leases:

> Five of the Company's material weaknesses relate to controls over the analysis and review of certain transactions to be able to correctly apply U.S. GAAP to record those transactions. The financial impact of these material weaknesses on the Company's restated financial results was principally related to the analysis and review of transactions which were complex or non-standard. These material weaknesses are:

1. The Company did not maintain adequate contrais, including period-end controls, over the analysis and review of revenue recognition for sales and lease transactions in accordance with U.S. GAAP. *Specifically, effective controls were not maintained to correctly assess the identification of deliverables and their aggregation into units of accounting and in certain cases the point when certain units of accounting were substantially complete to allow for revenue recognition on a theatre system.*

[Emphasis added.]

211 The 2006 10-K identified material weaknesses related to controls over the lines of communication between different departments as follows:

The Company did not maintain adequate controls over the lines of communication between operational departments and the Finance Department related to revenue recognition for sales and lease transactions. Specifically, effective controls were not maintained to raise on a timely basis certain issues relating to observations of the installation process, any remaining installation or operating obligations and concessions on contractual terms that may impact the accuracy and timing of revenue recognition. This control deficiency contributed to the restatement of the Company's consolidated financial statements for the years ended December 31, 2002 through 2005.

212 PwC provided its opinion as part of the Restatement, concurring with management's assessment that the Company did not maintain effective internal control over financial reporting as of December 31, 2006.[FN89]

14. Expert Evidence as to IMAX's Accounting: The Rosen Reports

213 The plaintiffs also put forward, as part of their evidence, the expert opinions of Lawrence Rosen, a chartered and forensic accountant. It was Mr. Rosen's opinion that IMAX's revenue recognition for theatre system sales for the year ended December 31, 2005 was not in accordance with U.S. GAAP. IMAX prematurely recognized revenue on its theatre systems and thereby rendered its 2005 financial statements materially misleading to investors and other financial statement users.

214 Mr. Rosen concluded that the application of MEA accounting (referred to in his reports as Revenue Accounting for Multiple Deliverables or "RAMD"), was not consistent with the terms and conditions of IMAX's theatre system sales transactions. He noted that RAMD is intended to account for separate and distinct components of multi-part transactions or parte of a series of transactions.

215 One of the criteria for the application of EITF 00-21 is that a revenue arrangement has "multiple deliverables". Mr. Rosen reviewed IMAX's own marketing of integrated theatre systems, the fact that individual component parts lack productive functionality without the related parts, the absence of a practice of selling components of the system on a stand-alone basis as well as the description of the product and the payment obligations of customers under the Contracts. He concluded that it would be illogical and inappropriate to artificially subdivide a single transaction (the sale of a complete theatre system) into component parts for revenue accounting purposes.

216 His reports concluded that the sale of an IMAX theatre system is more fairly characterized as a single transaction involving multiple sub-components: that is, a single deliverable being the complete theatre system.

217 Mr. Rosen also expressed the opinion that IMAX's recording of revenues prior to the completion of each theatre installation would not be appropriate, regardless of the application of MEA accounting. Applying the criteria from SAB 104, he noted that delivery of the theatre system could not be considered to have occurred until all of the elements essential for its functionality are installed and the transfer of risks and rewards could not occur until the system is installed with testing and training completed, so that the owner can realize the rewards through operation

of the theatre.

218 Mr. Rosen noted that IMAX chose to employ RAMD in fiscal 2005 on a prospective basis, without retroactively stating its prior years' results or disclosing the net income effect on retained earnings. "All else being equal, IMAX's 2005 reported results inappropriately appeared to be improved relative to prior years' earnings (assuming the prior years accounting did not employ RAMD)."

219 The respondents have not put forward any expert opinion of their own with respect to the accounting issues in these proceedings. Although they contend that the matter was complex and involved substantial judgment, they have not attempted to justify the accounting approach that was taken initially by IMAX management (proposing to recognize all revenue on 14 theatre systems in Q4 2005), and they have not offered an expert opinion to support PwC's MEA accounting approach as correct or even a reasonable alternative.

220 The respondents accordingly do not appear at this stage to defend the accounting judgments that were made by the Company and PwC; rather they assert that it was reasonable for the respondents to rely on the advice of its experienced and informed auditors as to the application of MEA accounting in recognizing revenue on 14 theatre systems in Q4 2005.

D. The Causes of Action and Claims for Damages

221 In their Claim, the plaintiffs claim damages of $200 million against IMAX and the Individual Defendants for negligent and "reckless" misrepresentation, negligence and civil conspiracy. Punitive damages of $10 million are also claimed. The substance of the allegations in support of the common law claims is addressed in detail in my reasons in the certification and Rule 21 motions.

222 Against all of the defendants as well as the proposed defendants, the plaintiffs claim damages for secondary market misrepresentation under s. 138.3 of the OSA; calculated in accordance with s. 138.5 (essentially the difference between the average price paid for the securities and the price received on disposition, or where shares are held more than ten days after the correction of the misrepresentation, the lesser of the difference between the average purchase price and the price received on disposition and the difference between the average purchase price and a benchmark price).

E. The Statutory Cause of Action

223 This section of the reasons provides an overview of the substance and mechanics of the statutory cause of action provided for in the OSA, Part XXIII.1, Civil Liability for Secondary Market Disclosure, with reference to the specific allegations of the plaintiffs set forth in the Claim.

224 Before discussing the specific statutory provisions and how they relate to the claims in these proceedings, I will describe the genesis of the statutory cause of action and place it in its statutory context.

1. The Genesis of the Statutory Cause of Action

225 Typically, secondary market disclosure obligations have been enforced through the investigatory and enforcement powers of the OSA and other provincial securities regulators and the SEC, the U.S. national securities regulator, as well as the various stock exchanges.

226 The adoption of a statutory civil liability regime as an additional measure for ensuring proper continuous disclosure was proposed by a federal task force as early as 1979[FN90], and by the OSC in 1984[FN91].

227 In the early 1990s the TSE established a committee on Corporate Disclosure, headed by Thomas I.A. Allen, Q.C. (the "Allen Committee"), with the mandate to "review current corporate disclosure practices in Canada, to examine the rules and determine whether investors should be able to pursue private remedies if a company fails to comply with disclosure rules".[FN92]

228 The reasons for the establishment of the Allen Committee have been described as follows:

> ...The TSE initiative to establish the Allen Committee was the result of a number of factors. These included several high profile and well publicized incidents of alleged misrepresentations and questionable disclosure by public companies in Canada which illustrated the anomalous gap between statutory civil liability for prospectus disclosure and the absence of such liability for continuous disclosure. This gap was underscored by the fact that primary issuances of securities under a prospectus accounted for only about 6% of all capital markets trading while secondary market trading constituted the remaining 94% of such activity. Also, there was a growing recognition that private rights of action were a necessary complement to the enforcement activities of securities regulators. In addition, the primary focus on the prospectus as the cornerstone of issuer communication was becoming an increasingly outmoded notion in today's electronic media-driven environment. Lastly, there were perceived differences between the Canadian and U.S. liability regimes as well as perceived gaps in the standard and quality of disclosure in the two countries.[FN93]

229 The Allen Committee released its interim report[FN94] in December 1995, which recommended limited statutory civil liability for misleading continuous disclosure by a reporting issuer. This recommendation was repeated in its final report entitled "Responsible Corporate Disclosure"[FN95] released in 1997 after significant additional consultation with market participants.

230 The Canadian Securities Administrators (the "CSA") publicly supported the Allen Committee's recommendations and established a committee comprised of staff from the securities commissions of B.C., Alberta, Saskatchewan, Ontario and Québec to consider the Allen Committee reports. The CSA committee issued draft legislation for public comment in 1998 and ultimately issued revised draft legislation in 2000, together with a report detailing the history, purpose and rationale for proposed amendments to provincial securities laws throughout the country.[FN96]

231 The key features of the CSA proposal for a statutory remedy for secondary market misrepresentation included the right to sue, whether or not an investor had actually relied on the misrepresentation or failure to make timely disclosure, defences for various participants based on their responsibility for the disclosure, liability caps and proportionate liability based on share of responsibility, subject to certain exceptions, and the requirement of court approval of settlement agreements. The report also proposed a "screening mechanism" for such actions (which had not been part of the Allen Committee recommendations) and stated:

> One of the risks of creating statutory liability for misrepresentations or failures to make timely disclosure is the potential for investors to bring actions lacking any real basis in the hope that the issuer will pay a settlement just to avoid the cost of litigation. To limit unmeritorious litigation or strike suits, plaintiffs would be required to obtain leave of the court to commence an action. In granting leave, the court would have to be satisfied that the action (i) is being brought in good faith, and (ii) has a reasonable possibility of success.[FN97]

232 Later in its report under the topic "Strike Suit Exposure", the CSA noted the concerns raised by issuers about strike suits. In *Epstein v. First Marathon Inc. / Société First Marathon Inc.*, [2000] O.J. No. 452 (Ont. S.C.J.), Gumming J. at para. 41 described a "strike suif as follows:

> The term "strike action" or "strike suit" has emerged in the context of certain class proceedings litigation in the

> United States. The term connotes the commencement and pursuit of a class proceeding where the merits of the claim are not apparent but the nature of the claim and targeted transaction is such that a sizeable settlement can be achieved with some degree of probability. The term suggests a class proceeding that is properly regarded as an abuse of process.

This decision and Cumming J.'s definition of "strike suit" were referenced in the CSA report.

233 The CSA noted that the screening mechanism was designed "not only to minimize the prospects of an adverse court award in the absence of a meritorious claim but, more importantly, to try to ensure that unmeritorious litigation, and the time and expense it imposes on defendants, is avoided or brought to an end early in the litigation process."[FN98] In addition to the screening mechanism, the requirement for court approval of any settlement and the "loser pays" costs rule in such proceedings (overriding any inconsistent costs provisions in class action statutes) would provide further disincentives to strike suits.

234 The CSA contrasted its proposal for a statutory cause of action with the approach in U.S. jurisdictions under s. 10b of the *Securities Exchange Act of 1934* and Rule 10b-5 promulgated thereunder.[FN99] The report noted:

> As a starting point, it is important to recognize that the 2000 Draft Legislation (and previously the 1998 Draft Legislation) is fundamentally different from Rule 10b-5. The 2000 Draft Legislation is a specific and comprehensive code whereas Rule 10b-5 is a general anti-fraud rule from which U.S. courts have implied a right of action and which has evolved and been variously interpreted by U.S. courts over the past several decades. In fact, there has been considerable litigation in the U.S. over what could be considered strictly threshold issues such as who bears liability and what is the nature of such liability.
>
> In a Rule 10b-5 action, a plaintiff must prove that the defendant acted with "*scienter*", defined by the U.S. Supreme Court as a "mental state embracing intent to deceive, manipulate or defraud", with most courts agreeing that recklessness constitutes *scienter* as well. Reliance, and to some extent causation, have been made easier to prove in the U.S. as a result of U.S. courts' decision to adopt a "fraud-on-the-market" theory. Essentially, this theory creates the presumption that because most publicly available information is reflected in the market price of an issuer's securities, an investor's reliance on any public material misrepresentations may be presumed. In this context, Rule 10b-5 has developed into a fully compensatory model.[FN100] [Footnotes omitted.]

235 The CSA commented on the rejection of the fraud on the market theory or deemed reliance in Winkler J.'s decision in *Carom v. Bre-X Minerals Ltd.* (1998), 41 O.R. (3d) 780 (Ont. Gen. Div.) and noted the limitations inherent in class actions in securities litigation in Canadian jurisdictions based on the common law. The report went on to observe:

> The CSA recognize that a due diligence standard is a more rigorous liability standard than the fraud based standard under Rule 10b-5. The key element of intent or recklessness which a plaintiff must establish to succeed in a Rule 10b-5 action need not be proved to establish liability on the basis of an absence of due diligence. The rationale for the allocation of the burden is twofold. The first reason is to provide a deterrent to poor continuous disclosure. By requiring the defendant to prove due diligence there is a much greater incentive to exercise due diligence. The second reason is access to evidence. The necessary information to establish that an officer or director, for example, was or was not duly diligent would be under the control of that officer or director. In this context, the 2000 Draft Legislation, unlike Rule 10b-5, is essentially a deterrent model.[FN101]

236 The Allen Interim Report, under the topic, "Should Liability for Damages be Unlimited?", states:

> Any claim by damaged shareholders of a corporation will, if successful, lead to a bill being paid indirectly by all shareholders of the corporation...at the risk of a sweeping generality, such claims pit short term trading

shareholders against long term shareholders.[FN102]

237 To the same effect, the CSA noted:

> The proposal is primarily directed to providing an effective deterrent to misrepresentation and failures to make timely disclosure. Providing compensation for investor damages is a secondary objective, which should be balanced against the interests of long term security holders of the issuer, who effectively pay the cost of any damage awards. *In order to achieve this balance, the proposed legislation would limit the potential exposure of issuers and other potential defendants.*[FN103]
>
> [Emphasis added.]

238 Accordingly, the statutory cause of action that was proposed and ultimately adopted in Ontario (and later throughout Canada) differed from the U.S. approach in its primary emphasis on deterrence. A plaintiff would not have to establish intent or recklessness (elements present in the U.S. Rule 10-b claim), and the onus would be on the defendants to establish a due diligence type defence. At the same time, claims would typically be subject to a damages cap and other limitations, including the threshold requirement for leave of the court before the statutory claim may proceed.

2. The Statutory Context - Continuous Disclosure Obligations

239 The OSA, s. 1.1 provides that the purposes of the Act are (a) to provide protection to investors from unfair, improper or fraudulent practices; and (b) to foster fair and efficient capital markets and confidence in capital markets.

240 Part XVIII of the OSA, "Continuous Disclosure", provides for the disclosure by a reporting issuer of any "material change" in the affairs of the company, and the issuance of interim and annual financial statements.

241 Material changes require a news release authorized by a senior officer disclosing the nature and substance of the change (s. 75(1)) and a report to the OSC in accordance with the regulations (s. 75(2)). Quarterly and annual financial statements comparative to the period covered by the preceding financial year "made up and certified as required by the regulations and in accordance with generally accepted accounting principles" must be filed (ss. 77 and 78). The annual financial statement must be accompanied by the report of the auditor prepared in accordance with the regulations, preceded by such examinations as will enable the auditor to make such report (ss. 78(2) and (3)).

242 The continuous disclosure reporting obligations are set out in National Instrument 51-102 ("NI 51-102") of the CSA, which has been adopted by securities administrators throughout Canada, including the OSC.[FN104]

243 NI 51-102 outlines requirements for annual and interim financial statements, and requires that both be accompanied by a "management discussion and analysis" ("MD&A"), which provides a plain language narrative explanation from the perspective of management about the company's performance, financial condition, and future prospects. An annual information form ("AIF"), which provides material information on the company and its operations, in both historical and future contexts, is also required to be filed. For issuers who are required to report under the U.S. *Securities Exchange Act of 1934*, such as IMAX, filing a Form 10-K meets the requirement of filing an AIF.[FN105]

244 NI 51-102 requires a reporting issuer to file annual financial statements accompanied by an auditor's report. Annual statements must include statements of income, retained earnings, and cash flow in respect of the most recent financial year and the financial year immediately preceding that year. They must be approved by the board of direc-

tors before being filed and such approval may not be delegated to the audit committee of the board. The CEO and CFO must certify annual filings of financial statements, the MD&A, and AIF.

3. Liability for Misrepresentation

245 The statutory cause of action is set out in s. 138.3 of the OSA, which provides for liability for misrepresentations (and failure to make timely disclosure) in favour of any person or company who acquires or disposes of a "responsible issuer's" security between the time the document was released and the misrepresentation was publicly corrected, without regard to reliance.

246 Section 138.3(1) provides in relevant part as follows:

> Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of a responsible issuer releases a document that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,
>
> (a) the responsible issuer;
>
> (b) each director of the responsible issuer at the time the document was released;
>
> (c) each officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document;...

247 "Responsible issuer" is defined in s. 138.1 to include a "reporting issuer" and any other issuer with a real and substantial connection to Ontario, any securities of which are publicly traded. IMAX is a reporting issuer under the OSA.

248 "Misrepresentation" is defined in s. 1(1) of the OSA as (a) an untrue statement of a material fact, or (b) an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made. A "material fact" is defined in s. 1(1) in relation to issued securities as "a fact that significantly affects, or would reasonably be expected to have a significant effect on, the market price or value of such securities".

249 The misrepresentations alleged in this case fall under (a), the untrue statements of IMAX's financial results, its compliance with GAAP and the number of installed theatre systems, which are alleged to be material facts.

250 In respect of misrepresentations in documents, the s. 138.3 right of action is against the responsible issuer and any director at the time the document was released, and any officer who authorized, permitted or acquiesced in the release of the document. (There is also a right of action against an 'influential person' or an 'expert' as defined in Part XXIII.1, which is not engaged in these proceedings.)

251 "Document" is defined under s. 138.1 as:

> Any written communication, including a communication prepared and transmitted only in electronic form,
>
> (a) that is required to be filed with the [Ontario Securities Commission], or

(b) that is not required to be filed with the commission and,

(i) that is filed with the commission,

(ii) that is filed or required to be filed with a government or an agency of a government under applicable securities or corporate law or with any stock exchange or quotation and trade reporting system under its by-laws, rules or regulations, or

(iii) that is any other communication the content of which would reasonably be expected to affect the market price or value of a security of the responsible issuer.

252 There is no question that the communications in question in these proceedings were "documents" within the meaning of s. 138.1.

253 The Act distinguishes between misrepresentations made in "core" and other or "non-core" documents. A "core document" is defined to include annual and interim financial statements of the issuer and the MD&A. IMAX's annual financial statements for 2005 including the MD&A (together the "Annual Report") and Form 10-K filed with the SEC (which included the Annual Report) are accordingly "core" documents, while the press releases are "non-core" documents.

254 For misrepresentations in non-core documents, except in relation to a claim against an expert, the plaintiff must prove that the person or company:

(a) knew at the time that the document was released, that the document contained the misrepresentation;

(b) at or before the time that the document was released, deliberately avoided acquiring knowledge that the document contained the misrepresentation; or

(c) was, through action or failure to act, guilty of gross misconduct in connection with the release of the document that contained the misrepresentation: see s. 138.4(1).

255 In the Claim the plaintiffs define "Representation" as follows:

the statement explicitly and/or implicitly contained in the February Press Release and expressly repeated in the Form 10-K and Annual Report, that IMAX's revenue for the 2005 fiscal year were [*sic*] prepared and reported in accordance with GAAP and that such revenues met or exceeded the earnings guidance previously issued by IMAX.

256 In addition to the defined Representation, the Claim alleges that the statements that IMAX had successfully completed 14 theatre system installations in the fourth quarter of 2005 and that ten theatre systems installed by IMAX in 2005 were scheduled to open in the first and second quarters of 2006 were "misstatements". The misstatements, together with the Representation, are the "misrepresentations" that the plaintiffs allege give rise to statutory liability in this case.

257 It is alleged that the misrepresentations were made in the February and March 2006 press releases (non-core documents) and in IMAX's Form 10-K/Annual Report (core documents). With respect to a core document, as against IMAX and its directors (that is each of the defendants and proposed defendants except for Joyce and Gamble), the plaintiffs need only prove that the document contained a misrepresentation. The onus will then shift to each of these parties to establish one or more of the statutory defences.

258 In order to succeed in their claims against Joyce and Gamble (who are the only non-director officers named as proposed defendants), the plaintiffs must prove, in addition to the release of a document containing a misrepresentation (whether core or non-core), that they authorized, permitted or acquiesced in the release of the document: see s. 138.3(1)(c).

259 With respect to the non-core documents, before the onus shifts to a defendant, the plaintiffs will have to prove, in addition to the release of the documents containing a misrepresentation, the mental element of knowledge, willful blindness or gross misconduct required by s. 138.4(1).

260 In this case, the Claim pleads the elements of s. 138.4(1) against the Individual Defendants and Gamble only; that is, that only these individuals are subject to statutory liability for the alleged misrepresentations in the press releases. The allegations against the remaining proposed defendants are restricted to the alleged misrepresentations in the Company's Form 10-K/Annual Report.

4. Relevant Defences

261 Section 138.4 provides defences to liability for secondary market misrepresentation. There are two defences relied upon by the respondents in these proceedings.

262 Subsection 138.4(6) provides for a defence of "reasonable investigation" as follows:

> A person or company is not liable in an action under section 138.3 in relation to,
>
> (a) a misrepresentation if that person or company proves that
>
> (i) before the release of the document or the making of the public oral statement containing the misrepresentation, the person or company conducted or caused to be conducted a reasonable investigation, and
>
> (ii) at the time of the release of the document or the making of the public oral statement, the person or company had no reasonable grounds to believe that the document or public oral statement contained the misrepresentation[.]

263 Subsection 138.4(7) directs the court, in determining whether an investigation was reasonable under ss. (6) or whether a person or company is guilty of gross misconduct under ss. (1) or (3), to consider all relevant circumstances, including those listed in paras. 138.4(7)(a) through (k). These include such factors as the knowledge, experience and function of the defendant, the existence of a system within the issuer corporation and the reasonableness of reliance by the defendant on such system and on the issuer's officers, employees and others (see para. 360 below).

264 A second defence to secondary market misrepresentation that is raised by the respondents in these proceedings is the "expert reliance" defence in s. 138.4(11), which provides as follows:

> A person or company, other than an expert, is not liable in an action under section 138.3 with respect to any part of a document or public oral statement that includes, summarizes or quotes from a report, statement or opinion made by the expert in respect of which the responsible issuer obtained the written consent of the expert to the use of the report, statement or opinion, if the consent had not been withdrawn in writing before the document was released or the public oral statement was made, if the person or company proves that,

(a) the person or company did not know and had no reasonable grounds to believe that there had been a misrepresentation in the part of the document or public oral statement made on the authority of the expert; and

(b) the part of the document or oral public statement fairly represented the report, statement or opinion made by the expert.

265 The onus of proving each of these statutory defences rests with the defendant on the usual civil standard, a balance of probabilities.

5. Calculation of Damages, Several Liability, and the Cap on Damages

266 Section 138.5 of the OSA provides a formula for the assessment of damages in a successful action for secondary market misrepresentation.

267 In general, under ss. 138.5(1) and (2), damages are assessed in favour of a person or company that acquired an issuer's securities after the misrepresentation and disposed of the securities within ten days after the public correction of the misrepresentation, based on the difference between the average price paid for the securities and the price received on their disposition, calculated taking into account the result of hedging or other risk limitation transactions.

268 For shareholders who disposed of their securities after the tenth trading day after the public correction of the misrepresentation or have not disposed of the securities, damages are based on the lesser of the difference between the average price paid for the securities and the price received on their disposition, and the difference between the average price paid for the securities and the trading price of the issuer's securities on the principal market for the ten trading days following the correction of the misrepresentation.

269 Subsection 138.5(3) addresses the issue of "loss causation" and provides that, despite subsections (1) and (2), assessed damages shall not include any amount that the defendant proves is attributable to a change in the market price of securities that is unrelated to the misrepresentation. Again, the onus is on the defendant to prove that other factors caused a reduction in market value of the shares.

270 Liability for damages is several among defendants, based on a party's responsibility for the damages, except that there is joint and several liability where a court determines that a particular defendant, other than the responsible issuer, authorized, permitted or acquiesced in the making of the misrepresentation while knowing it to be a misrepresentation: see s. 138.6.

271 Section 138.7 provides for a cap on damages. In the case of the responsible issuer, the cap is the greater of five per cent of its market capitalization and $1 million. For a director or officer of a responsible issuer, the cap is the greater of $25,000 and 50% of the aggregate of the director's or officer's compensation from the responsible issuer and its affiliates.

272 Under s. 138.7(2), the damages cap does not apply to a defendant other than the responsible issuer, if the plaintiff proves that such defendant authorized, permitted or acquiesced in the making of the misrepresentation, while knowing that it was a misrepresentation.

273 In this case the Claim pleads the elements of s. 138.7(2) against the Individual Defendants and Gamble only. The statutory claim against the other proposed defendants would accordingly be subject to the statutory cap on

damages.

6. The Statutory Leave Procedure

274 Subsection 138.8(1) of the OSA requires that any action claiming secondary market misrepresentation requires leave of the court, and provides as follows:

> No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,
>
> (a) the action is being brought in good faith; and
>
> (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

275 Subsection 138.8(2) requires the plaintiff and each defendant to serve and file one or more affidavits setting forth the material facts upon which each intends to rely, and s. 138.8(3) provides for examination of the makers of the affidavits in accordance with the rules of court.

F. The Procedure Followed In this Case

276 in the present case, each plaintiff filed his own affidavit[FN106]. The plaintiffs also relied on several affidavits sworn by their lawyers, attaching various public documents and filings relating to IMAX.[FN107] The plaintiffs filed two affidavits sworn by Lawrence S. Rosen attaching his expert report dated February 12, 2007 on IMAX's accounting for theatre systems in Q4 2005[FN108], and a second report dated August 2, 2007, following the restatement in July 2007 of IMAX's financial results for 2002 through the first three quarters of 2006[FN109], and the affidavits of Lawrence Kryzanowski[FN110] and Robert Comment[FN111], providing their expert opinions on loss causation, market efficiency and the calculation of damages.

277 Each defendant and proposed defendant filed his or her own affidavit[FN112] and also referred to and relied on the affidavit of Kenneth G. Copland (chair of IMAX's audit committee) sworn September 8, 2007 (the "Copland Affidavit")[FN113]. The respondents also filed the affidavit of expert witness Denise Neumann Martin sworn September 7, 2007[FN114], setting out her opinion critiquing the Kryzanowski expert opinion, and the affidavit of a law clerk, sworn September 11, 2007[FN115], attaching various IMAX press releases and other public documents and articles discussing IMAX.

278 Although such examination is not provided for under s. 138.8, counsel for the plaintiffs examined as a witness under Rule 39.03, Lisa Coulman of PwC. The court was advised that no objection was taken to the examination, which proceeded prior to the cross-examinations of the affiants.[FN116]

279 The plaintiffs and respondents were cross-examined out of court. Each of the named defendants was examined twice, attending on the second occasion to answer questions that had been ordered to be answered, after initially being refused, and questions arising out of answers to undertakings.

280 Since this is the first proceeding under Part XXIII.1 of the OSA, there was no guidance for counsel or the court as to the type, nature and volume of evidence that would be required for the purpose of the court's determination of whether to grant leave. Experienced counsel for both sides proceeded with a view to adducing sufficient evidence relevant to the statutory claim and defences, while recognizing that the matter should not devolve into a "paper trial". The defendants and proposed defendants included in their affidavits documentary exhibits, including a number of documents that would be considered confidential to IMAX. Questions on the examinations led to the

production of additional documents, although there were numerous refusals as counsel quite properly attempted to control the scope of examinations so that they were focused on the immediate proceedings and not full discovery.

281 This process was clearly a challenge to the parties, as the leave procedure involves a testing of the merits of the action. Some questions refused were abandoned and others were pursued in a motion to this court: see *Silver v. Imax Corp.*, [2008] O.J. No. 2751 (Ont. S.C.J.).

III. Determination of the Issues on the Motion for Leave to Proceed with the Statutory Claims

282 As described above, the statutory leave test under s. 138.8 provides that the court shall grant leave only where it is satisfied that, (a) the action is being brought in good faith; and (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

283 This section of the OSA has never been interpreted previously, and there are no other statutory provisions in force in a Canadian jurisdiction, that adopt the same type of test.

284 How high the court should set the bar for a prospective plaintiff seeking to bring a claim for secondary market misrepresentation was the subject of extensive argument at the hearing of the motion, particularly in respect of how the court should interpret whether the plaintiffs have "a reasonable possibility of success at trial".

285 The plaintiffs argue for a low threshold. The low bar would permit actions to proceed unless they are clearly an abuse of process or a "strike suit". The respondents, acknowledging in their factum that this action is not in fact a "strike suit", contend that the object of the leave test is to screen out unmeritorious actions. They argue for a more stringent test, with onerous obligations on a plaintiff to establish their good faith and that the case has obvious merit.

286 I turn now to the issues of determining the standard for granting or refusing leave under s.138.8 of the OSA and of applying that standard to the particular circumstances of this case.

A. General Principles of Statutory Interpretation

287 In the Court of Appeal decision in (2005), 77 O.R. (3d) 321 (Ont. C.A.), aff'd 2007 SCC 44 (S.C.C.)), Laskin J.A. summarized the correct approach to statutory interpretation. In the context of interpreting s. 130 of the OSA (liability for misrepresentation in an offering memorandum or prospectus), he stated, at paras. 82 to 85:

> Section 130 should be interpreted by applying Professor Driedger's "modern approach" to statutory interpretation, the approach consistently preferred by the Supreme Court of Canada:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> See Elmer A. Driedger, *The Construction of Statutes*, 2nd ed. (, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2 at para. 21; and , [2002] 2 S.C.R. 559, [2000] S.C.J. No. 43 at para. 26.
>
> This modern approach has two aspects. One aspect is that context matters. The court must interpret s. 130, not as a stand-alone provision, but in its total context. In *Bell ExpressVu* at para. 27, Iacobucci J. stressed the importance of context in interpreting the words of a statute:

> The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 *Can. Bar Rev.* 1 at p. 6, "words, like people, take their colour from their surroundings."

The context for interpreting s. 130 includes its purpose, the purpose of the OSA as a whole, an issuer's express disclosure obligations in Part XV of the statute, and related provisions of the OSA dealing with disclosure of material facts and material changes.

The second aspect of this modern approach imports the sound advice of Professor Ruth Sullivan, who has edited the third and fourth editions of *Driedger*, in interpreting a statutory provision, the court should take account of all relevant and admissible indicators of legislative meaning. After taking these indicators into account, the court should adopt an interpretation that complies with the legislative text, promotes the legislative purpose, and produces a reasonable and sensible meaning: see Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at 1-3 ["*Sullivan and Driedger*"]. [Additional citations omitted.]

288 With reference to determining legislative purpose, Laskin J.A. noted that committee reports would be relevant[FN117], stating at para. 119:

> Traditionally, committee reports have been considered a relevant and admissible indicator of legislative purpose but not of legislative meaning: see for example *Morguard Properties Ltd. v. Winnipeg (City)*, [1983] 2 S.C.R. 493, 3 D.L.R. (4th). More recently, courts have begun to rely on these reports as evidence of legislative meaning. The weight to be accorded to any particular report must be assessed on a case-by-case basis: see *Sullivan and Driedger*, *supra*, at pp. 500-502.

289 Applying the approach described by Laskin J., in interpreting the statutory leave test for secondary market misrepresentation, the court must consider the statutory words in their context and "in their grammatical and ordinary sense" harmoniously with the scheme and object of the OSA, and in particular the continuous disclosure obligations in Part XVIII, and the intention of the legislature when the statutory remedy was introduced.

290 In interpreting the statutory provision, the court should take account of all relevant and admissible indicators of legislative meaning, including committee reports leading to the statutory amendment (in this case, the Allen Committee reports and the CSA report), as well as any sources that may have been consulted by the legislature in devising the statutory threshold (such as the OLRC report on class actions referenced below).

291 In identifying indicators of legislative meaning in order to interpret the test for granting leave under s. 138.8, it is also helpful to consider comparable situations where the legislator has required leave before an action may be brought against a corporation. One such situation is the derivative action.

292 While derivative actions serve a different purpose in permitting individual shareholders to sue on behalf of a corporation, they are also subject to leave by the court (on meeting the threshold test of good faith, that the directors will not diligently pursue the action and that the action appears to be in the best interests of the corporation)[FN118]. In *Richardson Greenshields of Canada Ltd. v. Kalmacoff* (1995), 22 O.R. (3d) 577 (Ont. C.A.), the Court of Appeal considered an appeal from a decision refusing to grant leave to commence a derivative action under the CBCA. In authorizing the derivative action, Robins J.A. observed at pp. 584-585:

> In deciding whether leave should be granted, it should be borne in mind that a derivative action brought by an individual shareholder on behalf of a corporation serves a dual purpose. First, it ensures that a shareholder has a right to recover property or enforce rights for the corporation if the directors refuse to do so. Second, and more important for our present purposes, it helps to guarantee some degree of accountability and to ensure that con-

trol exists over the board of directors by allowing shareholders the right to bring an action against directors if they have breached their duty to the company: ML A. Maloney, "Whither The Statutory Derivative Action?" (1986), 64 Can. *Bar Rev.* 309.

It should also be borne in mind that s. 339 is drawn in broad terms and, as remedial legislation, should be given a liberal interpretation in favour of the complainant. The court is not called upon at the leave stage to determine questions of credibility or to resolve the issues in dispute, and ought not to try. These are matters for trial. Before granting leave, the court should be satisfied that there is a reasonable basis for the complaint and that the action sought to be instituted is a legitimate or arguable one.

293 The statutory cause of action for secondary market misrepresentation also serves a dual purpose, of permitting the recovery of damages by a shareholder, and as a deterrent to breach of a reporting issuer's continuous disclosure obligations under the OSA.

294 Similarly, the statutory cause of action was introduced as remedial legislation; that is, in recognition of the obstacles to pursuing claims for secondary market misrepresentation under common law. Accordingly, the leave test prescribed by the legislature should be interpreted so as to permit access to the courts by shareholders with legitimate claims.

B. Part One of the Statutory Leave Test: is the Action Brought in Good Faith?

295 The first part of the leave test requires the plaintiffs to satisfy the court that the action is brought in good faith. Good faith is not presumed, but must be established by the plaintiffs on the normal civil standard; that is, on a balance of probabilities.

296 The representative plaintiffs Cohen and Silver each depose in their affidavits that their purposes in bringing the action are to:

(a) recover the losses that he and other class members have suffered as a result of their investments in IMAX shares during the Class Period; and

(b) ensure that the defendants are held accountable for their behaviour, and to send a message to the officers and directors of public companies that they will be held accountable for their misrepresentations.

1. Positions of the Parties

297 The parties agree that "good faith" involves a consideration of the subjective intentions of the plaintiffs in bringing their action, which is to be determined objectively.

298 The respondents argue however that the plaintiffs have a heavy onus to establish good faith, and are required to offer cogent evidence of their motives. The defendants also assert that "good faith" means that the action must be for the benefit of the corporation and not for the plaintiffs' individual benefit. Finally, the respondents contend that the plaintiffs must demonstrate a reasonable belief in the merits of their claim, based on an assessment of the evidence placed before the court at the time of the hearing of their motion.

299 The plaintiffs submit that "good faith" refers to a belief in the claim that is honestly held, and the absence of any ulterior or improper purpose in bringing the litigation.

2. Analysis

300 The cases relied on by the respondents in support of a "high" onus on the plaintiffs to prove good faith arose in the context of motions for leave to bring derivative actions (that is, claims by individual shareholders or others attempting to sue for a wrong done to the corporation).

301 In *Tremblett v. S.C.B. Fisheries Ltd.* (1993),. (1993), 116 Nfld. & P.E.I.R. 139 (Nfld. T.D.), for example, Puddester J. described the obligation to satisfy the court as to the plaintiff's good faith in a derivative action as a "substantial onus". His decision however is clearly based on considerations that a derivative action provides a shareholder with extraordinary rights to intervene in majority decisions internal to corporations, to use corporate resources and to create a position of legal conflict between the corporation and others, and his conclusion that another company controlled by the plaintiff would stand to gain personally if the derivative action were allowed to proceed.

302 Similarly, in *Chandler v. Sun Life Financial Inc.*, [2006] O.J. No. 451 (Ont. S.C.J. [Commercial List]) at paras. 25-26, C. Campbell J. recognized a "high onus" to establish good faith on a party seeking leave to bring a derivative action, noting that in the absence of evidence to the contrary there would be a presumption that the directors (in refusing to commence the proceedings on behalf of the company) have exercised reasonable and sound judgment and recognizing the risk of a collateral purpose on the part of the applicant shareholders.

303 Such analysis is not directly applicable to the requirement of "good faith" as that term is employed in s. 138.8 of the OSA. The statutory remedy for secondary market misrepresentation is afforded directly to shareholders for their own benefit and is not a vehicle to sue on behalf of the company for a wrong to the company. Proceedings alleging secondary market misrepresentation are brought to recover damages for loss to an individual shareholder or group of shareholders. The shareholder's personal loss is central. There is no reason to read in a "high" or "substantial" onus requirement for good faith in this type of proceeding.

304 Another purpose of the statutory remedy is to enforce a corporation's disclosure obligations; that is, to protect and enhance the integrity of the secondary market. In this case, on the evidence that is available, it is clear that both of these objectives are being pursued in good faith by the plaintiffs. There was no cross-examination of the plaintiffs going to any ulterior motive or lack of good faith in pursuing these proceedings.

305 In any event, as Robins J.A. remarked at p. 587 in *Richardson Greenshields of Canada Ltd. v. Kalmacoff*, even in a derivative action, a plaintiff may be motivated by self-interest, and still be acting in good faith:

> Whether it is motivated by altruism, as the motions court judge suggested, or by self-interest, as the respondents suggest, is beside the point. Assuming as i suppose, it is the latter, self interest is hardly a stranger to the security or investment business. Whatever the reason, there are legitimate legal questions raised here that call for judicial resolution. The fact that this shareholder is prepared to assume the costs and undergo the risks of carriage of action intended to prevent the board from following a course of action that may be *ultra vires* and in breach of shareholders' rights does not provide a proper basis for impugning its *bona fides*. In my opinion, there is no valid reason for concluding that the good faith condition specified in [the statutory leave provision] has not been satisfied.

306 The respondents' counsel in argument also asserted that, having commenced the motion for leave, there is an obligation on the part of the individual plaintiffs, after all of the affidavits are exchanged and the cross-examinations completed, to evaluate the evidence and to demonstrate that they continue to believe on reasonable grounds that they have a claim, notwithstanding the defences that have been put forward. They assert that the failure of Mr. Silver and Mr. Cohen to personally review the respondents' affidavits and the transcripts of their cross-examinations is fatal.

307 I disagree. Parties pursuing legal proceedings are entitled to rely on their legal counsel to analyze and

evaluate the evidence as the case unfolds. There is no reason to require a plaintiff in this type of action (with complex and voluminous evidence) to demonstrate that his or her good faith pursuit of the action is based on a personal evaluation of all of the evidence as it unfolds, independent of the advice and assistance of counsel.

308 Accordingly, I interpret "good faith" in the context of s. 138.8, to require the plaintiffs to establish that they are bringing their action in the honest belief that they have an arguable claim, and for reasons that are consistent with the purpose of the statutory cause of action and not for an oblique or collateral purpose. "Good faith" involves a consideration of the subjective intentions of the plaintiffs in bringing their action, which is to be determined by considering the objective evidence.

3. Decision re: Good Faith

309 I am satisfied that the plaintiffs are acting in good faith in pursuing these proceedings. They have a personal financial interest in the action, as persons who acquired IMAX shares during the Class Period and continued to hold such shares on August 9, 2006. They have also asserted altruistic reasons for commencing the action, to hold the defendants accountable for misrepresentations to the public, and to send a message to directors and officers of other public companies that they too will be held accountable for misrepresentations to the public. These reasons for pursuing the action are consistent with the legislative purpose of the statutory remedy, which is deterrence. The plaintiffs have pleaded a misrepresentation that is supported by the evidence of the Company's Restatement. There is no evidence of any ulterior motive or conflict of interest. Accordingly, they meet the first branch of the test for leave to assert a claim for secondary market misrepresentation.

C. Part Two of the Statutory Leave Test: "Is There a Reasonable Possibility that the Action Will Be Resolved at Trial in Favour of the Plaintiffs?"

310 The second branch of the leave test requires that the court be satisfied that there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff. The interpretation of this part of the leave test was the focus of extensive argument at the hearing of the leave motion.

1. Interpretation of the Test

(a) Positions of the Parties

311 The respondents assert that the onus in this part of the test is on the plaintiffs and is substantial. They submit that the plaintiffs must prove that they have a reasonable possibility of success at trial on each element they are required to establish; namely: the existence of the misrepresentation in the Form 10-K and press releases, and the required mental element for Joyce and Gamble as officers and for all respondents in respect of the misrepresentations in the press releases. The respondents also assert that the plaintiffs must "overcome" the statutory defences asserted by the plaintiffs, and that the court must evaluate the plaintiffs' evidence respecting damages pleaded above the damages cap.

312 The plaintiffs, however, contend that the threshold for a reasonable possibility of success at trial is low and is met as long as there is some evidence which, if accepted by the court, is consistent with a misrepresentation. The plaintiffs argue that the issue of due diligence should be left for the trial judge unless the defendants demonstrate that they are entitled to summary judgment on this issue.

(b) Analysis and Conclusion

313 The phrase "a reasonable possibility that the action will be resolved at trial in favour of the plaintiff does not appear to have any direct antecedent in Canadian legislation. The origin of this wording however is in a screen-

ing mechanism for class actions that was proposed by the Ontario Law Reform Commission ("OLRC") in its 1982 *Report on Class Actions*.[FN119] (This recommendation, it may be noted, was not adopted as a part of the *Class Proceedings Act, 1992*.)

314 The OLRC proposed a procedure that is identical to that required under the OSA, requiring the parties to file affidavits setting out the facts material to the proposed certification tests upon which they intend to rely and permitting examination of the affiants.

315 The test was described by the OLRC as a "substantive adequacy test" and a "prophylactic measure against potential abuse of the proposed class action procedure."[FN120]

316 The respondents' counsel, relying on the OLRC report, argued that the plaintiffs at this stage of the leave test have a "substantial burden" of proving the "substantive adequacy" of their action. In my opinion, this formulation is a misreading of the report, and the particular page reference cited by the respondents in their factum.[FN121] In fact, the OLRC speaks of the preliminary merits test as one of testing the "substantial" or "substantive" adequacy of the proposed class proceeding. There is no reference to a "substantial burden" of proof.

317 The OLRC described the test by positioning it between two existing standards of proof that courts commonly apply in civil motions: "The preliminary merits test that we propose would require a standard of proof that is not as strict as a *prima facie* case test, but more than simple proof that a triable issue exists".[FN122]

318 It appears that although the OLRC recommended some examination of the merits of a proposed class action, it was concerned about not setting the bar for certification too high. (Here, it should also be noted that the overall thrust of its report was to make class actions more available than was previously the case for representative actions under then Rule 75 of the *Rules of Practice*.)

319 In any event, in interpreting the phrase as it is used in s. 138.8 of the OSA, the point of departure is to consider the words that the legislature has chosen, in their ordinary and grammatical sense.

320 A "possibility" is something that is possible. "Possible" has been defined as "capable of existing, happening or being achieved" and "that may exist or happen, but that is not certain or probable".[FN123] Unlike a "probable" event, a possible event does not have to be more likely than not to occur, and may in fact be unlikely or improbable. If one were dealing only with the plaintiff's possibility of success at trial, one would ask whether the plaintiff "may" or "could" be successful. That is, is there evidence that, if believed, would support the plaintiffs action?

321 The word "possibility" in s. 138.8 is modified by the adjective "reasonable". There are two alternative meanings of the adjective "reasonable" that may be applicable. First, "reasonable" may relate to the degree of possibility of success that the plaintiff is required to establish at the motion — as the respondents contend, "reasonable" could be considered "fair, proper, just or moderate,"[FN124] or more than a "mere possibility" and equivalent to a "serious possibility".[FN125]

322 One might also consider the term "reasonable" as it is used in other legal contexts, as tied to reason, evidence and common sense. For example, a "reasonable doubt" in the criminal context is described as "not an imaginary or frivolous doubt, [not] based on sympathy or prejudice. A reasonable doubt is a doubt based on reason and common sense, which must logically be derived from the evidence or absence of evidence."[FN126]

323 In *RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199 (S.C.C.) at para. 127, the Supreme Court of Canada in interpreting of s. 1 of the *Charter*, noted that, "reason imports the notion of inference from evidence or established truths". In *J. (A.) v. Cairnie Estate* (1993), 105 D.L.R. (4th) 501 (Man. C.A.), leave to appeal to the S.C.C. refused 109 D.L.R. (4th) vii (note) (S.C.C.), the Manitoba Court of Appeal, in considering a

similar phrase in a judge-made rule (at pp. 513-14) stated:

> In this context, a "reasonable chance of success" means more than simply disclosing a cause of action sufficient to successfully resist an application to strike out the statement of claim.....It must be shown that there is something to the case so that if sent on to trial there is some realistic prospect that the action will succeed.

324 The word "reasonable" as it is used in s. 138.8 captures both meanings. "Reasonable" is used instead of "mere" to denote that there must be something more than a *de minimis* possibility or chance that the plaintiff will succeed at trial. The adjective "reasonable" also reminds the court that the conclusion that a plaintiff has a reasonable possibility of success at trial must be based on a reasoned consideration of the evidence.

325 There are other factors that in my view inform the test that the court should apply. First there is the context in which the determination is made, in a motion based on affidavit evidence and transcripts of examinations. The merits are to be evaluated at the motion for leave stage, with a view to determining whether there is a reasonable possibility of success *at trial.*

326 In undertaking this evaluation the court must keep in mind that there are *limitations* on the ability of the parties to fully address the merits because of the motion procedure. There is no exchange of affidavits of documents, no discovery (although affiants may be cross-examined) and witnesses cannot be summoned.[FN127] The credibility of a witness' evidence given by affidavit in a motion, irrespective of how searching an out-of-court cross-examination may be, can only be fully determined when it is tested in open court. As Master McLeod noted in *Caputo v. Imperial Tobacco Ltd.*, [2002] O.J. No. 3767 (Ont. Master) at para. 19:

> A judge weighing affidavit evidence does not have the same opportunity as a trial judge to look the witness in the eye and assess whether he or she is forthright and believable. There is, of course, opportunity to reject affidavit evidence because it is internally inconsistent, illogical, wanting in detail, contrary to documentary evidence, or otherwise contradicted.

327 As a result, the court must evaluate and weigh the evidence at hand, keeping in mind the restrictions of the motions process and what may be available to the parties in a trial. This does not mean that the court should speculate about what better evidence a party may advance when the matter reaches trial, or fill obvious gaps in a party's case; it does however require the court to assess the evidence realistically, having regard to which party has the burden of proof and access to evidence that may be brought forward at the preliminary stage, and paying attention to conflicts in the evidence that may not be capable of being determined in a motion, without a full assessment of a witness' testimonial credibility.

328 The respondents' counsel argued that a more onerous threshold is required in evaluating the merits as part of the statutory leave test because the overall purpose of these provisions is not to provide compensation, but to act as a deterrent to non-compliance with statutory disclosure requirements.

329 In my view, this argument cuts both ways. A threshold that is too difficult to meet will eventually have little deterrent value. An onerous threshold may unduly lengthen and complicate the leave procedure, resulting in the very litigation costs that the drafters of the legislation were seeking to avoid. The emphasis on deterrence over "a fully compensatory model" is in any event, reflected in the limits on damages[FN128]. The "deterrent" objective of the statutory remedy does not inform the leave standard; any class proceeding, by reason of the aggregation of claims that may be very small or even nominal, will serve both compensatory and deterrent functions.

330 The statutory leave provision is designed to prevent an abuse of the court's process through the commencement of actions that have no real foundation, actions that are based on speculation or suspicion rather than evidence.

331 The leave provision, working with the definition of the statutory cause of action and defences, requires plaintiffs to put forward the evidence they rely on as to the misrepresentation, and the extent of knowledge or participation required for non-core documents and liability for officers, and permits each proposed defendant to offer an account that may contradict the plaintiffs' allegations, or would fall within the terms of one or more of the defences afforded by the statute.

332 The evidence must be considered at the leave stage to determine whether the plaintiffs' action, after the respondents have had the opportunity to put forward evidence to support their defences and the positions of the parties have been explored in cross-examination, has a reasonable possibility of success.

333 In this regard it is not sufficient (as the respondents contend) to put forward defences which the plaintiffs must "overcome". Nor is the court required (as the plaintiffs assert) to leave any assessment of the defences to a trial. The court must consider all of the evidence put forward in the leave motion, including evidence supportive of any statutory defence. Because the onus of proof of a statutory defence is on the respondents, the court must be satisfied that the evidence in support of such a defence at the preliminary merits stage will foreclose the plaintiffs' reasonable possibility of success at trial.

334 Considering all of the factors noted above, I have approached part two of the leave test by asking myself whether, on the evidence that is before the court on this motion — that is the affidavits and transcripts of examinations, as well as the various documents that have been tendered as exhibits, and produced in response to undertakings and ordered to be produced during the cross-examination process — as well as reasonable inferences to be drawn from such evidence, and considering the onus of proof for each of the cause of action and the defences, as well as the limitations of evaluating credibility in a motion, is there a reasonable possibility that the plaintiffs will succeed at trial in proving:

(i) that IMAX's Form 10-K/Annual Report and/or its February and March press releases contained a misrepresentation as alleged by the plaintiffs;

(ii) with respect to Joyce and Gamble, that they authorized, permitted or acquiesced in the release of a document containing the misrepresentation;

(iii) if the alleged misrepresentations were contained only in the press releases (as non-core documents), that the Individual Defendants and Gamble knew of the misrepresentation, deliberately avoided acquiring knowledge or were guilty of gross misconduct in connection with their release;

and, with respect to the defences relied upon by each respondent, is there a reasonable possibility that such respondent will not be able to establish at trial both elements of the defence of "reasonable investigation"; namely:

(i) that the respondent conducted or caused to be conducted a "reasonable investigation"; and

(ii) at the time of the release of the document the respondent had no reasonable grounds to believe that the document contained the misrepresentation;

or, to the extent the expert reliance defence is applicable:

(i) that the respondent did not know that there had been a misrepresentation in the part of the document made on the authority of the expert; and

(ii) the respondent had no reasonable grounds to believe that there had been a misrepresentation in the part of

the document made on the authority of the expert.

335 With respect to the loss causation defence in s. 138.5(3), is there a reasonable possibility that the respondents will not be able to establish that the plaintiffs' entire loss is attributable to a change in the market price of securities that is unrelated to the misrepresentation?

336 While the statute speaks of leave in the general sense, that is leave to proceed with the action, I have approached this task individually with respect to each respondent. If on the evidence at this stage, the plaintiffs do not have a reasonable possibility of success at trial against a specific Individual Defendant or proposed defendant, the statutory action will not be permitted to proceed against that person.

337 I reach this conclusion because of the requirement under s. 138.8(2) for each defendant to deliver an affidavit setting forth the material facts upon which he or she intends to rely, and s. 138.8(3) providing for the examination of each affiant. Indeed in this case, each respondent filed an affidavit and has been cross-examined with respect to the statutory defences, and an examination of the defences as they would apply to each individually is possible and appropriate.

338 With respect to the application of the damages cap, the respondents assert that the court must consider whether to grant leave to assert a claim exceeding the damages cap for the individual respondents based on whether they authorized, permitted, acquiesced in or influenced the making of the misrepresentation while knowing that it was a misrepresentation (s. 138.7(2)).

339 As noted, the plaintiffs have pleaded facts that would exceed the damages cap only in respect of the Individual Defendants and Gamble. It is unnecessary at the leave stage to determine whether there is a reasonable possibility that the damages cap will be exceeded. The statutory threshold speaks of a reasonable possibility of success at trial, and does not invite the court to make specific findings with respect to the measure of success the plaintiffs might hope to achieve against a particular respondent. Provided that there is a reasonable possibility that the action will succeed against a particular respondent, the claim against that person should be permitted to proceed.

2. A Proposed "Part Three" of the Leave Test: Is it Necessary for the Plaintiffs to Plead Fraud or "Scienter"?

340 The respondents assert that, as part of the consideration of whether to grant leave to proceed with the statutory claim, the court must be satisfied that all of the elements of the statutory cause of action are properly pleaded. As part of their argument, the respondents assert that the plaintiffs have neglected to properly plead fraud, which they contend is an essential part of the statutory cause of action.

341 The Claim on its face pleads all of the elements of the statutory cause of action that are provided for in s. 138.3 of the OSA. That is, the Claim identifies the defendants as the Company and directors and officers of IMAX. The Claim pleads the making of the Representation, as well as other misstatements which are specifically identified, and alleges that they were made in the Annual Report, Form 10-K, and three press releases. The plaintiffs plead in what respect the Representation and misstatements were false or materially misleading. They plead that the August 9, 2006 press release revealed the truth about IMAX's revenue recognition for theatre systems. Finally, they plead the drop in IMAX's share price, which they allege to have resulted from August 9th disclosure.

342 All of the necessary elements for statutory liability for a misrepresentation by IMAX in its annual financial statements and Form 10-K (as core documents) are pleaded against all of the Individual Defendants and the proposed defendants. As against the Individual Defendants and Gamble are pleaded the additional elements of knowledge and participation necessary for their liability in respect of the press releases (as non-core documents) and to claim damages against them exceeding the damages cap.

343 The respondents assert that, as part of the pleading of the statutory cause of action, the plaintiffs must plead fraud, and in this regard, they must meet the more rigorous pleadings standard required when fraud is alleged. The respondents point to the requirement in respect of non-core documents, for the plaintiffs to prove, as an element of the offence, that the defendant possessed one of the required mental states set out in s. 138.4(1) (i.e., knowledge, wilful blindness or gross misconduct), and assert that such allegations are tantamount to the moral culpability required to establish fraudulent misrepresentation.

344 The respondents in effect are urging the court to adopt, in addition to the statutory leave test, the requirement for pleading "*scienter*" in fraud on the secondary market claims, as they are put forward in U.S. jurisdictions. They make reference to the statutory requirement in such actions requiring plaintiffs to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind", and case law, such as the decision of the U.S. Supreme Court in *Tellabs Inc v. Makor Issues & Rights Ltd.*, (2007) 127 S.Ct. 2499, interpreting the pleadings standard as requiring a factual pleading which establishes an inference of fraudulent intent that is as strong as any competing inferences of non-fraudulent intent.

345 As noted above, the legislative history of the Ontario statutory remedy reflects an informed decision to put in place a screening mechanism that differs from the U.S. pleadings-based approach. The CSA noted that the Ontario proposed legislation, as a specific and comprehensive code, was fundamentally different from Rule 10b-5, which is a general anti-fraud rule from which the courts have implied a right of action. The key element of intent or recklessness that a plaintiff must establish to succeed in a Rule 10b-5 action need not be proved in an Ontario statutory proceeding, where the mental element is the absence of due diligence.[FN129]

346 Accordingly, the respondents' argument that the Claim fails to properly plead all necessary elements of the statutory cause of action is rejected.

3. Applying Part Two of the Leave Test in this Case

347 In this part of the reasons, with reference to the evidence on the motion, I will consider whether the plaintiffs have established that they have a reasonable possibility of success at trial in their claims against IMAX and the individual respondents.

(a) The Misrepresentations

348 On July 20, 2007, IMAX filed its Form 10-K for the fiscal year ending December 31, 2006 which included a restatement of its financial results for the period 2002 to the third quarter of 2006 (the "Restatement"). IMAX acknowledged, among other things, that the use of MEA accounting in its theatre system sales and lease transactions was an error under GAAP, and that each theatre system ought to have been viewed as a single deliverable, with revenues deferred until the entire system had been installed and was fully operational. According to the Form 2006 10-K, theatre system revenues of US$17.5 million (and net earnings of US$9.7 million) were prematurely recorded in fiscal 2005.

349 The Restatement resulted in revenue relating to 14 theatre system installations being moved to later periods. Ten installations from Q4 2005 on which revenue had been recognized in the 2005 10-K were moved to later years; eight were moved to 2006, and two to subsequent periods.

350 IMAX's EPS for 2005 went from US$0.40, as reported in the 2005 10-K, to US$0.20 following the Restatement.

351 The fact that IMAX restated its financials for 2005 and admitted that it had not complied with GAAP supports the plaintiffs' claim of misrepresentation. The evidence in the motion for leave was uncontradicted that

IMAX's assertions in its 2005 Form 10-K and March 2006 press release, that its revenues for 2005 were prepared and reported in accordance with GAAP and that such revenues met or exceeded the earnings guidance previously issued by IMAX, were false, and having been corrected in the Restatement, were material. Accordingly, the plaintiffs will have a reasonable possibility of success at trial in establishing a misrepresentation.

352 It is also uncontested that each of the respondents (except for Joyce and Gamble) was a director of IMAX at the material time, and would accordingly, together with the Company, be liable for the misrepresentations in the 2005 Form 10-K, unless a statutory defence is available.

353 With respect to Joyce and Gamble, it is necessary for the plaintiffs to establish that there is a reasonable possibility that they will prove at trial that these individuals permitted, authorized or acquiesced in the release of the 10-K. In view of their roles as CFO and Vice-President, Finance and the evidence of their direct involvement in IMAX's year-end accounting and that they signed the document, this hurdle is met.

354 In the present case, misrepresentations are alleged to have been communicated in the February and March press releases. Liability for misrepresentation in a non-core document would require evidence that a defendant knew, deliberately avoided knowledge or was guilty of gross misconduct in relation to the misrepresentation.

355 However, the same alleged misrepresentations were communicated in the 2005 10-K, which is a "core document". As such, statutory liability would follow from the misrepresentations in the Form 10-K, and it is unnecessary to consider for the purpose of this motion whether the misrepresentations were in fact contained in the February and March press releases, and whether the requisite mental element was present in respect of the respondents.

(b) The "Reasonable Investigation" Defence

356 The position of the defendants and proposed defendants is that these proceedings arise out of an accounting judgment made by IMAX in completing its financial statements for 2005. The respondents assert that the accounting issues are complex and that they conducted a reasonable investigation and reasonably relied on the advice of IMAX's auditors when the Company recognized revenue from the sale and lease of theatre systems and reported its financial performance for fiscal 2005, even if ultimately it erred in its financial reporting and revenue recognition for that year.

357 The bulk of the evidence in the leave motion was directed toward the conduct of IMAX and each of its directors as well as Mr. Joyce and Ms Gamble as officers, relevant to the reporting of IMAX's financial results for Q4 2005, in comparison with its reporting in prior periods, in particular in relation to revenue recognition for theatre system sales and leases. Such evidence is relevant to the "reasonable investigation" and "expert reliance" defences.

(i) The Reasonable Investigation Defence Defined

358 Each of the respondents relies on s. 138.4(6) of the OSA, which provides that it is a defence to an action in relation to a misrepresentation if the defendant proves that (i) before the release of the document containing the misrepresentation, he *conducted or caused to be conducted a reasonable investigation*; and (ii) at the time of the release of the document he had *no reasonable grounds to believe that the document contained the misrepresentation* (emphasis added).

359 The "reasonable investigation" defence requires the application of objective criteria on two points. The defendant must establish that an investigation that he undertook or caused to be undertaken was reasonable in the circumstances, and he must have had no reasonable grounds to believe that there was a misrepresentation.

360 In determining whether an investigation was reasonable, the court is directed to consider all relevant cir-

cumstances, including a non-exhaustive list of relevant circumstances (s. 138.4(7)), which include (as they are applicable in this case):

> (b) the knowledge, experience and function of the [defendant];
>
> (c) the office held, if the person was an officer;
>
> (d) the presence or absence of another relationship with the responsible issuer, if the person was a director;
>
> (e) the existence, if any, and the nature of any system designed to ensure that the responsible issuer meets its continuous disclosure obligations;
>
> (f) the reasonableness of reliance by the [defendant] on the responsible issuer's disclosure compliance system and on the responsible issuer's officers, employees and others whose duties would in the ordinary course have given them knowledge of the relevant facts;
>
> . . .
>
> (h) in respect of a report, statement or opinion of any expert, any professional standards applicable to the expert;
>
> (i) the extent to which the [defendant] knew, or should reasonably have known, the content and medium of dissemination of the document...; [and]
>
> (j) ...the role and responsibility of the [defendant] in the preparation and release of the document ... or the ascertaining of the facts contained in that document.

361 The first part of the "reasonable investigation" defence involves a consideration of such matters as the measures and systems in place at the Company respecting the recognition of revenue for financial reporting, the roles and responsibilities of various persons in the revenue recognition and reporting processes, policies and procedures, and oversight and assurance measures, including the performance of audit functions by PwC.

362 Factors applicable to the individual respondents are also relevant, including their qualifications, knowledge and experience and their roles and responsibilities within or in relation to the organization and in connection with the Company's financial reporting.

363 The second part of the "reasonable investigation" defence involves a consideration of the specific knowledge of each respondent and the knowledge someone in his or her position ought to have had with respect to the misstatement of the Company's financial results. The second part of the test focuses on a consideration of the true state of affairs — what was known to whom, and which of the respondents, if any, ought to have known that when the Representation and misstatements were made, they were untrue?

364 In the present case, there is the added fact that revenue recognition had been elevated to an issue of concern within IMAX by reason of the Delhi Post. The accusations contained in the Delhi Post, which were known to all of the respondents, as well as the actions that followed, are part of the overall circumstances that must be considered, in evaluating both the reasonableness of the investigation associated with the financial reporting for 2005, and the knowledge and conduct of the individual respondents.

(ii) Does the Business Judgment Rule Apply to the Reasonable Investigation Defence?

365 The business judgment rule is a deferential standard of review that courts apply to business decisions. In *People's Department Stores Ltd. (1992) Inc., Re*, [2004] 3 S.C.R. 461 (S.C.C.), the Supreme Court concluded that the business judgment rule is relevant to determining whether directors have satisfied their statutory duty of care under s. 122(1)(b) of the CBCA.[FN130] In respect of a director's duty to act reasonably and fairly, deference will be accorded to the board's decision where the decision taken is within a range of reasonableness (at paras. 63-67 and citing Weiler J.A.'s description of the business judgment rule in *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (Ont. C.A.), at 192).

366 The business judgment rule was most recently affirmed in the Supreme Court's reasons in *BCE Inc., Re*, [2008] 3 S.C.R. 560 (S.C.C.), where the Court considered an appeal of court approval of a plan of arrangement for the purchase of its shares through a leveraged buy-out, that was opposed by debentureholders claiming oppression. The business judgment rule was applied to afford deference to directors where they had to make decisions involving competing interests. In discharging their statutory duty under s.122(1)(a) of the CBCA to act honestly and in good faith with a view to the best interests of the corporation, it was sufficient that the directors had considered the interests of the debentureholders, even if the ultimate decision prejudiced them. The Court emphasized that the duty owed by directors is to the corporation, not to stakeholders. While these interests may coincide, where they do not, stakeholders have a reasonable expectation that the directors act in the best interests of the corporation, not to a particular group of stakeholders (para. 66).

367 In *Kerr v. Danier Leather*, the Supreme Court rejected the application of the business judgment rule to the legal duty of disclosure in the context of a forecast contained in the prospectus of the defendant. Binnie J. noted, at paras. 54 and 55:

> On the broader legal proposition, however, I agree with the appellants that while forecasting is a matter of business judgment, disclosure is a matter of legal obligation. The Business Judgment Rule is a concept well-developed in the context of *business* decisions but should not be used to qualify or undermine the duty of disclosure.
>
> . . .
>
> However, the disclosure requirements under the Act are not to be subordinated to the exercise of business judgment.... It is for the legislature and the courts, not business management, to set the legal disclosure requirements.
>
> [Emphasis in original.]

368 The Court in *Kerr v. Danier Leather* concluded that the justifications for the application of the business judgment rule, namely the relative expertise of managers and the need for reasonable risk-taking, do not apply to decisions concerning disclosure (at para. 58), and observed that the business judgment rule had been rejected by U.S. courts in the context of proxy and supplemental disclosures.[FN131]

369 In the present case, the respondents seek to supplement the statutory reasonable investigation defence under s. 138.4(6) of the OSA with the protection of the common law business judgment rule as set out in *Peoples*. While they acknowledge that the Supreme Court has "curtailed the application" of the rule to statutory disclosure obligations, they submit that the rule would be applicable in considering the "reasonableness of the process which [was] followed in determining the proper revenue recognition for Q4 2005". The respondents submit that the due diligence defence should be interpreted consistently with the statutory duties of directors under s. 122(1) of the CBCA[FN132] and s. 134(1)[FN133] of the Ontario *Business Corporations Act* R.S.O. 1990, c. B.16 ("OBCA"), and that the deference afforded by the business judgment rule should apply to the OSA as it has been applied in in-

terpreting these statutory duties.

370 The defect in this argument is that the OBCA and CBCA statutory duties referred to by the respondents are duties that are owed to the corporation, while the disclosure obligations under the OSA protect the interests of shareholders, prospective investors and the investment market. The business judgment rule has been applied in determining whether directors have acted reasonably and fairly in the interests of the corporation; that is, in discharging their statutory and common law duties of good faith and diligence that they owe as directors to the corporation.

371 The secondary market misrepresentation regime creates strict liability for material misrepresentations by a reporting issuer, with a reverse onus on defendants to establish a reasonable investigation or other defence. The defences are defined in the OSA, which provides a non-exhaustive list of factors that the court is to consider in determining whether a defence is made out

372 To "read in" the business judgment rule is both unnecessary and inconsistent with the legislative approach to the statutory remedy and defences.

373 In an article commenting on *Kerr v. Danier Leather*, Jeremy D. Fraiberg and Robert Yalden suggest that the business judgment rule has the potential to conflict with the s. 138.4(6) reasonable investigation defence. They note three important distinctions between the rule and the statutory defence:

> First and most importantly, the reasonable investigation defence applies *after* there has been a determination that a document or public oral statement contains a misrepresentation or that there has been a failure to make timely disclosure. The business judgment rule would normally be thought to apply in determining whether there has in fact been a disclosure violation (*i.e., before* the defence needs to be invoked). Second, under the business judgment rule, deference is due if the impugned decision falls within a range of reasonableness. Under the reasonable investigation defence, however, a person or company must prove that they had *no* reasonable grounds to believe that there was a disclosure violation — arguably a stricter standard. Third, were the business judgment rule to apply, the burden of proof would typically be on the plaintiff to establish that no reasonable decision-making process was followed, whereas the burden of proof is on the defendant in invoking the reasonable investigation defence.[FN134]

374 While the authors conclude that the extension of the rule would not render the statutory defence moot in all circumstances, they suggest that it would be moot in many cases.[FN135]

375 I agree with these observations. The business judgment rule, that recognizes that business decisions of directors are entitled to deference, has a role to play in cases involving the fiduciary and statutory duties of directors owed to a corporation, in evaluating the reasonableness of the business decisions that directors are called upon to make from day to day. Such decisions are entitled to deference, even if subsequent events prove that they were harmful to the corporation or to certain corporate stakeholders, provided that they fall within a range of reasonableness.

376 There is no compelling reason for a court to apply the business judgment rule when considering the reasonable investigation defence in the context of a statutory remedy for secondary market misrepresentation. Statutory disclosure obligations exist to protect investors and the capital markets. There is a mandatory obligation to issue accurate financial statements, with strict liability for any material misrepresentation subject to the prescribed defences. The onus of establishing the defences is on the defendants, and the terms of the defences are prescribed by the statute. Reading in a standard of deference to a director's decisions would be both unnecessary and inconsistent with the scheme and purpose of the statutory remedy.

(iii) Positions of the Parties: Reasonable Investigation Defence

377 Turning to the evidence, the respondents assert that the defence of "reasonable investigation" has been established to the extent that there is no reasonable possibility that the plaintiffs could succeed in this action at trial.

378 They contend that the Company had in place a "well-organized and diligent internal accounting process", with written revenue recognition policies that were revised from time to time and approved by PwC. They rely on the audit process, which involved extensive dialogue between IMAX management (including Ms Gamble and Mr. Joyce) and PwC, which they characterize as "active and transparent", and management's full response to PwC's request for extensive explanation and documentation for the Company's proposed revenue recognition treatment of the Q4 2005 installations.

379 With respect to the Delhi Post, the respondents contend that appropriate steps were taken by the Company and the audit committee to conduct investigations, which concluded that the Company's recognition of revenue for the Delhi installation in Q3 2005 was appropriate, despite the fact that the silver screen was not in place.

380 The respondents rely on the involvement of PwC throughout the process. PwC suggested the application of MEA accounting, which was accepted. PwC had approved the Company's most recent policy on revenue recognition and had provided its opinion that internal controls over financial reporting were effective. PwC gave a "clean" audit opinion.

381 The plaintiffs rely on the fact that IMAX and its auditors acknowledged in the Restatement that IMAX's internal accounting controls were in fact deficient. Management had come to a "final decision" to recognize revenue on all 14 theatre systems, an approach that the respondents did not in this motion seek to justify as correct, and only adopted the MEA accounting approach when it was apparent that the impact on reported revenue would still permit the Company to achieve its projected earnings. The accounting that was ultimately applied was inconsistent with IMAX's internal policies and past accounting practices. Even the Company's revised policy on revenue recognition after the Dehli Post investigation was inconsistent with the MEA accounting treatment that was applied.

382 With respect to reliance on the Company's auditors, the plaintiffs argue that responsibility for the accounting was on IMAX management and not on the auditors, as reflected in the management representation letter, and acknowledged in the Copland Affidavit. There were deficiencies in management's approach that were identified by PwC, and it was only at their insistence that fulsome transaction memos were prepared, that oral agreements with customers were documented and that the recognition of revenue on all 14 theatre installations in Q4 2005 was reconsidered.

383 The plaintiffs point to evidence that management was aware of the true status of the installations, which included buildings that were not yet fully constructed and a requirement to move a system to another location. While PwC required proper documentation of revenue recognition on theatre systems, they were not provided with all relevant information on the status of the installations until the following year, during the Restatement process. Ms Coulman acknowledged that having this additional information might have affected PwC's opinion with respect to revenue recognition for 2005.

384 The plaintiffs contend that the Delhi Post had raised concerns about the proper recognition of revenue where a theatre was not yet open. While investigations were undertaken, they did not include contact with anyone outside the Company, including the customer. Although the investigation reports concluded that there had been no wrongdoing, they confirmed that the Company had not been following its own written policies for revenue recognition. The fact that the anonymous posting had been made is important, as it raised the matter of revenue recognition to a matter of heightened concern, including at the level of the Board.

(iv) Analysis of the "Reasonable Investigation" Defence

385 The function of the court at the leave stage is not to determine the action on the merits, but to consider the evidence on a preliminary basis to evaluate whether the plaintiffs have a reasonable possibility of success. If the matter progresses to trial, the discovery process will expand the information and evidence that is ultimately available to the trial judge, who will in any event have the advantage of hearing the witnesses, including persons whose evidence may not have been before the court at the leave stage. The case may change substantially, as the matter proceeds toward trial.

386 Accordingly, it is not appropriate or necessary for the court to make specific findings. Any observations I make on the evidence at this stage are of necessity preliminary and any findings of fact provisional.

a. The Company. The Individual Defendants and Gamble

387 The first part of the "reasonable investigation" defence involves a consideration of whether the defendants "conducted or caused to be conducted a reasonable investigation". That is, considering all of the circumstances, including the particular factors in s. 138.4(7), was the investigation by or at the direction of the defendants of the substance of the misrepresentation reasonable? The substance of the misrepresentation in this case was the financial reporting as to revenue recognition and compliance with GAAP.

388 The Individual Defendants and Gamble were directly involved in the financial accounting process. The CEO and CFO have affirmative obligations in relation to the financial reporting of the corporation and its disclosure. In accordance with regulatory requirements[FN136] Mr. Gelfond, Mr. Wechsler and Mr. Joyce certified that the 2005 10-K presented fairly, in all material respects, IMAX's financial condition. The 10-K was also signed by Ms Gamble as Vice-President, Finance and Controller and Principal Accounting Officer. The CEOs and CFO also provided certifications in the 10-K respecting their responsibility for establishing and maintaining disclosure controls and procedures and internal controls over financial reporting and the status of such controls.

389 According to Mr. Joyce the purpose of internal controls was to set up processes and procedures to safeguard the assets of the Company, to better assure proper financial reporting and accounting policies are adhered to and to make GAAP compliance more likely.[FN137]

390 Mr. Joyce and Ms Gamble were directly involved in the gathering of information and preparation of the IMAX financial statements and the transaction memos that were prepared for PwC. They were part of the management team that had arrived at a decision to recognize revenue on all 14 theatre systems, before PwC "pushed back" and recommended that MEA accounting be considered, and they were directly involved in discussions with PwC. They were responsible for providing a report to the audit committee on the 2005 accounting, which was presented by Ms Gamble on March 1, 2006.

391 The evidence at this stage suggests that there were deficiencies in the internal accounting at IMAX in respect of revenue recognition on theatre systems. The documentation of management's revenue recognition analysis initially was inadequate, notwithstanding that following the Delhi Post, the importance of proper documentation of the proposed revenue recognition had been emphasized by PwC, and the internal policy had been revised. Agreements with customers to ensure "installation" by year end were oral until PwC requested they be documented.

392 The lack of internal controls and effective communication between departments at IMAX during the 2005 year end accounting are admitted in the Restatement as having contributed to the accounting errors. The Individual Defendants and Gamble had direct responsibility for the Company's accounting and internal controls. All of this is evidence inconsistent with their having performed a "reasonable investigation" in connection with the subject of the alleged misrepresentations — the status of theatre system installations, the recognition of revenue and compliance with GAAP.

393 The second branch of the "reasonable investigation" defence involves the actual knowledge or what a defendant should reasonably have known at the time of the alleged misrepresentation.

394 The evidence at this stage suggests that the Individual Defendants and Gamble were aware of the actual status of the theatre system installations from the email and other communications they received in Q4 2005. As such they knew that 14 theatre system installations had not been "completed" (as claimed in the February press release). As the persons directly responsible for the Company's accounting, these parties, and those under their supervision, controlled the information that was provided to PwC.

395 The accounting that was initially proposed, to recognize all revenues on theatre installations, even where the silver screen had not been installed, depended on a conclusion that the remaining obligations were "perfunctory and inconsequential". PwC could not agree with the Company's conclusion In this regard. The adoption of EITF 00-21 was proposed by PwC, and accepted by IMAX management, notwithstanding that it appeared to be inconsistent with the Company's policies, past practices and disclosures, including a memo from IMAX's GAAP expert, during the Delhi Post investigation, that EITF 00-21 would not apply to IMAX's theatre systems.

396 With respect to all of the respondents, there will be an issue at trial as to the extent to which they were entitled to rely upon the opinions and actions of PwC.

397 For the Individual Defendants and Gamble and (as there is no doubt that these respondents were its "directing minds") for the Company, there is a reasonable possibility that they will not succeed in the defence by reason of their own participation in the accounting, the admitted lack of internal controls, their knowledge of the status of the installations and their knowledge and awareness of the Company's past practices, policies and disclosures respecting revenue recognition.

398 For these reasons, I have concluded that the evidence concerning the "reasonable investigation" defence is not sufficient to preclude the possibility of success at trial against the Company, the Individual Defendants and Gamble.

399 I have also concluded that, in respect of Joyce and Gamble, there is a reasonable possibility on the evidence, in particular as to their direct involvement in the 2005 accounting decisions and reporting, that the plaintiffs will succeed at trial in establishing that they "authorized, permitted or acquiesced" in the release of the documents containing the misrepresentation. This is an essential element for their potential liability under s. 138.3 as "officers".

b. The Outside Director Respondents

400 The other respondents, Braun, Copland, Fuchs, Girvan, Leebron and Utay, were outside directors of IMAX. They are named as proposed defendants only in respect of a remedy under s. 138.5 of the OSA, and there are no allegations that they authorized, permitted or acquiesced in the making of the misrepresentation or influenced the making of the misrepresentation while knowing that it was a misrepresentation. Accordingly, under s. 138.7, their liability for damages would be capped at the greater of $25,000 and 50% of the aggregate of their compensation from the responsible issuer in the year preceding the misrepresentation[FN138].

401 The question with respect to these respondents is whether there is a reasonable possibility that the defence of "reasonable investigation" will not succeed at trial for any or all of them. Again, the onus of proof under the OSA is on each person who relies on this defence. If the court accepts at this stage that the defence will be made out at trial, then leave will not be granted to proceed against the respondent. If the court determines that there is a reasonable possibility that the defence will not be made out, then the respondent will remain in the action as a defendant. The determination of this issue is not a final decision on the merits with respect to the potential liability of each of

the external director respondents.

402 Again, there are two branches to the "reasonable investigation" defence: whether the individual conducted or caused to be conducted a "reasonable investigation", and whether at the time the misrepresentation was made, he or she had no reasonable grounds to believe that the document contained a misrepresentation.

403 The parties at this stage of the litigation did not offer any expert evidence as to the standard of care for board and audit committee members with respect to financial reporting and disclosure. Indeed, there was little argument addressed to the relative potential liability of the various respondents, except for the respondents' assertion in their factum that the reasonable investigation defence is "particularly accessible" for the respondents who were outside directors, and who, under s.138.4(7) had no day-to-day "other relationship with the responsible issuer".

404 In this regard, the respondents cite *Cadrin c. R.*, [1998] F.C.J. No. 1926 (Fed. C.A.) which distinguished between inside and outside directors for liability under the *Income Tax Act* for failure to deduct or withhold remittances at source. DeCary J.A. noted at para. 5:

> The outside director who gets involved to the extent of his role in the business and his abilities meets the standard of care in principle. If he ensures that the business is viable before investing money in it, if he surrounds himself with reliable and competent people who undertake the day-to-day management of the business, if he stays generally informed about what is happening, if nothing happens which should arouse suspicion about the payment of the corporation's liabilities, if he acts quickly when problems arise, he should not as a general rule be held liable.

405 This statement emphasizes the ability of an external director to rely on management, except when something occurs that should arouse the director's suspicion, so that he should personally take action. While this statement is helpful in describing the standard of care of an external director in connection with such day-to-day matters that are the responsibility of management, such as the payment of taxes,[FN139] it may be insufficient to describe the standard of care of an outside director in respect of secondary market misrepresentation.

406 Unlike their indirect role in ensuring the proper payment of taxes, the audit committee and the board of directors have a specific and direct role to play in respect of an issuer's financial disclosure. Annual statements of public issuers must be approved by the board of directors before they are filed, and such approval may not be delegated to the audit committee of the board.[FN140] The IMAX 2005 Form 10-K was signed by all members of the Board personally or under power of attorney, and accordingly the financial statements of IMAX were approved by each of the external director respondents.

407 S. 138.4(7) includes as relevant circumstances to be considered when determining whether an investigation was reasonable, (b) the "knowledge, experience and function" of the person, and (j) his "role and responsibility" in the preparation and release of the document containing the misrepresentation.

408 In considering the potential application of the "reasonable investigation" defence to the remaining respondents, it is important to keep in mind that the external directors were not part of management and accordingly were not involved in gathering information or preparing the Company's accounting. According to the evidence available at this time, they had the same information as PwC as to the true status of the theatre system installations.

409 It is also important to note that, while each of the external director respondents filed an affidavit, the affidavits, except for that of Kenneth Copland, as chair of the audit committee, are *pro forma*, and do not address or differentiate between the specific circumstances or individual knowledge of each director; rather the deponents refer to and adopt as accurate the evidence contained in the Copland Affidavit as to IMAX's accounting, the processes followed and the PwC audit, and attest to their reliance on IMAX management and PwC to properly prepare IMAX's

financial statements for public disclosure and regulatory filing.

• *Audit Committee Members and Girvan*

410 In contrast to the other Board members, the audit committee members, Copland, Braun and Leebron, had specific responsibilities for oversight of the Company's financial reporting.

411 Audit committee members are required by OSC rules[FN141] to be independent and financially literate[FN142]. The audit committee is "a committee of a board of directors to which the board delegates its responsibility for oversight of the financial reporting process", and its roles include helping directors meet their responsibilities and increasing the credibility and objectivity of financial reports. The audit committee is directly responsible for overseeing the work of the external auditors, including the resolution of disagreements between management and the external auditors regarding financial reporting.[FN143]

412 According to the affidavits of all of the respondents, the audit committee met regularly with PwC, including meetings without management (although the evidence in the cross-examinations was that there was only one meeting in 2006 prior to the release of IMAX's 2005 financial statements, which took place on March 1st).

413 While Mr. Girvan was not a member of the audit committee in 2005 and 2006 (he had been a member of the committee from September 1994 to June 2004), he attended their meetings regularly and, more importantly, he received and reviewed the information that was presented to the audit committee in connection with the year end accounting, in the form of the reports from management, PwC and Mr. Vance. Mr. Girvan was also notified of the Delhi Post and participated in the Company's response.

414 The audit committee and Mr. Girvan knew that there were outstanding obligations in respect of a number of the theatre systems where revenue was to be recognized in Q4 2005. These were disclosed in the report of management, presented by Ms Gamble, as well as the transaction memos, copies of which were provided to the members of the Board. That is, while they did not have all the details, they were aware that several of the theatre system installations were incomplete.

415 The audit committee and Mr. Girvan also knew that management had originally recognized *all initial* revenues on the installations, and that PwC disagreed with this approach. This was detailed in Ms Coulman's report, and recorded by Mr. Vance as a significant deficiency in his SOX report. The audit committee and Mr. Girvan were made aware that there was a change in the accounting approach for revenue recognition on theatre systems. Although Ms Coulman certified that the Company had not adopted any new accounting policies, both she and Mr. Vance observed that there were "changed circumstances" in the Company's theatre system installations.

416 The "changed circumstances" were that, of the 14 theatre systems in respect of which revenue was recognized in Q4 2005, ten had not been fully installed in the quarter. Whether or not these were in fact changed circumstances (the Company had recorded revenue for theatre system installations in a quarter on at least two occasions in 2005, when the silver screen had not been installed, including in respect of the Delhi installation), this was the reason offered for the change in approach.

417 The affidavits of the audit committee members do not address their specific roles and involvement in the year end accounting, except to say that they relied on management and PwC to complete their duties, and that "upon investigation" they were advised that management had used appropriate efforts to ensure that the Company properly applied GAAP, and that "upon investigation" the audit committee was advised by PwC during regular meetings that they had a full opportunity to advise the audit committee of any issues regarding management.

418 The evidence is that the audit committee met on March 1, 2006 for the purpose of reviewing the Company's

financial statements. By that point the Company had already issued the February press release reporting its anticipated financial results.

419 The respondents refused in the motion proceedings to produce the minutes of audit committee and board meetings from November 10, 2005 up to and including the board meeting when the decision was made to restate financial results[FN144] (although audit committee and board minutes after August 6, 2006 were produced in response to a different undertaking).[FN145]

420 While they were not responsible for performing IMAX's accounting, the members of the audit committee nevertheless had an independent role to scrutinize the accounting decisions that were made, and Girvan, in attending their meetings and reviewing the information that the audit committee members received, had become part of the oversight process. The audit committee and Girvan were aware of the disagreement between IMAX management and PwC. They were also aware that the Company was facing what were described as "changed circumstances" where it was proposed to recognize revenue on numerous theatre system installations that had not been completed.

421 A critical factor in this case is that, at the time of their consideration and approval of 2005 IMAX's financial statements, the audit committee members and Girvan were aware of the allegations of improper revenue recognition, and practices by IMAX personnel that were contained in the Delhi Post. The Delhi installation had also involved a theatre system where certain outstanding obligations, including installation of the silver screen, had not been completed. The detailed investigation reports of Vance and Lister had been provided to the members of the audit committee; in fact Mr. Vance's investigation had been commissioned by the audit committee. Although the reports concluded that there had been no fraud, they disclosed that the Company had not been following Us internal policies with respect to revenue recognition on theatre system installations.

422 The evidence was that revenue recognition had been a topic of discussion at numerous Board meetings. The audit committee members and Girvan were aware of the decision to market the Company for sale, and of the details of the Delhi Post allegations and investigations. The evidence of each of these individuals as to the "reasonable investigation" into the representations in IMAX's 10-K as to its revenue recognition and compliance with GAAP was limited to reliance on IMAX management and PwC. The circumstances that existed at the time may well have called for closer scrutiny on the part of the audit committee members and Girvan by reason of their positions, responsibilities and knowledge.

423 On the evidence that was available at the motion, I am satisfied that the plaintiffs have a reasonable possibility of success at trial against the respondents Copland, Leebron, Braun and Girvan. This does not mean that the plaintiffs are *likely* to succeed against some or all of these individuals; only that there is sufficient evidence to meet the threshold for including them as defendants in this action, or put another way, having regard to the reverse onus, these respondents have not persuaded me at this stage that their defence will of necessity succeed at trial. Again, there will be an important issue as to the extent to which these respondents or any of them were entitled to rely upon the opinions and advice of PwC.

• *The Remaining Directors: Utay and Fuchs*

424 In their factum the plaintiffs did not seek to attribute to the remaining respondents Marc Utay and Michael Fuchs any actual or constructive knowledge of a misrepresentation. These individuals were Board members who were not on the audit committee. As such, they had a limited role in respect of the Company's financial reporting. They were not party to the discussions of the audit committee and did not see the reports provided to the audit committee by management and by PwC. Before they approved the financial statements they knew that both the audit committee and PwC were satisfied with the Company's revenue recognition for 2005.

425 With respect to the Delhi Post investigation, the Board members received a report from Mr. Copland as

chair of the audit committee that did not contain details as to the specific accounting issue. The report concluded that there was no wrongdoing, and went on to affirm that "the Company's internal controls and reporting structure appear well-designed to discover these types of accounting fraud should they have occurred".

426 Considering all of the relevant circumstances in connection with the respondents Utay and Fuchs, I conclude that on the evidence that has been put forward in the motion for leave, there is no reasonable possibility of success against these individuals at trial.

(c) The Expert Reliance Defence

427 Section 138.4(11) provides for the expert reliance defence as follows:

> A person or company, other than an expert, is not liable in an action under section 138.3 with respect to any part of a document..... that *includes, summarizes or quotes from a report, statement or opinion made by the expert* in respect of which the responsible issuer obtained the written consent of the expert to the use of the report, statement or opinion, if the consent had not been withdrawn in writing before the document was released..., if the person or company proves that,
>
> (a) the person or company did not know and had no reasonable grounds to believe that there had been a *misrepresentation in the part of the document...made on the authority of the expert*, and
>
> (b) the part of the document.... fairly represented the report, statement or opinion made by the expert.
>
> [Emphasis added.]

428 The respondents submit that the Representation pleaded in the Claim (that IMAX's 2005 revenue was reported in accordance with GAAP, and met or exceeded the earnings guidance) as it appears in the 2005 Form 10-K and March press releases can only have been inferred or repeated from the audited 2005 financial statements "prepared for the Company by PwC", and that accordingly the expert reliance defence would apply.

429 The respondents refer to the decisions in *Benson v. Third Canadian General Investment Trust Ltd.* (1993), 14 O.R. (3d) 493 (Ont. Gen. Div. [Commercial List]) (where the court endorsed a director's reliance on legal advice that may in fact turn out to be incorrect, provided that the advice was not given for an "illegal design"), and in *CW Shareholdings Inc. v. WIC Western International Communications Ltd.* (1998), 39 O.R. (3d) 755 (Ont. Gen. Div. [Commercial List]) at p. 775, where the court applied the "business judgment rule" and upheld a business decision made "in reasonable and informed reliance on the advice of financial and legal advisors appropriately retained and consulted in the circumstances". These cases stand for the proposition that reasonable reliance on legal or other professional advice will assist a director in establishing that he has met his statutory and fiduciary duties to the corporation.

430 However, the expert reliance defence under s. 138.4, like the "reasonable investigation" defence, is drafted in specific terms. It is not a general defence that is available whenever a misrepresentation is made by a person who has reasonably relied on expert advice, but is of much narrower application. In this regard, the cases cited by the respondents are not helpful in defining the particular defence.

431 By its terms, the expert reliance defence applies to any part of a document that "includes, summarizes or quotes from a report, statement or opinion made by the expert". Arguably, it is not available as the respondents suggest, as a general defence to representations of a reporting issuer that were "inferred or repeated from" a report of an expert.

432 The respondents are also incorrect in stating that the financial statements were prepared by PwC; they were prepared by IMAX management and then audited by PwC. While the Form 10-K attaches the report of IMAX's auditors, this is the only part of the 2005 10-K that appears to "include, summarize or quote from" an expert. The expert reliance defence would not appear to extend to the representations in IMAX's Form 10-K as to its revenues and compliance with GAAP.

433 Similarly, the expert reliance defence would not appear to apply to the press releases which did not "include, summarize or quote from" an opinion of PwC.

434 The wording of this section suggests that it is intended to apply where the misrepresentation at issue originates with the expert, in circumstances where it has been communicated to the secondary market by the person or company on the authority of the expert.

435 The expert reliance defence would not appear to apply to the alleged misrepresentations in this case, which originated with the Company. The question of reliance on PwC is more appropriately considered as part of the reasonable investigation defence, as noted above.

436 If I am wrong in this conclusion (and here it should be recalled that for the purposes of this motion, I am not deciding the case on its merits), and the expert reliance defence would be available as a defence to the misrepresentations in this case, it would only apply where a defendant establishes that he or she did not know and had no reasonable grounds to believe that there had been a misrepresentation. This would raise the same considerations as are applicable to the reasonable investigation defence; that is, as to the investigation carried out by or on the direction of each respondent, and his or her knowledge of the circumstances.

437 My analysis and conclusions when considering the expert reliance defence would accordingly be the same with respect to each of the respondents, as above with respect to the "reasonable investigation" defence. The evidence in this preliminary assessment of the merits would not foreclose the plaintiffs from a reasonable possibility of success at trial in their claim for secondary market misrepresentation against each of the respondents, except for Mr. Fuchs and Mr. Utay.

(d) Loss Causation

438 Section 138.5(1) of the OSA provides the method for assessing damages in favour of a person who acquired an issuer's securities after the release of a document containing a misrepresentation. Section 138.5(3) provides that "assessed damages shall not include any amount that the defendant proves is attributable to a change in the market price of securities that is unrelated to the misrepresentation".

439 While the parties have put forward contradictory expert evidence on the "loss causation" issue, the respondents did not seriously contend that this is an issue on which the plaintiffs would fail to meet the leave threshold. The onus on this issue, under s. 138.5(3), is on the defendants to establish the extent to which any loss was due to a change in the market price of securities that was unrelated to the misrepresentation (including for example the respondents' assertion that the IMAX share price fell as a result of the announcement of its failed merger efforts, and not as a result of the revelation of a misrepresentation.)

440 The plaintiffs' expert Lawrence Kryzanowski offered the opinion that the decline in the price of IMAX's securities following the August 9, 2006 announcement was at least in part attributable to the disclosures concerning IMAX's accounting, and that the announcement that IMAX had not to date been successful in completing an acquisition or merger accounted for, at most, approximately 25% of the shareholder value lost following the August 9th press release,[FN146]

441 The plaintiffs' second expert, Robert Comment, observed that it was plausible that the reason that no acquirer was willing to pay the premium to market price sought by the Boad was that, in the course of their due diligence, potential acquirers examined the correspondence from the SEC, reviewed IMAX's application of MEA accounting, decided that IMAX had or may have overstated its earnings and revenue under GAAP, and concluded that IMAX may have exposed itself thereby to regulatory action.[FN147] He also noted that it was plausible that 100% of the stock-price drop immediately following the press release of August 9th was due to information corrective of the alleged fraud, in which case Professor Kryzanowki's assumption that only 75% was corrective of the alleged fraud would be conservative in the sense of being a pro-defendant assumption.[FN148]

442 The opinion of the respondents' expert, Denise Neumann Martin, is that there is no basis to conclude that any of the August 10th stock price reaction was attributable to a disclosure of the alleged misrepresentation. She concluded that a substantial majority of the price drop the drop in IMAX's securities resulted from the announcement that the Company had failed to find a merger partner.[FN149]

443 The onus on the issue of loss causation, under OSA s. 138.5(3), is on a defendant to establish the extent to which any loss was due to a change in the market price of securities that was unrelated to the misrepresentation. The evidence of the respondents (including the cross-examinations of the plaintiffs' experts) did not eliminate the force and effect of the plaintiffs' expert opinions, and accordingly the plaintiffs' reasonable possibility of success at trial on this issue.

IV. Conclusion

444 For the foregoing reasons I have concluded that the plaintiffs have met the test for leave under s. 138.8 of the OSA to pursue a statutory claim for misrepresentation in the secondary market against the defendants and the proposed defendants Braun, Copland, Girvan, Leebron and Gamble. An order will go granting leave to plead the causes of action contained in Part XXIII.1 of the OSA as against such persons, and permitting such proposed defendants to be added as defendants in the existing action. The motion for leave with respect to the proposed defendants Utay and Fuchs is dismissed.

445 If the parties are unable to agree on costs of this motion, costs may be addressed in the attendance to be arranged through the court office that will be required to settle the terms of the certification order, as well as any directions necessary to implement the orders in these motions.

Motion granted in part.

FN1 System for Electronic Document Analyste and Retrieval (SEDAR) is a filing system developed for the Canadian Securities Administrators.

FN2 IMAX adopted U.S. GAAP; all references in these reasons to GAAP relate to U.S. GAAP.

FN3 These are the estimated losses of the proposed representative plaintiffs, according to the opinion of the plaintiffs' expert: Affidavit of Lawrence Kryzanowski sworn May 30, 2007 ("Kryzanowski Affidavit"), Moving Parties' Supplementary Motion Record, Tab 2. The plaintiffs depose in their own affidavits that their losses are $2,026 (Silver) and $7,500 (Cohen), based on the difference between the purchase price of their IMAX shares and, in the case of Silver, their sale price, and In the case of Cohen, the value at the date he swore his affidavit in February 2007: Affidavit of Marvin Neil Silver sworn February 26, 2007 ("Silver Affidavit") and Affidavit of Cliff Cohen sworn February 21, 2007 ("Cohen Affidavit"), Moving Parties' Motion Record Tabs 3 and 4.

FN4 While all of the other provincial and territorial jurisdictions in Canada have now incorporated the statutory

cause of action into their securities legislation, Ontario was the only province to have such provisions in force when these proceedings were commenced.

FN5 IMAX Corporation Form 10-K for the fiscal year ending December 31, 2005, Affidavit of Kenneth Copland sworn September 8, 2007 ("Copland Affidavit"), Exh. "I", Motion Record of the Responding Parties, Vol. V. ("IMAX 2005 10-K").

FN6 Annual Report pursuant to Section 13 or 15(d) of the *Securities Exchange Act of 1934*, 15 U.S.C. 78(a) filed with the United States Securities and Exchange Commission ("SEC").

FN7 Report of Rosen & Associates Limited, Exhibit A to the Affidavit of Lawrence Rosen sworn February 23, 2007 ("First Rosen Report"), p. 12, and Report of Rosen & Associates Limited, Exhibit A to the Affidavit of Lawrence Rosen sworn August 2, 2007 ("Second Rosen Report"), p. 17, in each case quoting CICA Handbook, *Revenue*, Section 3400 s. 20, Oct. 1986.

FN8 First Rosen Report, pp. 13-15; Second Rosen Report, pp. 17-20.

FN9 SEC Staff Accounting Bulletin No. 101, 17 CFR Part 211 ("SAB 101"), Copland Affidavit para. 40 and Exh. "L".

FN10 SAB 101, citing *Fraudulent Financial Reporting: 1987-1997 An Analysis of U.S. Public Companies*, sponsored by the Committee of Sponsoring Organizations (COSO) of the Treadway Commission.

FN11 SEC Staff Accounting Bulletin No. 104, 17 CFR Part 211 ("SAB 104"), Copland Affidavit para. 48 and Exh. "M".

FN12 EITF 00-21, Copland Affidavit paras. 35, 36 and 40 and Exh. "Q".

FN13 The Financial Accounting Standards Board (FASB) establishes standards of financial accounting for the private sector that are recognized as authoritative by the SEC and the American Instituted of Certified Public Accountants.

FN14 First Rosen Report, p. 16; Second Rosen Report, p. 21.

FN15 Moving Parties' Fourth Supplementary Motion Record Vol. 6, p. 1812.

FN16 Moving Parties' Fourth Supplementary Motion Record Vol. 2, p. 635.

FN17 Moving Parties' fourth Supplementary Motion Record, Vol. 2, Tab 70, p. 52.

FN18 Copland Affidavit, para. 46.

FN19 Moving Parties' Fourth Supplementary Motion Record, Vol. 6, pp. 1833-1840.

FN20 IMAX 2004 10-K, Copland Affidavit, Exh. "H".

FN21 Copland Affidavit, paras. 51 and 52.

FN22 Cross-examination of Kathryn Gamble ("Gamble Cross-examination"), Q. 1152; Cross-examination of Francis Joyce ("Joyce Cross-examination"), pp. 145 and 255.

FN23 Copland Affidavit, Exh. "R".

FN24 Letter from the SEC to IMAX Corporation dated September 20, 2006, Moving Parties' Fourth Supplementary Motion Record, Vol. 1, Tab 19-I-B.

FN25 *Sarbanes-Oxley Act of 2002*, Pub.L. 107-204, [116 Stat. 745] ("Sarbanes-Oxley" or "SOX") is legislation introduced in July 2002 to provide for enhancements to corporate governance and disclosure obligations of publicly traded companies in the United States.

FN26 Moving Parties' Fourth Supplementary Motion Record, Vol. 2, Tab 55, p. 637D.

FN27 Vance Report to the Audit Committee, Moving Parties' Fourth Supplementary Motion Record, Vol. 4, Tab 145, p. 1476.

FN28 Moving Parties' Fourth Supplementary Motion Record, Vol. 2, Tab 55A.

FN29 R. 39.03 Examination of Lisa Coulman ("Coulman Examination"), pp. 34, 44, 48

FN30 Coulman Examination, pp. 46-47

FN31 Cross-examination of Richard Gelfond ("Gelfond Cross-examination"), pp. 45 and 46.

FN32 Moving Parties' Fourth Supplementary Motion Record, Vol. 4, Tab 76B.

FN33 Kathryn Gamble was included in the emails beginning in December 2005.

FN34 Amending Agreement No. 1 between IMAX Corporation and Lark International Multimedia Limited dated December 31, 2005, Plaintiffs' Fourth Supplementary Motion Record, Vol. 3, Tab 75-4-B, pp. 972-973; Amending Agreement No. 2 between IMAX Corporation and Suvar-Kazan Company Ltd. dated October 12, 2005, Moving Parties' Fourth Supplementary Motion Record, Vol. 3, Tab 75-5-B, pp. 1021-1022; Amending Agreement No. 4 between IMAX Corporation and Suvar-Kazan Company Ltd. dated December 31, 2005, Moving Parties' Fourth Supplementary Motion Record, Vol. 3, Tab 75-5-C, p. 1024; Amending Agreement No. 2 between IMAX Corporation and Evergreen Vintage Aircraft Inc., dated December 31, 2005, Moving Parties' Fourth Supplementary Motion Record, Vol. 3, Tab 75-8-C, pp. 1178-1179 and Amending Agreement No. 2 between IMAX Corporation and Jafif Penhos Elias dated November 29, 2005, Moving Parties' Fourth Supplementary Motion Record, Vol. 3, Tab 75-9-C, pp. 1237-1238.

FN35 Mr. Joyce suggested that these arrangements were not intended to ensure completion of theatre system installations in the fourth quarter (Joyce Cross-examination, pp. 266-268); Mr. Gelfond suggested that the incentives encouraged theatre owners to complete construction and open their theatres, with the result that the IMAX brand would be promoted, and to advance the date when film revenue would be received (Gelfond Cross-examination, pp. 91-92 and 306-308) In fact, the deferral of payments resulted in reduced cash flow to IMAX, and film royalties were not payable until training had been completed and the theatre was open to the public. The incentives did not appear to accelerate the opening of the theatres to the public (several of the theatres did not open until well into 2006 and even 2007). In his report on the Delhi Post, Mr. Lister had referred to the payments as "financial incentives for clients to install systems by dates prior to year-end".

FN36 Moving Parties' Fourth Supplementary Motion Record, Vol. 6, Tab 214.

FN37 Copland Affidavit, para. 67 (and as stated in the IMAX 2005 Form 10-K).

FN38 Moving Parties' Fourth Supplementary Motion Record, Vol. 2, Tab 27, pp. 481-493.

FN39 Coulman Examination, p. 195.

FN40 Copland Affidavit, paras. 80 and 81.

FN41 Joyce Cross-examination, p. 393

FN42 Gamble Cross-examination, Q. 163 and 164.

FN43 Gamble Cross-examination, Q. 159.

FN44 In a memo to Mr. Joyce dated December 1, 2005 entitled "Revenue Recognition Policy Compliance", Ms Gamble noted that Company policy required the commissioner, the project manager and the Director to sign off on a theatre system installation close-out report where the technology department concluded that the installation of the theatre system was substantially complete, meeting full working standards according to the terms of Schedule A of the Agreement. She also noted however, "in the past, outstanding items such as the glass cleaning machine or the use of a white sheet were evaluated and deemed inconsequential to the overall installation" (Moving Parties' Fourth Supplementary Motion Record, Vol. 6, Tab 151).

FN45 In a memo dated January 16, 2006, Ms Gamble outlined the steps management considered in Q3 2005 in recognizing revenue on the New Delhi, India installation. She noted that the entire purchase price had been received, and that the theatre system installation report signed by the commissioner, the project manager and the project director had been reviewed and indicated the installation was substantially complete. She also noted with respect to the two items outstanding that were IMAX's responsibility, the silver screen and glasses cleaning machine, "Management deemed the above two outstanding items as inconsequential since completing these obligations were immaterial from an overall cost perspective and perfunctory in terms of performance." There had been no client concerns expressed and the client had signed a certificate of acceptance (Moving Parties' Fourth Supplementary Motion Record, Vol. 4, Tab 119).

FN46 Joyce Cross-examination, p. 432.

FN47 Gamble Cross-examination, Q. 1273.

FN48 Moving Parties' Fourth Supplementary Motion Record, Vol.6, Tab 214.

FN49 Gamble Cross-examination, Q. 212 and 534.

FN50 Gelfond Cross-examination, pp. 45 and 46.

FN51 Coulman Examination, Qs. 271-272.

FN52 Coulman Examination, Q. 325.

FN53 Answers to Undertakings, Qs. 152 and 153, Moving Parties' Fourth Supplementary Motion Record, Vol. 1, Tab 1-A.

FN54 Copland Cross-examination, p. 190.

FN55 Copland Affidavit, Exh. "R", pp. 1855-1866.

FN56 Copland Affidavit, Exh. "R", pp. 1867-1883.

FN57 Copland Affidavit, Exh. "S".

FN58 Cross-examination of Neil Braun ("Braun Cross-examination"), pp. 97-98.

FN59 Braun Cross-examination, pp. 110-111.

FN60 Braun Cross-examination, p. 56.

FN61 Cross-examination of David Leebron, pp. 63-66.

FN62 Cross-examination of Kenneth Copland ("Copland Cross-examination"), p. 56.

FN63 Cross-examination of Garth Girvan ("Girvan Cross-examination"), pp. 95-96.

FN64 Girvan Cross-examination, p. 76.

FN65 Cross-Examination of Bradley Wechsler ("Wechsler Cross-examination"), p. 129; Minutes of March 8, 2006 Board Meeting, Moving Parties' Fourth Supplementary Motion Record, Vol. I, Tab 7.

FN66 Gelfond Cross-Examination, pp.120-122.

FN67 IMAX 2005 10-K, p. 100.

FN68 IMAX 2005 10-K, p. 55.

FN69 Emails of December 19, 2005; Moving Parties' Fourth Supplementary Motion Record, Vol. 4, Tab 76-B; IMAX Theatre Installation Close-Out dated October 19, 2006, Moving Parties' Fourth Supplementary Motion Record, Vol. 5, Tab 147-5-H.; Answer to Undertaking #219, Moving Parties' Fourth Supplementary Motion Record, Vol. 1, Tab 1-B.

FN70 Emails December 2005; Moving Parties' Fourth Supplementary Motion Record, Vol. 4, Tab 76-B.

FN71 Emails of December 6, 2005; Moving Parties' Fourth Supplementary Motion Record, Vol. 4, Tab 76-B.

FN72 Coulman Cross-examination, pp. 87-93.

FN73 Coulman Cross-examination, p. 138.

FN74 Gelfond Cross-examination, pp. 122-123.

FN75 Gelfond Cross-examination, p. 126.

FN76 Gelfond Cross-examination, pp. 124-126.

FN77 Answer to Undertaking #84, Moving Parties' Fourth Supplementary Motion Record, Vol. 1, Tab I-A.

FN78 Wechsler Cross-examination, pp. 150-157.

FN79 Wechsler Cross-examination, pp. 151-152.

FN80 Coulman Cross-examination, pp. 108-110.

FN81 Wechsler Cross-examination, pp. 152-154.

FN82 Moving Parties' Fourth Supplementary Motion Record, Tab 19-I-A.

FN83 Gelfond Cross-examination, p. 156

FN84 Wechsler Cross-examination, p. 155.

FN85 IMAX Press Release dated August 9, 2006, First Robb Affidavit, Exh. "M".

FN86 Copland Affidavit, Exhs. "U" and "V".

FN87 Affidavit of Scott Selig sworn August 2, 2007 ("Selig Affidavit"), Moving Parties' Second Supplementary Motion Record (#1), Tab 1, Exh. "K".

FN88 Copland Affidavit, para. 87.

FN89 IMAX 2006 10-K, Report of Independent Registered Public Accounting Firm, p. 70.

FN90 P. Anisman, J. Howard, W. Grover and J.P. Williamson, *Federal Proposals for a Securities Market Law of Canada*, 1979.

FN91 *Civil Liability for Continuous Disclosure Documents Filed under the Securities Act — Request for Comments*, 7 OSCB 4910.

FN92 Letter from the President and CEO of the TSE in the Toronto Stock Exchange, Committee on Corporate Disclosure, *Final Report: Responsible Corporate Disclosure: A Search for Balance* (1997) ("Allen Report").

FN93 Canadian Securities Administrators Notice 53-302 Report of the Canadian Securities Administrators, *Proposal for a Statutory Civil Remedy for investors in the Secondary Market and Response to the Proposed Change to the Definitions of "Material Fact" and "Material Change"* (2000) 23 OSCB 1, at pp. 1-2.

FN94 Toronto Stock Exchange Committee on Corporate Disclosure, *Toward Improved Disclosure: A Search for*

Balance in Corporate Disclosure (1995) ("Allen Interim Report").

FN95 *Supra*, note 92.

FN96 *Supra* note 93.

FN97 *Supra* note 93, Executive Summary.

FN98 *Supra* note 93 (2000) 23 OSCB 6.

FN99 See "Some Comparisons Between Class Actions in Canada and the U.S.: Securities Class Actions, Certification and Costs", Philip Anisman and Gary Watson, *The Canadian Class Action Review*, Vol. 3, No. 2, July 2006, 467-526, at p. 521: "An action brought in the United States Federal Court based on Rule 10b-5 under the *Securities Exchange Act of 1934* requires a plaintiff to allege that the misrepresentation was fraudulent and to satisfy the pleading standards of the PLSRA [*Private Securities Litigation Reform Act of 1995*]. The plaintiffs claim must identify each alleged misleading statement, the reasons why it was misleading and all facts informing an allegation made on information and belief and must state with particularity facts giving rise to a "strong inference" that each defendant acted with *scienter*, that is, fraudulently".

FN100 (2000) 23 OSCB 8.

FN101 (2000) 23 OSCB 9.

FN102 Allen Interim Report, para. 6.61.

FN103 (2000) 23 OSCB 1.

FN104 *Ontario Securities Commission Rule 52-801 — Implementing National Instrument 51-102 Continuous Disclosure Obligations*, O.S.C. Rule 51-801, (*April 2, 2004*); *Companion Policy 51-801 CP — To Ontario Securities Commission Rule 51-801 Implementing National Instrument 51-102 Continuous Disclosure Obligations*, O.S.C. 51-801CP, (2004) 27 OSCB 3476, at s.1.2, *Securities Act* R.R.O. 1990, Reg. 1015, s. 3.

FN105 National Instrument 51-102 Continuous Disclosure Obligations, O.S.C. NI 51-102 (2004) 27 OSCB 3441, s. 1.1.

FN106 Silver Affidavit and Cohen Affidavit.

FN107 Affidavit of Michael Robb sworn February 22, 2007 ("First Robb Affidavit"), Moving Parties' First Motion Record, Tab 2; Affidavit of Scott Selig sworn August 2, 2007 ("Selig Affidavit"), Moving Parties' Second Supplementary Motion Record (#1), Tab 1; Affidavit of Michael Robb sworn January 25, 2008 ("Second Robb Affidavit"), Moving Parties' Second Supplementary Motion (#2), Tab 1; Affidavit of Michael Robb sworn February 12, 2008 ("Third Robb Affidavit"), Moving Parties' Third Supplementary Motion Record, Tab 1.

FN108 First Rosen Report.

FN109 Second Rosen Report.

FN110 Kryzanowski Affidavit, Moving Parties' Supplementary Motion Record, Tab 2.

FN111 Affidavit of Robert Comment sworn September 18, 2007 ("Comment Affidavit"), Moving Parties' Reply Motion Record, Tab 1.

FN112 The affidavits of the respondents other than Kenneth G. Copland are variously sworn September 10, 11 and 12, 2007 and are contained in the Motion Record of the Responding Parties, Vol. I, Tabs 1 to 9.

FN113 Copland Affidavit, Motion Record of the Responding Parties, Vol. III to VIII.

FN114 Affidavit of Denise Neumann Martin sworn September 7, 2007 ("Neumann Martin Affidavit"), Motion Record of the Responding Parties, Vol. I, Tab 10.

FN115 Affidavit of Margarette Livie sworn September 11, 2007, Motion Record of the Responding Parties, Vol. II.

FN116 Lax J. observed in *Ainslie v. CV Technologies Inc.* (2008), 93 O.R. (3d) 200 (Ont. S.C.J.) (leave to appeal to the Divisional Court granted on other grounds (Ont. S.C.J.)) that such examinations may not be compelled in proceedings under s. 138.8.

FN117 In that case the court referred to three Ontario committee reports, including the Alien Committee Report of 1997 to assist in the interpretation of the OSA provisions respecting prospectus disclosure, and in particular the distinction between material facts and material changes.

FN118 *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 239; *Business Corporations Act*, R.S.O. 1990, C.B.16, s. 246(2).

FN119 Ontario Law Reform Commission, Report on Class Actions (1982) ("OLRC Report"), Vol. III, p. 862

FN120 OLRC Report, pp. 312-313.

FN121 OLRC Report, p. 425; Respondents' Leave Factum, para. 181.

FN122 OLRC Report, p. 324.

FN123 Concise Oxford English Dictionary, 11th ed.

FN124 Black's Law Dictionary, 6th ed. (St. Paul: West, 1990)

FN125 See *Chan v. Canada (Minister of Employment & Immigration)*, [1995] 3 S.C.R. 593 (S.C.C.), where, in the context of a refugee claim and the determination of the objective test of whether the claimant would face persecution, the Supreme Court equated the phrase "reasonable possibility" with "serious possibility", and certainly more than a "mere possibility".

FN126 *R. v. Lifchus*, [1997] 3 S.C.R. 320 (S.C.C.).

FN127 In this case the parties agreed to a Rule 39.03 examination of a non-party, however there is no right to such an examination (*Ainslie v. CV Technologies, inc.*, *supra* note 115).

FN128 See OSA, s. 138.7.

FN129 See also Winkler J.'s decision in *Carom* at pp. 787-790 for a description of the development of and specific requirements of U.S. 10b-5 actions.

FN130 S. 122(1) of the CBCA provides: Every director and officer of a corporation in exercising their powers and discharging their duties shall (a) act honestly and in good faith with a view to the best interests of the corporation; and (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

FN131 Binnie J. cited *Re Anderson, Clayton Shareholders' Litigation*, 519 A.2d 669 (Del. Ch. 1986).

FN132 See note 130.

FN133 S. 134(1) of the OBCA provides: Every director and officer of a corporation in exercising his or her powers and discharging his or her duties to the corporation shall, (a) act honestly and in good faith with a view to the best interests of the corporation; and (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

FN134 Jeremy D. Fraiberg and Robert Yalden, "*Kerr v. Danier Leather Inc.*: Disclosure, Defence and the Duty to Update Forward-Looking Information" (2006), 43 Can. Bus. L.J. 106 at 128.

FN135 Fraiberg and Yalden, at 129.

FN136 Ss. 906 and 302 of the *Sarbanes-Oxley Act of 2002*.

FN137 Joyce Cross-examination, p. 30.

FN138 OSA, s. 138.7.

FN139 *Income Tax Act*, s. 227.1(3) provides "[a] director is not liable...where he exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances."

FN140 See note 104.

FN141 Multilateral Instrument 52-110 *Audit Committees* (2004) 27 OSCB 3252, Joint Book of Exhibits, Vol 1, Tab 1 ("Multilateral Instrument 52-110").

FN142 Financial literacy is defined as having "the ability to read and understand a set of financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of the issues that can reasonably be expected to be raised by the issuer's financial statements", however "it is not necessary for a member to have a comprehensive knowledge of GAAP and GAAS to be considered financially literate." *Ibid.* (2004) 27 OSCB 3266.

FN143 Multilateral Instrument 52-110, ss. 2.1 and 2.2.

FN144 Answers to Undertakings, Q. 101, Moving Parties' Fourth Supplementary Motion Record, Tab 1-A.

FN145 Moving Parties' Fourth Supplementary Motion Record, Tab 23A-K.

FN146 Kryzanowski Affidavit, para 37.

FN147 Comment Affidavit, paras 22-25.

FN148 Comment Affidavit, para. 20.

FN149 Neumann Martin Affidavit, para. 24.

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2000 CarswellAlta 622, 19 C.B.R. (4th) 1

Canadian Airlines Corp., Re

In the Matter of Canadian Airlines Corporation and Canadian Airlines International Ltd.

The Bank of Nova Scotia Trust Company of New York, As Trustee for the Holders of Senior Secured Notes and Montreal Trust Company of Canada, As Collateral Agent for the Holders of Senior Secured Notes, Plaintiffs and Canadian Airlines Corporation, Canadian Airlines International Ltd., Canadian Regional Airlines Ltd., Canadian Regional Airlines (1998) Ltd. and Canadian Airlines Fuel Corporation Inc., Defendants

Alberta Court of Queen's Bench

Paperny J.

Judgment: May 4, 2000
Docket: Calgary 0001-05071, 0001-05044

Counsel: *G. Morawetz*, *A.J. McConnell* and *R.N. Billington*, for Bank of Nova Scotia Trust Co. of New York and Montreal Trust Co. of Canada.

A.L. Friend, Q.C., and *H.M. Kay, Q.C.*, for Canadian Airlines.

S. Dunphy, for Air Canada and 853350 Alberta Ltd.

R. Anderson, Q.C., for Loyalty Group.

H. Gorman, for ABN AMRO Bank N.V.

P. McCarthy, for Monitor - Price Waterhouse Cooper.

D. Haigh, Q.C., and *D. Nishimura*, for Unsecured noteholders - Resurgence Asset Management.

C.J. Shaw, for Airline Pilots Association International.

G. Wells, for NavCanada.

D. Hardy, for Royal Bank of Canada.

2000 CarswellAlta 622, 19 C.B.R. (4th) 1

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Senior secured noteholders brought application for appointment of receiver over collateral on same day that airline was granted CCAA protection — Noteholders constituted separate class that intended to vote against plan and had voted to realize on security — Noteholders brought application for order lifting stay of proceedings against them to allow for appointment of receiver and manager over assets and property charged in their favour, and for order appointing court officer with exclusive right to negotiate sale of assets or shares of airline's subsidiary — Application dismissed — In determining whether stay should be lifted, court had to balance interests of all parties who stood to be affected — This would include general public, which would be affected by collapse of airline — Evidence indicated that liquidation would be inevitable were noteholders to realize on collateral — Objective of stay was not to maintain literal status quo but to maintain situation that was not prejudicial to creditors while allowing airline "breathing room" — It was premature to conclude that plan would be rejected or that proposal acceptable to noteholders could not be reached — Evidence indicated that airline was moving to effect compromises swiftly and in good faith — Appointment of receiver to manage collateral would negate effect of stay and thwart purposes of Act — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Senior secured noteholders brought application for appointment of receiver over collateral on same day that airline was granted CCAA protection — Noteholders constituted separate class that intended to vote against plan and voted to realize on security — Noteholders brought application for order lifting stay of proceedings against them to allow for appointment of receiver and manager over assets and property charged in their favour, and for order appointing court officer with exclusive right to negotiate sale of assets or shares of airline's subsidiary — Application dismissed — Proposal that airline make interim payments for use of security was not viable — Suggestion that other airline financially supporting plan should pay out airline's debts to noteholders was without legal foundation — Existence of solvent entity financially supporting plan with view to obtaining economic benefit for itself did not create obligation on that entity to pay airline's creditors — Noteholders could not require sale of assets or shares of airline's subsidiary — Subsidiary was not debtor company but was itself property of airline — Marketing of subsidiary's assets would constitute "proceeding in respect of petitioners' property" within meaning of s. 11 of Act — Even if marketing of subsidiary's assets did not so qualify, court has inherent jurisdiction to grant stays in relation to proceedings against third parties where exercise of jurisdiction is important to reorganization process — In deciding whether to exercise inherent jurisdiction, court weighs interests of insolvent corporation against interests of parties who would be affected by stay — Threshold of prejudice required to persuade court not to exercise inherent jurisdiction to grant stay is lower than threshold required to persuade court not to exercise discretion under s. 11 of Act — Noteholders failed to meet either threshold — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Cases considered by *Paperny J.*:

Alberta-Pacific Terminals Ltd., Re (1991), 8 C.B.R. (3d) 99 (B.C. S.C.) — considered

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

Citibank Canada v. Chase Manhattan Bank of Canada (1991), 5 C.B.R. (3d) 165, 2 P.P.S.A.C. (2d) 21, 4 B.L.R. (2d) 147 (Ont. Gen. Div.) — referred to

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — referred to

Meridian Development Inc. v. Toronto Dominion Bank, [1984] 5 W.W.R. 215, 52 C.B.R. (N.S.) 109, 32 Alta. L.R. (2d) 150, 53 A.R. 39, 11 D.L.R. (4th) 576 (Alta. Q.B.) — referred to

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20, 72 C.R. (N.S.) 20 (Alta. Q.B.) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282 (Ont. C.A.) — referred to

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) — considered

Philip's Manufacturing Ltd., Re (1992), 9 C.B.R. (3d) 25, 67 B.C.L.R. (2d) 84, 4 B.L.R. (2d) 142 (B.C. C.A.) — considered

Philip's Manufacturing Ltd., Re (1992), 15 C.B.R. (3d) 57 (note), 143 N.R. 286 (note), 70 B.C.L.R. (2d) xxxiii (note), 15 B.C.A.C. 240 (note), 27 W.A.C. 240 (note), 6 B.L.R. (2d) 149 (note) (S.C.C.) — referred to

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 80 C.B.R. (N.S.) 98 (B.C. S.C.) — considered

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257 (B.C. S.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

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

Generally — considered

s. 11 — considered

s. 11(4) — considered

APPLICATION by holders of senior secured notes in corporation for order lifting stay of proceedings against them in *Companies' Creditors Arrangement Act* proceeding to allow for appointment of receiver and manager over assets and property charged in their favour and for order appointing court officer with exclusive right to negotiate sale of assets or shares of corporation's subsidiary.

***Paperny J.* (orally):**

1 Montreal Trust Company of Canada, Collateral Agent for the holders of the Senior Secured Notes, and the Bank of Nova Scotia Trust Company of New York, Trustee for the holders of the Senior Secured Notes, apply for

the following relief:

1. In the CCAA proceeding (Action No. 0001-05071) an order lifting the stay of proceedings against them contained in the orders of this court dated March 24, 2000 and April 19, 2000 to allow for the court-ordered appointment of Ernst & Young Inc. as receiver and manager over the assets and property charged in favour of the Senior Secured Noteholders; and

2. In Action No. 0001-05044, an order appointing Ernst & Young Inc. as a court officer with the exclusive right to negotiate the sale of the assets or shares of Canadian Regional Airlines (1998) Ltd.

2 Canadian Airlines Corporation ("CAC") is a Canadian based holding company which, through its majority owned subsidiary Canadian Airlines International Ltd. ("CAIL") provides domestic, U.S.-Canada transborder and international jet air transportation services. CAC also provides regional transportation through its subsidiary Canadian Regional Airlines (1998) Ltd. ("Canadian Regional"). Canadian Regional is not an applicant under the CCAA proceedings.

3 The Senior Secured Notes were issued under an Indenture dated April 24, 1998 between CAC and the Trustee. The principal face amount is $175 million U.S. As well, there is interest outstanding. The Senior Secured Notes are directly and indirectly secured by a diverse package of assets and property of the CCAA applicants, including spare engines, rotables, repairables, hangar leases and ground equipment. The security comprises the key operational assets of CAC and CAIL. The security also includes the outstanding shares of Canadian Regional and the $56 million intercompany indebtedness owed by Canadian Regional to CAIL.

4 Under the terms of the Indenture, CAC is required to make an offer to purchase the Senior Secured Notes where there is a "change of control" of CAC. It is submitted by the Senior Secured Noteholders that Air Canada indirectly acquired control of CAC on January 4, 2000 resulting in a change of control. Under the Indenture, CAC is then required to purchase the notes at 101 percent of the outstanding principal, interest and costs. CAC did not do so. According to the Trustee, an Event of Default occurred, and on March 6, 2000 the Trustee delivered Notices of Intention to Enforce Security under the Bankruptcy and Insolvency Act.

5 On March 24, 2000, the Senior Secured Noteholders commenced Action No. 0001-05044 and brought an application for the appointment of a receiver over their collateral. On the same day, CAC and CAIL were granted CCAA protection and the Senior Secured Noteholders adjourned their application for a receiver. However, the Senior Secured Noteholders made further application that day for orders that Ernst & Young be appointed monitor over their security and for weekly payments from CAC and CAIL of $500,000 U.S. These applications were dismissed.

6 The CCAA Plan filed on April 25, 2000, proposes that the Senior Secured Noteholders constitute a separate class and offers them two alternatives:

1. To accept repayment of less than the outstanding amount; or

2. To be unaffected by the CCAA Plan and realize on their security.

7 On April 26th, 2000, the Senior Secured Noteholders met and unanimously rejected the first option. They passed a resolution to take steps to realize on the security.

8 The Senior Secured Noteholders argue that the time has come to permit them to realize on their security. They have already rejected the Plan and see no utility in waiting to vote in this regard on May 26th, 2000, the date set by this court.

9 The Senior Secured Noteholders submit that since the CCAA proceedings began five weeks ago, the following has occurred:

-interest has continued to accrue at approximately $2 million U.S. per month;

-the security has decreased in value by approximately $6 million Canadian;

-the Collateral Agent and the Trustee have incurred substantial costs;

-no amounts have been paid for the continued use of the collateral, which is key to the operations of CAIL;

-no outstanding accrued interest has been paid; and- they are the only secured creditor not getting paid.

10 The Senior Secured Noteholders emphasize that one of the end results of the Plan is a transfer of CAIL's assets to Air Canada. The Senior Secured Noteholders assert that the Plan is sponsored by this very solvent proponent, who is in a position to pay them in full. They are argue that Air Canada has made an economic decision not to do so and instead is using the CCAA to achieve its own objectives at their expense, an inappropriate use of the Act.

11 The Senior Secured Noteholders suggest that the Plan will not be impacted if they are permitted to realize on their security now instead of after a formal rejection of the Plan at the court-scheduled vote on May 26, 2000. The Senior Secured Noteholders argue that for all of the preceding reasons lifting the stay would be in accordance with the spirit and intent of the CCAA.

12 The CCAA is remedial legislation which should be given a large and liberal interpretation: See, for example, *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3d) 165 (Ont. Gen. Div.). It is intended to permit the court to make orders which will effectively maintain the status quo for a period while the struggling company attempts to develop a plan to compromise its debts and ultimately continue operations for the benefit of both the company and its creditors: See for example, *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.), and *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.).

13 This aim is facilitated by the power to stay proceedings provided by Section 11 of the Act. The stay power is the key element of the CCAA process.

14 The granting of a stay under Section 11 is discretionary. On the debtor's initial application, the court may order a stay at its discretion for a period not to exceed 30 days. The burden of proof to obtain a stay extension under Section 11(4) is on the debtor. The debtor must satisfy the court that circumstances exist that make the request for a stay extension appropriate and that the debtor has acted, and is acting, in good faith and with due diligence. CAC and CAIL discharged this burden on April 19, 2000. However, unlike under the Bankruptcy and Insolvency Act, there is no statutory test under the CCAA to guide the court in lifting a stay against a certain creditor.

15 In determining whether a stay should be lifted, the court must always have regard to the particular facts. However, in every order in a CCAA proceeding the court is required to balance a number of interests. McFarlane J.A. states in his closing remarks of his reasons in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]):

> In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and problems.

16 Also see Blair J.'s decision in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.P.C. (3d) 339 (Ont. Gen. Div.), for another example of the balancing approach.

17 As noted above, the stay power is to be used to preserve the status quo among the creditors of the insolvent company. Huddart J., as she then was, commented on the status quo in *Re Alberta-Pacific Terminals Ltd.* (1991), 8 C.B.R. (3d) 99 (B.C. S.C.). She stated:

> The status quo is not always easy to find... Nor is it always easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the prairie provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered.

18 Further commentary on the status quo is contained in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 80 C.B.R. (N.S.) 98 (B.C. S.C.). Thackray J. comments that the maintenance of the status quo does not mean that every detail of the status quo must survive. Rather, it means that the debtor will be able to stay in business and will have breathing space to develop a proposal to remain viable.

19 Finally, in making orders under the CCAA, the court must never lose sight of the objectives of the legislation. These were concisely summarized by the chambers judge and adopted by the British Columbia Court of Appeal in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]):

> (1) The purpose of the CCAA is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and court.
>
> (2) The CCAA is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and employees.
>
> (3) During the stay period, the Act is intended to prevent manoeuvres for positioning amongst the creditors of the company.
>
> (4) The function of the court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.
>
> (5) The status quo does not mean preservation of the relative pre-stay debt status of each creditor. Since the companies under CCAA orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, the preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.
>
> (6) The court has a broad discretion to apply these principles to the facts of th particular case.

20 At pages 342 and 343 of this text, Canadian Commercial Reorganization: Preventing Bankruptcy (Aurora: Canada Law Book, looseleaf), R.H. McLaren describes situations in which the court will lift a stay:

1. When the plan is likely to fail;

2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);

3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence);

4. The applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;

5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passage of time;

6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

21 I now turn to the particular circumstances of the applications before me.

22 I would firstly address the matter of the Senior Secured Noteholders' current rejection of the compromise put forward under the Plan. Although they are in a separate class under CAC's Plan and can control the vote as it affects their interest, they are not in a position to vote down the Plan in its entirety. However, the Senior Secured Noteholders submit that where a plan offers two options to a class of creditors and the class has selected which option it wants, there is no purpose to be served in delaying that class from proceeding with its chosen course of action. They rely on the *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.) at 115, as just one of several cases supporting this proposition. *Re Philip's Manufacturing Ltd.* (1992), 9 C.B.R. (3d) 25 (B.C. C.A.) at pp. 27-28, leave to appeal to S.C.C. refused (1992), 15 C.B.R. (3d) 57 (note) (S.C.C.), would suggest that the burden is on the Senior Secured Noteholders to establish that the Plan is "doomed to fail". To the extent that Nova Metal and Philip's Manufacturing articulate different tests to meet in this context, the application of either would not favour the Senior Secured Noteholders.

23 The evidence before me suggests that progress may still be made in the negotiations with the representatives of the Senior Secured Noteholders and that it would be premature to conclude that any further discussions would be unsuccessful. The parties are continuing to explore revisions and alternative proposals which would satisfy the Senior Secured Noteholders.

24 Mr. Carty's affidavit sworn May 1, 2000, in response to these applications states his belief that these efforts are being made in good faith and that, if allowed to continue, there is a real prospect for an acceptable proposal to be made at or before the creditors' meeting on May 26, 2000. Ms. Allen's affidavit does not contain any assertion that negotiations will cease. Despite the emphatic suggestion of the Senior Secured Noteholders' counsel that negotiations would be "one way", realistically I do not believe that there is no hope of the Senior Secured Noteholders coming to an acceptable compromise.

25 Further, there is no evidence before me that would indicate the Plan is "doomed to fail". The evidence does disclose that CAC and CAIL have already achieved significant compromises with creditors and continue to work swiftly and diligently to achieve further progress in this regard. This is reflected in the affidavits of Mr. Carty and the reports from the Monitor.

26 In any case, there is a fundamental problem in the application of the Senior Secured Noteholders to have a receiver appointed in respect of their security which the certainty of a "no" vote at this time does not vitiate: It disregards the interests of the other stakeholders involved in the process. These include other secured creditors, unsecured creditors, employees, shareholders and the flying public. It is not insignificant that the debtor companies serve an important national need in the operation of a national and international airline which employs tens of thousands of employees. As previously noted, these are all constituents the court must consider in making orders under the CCAA proceeding.

27 Paragraph 11 of Mr. Carty's May 1, 2000 affidavit states as follows:

> In my opinion, the continuation of the stay of proceedings to allow the restructuring process to continue will be of benefit to all stakeholders including the holders of the Senior Secured Notes. A termination of the stay proceedings as regards the security of the holders of the Senior Secured Notes would immediately deprive CAIL of assets which are critical to its operational integrity and would result in grave disruption of CAIL's operations and could lead to the cessation of operations. This would result in the destruction of value for all stakeholders, including the holders of the Senior Secured Notes. Furthermore, if CAIL ceased to operate, it is doubtful that Canadian Regional Airlines (1998) Ltd. ("CRAL98"), whose shares form a significant part of the security package of the holders of the Senior Secured Notes, would be in a position to continue operating and there would be a very real possibility that the equity of CAIL and CRAL, valued at approximately $115 million for the purposes of the issuance of the Senior Secured Notes in 1998, would be largely lost. Further, if such seizure caused CAIL to cease operations, the market for the assets and equipment which are subject to the security of the holders of the Senior Secured Notes could well be adversely affected, in that it could either lengthen the time necessary to realize on these assets or reduce realization values.

28 The alternative to this Plan proceeding is addressed in the Monitor's reports to the court. For example, in Paragraph 8 of the Monitor's third report to the court states:

> The Monitor believes the if the Plan is not approved and implemented, CAIL will not be able to continue as a going concern. In that case, the only foreseeable alternative would be a liquidation of CAIL's assets by a receiver and manager and/or by a trustee. Under the Plan, CAIL's obligations to parties it considers to be essential in order to continue operations, including employees, customers, travel agents, fuel, maintenance, catering and equipment suppliers, and airport authorities, are in most cases to be treated as unaffected and paid in full. In the event of a liquidation, those parties would not, in most cases, be paid in full and, except for specific lien rights, statutory priorities or other legal protection, would rank as ordinary unsecured creditors. The Monitor estimates that the additional unsecured claims which would arise if CAIL were to cease operation as a going concern and be forced into liquidation would be in excess of $1.1 billion.

29 This evidence is uncontradicted and flies in the face of the Senior Secured Noteholders' assertion that realizing on their collateral at this point in time will not affect the Plan. Although, as the Senior Secured Noteholders heavily emphasized the Plan does contemplate a "no" vote by the Senior Secured Noteholders, the removal of their security will follow that vote. 9.8(c) of the Plan states that:

> If the Required Majority of Affected Secured Noteholders fails to approve the Plan, arrangements in form and substance satisfactory to the Applicants will have been made with the Affected Secured Noteholders or with a receiver appointed over the assets comprising the Senior Notes Security, which arrangements provide for the transitional use by [CAIL], and subsequent sale, of the assets comprising the Senior Notes Security.

30 On the other side of the scale, the evidence of the Senior Secured Noteholders is that the value of their security is well in excess of what they are owed. Paragraph 15(a) of the Monitor's third report to the court values the col-

lateral at $445 million. The evidence suggests that they are not the only secured creditor going unpaid. CAIL is asking that they be permitted to continue the restructuring process and their good faith efforts to attempt to reach an acceptable proposal with the Senior Secured Noteholders until the date of the creditors meeting, which is in three weeks. The Senior Secured Noteholders have not established that they will suffer any material prejudice in the intervening period.

31 The appointment of a receiver at this time would negate the effect of the order staying proceedings and thwart the purposes of the CCAA.

32 Accordingly, I am dismissing the application, with leave to reapply in the event that the Senior Secured Noteholders vote to reject the Plan on May 26, 2000.

33 An alternative to receivership raised by the Senior Secured Noteholders was interim payment for use of the security. The Monitor's third report makes it clear that the debtor's cash flow forecasts would not permit such payments.

34 The Senior Secured Noteholders suggested Air Canada could make the payments and, indeed, that Air Canada should pay out the debt owed to them by CAC. It is my view that, in the absence of abuse of the CCAA process, simply having a solvent entity financially supporting a plan with a view to ultimately obtaining an economic benefit for itself does not dictate that that entity should be required to pay creditors in full as requested. In my view, the evidence before me at this time does not suggest that the CCAA process is being improperly used. Rather, the evidence demonstrates these proceedings to be in furtherance of the objectives of the CCAA.

35 With respect to the application to sell shares or assets of Canadian Regional, this application raises a distinct issue in that Canadian Regional is not one of the debtor companies. In my view, Paragraph 5(a) of Chief Justice Moore's March 24, 2000 order encompasses marketing the shares or assets of Canadian Regional. That paragraph stays, inter alia:

> ...any and all proceedings ... against or in respect of ... any of the Petitioners' property ... whether held by the Petitioners directly or indirectly, as principal or nominee, beneficially or otherwise...

36 As noted above, Canadian Regional is CAC's subsidiary, and its shares and assets are the "property" of CAC and marketing of these would constitute a "proceeding ... in respect of ... the Petitioners' property" within the meaning of Paragraph 5(a) and Section 11 of the CCAA.

37 If I am incorrect in my interpretation of Paragraph 5(a), I rely on the inherent jurisdiction of the court in these proceedings.

38 As noted above, the CCAA is to be afforded a large and liberal interpretation. Two of the landmark decisions in this regard hail from Alberta: *Meridian Development Inc. v. Toronto Dominion Bank*, supra, and *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.). At least one court has also recognized an inherent jurisdiction in relation to the CCAA in order to grant stays in relation to proceedings against third parties: *Re Woodward's Ltd.* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.). Tysoe J. urged that although this power should be used cautiously, a prerequisite to its use should not be an inability to otherwise complete the reorganization. Rather, what must be shown is that the exercise of the inherent jurisdiction is important to the reorganization process. The test described by Tysoe J. is consistent with the critical balancing that must occur in CCAA proceedings. He states:

> In deciding whether to exercise its inherent jurisdiction, the court should weigh the interests of the insolvent company against the interests of parties who will be affected by the exercise of the inherent jurisdiction. If, in

> relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the court should decline to its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to persuade the court that it should not exercise its discretion under Section 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).

39 The balancing that I have described above in the context of the receivership application equally applies to this application. While the threshold of prejudice is lower, the Senior Secured Noteholders still fail to meet it. I cannot see that it is important to the CCAA proceedings that the Senior Secured Noteholders get started on marketing Canadian Regional. Instead, it would be disruptive and endanger the CCAA proceedings which, on the evidence before me, have progressed swiftly and in good faith.

40 The application in Action No. 0001-05044 is dismissed, also with leave to reapply after the vote on May 26, 2000.

41 I appreciate that the Senior Secured Noteholders will be disappointed and likely frustrated with the outcome of these applications. I would emphasize that on the evidence before me their rights are being postponed and not eradicated. Any hardship they experience at this time must yield to the greater hardship that the debtor companies and the other constituents would suffer were the stay to be lifted at this time.

Application dismissed.

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2001 CarswellAlta 884, 2001 SCC 46, [2001] A.W.L.D. 432, 201 D.L.R. (4th) 385, 272 N.R. 135, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, [2001] 2 S.C.R. 534, 2001 CarswellAlta 885, 2 S.C.R. 534, [2000] S.C.J. No. 63, REJB 2001-25017, J.E. 2001-1430

2001 CarswellAlta 884, 2001 SCC 46, [2001] A.W.L.D. 432, 201 D.L.R. (4th) 385, 272 N.R. 135, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, [2001] 2 S.C.R. 534, 2001 CarswellAlta 885, 2 S.C.R. 534, [2000] S.C.J. No. 63, REJB 2001-25017, J.E. 2001-1430

Western Canadian Shopping Centres Inc. v. Dutton

Bennett Jones Verchere, Garnet Schulhauser, Arthur Andersen & Co., Ernst & Young, Alan Lundell, The Royal Trust Company, William R. MacNeill, R. Byron Henderson, C. Michael Ryer, Gary L. Billingsley, Peter K. Gummer, James G. Engdahl, Jon R. MacNeill, Appellants/Respondents on cross-appeal and Western Canadian Shopping Centres Inc. and Muh-Min Lin and Hoi-Wah Wu, representatives of all holders of Class "A", Class "E" and Class "F" Debentures issued by Western Canadian Shopping Centres Inc., Respondents/Appellants on cross-appeal

Supreme Court of Canada

McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Iacobucci, Binnie, Arbour, LeBel JJ.

Heard: December 13, 2000
Judgment: July 13, 2001
Docket: 27138

Proceedings: additional reasons to (December 13, 2000), Doc. 27138 (S.C.C.); reversing in part (1998), 228 A.R. 188 (Alta. C.A.); affirming (1996), 41 Alta. L.R. (3d) 412 (Alta. Q.B.)

Counsel: *Barry R. Crump*, *Brian Beck*, *David C. Bishop*, for Appellants/Respondents on Cross-Appeal

Hervé H. Durocher, *Eugene J. Erler*, for Respondents/Appellants on Cross-Appeal

Subject: Civil Practice and Procedure; Corporate and Commercial; Contracts; Torts

Practice --- Parties — Representative or class actions — Procedural requirements

Appeal of dismissal of defendants' application to strike representative action on grounds that plaintiffs failed to establish requisite conditions was dismissed — Defendants' further appeal was dismissed — Discretion was exercised to strike balance between efficiency and fairness — No countervailing considerations existed that outweighed benefits of allowing action to proceed.

Fraud and misrepresentation --- Negligent misrepresentation (Hedley Byrne principle) — Particular relationships — Fiduciary relationship

Appeal of dismissal of defendants' application to strike representative action by foreign investors on grounds they

2001 CarswellAlta 884, 2001 SCC 46, [2001] A.W.L.D. 432, 201 D.L.R. (4th) 385, 272 N.R. 135, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, [2001] 2 S.C.R. 534, 2001 CarswellAlta 885, 2 S.C.R. 534, [2000] S.C.J. No. 63, REJB 2001-25017, J.E. 2001-1430

had failed to establish requisite conditions was dismissed — Defendants' further appeal was dismissed — Fiduciary duty issues raised by investors were common to all plaintiffs — Material differences between investors' rights could be dealt with if they arose — Class action was not foreclosed on ground that investors might be required to show individual reliance in order to establish breach of fiduciary duty.

Practice --- Discovery — Examination for discovery — Who may be examined — General

Appeal of dismissal of defendants' application to strike representative action by foreign investors on grounds they had failed to establish requisite conditions was dismissed on further appeal — Plaintiffs cross-appealed decision on appeal that defendants were allowed to discover each individual class member — Cross-appeal allowed — Individualized discovery was premature at this stage of proceeding — Defendants were allowed to discover representative plaintiffs — Discovery of other class members was only available by order of court, upon establishment of reasonable necessity.

Corporations --- Directors and officers — Fiduciary duties — General

Appeal of dismissal of defendants' application to strike representative action by foreign investors on grounds they had failed to establish requisite conditions was dismissed — Defendants' further appeal was dismissed — Fiduciary duty issues raised by investors were common to all plaintiffs — Material differences between investors' rights could be dealt with if they arose — Class action was not foreclosed on ground that investors might be required to show individual reliance in order to establish breach of fiduciary duty.

Procédure --- Parties — Recours collectif — Exigences procédurales

Pourvoi à l'encontre du rejet de la demande des défendeurs de radier le recours collectif parce que les plaignants n'avaient pas prouvé les conditions requises a été rejeté — Nouveau pourvoi des défendeurs a été rejeté — Pouvoir discrétionnaire a été utilisé pour concilier l'efficacité et l'équité — Il n'existait pas d'autres considérations défavorables qui l'emportaient sur les avantages d'autoriser le recours.

Fraude et assertion inexacte --- Assertion négligente et inexacte (principe Hedley Byrne) — Relations particulières — Relation fiduciaire

Pourvoi à l'encontre du rejet de la demande des défendeurs de radier le recours collectif intenté par des investisseurs étrangers sous prétexte que ces derniers n'avaient pas prouvé les conditions requises a été rejeté — Nouveau pourvoi des défendeurs a été rejeté — Questions relatives à l'obligation fiduciaire soulevées par les investisseurs touchaient tous les demandeurs — Différences importantes entre les droits des investisseurs pouvaient être résolues si elles survenaient — Recours collectif n'a pas été interdit au motif qu'on exigerait peut-être des investisseurs qu'ils démontrent un lien de confiance individuel afin de prouver le manquement à l'obligation fiduciaire.

Procédure --- Communication préalable — Interrogatoire préalable — Qui peut être interrogé — En général

Pourvoi à l'encontre du rejet de la demande des défendeurs de radier le recours collectif intenté par des investisseurs étrangers sous prétexte que ces derniers n'avaient pas prouvé les conditions requises a été rejeté — Demandeurs ont formé un appel incident à l'encontre de l'appel des défendeurs, lesquels voulaient interroger chaque membre du groupe individuellement — Pourvoi incident accueilli — À ce stade des procédures, l'interrogatoire préalable individuel était prématuré — Défendeurs ne pouvaient qu'interroger les représentants des demandeurs — L'interrogatoire des autres membres du groupe ne pouvait être autorisé que par ordonnance du tribunal, après avoir établi que c'était raisonnablement nécessaire.

Sociétés par actions --- Administrateurs et dirigeants — Obligations fiduciaires — En général

2001 CarswellAlta 884, 2001 SCC 46, [2001] A.W.L.D. 432, 201 D.L.R. (4th) 385, 272 N.R. 135, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, [2001] 2 S.C.R. 534, 2001 CarswellAlta 885, 2 S.C.R. 534, [2000] S.C.J. No. 63, REJB 2001-25017, J.E. 2001-1430

Pourvoi à l'encontre du rejet de la demande des défendeurs de radier le recours collectif intenté par des investisseurs étrangers sous prétexte que ces derniers n'avaient pas prouvé les conditions requises a été rejeté — Nouveau pourvoi des défendeurs a été rejeté — Questions relatives à l'obligation fiduciaire soulevées par les investisseurs touchaient tous les demandeurs — Différences importantes entre les droits des investisseurs pouvaient être résolues si elles survenaient — Recours collectif n'a pas été interdit au motif qu'on exigerait peut-être des investisseurs qu'ils démontrent un lien de confiance individuel afin de prouver le manquement à l'obligation fiduciaire.

The representative plaintiffs, together with 229 other investors, purchased debentures in a corporation under the federal government's business immigration program, in order to facilitate their qualification as Canadian permanent residents. They made their purchases at different times pursuant to different offering memoranda presented to them by different defendants. The corporation invested all of its proceeds into a gold mine, which failed. The plaintiffs lost all of their investment. The plaintiffs commenced a representative action pursuant to R. 42 of the *Alberta Rules of Court* against the defendants for breach of fiduciary duty. The defendants applied to strike the representative action on grounds that the plaintiffs as a group could not show the requisite element of reliance because they invested at different times under different offering memoranda. The application was dismissed on grounds that it was not plain and obvious that the plaintiffs failed to meet the requirements under R. 42 and that the existence of a fiduciary duty was an issue of fact that should be left for the trial judge. The defendants' appeal was dismissed. The defendants appealed.

Held: The appeal was dismissed and the cross-appeal was allowed.

Per McLachlin C.J.C. (Arbour, Binnie, Gonthier, Iacobucci, L'Heureux-Dubé and LeBel JJ. concurring): No comprehensive legislative framework currently exists in Alberta respecting class actions. Practice is governed by R. 42 of the *Alberta Rules of Court*, which allows representative actions where "numerous persons have a common interest in the subject of an intended action". Details of class action practice were left to the courts. The common law of Alberta identified four conditions in order for the class action to proceed. First, the class must be capable of clear definition. Secondly, there must be issues of fact or law common to all class members, and the resolution of those issues must be necessary to a resolution of each class member's claim. Thirdly, success for one class member must mean success for all, and no conflicting interests must exist. Finally, the class representatives must adequately represent the class. When these conditions are met, the court should then exercise its discretion to strike a balance between efficiency and fairness. Class actions should not be approached restrictively. The test was not whether it was plain and obvious that an action should not proceed as a class action, under R. 42. Denial of class status under R. 42 did not defeat the claim, it determined how the claim would proceed. No countervailing considerations outweighed the benefits of allowing the action to proceed in this case. The court retained the discretion to deal with any non-common issues among the plaintiffs. As the fiduciary duty issues raised were common to all the investors, the plaintiffs had satisfied the requirements of R. 42. If the court later determined that the investors were required to show individual reliance to establish breach of fiduciary duty, the court could consider at that time whether the action should continue as a class action.

Allowing individualized discovery at this stage of the proceedings was premature. One of the benefits of a class action was that discovery of the class representatives was usually sufficient. Individual discovery of all class members was the exception rather than the rule. The defendants were allowed to examine the representative plaintiffs as of right. Examination of other class members was only available by court order, upon the demonstration by the defendants of reasonable necessity.

Les demandeurs représentants, ainsi que 229 autres investisseurs, ont participé au programme d'immigration des gens d'affaires du gouvernement fédéral en achetant des débentures d'une compagnie, dans le but de faciliter leur obtention du statut de résident permanent du Canada. Ils ont effectué leurs achats à divers moments selon différentes notices d'offre qui leur ont été présentées par divers défendeurs. La compagnie a investi tous ses profits dans une mine d'or, qui a fait faillite. Les demandeurs ont tout perdu. Ils ont alors intenté un recours collectif, conformément à

2001 CarswellAlta 884, 2001 SCC 46, [2001] A.W.L.D. 432, 201 D.L.R. (4th) 385, 272 N.R. 135, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, [2001] 2 S.C.R. 534, 2001 CarswellAlta 885, 2 S.C.R. 534, [2000] S.C.J. No. 63, REJB 2001-25017, J.E. 2001-1430

la règle 42 des *Alberta Rules of Court*, à l'encontre des défendeurs pour manquement à leur obligation fiduciaire. Les défendeurs ont demandé que le recours collectif soit radié sous prétexte que les demandeurs, en tant que groupe, ne pouvaient démontrer le lien de confiance requis parce qu'ils ont investi à divers moment selon différentes notices d'offre. La demande a été rejetée au motif qu'il n'était pas clair et évident que les demandeurs n'avaient pas satisfait à toutes les exigences de la règle 42 et aussi parce que l'existence d'une obligation fiduciaire constitue une question de fait qui devait être tranchée par le juge de première instance. Le pourvoi des défendeurs a été rejeté. Ils ont interjeté appel.

Arrêt: Le pourvoi a été rejeté et le pourvoi incident a été accueilli.

La juge en chef McLachlin (les juges Arbour, Binnie, Gonthier, Iacobucci, L'Heureux-Dubé et LeBel y souscrivant): À l'heure actuelle, il n'existe en Alberta aucun cadre législatif complet relatif aux recours collectifs. Cette procédure est régie par l'art. 42 des *Alberta Rules of Court* qui permet les recours collectifs lorsque « [traduction] de nombreuses personnes ont un intérêt commun dans l'objet de l'action projetée ». Les détails de la procédure à suivre pour les recours collectifs ont été laissés aux tribunaux. La common law de l'Alberta a identifié quatres conditions à respecter pour que le recours collectif puisse être exercé. Premièrement, le recours collectif doit pouvoir être clairement défini. Deuxièmement, tous les membres du groupe doivent avoir en commun des questions de fait ou de droit, et la résolution de ces questions doit être nécessaire pour résoudre la réclamation de chacun des membres du groupe. Troisièmement, le succès d'un membre du groupe doit se traduire par celui de tous les membres et il ne doit pas exister de conflits d'intérêts. En dernier lieu, les représentants du groupe doivent représenter adéquatement le groupe. Si toutes ces conditions sont réunies, le tribunal peut exercer son pouvoir discrétionnaire pour concilier l'efficacité et l'équité. Les recours collectifs ne devraient pas être abordés de façon restrictive. En vertu de la règle 42, le critère à respecter n'était pas de savoir s'il était clair et évident qu'une poursuite ne pouvait être intentée comme un recours collectif. Le refus du statut de recours collectif en vertu de la règle 42 n'empêchait pas la poursuite, cela ne faisait que déterminer de quelle façon la poursuite serait intentée. En l'espèce, il n'y avait aucune considération défavorable qui l'emportait sur les avantages que comportait l'autorisation du recours. Le tribunal conservait son pouvoir discrétionnaire lui permettant de trancher toutes questions qui n'étaient pas communes à tous les demandeurs. Les demandeurs avaient rempli toutes les conditions de la règle 42 parce que les questions soulevées relatives aux obligations fiduciaires étaient communes à tous les investisseurs. Si le tribunal venait à déterminer que les investisseurs doivent démontrer un lien de confiance individuel pour prouver le manquement à l'obligation fiduciaire, il pourrait, à ce moment-là, décider si le recours doit se poursuivre comme recours collectif.

À ce stade des procédures, il était prématuré de permettre des interrogatoires au préalable individuels. Un des avantages du recours collectif était que l'interrogatoire des représentants du groupe était habituellement suffisant. L'interrogatoire préalable individuel de tous les membres du groupe constitue l'exception et non la règle. Les défendeurs avaient l'autorisation, de plein droit, d'interroger les demandeurs représentants. L'interrogatoire des autres membres du groupe n'était possible que sur ordonnance du tribunal, une fois que les défendeurs auraient prouvé que cela était raisonnablement nécessaire.

Cases considered by/Jurisprudence citée par *McLachlin C.J.C.*:

Bell v. Wood, 38 B.C.R. 310, [1927] 1 W.W.R. 580, [1927] 2 D.L.R. 827 (B.C. S.C.) — referred to

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Guarantee Co. of North America v. Caisse populaire de Shippagan Ltée (1988), 86 N.B.R. (2d) 342, 219 A.P.R. 342 (N.B. Q.B.) — referred to

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Horne v. Canada (Attorney General) (1995), 39 C.P.C. (3d) 38, 129 Nfld. & P.E.I.R. 109, 402 A.P.R. 109 (P.E.I. T.D.) — referred to

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Wallworth v. Holt (1841), 41 E.R. 238, 4 My. & Cr. 619 (Eng. Ch. Div.) — considered

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Statutes considered/Législation citée:

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Generally — considered

s. 4(1) — considered

s. 7 — considered

s. 27 — considered

Class Proceedings Act, 1992/Recours collectifs, Loi de 1992 sur les, S.O./L.O. 1992, c. 6

Generally/en général — considered

s. 5(1) — considered

s. 6 — considered

s. 25 — considered

Code de procédure civile, L.R.Q., c. C-25

Livre IX — considered

art. 1003 — considered

art. 1039 — considered

Supreme Court of Judicature Act, 1873 (36 & 37 Vict.), c. 66

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Generally — considered

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R. 42 — considered

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R. 187 — considered

R. 201 — considered

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R. 19.10-19.15 — considered

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R. 23 — referred to

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Sched., R. 10 — considered

ADDITIONAL REASONS to judgment decided at (December 13, 2000), Doc. 27138 (S.C.C.), reversing in part judgment reported at 228 A.R. 188, 188 W.A.C. 188, [1998] A.J. No. 1364, 30 C.P.C. (4th) 1, 73 Alta. L.R. (3d) 227, 1998 ABCA 392 (Alta. C.A.), affirming judgment reported at 41 Alta. L.R. (3d) 412, 191 A.R. 265, 3 C.P.C. (4th) 329, 1996 CarswellAlta 690, [1996] A.J. No. 1165 (Alta. Q.B.), dismissing defendants' application to strike representative action.

MOTIFS SUPPLÉMENTAIRES de la décision rendue le 13 décembre 2000, Doc. 27138 (C.S.C.), infirmant en partie l'arrêt publié à 228 A.R. 188, 188 W.A.C. 188, [1998] A.J. No 1364, 30 C.P.C. (4th) 1, 73 Alta. L.R. (3d) 227, 1998 ABCA 392 (Alta. C.A.) qui a confirmé le jugement publié à 41 Alta. L.R. (3d) 412, 191 A.R. 265, 3 C.P.C. (4th) 329, 1996 CarswellAlta 690, [1996] A.J. No 1165 (Alta. Q.B.), qui avait rejeté le demande des défendeurs de radier le recours collectif.

The judgment of the court was delivered by *McLachlin C.J.C.*:

1 This appeal requires us to decide when a class action may be brought. While the class action has existed in one form or another for hundreds of years, its importance has increased of late. Particularly in complicated cases implicating the interests of many people, the class action may provide the best means of fair and efficient resolution. Yet absent legislative direction, there remains considerable uncertainty as to the conditions under which a court should permit a class action to be maintained.

2001 CarswellAlta 884, 2001 SCC 46, [2001] A.W.L.D. 432, 201 D.L.R. (4th) 385, 272 N.R. 135, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, [2001] 2 S.C.R. 534, 2001 CarswellAlta 885, 2 S.C.R. 534, [2000] S.C.J. No. 63, REJB 2001-25017, J.E. 2001-1430

2 The claimants wanted to immigrate to Canada. To qualify, they invested money in Western Canadian Shopping Centres Inc., under the Canadian government's Business Immigration Program. They lost money and brought a class action. The defendants (appellants) claim the class action is inappropriate and ask the Court to strike it out. For the following reasons, I conclude that the claimants may proceed as a class.

I. Facts

3 The representative plaintiffs Muh-Min Lin and Hoi-Wah Wu, together with 229 other investors, became participants in the government's Business Immigration Program of Employment and Immigration Canada by purchasing debentures in Western Canadian Shopping Centres Inc. ("WCSC"). WCSC was incorporated by Joseph Dutton, its sole shareholder, for the purpose of "facilitat[ing] the qualification of the Investors, their spouses, and their never-married children as Canadian permanent residents."

4 WCSC solicited funds through two offerings "to invest in land located in the Province of Saskatchewan for the purpose of developing commercial, non-residential, income-producing properties". The offering memoranda provided that the subscription proceeds would be deposited with an escrow agent, later designated as The Royal Trust Company ("Royal Trust"), and would be released to WCSC upon conditions, subsequently amended.

5 The dispute arises from events after the investors' funds had been deposited with Royal Trust. In May 1990, WCSC entered into a Purchase and Development Agreement ("PDA") with Claude Resources Inc. ("Claude") under which WCSC purchased from Claude, for $5,550,000, the rights to a Crown surface lease adjacent to Claude's "Seabee" gold deposits in northern Saskatchewan. WCSC also agreed to commit a further $16.5 million for surface improvements and for the construction of a gold mill, which would be owned by WCSC. A lease agreement executed in tandem with the PDA leased the not-yet-constructed gold mill and related facilities, together with the surface lands, back to Claude. The payments required of Claude under that lease agreement matched the semi-annual interest payments required of WCSC with respect to the investors.

6 To finance WCSC's obligations under the PDA with Claude, Dutton directed Royal Trust to issue debentures in an aggregate principal amount of $22,050,000 to a subset of the investors who had subscribed by that point. Royal Trust did so by issuing "Series A" debentures to 142 investors. After the debentures were issued, WCSC distributed an update letter to its investors, describing the investment in Claude.

7 In a separate series of transactions executed around the same time, Dutton and Claude entered into an agreement by which (1) Dutton effectively conveyed to Claude 49 percent of his shares in WCSC; (2) Claude paid Dutton $1.6 million in cash; (3) Claude advanced Dutton a $1.6 million non-recourse loan; (4) Dutton entered into an employment contract with Claude for a salary of $50,000 per year; and (5) Claude and Dutton's management company, J.M.D. Management Ltd., entered into a management contract for $200,000 per year. It appears that WCSC did not distribute an update letter to its investors describing this series of transactions.

8 Over the next months, Dutton advanced more funds to Claude and directed Royal Trust to issue corresponding debentures. Of particular relevance to the instant dispute are the Series E debentures issued in December 1990 (aggregate principal of $2.56 million), and the Series F debentures issued in May 1991 (aggregate principal of $9.45 million). When the Series E debentures were issued, the Series A and E debentures were pooled, so that investors in those series became entitled to a *pro rata* claim on the total security pledged with respect to the two series. When the Series F debentures were issued, the security for that series was pooled with the security that had been pledged with respect to the Series A and E debentures. WCSC apparently distributed investor update letters after the issuance of the Series E and F debentures, just as it had done after the issuance of the Series A debentures.

9 In December 1991, Claude announced that it could not pay the interest due on the Series A, E, and F debentures and Muh-Min and Hoi-Wah commenced this action. The gravamen of the complaint is that Dutton and various

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affiliates and advisors of WCSC breached fiduciary duties to the investors by mismanaging or misdirecting their funds.

II. Statutory Provisions

10 *Alberta Rules of Court*, Alta. Reg. 390/68

42 Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

129 (1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that

(a) it discloses no cause of action or defence, as the case may be, or

(b) it is scandalous, frivolous or vexatious, or

(c) it may prejudice, embarrass or delay the fair trial of the action, or

(d) it is otherwise an abuse of the process of the court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly.

(2) No evidence shall be admissible on an application under clause (a) of subrule (1).

(3) This Rule, so far as applicable, applies to an originating notice and a petition.

187. A person for whose benefit an action is prosecuted or defended or the assignor of a chose in action upon which the action is brought, shall be regarded as a party thereto for the purposes of discovery of documents.

201 A member of a firm which is a party and a person for whose benefit an action is prosecuted or defended shall be regarded as a party for the purposes of examination.

III. Decisions

11 The appellants applied to the Court of Queen's Bench of Alberta (1996), 41 Alta. L.R. (3d) 412 (Alta. Q.B.) for a declaration and order striking that portion of the Amended Statement of Claim in which the individual plaintiffs purport, pursuant to Rule 42 of the *Alberta Rules of Court*, to represent a class of 231 investors. The chambers judge identified four issues: (1) whether the court had the power under Rule 42 to strike the investors' claim to sue in a representative capacity; (2) whether the court was restricted to considering only the Amended Statement of Claim filed; (3) the standard of proof required to compel the court to exercise its discretion to strike the representative claim; and (4) whether, in this case, this standard was met.

12 On the first issue, the chambers judge relied on the decision of Master Funduk in *353850 Alberta Ltd. v. Horne & Pitfield Foods Ltd.* (July 31, 1989), Doc. JDE 8803-26537 (Alta. Master), to conclude that the court has the power, under Rule 42, to strike a claim made by plaintiffs to sue in a representative capacity.

13 On the second issue, the chambers judge held that the court need not limit its inquiry to the pleadings, relying

2001 CarswellAlta 884, 2001 SCC 46, [2001] A.W.L.D. 432, 201 D.L.R. (4th) 385, 272 N.R. 135, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, [2001] 2 S.C.R. 534, 2001 CarswellAlta 885, 2 S.C.R. 534, [2000] S.C.J. No. 63, REJB 2001-25017, J.E. 2001-1430

on *353850 Alberta, supra*, and on the decision of the British Columbia Supreme Court in *Shaw v. Vancouver Real Estate Board* (1972), 29 D.L.R. (3d) 774 (B.C. S.C.). He concluded, however, that resolution of the case before him did not require resort to the affidavit evidence.

14 On the third issue, the chambers judge concluded that the court should strike a representative claim under Rule 42 only if it is "entirely clear" or "beyond doubt" or "plain and obvious" that the claim is deficient — the standard applied to applications to strike pleadings for disclosing no reasonable claim: *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.).

15 On the final issue, the chambers judge, applying the "plain and obvious" rule, concluded that the Amended Statement of Claim was not deficient under Rule 42 and met the requirements set out in *Korte v. Deloitte, Haskins & Sells* (1993), 8 Alta. L.R. (3d) 337 (Alta. C.A.): (1) that the class be capable of clear and definite definition; (2) that the principal issues of law and fact be the same; (3) that one plaintiff's success would necessarily mean success for all members of the plaintiff class; and (4) that the resolution of the dispute not require any individual assessment of the claims of individual class members. However, he left the matter open to review by the trial judge.

16 The Alberta Court of Appeal, *per* Russell J.A. (for the majority), dismissed the appeal, Picard J.A., dissenting: (1998), 73 Alta. L.R. (3d) 227 (Alta. C.A.). The majority rejected the argument that the chambers judge should have conclusively resolved the Rule 42 issue rather than left it open to the trial judge, citing *Pasco v. Canadian National Railway*, [1989] 2 S.C.R. 1069 (S.C.C.), in which this Court left to the trial judge the issue of whether the plaintiffs were authorized to sue on behalf of a broader class. The majority also rejected the argument that the investors must show individual reliance to succeed. However, it granted the defendants the right to discovery from each of the 231 plaintiffs on the grounds that Rule 201, read with Rule 187, allows discovery from any person for whose benefit an action is prosecuted or defended and that the defendants should not be barred from developing an argument based on actual reliance merely because it was speculative.

17 Picard J.A., would have allowed the appeal. In her view, the Chambers judge erred in deferring the matter to the trial judge because, unlike *Pasco* , the case was narrow and "a great deal of relevant evidence was available to the court to allow it to make a decision" (p. 235). The need to show individual reliance was only one of many problems that the investors would face if allowed to proceed as a class. Citing this Court's decisions in *International Corona Resources Ltd. v. Lac Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.), and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.), she concluded that "[t]he extent of fiduciary duties in a particular case requires a meticulous examination of the facts, particularly of any contract between the parties" (p. 237). She concluded that "[t]his responsibility of proof by the [investors] cannot possibly be met by a representative action nor by giving a right of discovery of the 229 other parties to the action" (*idem*).

IV. Issues

18

1. Did the courts below apply the proper standard in determining whether the investors had satisfied the requirements for a class action under Rule 42?

2. Did the courts below err in denying defendants' motion to strike under Rule 42?

3. If the class action is allowed, should the defendants have the right to full oral and documentary discovery of all class members?

V. Analysis

2001 CarswellAlta 884, 2001 SCC 46, [2001] A.W.L.D. 432, 201 D.L.R. (4th) 385, 272 N.R. 135, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, [2001] 2 S.C.R. 534, 2001 CarswellAlta 885, 2 S.C.R. 534, [2000] S.C.J. No. 63, REJB 2001-25017, J.E. 2001-1430

A. The History and Functions of Class Actions

19 The class action originated in the English courts of equity in the late seventeenth and early eighteenth centuries. The courts of law focussed on individual questions between the plaintiff and the defendant. The courts of equity, by contrast, applied a rule of compulsory joinder, requiring all those interested in the subject matter of the dispute to be made parties. The aim of the courts of equity was to render "complete justice" — that is, to "arrange[] all the rights, which the decision immediately affects": F. Calvert, *A Treatise Upon the Law Respecting Parties to Suits in Equity* (1837), at p. 3; see also C.A. Wright, A.R. Miller and M.K. Cane, *Federal Practice and Procedure* (2nd ed. 1986), § 1751; J. Story, *Equity Pleadings* (10th ed. 1892), at s. 76*a*. The compulsory-joinder rule "allowed the Court to examine every facet of the dispute and thereby ensure that no one was adversely affected by its decision without first having had an opportunity to be heard": J.A. Kazanjian, "Class Actions in Canada" (1973), 11 *Osgoode Hall L.J.* 397, at p. 400. The rule possessed the additional advantage of preventing a multiplicity of duplicative proceedings.

20 The compulsory-joinder rule eventually proved inadequate. Applied to conflicts between tenants and manorial lords or between parsons and parishioners, it closed the door to the courts where interested parties in such cases were too numerous to be joined. The courts of equity responded by relaxing the compulsory-joinder rule where strict adherence would work injustice. The result was the representative action. For example, in *Chancey v. May* (1722), Prec. Ch. 592, 24 E.R. 265 (Eng. Ch.), members of a partnership were permitted to sue on behalf of themselves and some 800 other partners for misapplication and embezzlement of funds by the partnership's former treasurer and manager. The court allowed the action because "it was in behalf of themselves, and all others the proprietors of the same undertaking, except the defendants, and so all the rest were in effect parties," and because "it would be impracticable to make them all parties by name, and there would be continual abatements by death and otherwise, and no coming at justice, if all were to be parties" (p. 265); see also Kazanjian, *supra*, at p. 401; G.T. Bispham, *The Principles of Equity* (8th ed. 1909), at para. 415; S.C. Yeazell, "Group Litigation and Social Context: Toward a History of the Class Action" (1977), 77 *Colum. L. Rev.* 866, at pp. 867 and 872; J.K. Bankier, "Class Actions for Monetary Relief in Canada: Formalism or Function?" (1984), 4 *Windsor Y.B. Access Just.* 229, at p. 236.

21 The representative or class action proved useful in pre-industrial English commercial litigation. The modern limited-liability company had yet to develop, and collectives of business people had no independent legal existence. Satisfying the compulsory-joinder rule would have required a complainant to bring before the court each member of the collective. The representative action provided the solution to this difficulty: see Kazanjian, *supra*, at p. 401; Yeazell, *supra*, at p. 867; *City of London v. Richmond* (1701), 2 Vern. 421, 23 E.R. 870 (Eng. Ch.) (allowing the plaintiff to sue trustees for rent owed, though the beneficiaries of the trust were not joined).

22 The class action required a common interest between the class members. Many of the early representative actions were brought in the form of "bills of peace," which could be maintained where the interested individuals were numerous, all members of the group possessed a common interest in the question to be adjudicated, and the representatives could be expected fairly to advocate the interests of all members of the group: see Wright, Miller and Kane, *supra*, at § 1751; Z. Chafee, *Some Problems of Equity* (1950), at p. 201, T.A. Roberts, *The Principles of Equity* (3rd ed. 1877), at pp. 389-92; Bispham, *supra*, at para. 417.

23 The courts of equity applied a liberal and flexible approach to whether a class action could proceed. They "continually sought a proper balance between the interests of fairness and efficiency": Kazanjian, *supra*, at p. 411. As stated in *Wallworth v. Holt* (1841), 4 My. & Cr. 619, 41 E.R. 238 (Eng. Ch. Div.), at p. 244, "it [is] the duty of this Court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy".

24 This flexible and generous approach to class actions prevailed until the fusion of law and equity under the *Supreme Court of Judicature Act, 1873* (U.K.), 36 & 37 Vict., c. 66, and the adoption of Rule 10 of the *Rules of*

2001 CarswellAlta 884, 2001 SCC 46, [2001] A.W.L.D. 432, 201 D.L.R. (4th) 385, 272 N.R. 135, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, [2001] 2 S.C.R. 534, 2001 CarswellAlta 885, 2 S.C.R. 534, [2000] S.C.J. No. 63, REJB 2001-25017, J.E. 2001-1430

Procedure:

> 10. Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorised by the Court to defend in such actions, on behalf or for the benefit of all parties so interested.

While early cases under the new rules maintained a liberal approach to class actions (see, e.g., *Duke of Bedford v. Ellis* (1900), [1901] A.C. 1 (U.K. H.L.); *Taff Vale Railway v. Amalgamated Society of Railway Servants*, [1901] A.C. 426 (U.K. H.L.)), later cases sometimes took a restrictive approach (see, e.g., *Markt & Co. v. Knight Steamship Co.*, [1910] 2 K.B. 1021 (Eng. K.B.). This, combined with the widespread use of limited-liability companies, resulted in fewer class actions being brought.

25 The class action did not forever languish, however. Conditions emerged in the latter part of the twentieth century that once again invoked its utility. Mass production and consumption revived the problem that had motivated the development of the class action in the eighteenth century — the problem of many suitors with the same grievance. As in the eighteenth century, insistence on individual representation would often have precluded effective litigation. And, as in the eighteenth century, the class action provided the solution.

26 The class action plays an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs have all contributed to its growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the alleged wrongdoer. Sometimes, the complainants are identically situated *vis-à-vis* the defendants. In other cases, an important aspect of their claim is common to all complainants. The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties.

27 Class actions offer three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times): see W.K. Branch, *Class Actions in Canada* (1998), at para. 3.30; M.A. Eizenga, M.J. Peerless and C.M. Wright, *Class Actions Law and Practice* (1999), at § 1.6; Bankier, *supra*, at pp. 230-31; Ontario Law Reform Commission, *Report on Class Actions* (1982), at pp. 118-19.

28 Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied: see Branch, *supra*, at para. 3.40; Eizenga, Peerless and Wright, *supra*, at § 1.7; Bankier, *supra*, at pp. 231-32; Ontario Law Reform Commission, *supra*, at pp. 119-22.

29 Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation: see "Developments in the Law — The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives" (2000), 113 *Harv. L. Rev.* 1806, at pp. 1809-10; see Branch, *supra*, at

2001 CarswellAlta 884, 2001 SCC 46, [2001] A.W.L.D. 432, 201 D.L.R. (4th) 385, 272 N.R. 135, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, [2001] 2 S.C.R. 534, 2001 CarswellAlta 885, 2 S.C.R. 534, [2000] S.C.J. No. 63, REJB 2001-25017, J.E. 2001-1430

para. 3.50; Eizenga, Peerless and Wright, *supra*, at § 1.8; Bankier, *supra*, at p. 232; Ontario Law Reform Commission, *supra*, at pp. 11 and 140-46.

B. The Test for Class Actions

30 In recognition of the modern importance of representative litigation, many jurisdictions have enacted comprehensive class action legislation. In the United States, Federal Rule of Civil Procedure 28 U.S.C.A. § 23 (introduced in 1938 and substantially amended in 1966) addressed aspects of class action practice, including certification of litigant classes, notice, and settlement. The English procedural rules of 1999 include detailed provisions governing "Group Litigation": United Kingdom, *Civil Procedure Rules 1998*, SI 1998/3132, rr. 19.10-19.15. And in Canada, the provinces of British Columbia, Ontario, and Quebec have enacted comprehensive statutory schemes to govern class action practice: see British Columbia *Class Proceedings Act*, R.S.B.C. 1996, c. 50; Ontario *Class Proceedings Act, 1992*, S.O. 1992, c. 6; Quebec *Code of Civil Procedure*, R.S.Q., c. C-25, Book IX. Yet other Canadian provinces, including Alberta and Manitoba, are considering enacting such legislation: see Manitoba Law Reform Commission, Report #100, *Class Proceedings* (January 1999); Alberta Law Reform Institute, Final Report No. 85, *Class Actions* (December 2000); see also R. Rogers, "A Uniform Class Actions Statute", Appendix O to the Proceedings of the 1995 Meeting of The Uniform Law Conference of Canada.

31 Absent comprehensive codes of class action procedure, provincial rules based on Rule 10, Schedule, of the English *Supreme Court of Judicature Act, 1873* govern. This is the case in Alberta, where class action practice is governed by Rule 42 of the *Alberta Rules of Court*:

> **42** Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

The intention of the Alberta legislature is clear. Class actions may be brought. Details of class action practice, however, are largely left to the courts.

32 Alberta's Rule 42 does not specify what is meant by "numerous" or by "common interest". It does not say when discovery may be made of class members other than the representative. Nor does it specify how notice of the suit should be conveyed to potential class members, or how a court should deal with the possibility that some potential class members may desire to "opt out" of the class. And it does not provide for costs, or for the distribution of the fund should an action for money damages be successful.

33 Clearly, it would be advantageous if there existed a legislative framework addressing these issues. The absence of comprehensive legislation means that courts are forced to rely heavily on individual case management to structure class proceedings. This taxes judicial resources and denies the parties *ex ante* certainty as to their procedural rights. One of the main weaknesses of the current Alberta regime is the absence of a threshold "certification" provision. In British Columbia, Ontario, and Quebec, a class action may proceed only after the court certifies that the class and representative meet certain requirements. In Alberta, by contrast, courts effectively certify *ex post*, only after the opposing party files a motion to strike. It would be preferable if the appropriateness of the class action could be determined at the outset by certification.

34 Absent comprehensive legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them: *Bell v. Wood*, [1927] 1 W.W.R. 580 (B.C. S.C.), at pp. 581-82; *Langley v. North West Water Authority*, [1991] 3 All E.R. 610 (Eng. C.A.), leave denied, [1991] W.L.R. 711n (Eng. H.L.); *N.A.P.E. v. Newfoundland (Treasury Board)* (1995), 132 Nfld. & P.E.I.R. 205 (Nfld. T.D.); W.A. Stevenson and J.E. Côté, *Civil Procedure Guide, 1996*, at p. 4. However desirable comprehensive legislation on class action practice may be, if such legislation has not been enacted, the courts must determine the availability of the class action and the mechanics of class action practice.

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35 Alberta courts moved to fill the procedural vacuum in *Korte*, *supra*. *Korte* prescribed four conditions for a class action: (1) the class must be capable of clear and definite definition; (2) the principal issues of fact and law must be the same; (3) success for one of the plaintiffs must mean success for all; and (4) no individual assessment of the claims of individual plaintiffs need be made.

36 The *Korte* criteria loosely parallel the criteria applied in other Canadian jurisdictions in which comprehensive class-action legislation has yet to be enacted: see, e.g., *Ranjoy Sales & Leasing Ltd. v. Deloitte, Haskins & Sells*, [1984] 4 W.W.R. 706 (Man. Q.B.); *International Capital Corp. v. Schafer* (1995), 130 Sask. R. 23 (Sask. Q.B.); *Guarantee Co. of North America v. Caisse populaire de Shippagan Ltée* (1988), 86 N.B.R. (2d) 342 (N.B. Q.B.); *Lee v. OCCO Developments Ltd.* (1994), 148 N.B.R. (2d) 321 (N.B. Q.B.); *Van Audenhove v. Nova Scotia (Attorney General)* (1994), 134 N.S.R. (2d) 294 (N.S. S.C.), at para. 7; *Horne v. Canada (Attorney General)* (1995), 129 Nfld. & P.E.I.R. 109 (P.E.I. T.D.), at para. 24.

37 The *Korte* criteria also bear resemblance to the class-certification criteria in the British Columbia, Ontario, and Quebec class action statutes. Under the British Columbia and Ontario statutes, an action will be certified as a class proceeding if (1) the pleadings or the notice of application disclose a cause of action; (2) there is an identifiable class of two or more persons that would be represented by the class representative; (3) the claims or defences of the class members raise common issues (in British Columbia, "whether or not those common issues predominate over issues affecting only individual members"); (4) a class proceeding would be the preferable procedure for the resolution of common issues; and (5) the class representative would fairly represent the interests of the class, has advanced a workable method of advancing the proceeding and notifying class members, and does not have, on the common issues for the class, an interest in conflict with other class members: see Ontario *Class Proceedings Act, 1992*, s. 5(1); British Columbia *Class Proceedings Act*, s. 4(1). Under the Quebec statute, an action will be certified as a class proceeding if (1) the recourses of the class members raise identical, similar, or related questions of law or fact; (2) the alleged facts appear to warrant the conclusions sought; (3) the composition of the group makes joinder impracticable; and (4) the representative is in a position to adequately represent the interests of the class members: see Quebec *Code of Civil Procedure*, art. 1003.

38 While there are differences between the tests, four conditions emerge as necessary to a class action. First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria: see Branch, *supra*, at paras. 4.190-4.207; Friedenthal, Kane and Miller, *supra*, at pp. 726-27; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.), at paras. 10-11.

39 Second, there must be issues of fact or law common to all class members. Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.

2001 CarswellAlta 884, 2001 SCC 46, [2001] A.W.L.D. 432, 201 D.L.R. (4th) 385, 272 N.R. 135, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, [2001] 2 S.C.R. 534, 2001 CarswellAlta 885, 2 S.C.R. 534, [2000] S.C.J. No. 63, REJB 2001-25017, J.E. 2001-1430

40 Third, with regard to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests.

41 Fourth, the class representative must adequately represent the class. In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class: see Branch, *supra*, at paras. 4.210-4.490; Friedenthal, Kane and Miller, *supra*, at pp. 729-32.

42 While the four factors outlined must be met for a class action to proceed, their satisfaction does not mean that the court must allow the action to proceed. Other factors may weigh against allowing the action to proceed in representative form. The defendant may wish to raise different defences with respect to different groups of plaintiffs. It may be necessary to examine each class member in discovery. Class members may raise important issues not shared by all members of the class. Or the proposed class may be so small that joinder would be a better solution. Where such countervailing factors exist, the court has discretion to decide whether the class action should be permitted to proceed, notwithstanding that the essential conditions for the maintenance of a class action have been satisfied.

43 The class action codes that have been adopted by British Columbia and Ontario offer some guidance as to factors that would generally *not* constitute arguments against allowing an action to proceed as a representative one. Both state that certification should not be denied on the grounds that: (1) the relief claimed includes a demand for money damages that would require individual assessment after determination of the common issues; (2) the relief claimed relates to separate contracts involving different members of the class; (3) different class members seek different remedies; (4) the number of class members or the identity of every class member is unknown; or (5) the class includes subgroups that have claims or defences that raise common issues not shared by all members of the class: see Ontario *Class Proceedings Act, 1992*, s. 6; British Columbia *Class Proceedings Act*, s. 7; see also Alberta Law Reform Institute, *supra*, at pp. 75-76. Common sense suggests that these factors should no more bar a class action suit in Alberta than in Ontario or British Columbia.

44 Where the conditions for a class action are met, the court should exercise its discretion to disallow it for negative reasons in a liberal and flexible manner, like the courts of equity of old. The court should take into account the benefits the class action offers in the circumstances of the case as well as any unfairness that class proceedings may cause. In the end, the court must strike a balance between efficiency and fairness.

45 The need to strike a balance between efficiency and fairness belies the suggestion that a class action should be struck only where the deficiency is "plain and obvious", as the Chambers judge held. Unlike Rule 129, which is directed at the question of *whether* the claim should be prosecuted at all, Rule 42 is directed at the question of *how* the claim should be prosecuted. The "plain and obvious" standard is appropriate where the result of striking is to forever end the action. It recognizes that a plaintiff "should not be 'driven from the judgment seat' at this very early stage unless it is quite plain that his alleged cause of action has no chance of success": *Drummond-Jackson v. British Medical Assn.*, [1970] 1 All E.R. 1094 (Eng. C.A.), at pp. 1101-2 (quoted in *Hunt*, *supra*). Denial of class status under Rule 42, by contrast, does not defeat the claim. It merely places the plaintiffs in the position of any litigant who comes before the court in his or her individual capacity. Moreover, nothing in Alberta's rules suggests that class actions should be disallowed only where it is plain and obvious that the action should not proceed as a representative one. Rule 42 and the analogous rules in other provinces merely state that a representative may maintain a class action *if* certain conditions are met.

2001 CarswellAlta 884, 2001 SCC 46, [2001] A.W.L.D. 432, 201 D.L.R. (4th) 385, 272 N.R. 135, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, [2001] 2 S.C.R. 534, 2001 CarswellAlta 885, 2 S.C.R. 534, [2000] S.C.J. No. 63, REJB 2001-25017, J.E. 2001-1430

46 The need to strike a balance between efficiency and fairness also belies the suggestion that class actions should be approached restrictively. The defendants argue that *Naken v. General Motors of Canada Ltd.*, [1983] 1 S.C.R. 72 (S.C.C.), precludes a generous approach to class actions. I respectfully disagree. First, when *General Motors of Canada Ltd.* was decided, the modern class action was very much an untested procedure in Canada. In the intervening years, the importance of the class action as a procedural tool in modern litigation has become manifest. Indeed, the reform that has been effected since *General Motors of Canada Ltd.* has been motivated in large part by the recognition of the benefits that class actions can offer the parties, the court system, and society: see, e.g., Ontario Law Reform Commission, *supra*, at pp. 3-4.

47 Second, *General Motors of Canada Ltd.* on its facts invited caution. The action was brought on behalf of all persons who purchased new 1971 or 1972 Firenza motor vehicles in Ontario. The complaint was that General Motors had misrepresented the quality of the vehicles and that the vehicles "were not reasonably fit for use." The statement of claim alleged breach of warranty and breach of representation, and sought $1,000 in damages for each of approximately 4,600 plaintiffs. Estey J., writing for a unanimous Court, disallowed the class action. While each plaintiff raised the same claims against the defendant, the resolution of those claims would have required particularized evidence and fact-finding at both the liability and damages stages of the litigation. Far from avoiding needless duplication, a class action would have unnecessarily complicated the resolution of what amounted to 4,600 individual claims.

48 To summarize, class actions should be allowed to proceed under Alberta's Rule 42 where the following conditions are met: (1) the class is capable of clear definition; (2) there are issues of fact or law common to all class members; (3) success for one class member means success for all; and (4) the proposed representative adequately represents the interests of the class. If these conditions are met the court must also be satisfied, in the exercise of its discretion, that there are no countervailing considerations that outweigh the benefits of allowing the class action to proceed.

49 Other procedural issues may arise. One is notice. A judgment is binding on a class member only if the class member is notified of the suit and is given an opportunity to exclude himself or herself from the proceeding. This case does not raise the issue of what constitutes sufficient notice. However, prudence suggests that all potential class members be informed of the existence of the suit, of the common issues that the suit seeks to resolve, and of the right of each class member to opt out, and that this be done before any decision is made that purports to prejudice or otherwise affect the interests of class members.

50 Another procedural issue that may arise is how to deal with non-common issues. The court retains discretion to determine how the individual issues should be addressed, once common issues have been resolved: see Branch, *supra*, at para. 18.10. Generally, individual issues will be resolved in individual proceedings. However, as under the legislation of British Columbia, Ontario, and Quebec, a court may specify special procedures that it considers necessary or useful: see Ontario *Class Proceedings Act, 1992*, s. 25; British Columbia *Class Proceedings Act*, s. 27; Quebec *Code of Civil Procedure*, art. 1039.

51 The diversity of class actions makes it difficult to anticipate all of the procedural complexities that may arise. In the absence of comprehensive class-action legislation, courts must address procedural complexities on a case-by-case basis. Courts should approach these issues as they do the question of whether a class action should be allowed: in a flexible and liberal manner, seeking a balance between efficiency and fairness.

C. Whether the Investors Have Satisfied Rule 42

52 The four conditions to the maintenance of a class action are satisfied here. First, the class is clearly defined. The respondents Lin and Wu represent themselves and "[229 other] immigrant investors ... who each invested at

2001 CarswellAlta 884, 2001 SCC 46, [2001] A.W.L.D. 432, 201 D.L.R. (4th) 385, 272 N.R. 135, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, [2001] 2 S.C.R. 534, 2001 CarswellAlta 885, 2 S.C.R. 534, [2000] S.C.J. No. 63, REJB 2001-25017, J.E. 2001-1430

least the sum of $150,000.00 into a fund totalling $34,065,000.00, the said sum to be managed, administered and secured by ... Western Canadian Shopping Centres Inc.". Who falls within the class can be ascertained on the basis of documentary evidence that the parties have put before the court. Second, common issues of fact and law unite all members of the class. The essence of the investors' complaint is that the defendants owed them fiduciary duties which they breached. While the investors' Amended Statement of Claim alludes to claims in negligence and misrepresentation, counsel for the investors undertook in argument before this Court to abandon all but the fiduciary duty claims. Third, at this stage of the proceedings, it appears that resolving one class member's breach of fiduciary claim would effectively resolve the claims of every class member. As a result of security-pooling agreements effected by WCSC, each investor now has an interest, proportional to his or her investment, in the same underlying security. Finally, the representative plaintiffs are appropriate.

53 The defendants argue that the proposed suit is not amenable to prosecution as a class action because: (1) there are in fact multiple classes of plaintiffs; (2) the defendants will raise multiple defences to different causes of action advanced against different defendants; and (3) in order to prevail, the investors must show actual reliance on the part of each class member. I find these arguments unpersuasive.

54 The defendants' contention that there are multiple classes of plaintiffs is unconvincing. No doubt, differences exist. Different investors invested at different times, in different jurisdictions, on the basis of different offering memoranda, through different agents, in different series of debentures, and learned about the underlying events through different disclosure documents. Some investors may possess rescissionary rights that others do not. The fact remains, however, that the investors raise essentially the same claims requiring resolution of the same facts. While it may eventually emerge that different subgroups of investors have different rights against the defendants, this possibility does not necessarily defeat the investors' right to proceed as a class. If material differences emerge, the court can deal with them when the time comes.

55 The defendants' contention that the investors should not be permitted to sue as a class because each must show actual reliance to establish breach of fiduciary duty also fails to convince. In recent decades fiduciary obligations have been applied in new contexts, and the full scope of their application remains to be precisely defined. The fiduciary duty issues raised here are common to all the investors. A class action should not be foreclosed on the ground that there is uncertainty as to the resolution of issues common to all class members. If it is determined that the investors must show individual reliance, the court may then consider whether the class action should continue.

56 The same applies to the contention that different defences will be raised with respect to different class members. Simply asserting this possibility does not negate a class action. If and when different defences are asserted, the court may solve the problem or withdraw leave to proceed as a class.

57 I conclude that the basic conditions for a class action are met and that efficiency and fairness favour permitting it to proceed.

D. Cross-Appeal

58 The investors take issue on cross-appeal with the Court of Appeal's allowance of individualized discovery from each class member. The Court of Appeal held that the defendants are entitled, under Rules 187 and 201, to examination and discovery of each member of the class. The investors argue that the question of whether discovery should be allowed from each class member is a question best left to a case management judge appointed pursuant to the Alberta Rules of Court Binder, Practice Note No. 7.

59 I agree that allowing individualized discovery at this stage of the proceedings would be premature. One of the benefits of a class action is that discovery of the class representatives will usually suffice and make unnecessary discovery of each individual class member. Cases where individual discovery is required of all class members are

2001 CarswellAlta 884, 2001 SCC 46, [2001] A.W.L.D. 432, 201 D.L.R. (4th) 385, 272 N.R. 135, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, [2001] 2 S.C.R. 534, 2001 CarswellAlta 885, 2 S.C.R. 534, [2000] S.C.J. No. 63, REJB 2001-25017, J.E. 2001-1430

the exception rather than the rule. Indeed, the necessity of individual discovery may be a factor weighing against allowing the action to proceed in representative form.

60 I would allow the defendants to examine the representative plaintiffs as of right. Thereafter, examination of other class members should be available only by order of the court, upon the defendants showing reasonable necessity.

VI. Conclusion

61 For the foregoing reasons, I would dismiss the appeal and allow the investors to proceed as a class. I would allow the cross-appeal.

62 Costs of the appeal and cross-appeal are to the respondents.

Appeal dismissed; cross-appeal allowed.

Pourvoi rejeté; pourvoi incident accueilli.

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1991 CarswellOnt 215, 8 C.B.R. (3d) 62

Sairex GmbH v. Prudential Steel Ltd.

Re ALGOMA STEEL CORPORATION, LIMITED; SAIREX GmbH v. PRUDENTIAL STEEL LIMITED, DOFASCO INC. and TITAN INDUSTRIAL CORPORATION

Ontario Court of Justice (General Division), Commercial List

Farley J.

Heard: August 16, 1991
Judgment: August 19, 1991
Docket: Docs. 75663/91Q, RE 313/91

Counsel: *D. Wilson* and *T.W. Ward*, for plaintiff.

C. Thompson, Q.C. and *D. Short*, for Algoma Steel Corp., Dofasco Inc. and Prudential Steel Ltd.

M. Barrack, for Algoma Steel Corp.

B.S. Wortzman, Q.C. and *C. Simco*, for Titan Industrial Corp.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act.

Injunctions --- Availability of injunctions — Interim, interlocutory and permanent injunctions — Balance of convenience — Restrictive covenants.

Corporations — Arrangements and compromises — Motion for leave to proceed against company having protection order under Companies' Creditors Arrangement Act and for injunctions restraining company's activities — Factors considered — Motion dismissed — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

The plaintiff S entered an agreement with the plaintiff A whereby S would be the sole sales representative of A in China. A breached the agreement, allowing another agent to represent it in China. S brought a motion for: (1) leave to proceed against A, as A had obtained a protection order pursuant to s. 11 of the *Companies' Creditors Arrangement Act* ("CCAA"); (2) an interlocutory injunction restraining A from continuing to breach the agreement; (3) an interlocutory injunction restraining A's other agent and A's parent company from causing A to breach the agreement. A was willing to provide S with the specifics necessary to enable S to calculate its loss of commissions.

Held:

The motion was dismissed.

The status quo should be maintained for the period in which the proposal was being developed for approval by A's creditors. The injunctions sought would seriously impair the company's ability to continue in business during this period. That the defendant might be impecunious at the time of trial was not germane to a consideration of the balance of convenience in determining whether an injunction should issue. In considering these factors and weighing the various degrees of prejudice that would flow, leave was refused.

Public policy dictates that a company under CCAA protection should not be allowed to engage in offensive business practices from the safety of the Act. However, in this case A's dominant purpose was not to harm S but an ill-conceived attempt to save money.

To maintain confidentiality, the disclosure of specifics by A to S should be the details necessary to make the calculation of lost commissions and not details of contracts entered into.

Cases considered:

Bank of Montreal v. James Main Holdings Ltd. (1982), 28 C.P.C. 157 (Div. Ct.) — *considered*

Chomedy Aluminium Co. v. Belcourt Construction (Ottawa) Ltd. (1979), 24 O.R. (2d) 1, 97 D.L.R. (3d) 170 (C.A.) — *referred to*

DiGulio v. Boland, [1958] O.R. 384, 13 D.L.R. (2d) 510 (C.A.) — *considered*

Fisher v. Rosenberg (1960), 67 Man. R. 336 (Q.B.) — *referred to*

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.) — *considered*

R.G. McLean Ltd. v. Canadian Vickers Ltd., [1971] 1 O.R. 207, 15 D.L.R. (3d) 15 (C.A.) — *referred to*

Yule Inc. v. Atlantic Pizza Delight Franchise (1968) Ltd. (1977), 17 O.R. (2d) 505, 35 C.P.R. (2d) 273, 80 D.L.R. (3d) 725 (Div. Ct.) — *considered*

Statutes considered:

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

s. 11

Motion for leave to proceed against debtor company, for interlocutory injunction restraining debtor company from breaching exclusive representation agreement and for interlocutory injunction restraining other corporations from causing debtor company to breach agreement.

***Farley J.* (orally):**

1 This was a joint motion for: (i) leave to proceed against Algoma which leave has to be obtained pursuant to the protection order which Algoma obtained under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36; (ii) an interlocutory injunction until trial of this action restraining Algoma from breaching an exclusive representation agreement, dated September 22, 1989 ("agreement") between Algoma and Sairex Holding AG ("AG") for the distribution of seamless tubing and casing and related piping products ("products") in the Peoples' Republic of China ("P.R.C.") and ancillary relief, including using Titan to distribute the products; and (iii) an interlocutory injunction against Prudential and its parent corporation Dofasco from causing Algoma to breach the agreement together with ancillary relief.

2 Sairex GmbH (Sairex) attempted to bring this matter on on July 2, 1991, but, in accordance with the practice of the Commercial List that continuing matters are best dealt with if possible and practicable by the same judge, I determined on June 28, 1991 that there was not sufficient urgency in this matter to have it dealt with then. I scheduled this hearing for the first available date, being August 16, 1991, to allow the parties sufficient time to file responding materials and cross- examine.

3 It is unfortunate that information was still being exchanged on the "eve of trial" and I did not receive all the material until the morning of the hearing. Such is to be avoided if at all possible — and usually it is possible. The parties indicated that they urgently desired a determination of the issues involved in these motions to eliminate uncertainty. In fact, they sped through the hearing on Friday to avoid having to come back at a later date this month. Therefore, we are now here on Monday morning.

4 At the hearing, Sairex advised that it did not wish to enjoin the December 1990 and June 1991 orders Titan and Algoma had obtained from the P.R.C. Sairex specializes on a commission basis in representing the manufacturers of piping materials including the products. Titan has dealt as a principal in a trading operation specializing in steel other than piping materials. Prior to December 1990, Titan was never involved with steel products similar to the products. Both Sairex and Titan have had extensive business dealings in the P.R.C., especially with the China National Metals and Minerals Import and Export Corporation ("Minnmetals"), a P.R.C. state organization.

5 Sairex has been involved with the four departments of Minnmetals and Titan with several other departments. While under the umbrella of Minnmetals, these departments appear to act somewhat autonomously in their day-to-day operations. Algoma is owned and controlled by Dofasco as a result of a 1988 transaction. Algoma produces the products and other goods. Dofasco is not involved in the products, but rather with flat rolled steel essentially. Prudential is Dofasco's sales agent. Algoma appointed Prudential its sales agent formally on December 18, 1990, that is, subsequent to its being acquired by Dofasco. Titan has had a long business relationship with Dofasco.

6 Algoma wanted to penetrate the Soviet and Chinese markets in the 1980s. It was unsuccessful in doing so. It turned to AG for assistance. At this stage, there were a number of related companies which used the Sairex name — Sairex Holdings AG ("AG"), Sairex SA ("SA") and Sairex GmbH ("Sairex"). AG and SA merged into a continuing AG just after the agreement was entered into. AG transferred control of Sairex in mid-1990 to Rotec, another company which operated at arm's length to AG. Sairex's position was that Algoma was fully aware of the reorganization of the Sairex group at the time of entering into the agreement and that Algoma recognized that Sairex would be continuing the organization with which Algoma would deal vis-à-vis the agreement.

7 Sairex was successful where Algoma had not been. In 1988, it negotiated a trial order of 21,000 tons of products by Minnmetals. This accounted for about a quarter of Algoma's production of that type of goods that year. After months of negotiations and drafting, the agreement was entered into by AG and Algoma. An equivalent agreement was entered into concerning the U.S.S.R. I set forth the pertinent clauses of this agreement as follows:

I. Subject Matter of the Agreement

(1) ALGOMA appoints SAIREX as its sole sales distributor of the contractual products in the PRC.

SAIREX shall not be empowered to act in the name of ALGOMA unless ALGOMA has given its prior consent.

. . . . .

II. Exclusivity

(1) ALGOMA undertakes not to appoint other than SAIREX any distributor, dealer, commercial agent or representative for the sale and/or distribution of the contractual products in the PRC.

(2) SAIREX shall forward all enquiries for the contractual products from SAIREX customers within the PRC to ALGOMA.

(3) Notwithstanding anything contained herein, it is understood and agreed that in the event a major foreign end user purchaser (i.e. non PRC) chooses to purchase direct from a mill source for shipment to the PRC, Algoma shall be entitled to pursue such direct sales opportunities without any obligation on ALGOMA'S part to SAIREX.

III. Prices and Conditions of Sale

(1) Prices and other conditions of sale to SAIREX customers in the PRC shall be negotiated by SAIREX according to ALGOMA'S instructions taking the actual market situation into consideration.

In any event, unless otherwise negotiated, SAIREX shall be entitled to a three (3) % commission based on the final contracted FOB mill price with the SAIREX customer in the PRC and as confirmed by ALGOMA.

. . . . .

V. Obligations of ALGOMA

(1) ALGOMA undertakes to support SAIREX in its representation of ALGOMA and to place at SAIREX' disposal all information concerning the contractual products, new developments, market strategies etc. which are appropriate to support SAIREX in its activities under this Agreement.

. . . . .

VI. Obligations of SAIREX

(1) SAIREX shall use its best efforts to promote the marketing of the contractual products in the PRC.

(2) SAIREX undertakes to keep ALGOMA informed on the general market situation in the PRC and will submit reports to ALGOMA at regular intervals to be agreed upon.

. . . . .

VIII. Commencement and Term of the Agreement

(1) Subject to paragraph 2 below, this Agreement shall come into effect on September 22, 1989 and shall be in force for three years. At the end of the contractual term the Agreement shall be automatically extended for a further two years

unless one of the parties has given to the other party six month's [sic] notice of termination in writing to become effective at the end of the term.

(2) The parties agree to meet annually, as close as possible to the anniversary date of the agreement, to review the previous year's results. In the event either party is dissatisfied with such results and determines that the agreement is no longer mutually beneficial, such party shall be entitled to terminate the agreement by giving six month's [sic] written notice to the other.

(3) Notwithstanding Paragraph (2) above, the Agreement may be immediately terminated by either party for the following reasons:

(a) If the other party should commit a fundamental breach of the terms and conditions of this Agreement.

(b) If the other party should enter into bankruptcy or liquidation, whether compulsory or voluntary, or arrange with their creditors or take or suffer any similar action in consequence of insolvency.

(4) Any termination of this Agreement shall not relieve either of the parties from the obligations which are expressed to be continued after termination. This applies especially to the fulfilment of confirmed purchase orders.

(5) Any notice of termination must be given in writing.

IX. [Which I note is not titled]

SAIREX has the right to handle this Agreement as follows:

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For the PRC:            via SAIREX GmbH
                        Novesiastrasse 46

                        D-4044 Kaarst 2
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X. Applicable Law and Jurisdiction

(1) This Agreement shall be governed by the laws of the Province of Ontario, Canada. This applies equally to all individual orders placed in pursuance of this Agreement by SAIREX with ALGOMA.

(2) All disputes hereunder that cannot be resolved by negotiation shall be finally settled by arbitration pursuant to the Rules of the International Chamber of Commerce. Place of arbitration shall be Paris, France.

8 On October 3, 1989, AG transferred this contract to Sairex retaining a transfer fee equivalent to 10 per cent of Sairex's ongoing commissions. Algoma was not advised of the document; however, that same date AG wrote to Algoma enclosing Sairex's financials "as this is the company you are working with and we in Sairex Holding AG have no more activities." On June 15, 1990, Sairex informed Algoma that AG had transferred its ownership of Sairex to Rotec.

9 Sairex continued to obtain significant orders for Algoma from Minnmetals. In November 1990, Sairex received specification from Minnmetals which it relayed to F.J. Potter, previously with Algoma but then with Prudential as vice-president, international sales. Sairex then obtained an invitation from Minnmetals to have representatives of Algoma/Prudential and Sairex visit Minnmetals for the purposes of discussing and negotiating the terms of the order. Apparently, such an invitation is tantamount to an invitation to negotiate final terms and it usually results in a firm order being issued. Potter was instructed by his superiors to give false information that he was not available to visit China then — at least with Sairex; he did so with

Titan as instructed, despite his great reluctance to do so.

10 This came about as a result of a December 1990 Calgary meeting involving a high-level decision by four Algoma/Dofasco/Prudential executives who were looking at the restructuring of Algoma's operations. This meeting was attended by Stephen A. Levy of Titan, who said that, as a result of a chance meeting in the halls of Dofasco in Hamilton somewhat earlier, he had suggested that Titan may be able to do something for Algoma as to the products in P.R.C. Levy, a lawyer by training, claimed that he did not know that Sairex had an exclusive contract but rather that such arrangements were unusual in the steel business — channelling arrangements were preferred. It was only on the way to the P.R.C. in December 1990 that Levy discovered that there was a written contract with Sairex.

11 He was advised that it was none of his concern and that it was being taken care of. I would have to infer that Levy was only too happy not to dig further; he must not have been very acute at wondering about his good luck in walking away from the meeting with Minnmetals with a signed contract for 30,000 tons, no preparatory spade work having been done in that respect with Minnmetals.

12 Potter had to advise Sairex that he was in the P.R.C. to deal with "coil products" when by chance he ran into Sairex's representatives in the halls of Minnmetals. Sairex was understandably aghast; it sent Potter a fax on December 27, 1990 asking for a detailed explanation.

13 Wilson, the president of Prudential, went to Germany to meet Sairex on January 15, 1991. There is a dispute as to whether he advised Sairex that the December deal was a one-time shot to compensate Titan for a downturn in flat rolled steel or if he advised Sairex that it was out and Titan was in. Wilson advised that he at least said he would reconsider his decision to use Titan thereafter, rather than Sairex.

14 Sairex continued to attempt to set up meetings for Potter. He avoided a direct negative. Wilson wrote Sairex a letter dated March 14, 1991. The text of that letter, which inexplicably took until March 27, 1991 to reach Sairex, is as follows:

> Prudential Steel Ltd.
>
> March 14, 1991
>
> To Sairex GmbH:
>
> At our meeting with you in January, I explained to you that Algoma had been successful in obtaining sales to Minnmetals through Titan Industrial Corporation with whom Algoma's parent, Dofasco, has a long-standing relationship. At that time, we also indicated that it was Algoma's desire and intention to make use of Titan as a sales agent to secure additional future business in China.
>
> In reporting to the senior management of Algoma regarding the outcome of our meeting, I indicated that, while you would obviously have preferred that Sairex continue to represent Algoma in China, you understood and respected Algoma's decision to Titan as a sales agent for future Chinese business.
>
> Senior management of Algoma asked me to convey their thanks for your response and to assure you regarding Algoma's intentions to continue with our relationship for sales to the USSR in accordance with our agreement. We look forward to a mutually profitable association in this regard.
>
> These matters are always difficult and your response, under the circumstances, was very much appreciated.

15 Sairex faxed back the same day strongly resisting that the agreement be respected and that "in business concluded via

Titan or any other company for China market commission shall be payable to Sairex." Not having received any response, Sairex wrote on April 15, 1991 with an echo: "that on business concluded via Titan or any other company for China market commission shall be payable to Sairex."

16 There was another fax by Sairex on April 19, 1991 saying that Sairex had determined that efforts were being made then to get inquiries for Algoma casings via Titan. On April 22, 1991, an officer of Prudential wrote Sairex that Wilson was out of the country but upon his return later that week Prudential would respond. It never did. Another large order was obtained via Titan in June 1991.

17 Sairex complained that Algoma has taken up with Titan to save a few dollars on its commission — Sairex's 3 per cent commission is about $20-25 U.S. a ton versus Titan's markup of about $5 U.S. a ton.

18 On March 13, 1991, Sairex had written to Minnmetals advising it of the agreement and complaining of Algoma's dealings with Titan. Sairex asked for Minnmetals' support. Despite this and other requests, Minnmetals did not involve itself.

19 On June 25, 1991, a few days after issuing its notice of action, Sairex again wrote to Minnmetals indicating that Minnmetals "may not necessarily be involved as a (knowing) participant in breach of contract" but having been so notified on March 13, "Minnmetals — under international law — will come into liability for knowingly inducing or participating in the wrongful breach of contract... In these circumstances the court may be forced to add Minnmetals as a party defendant to the litigation under the rules of international law, which means Minnmetals could become a defendant under Sairex's legal dispute with Algoma."

20 Sairex said that it had suffered irreparable harm by Algoma's breach of the agreement as to its loss of commissions and that such had seriously damaged the credibility of Sairex as a manufacturer's representative in the P.R.C. It was said that this had impacted on a recent order opportunity when Sairex only got 40 tons rather than the hoped for 20,000 tons for another non-competing manufacturer.

21 Sairex says that it is willing to continue to represent Algoma and is better able to do so with its experience and expertise than is Titan. Sairex is also concerned about Algoma's serious financial difficulties, which may jeopardize Sairex's ability to collect a judgment for loss of commission and damages for loss of other business.

22 Algoma stated that it has two mills in Sault Ste. Marie which are suited only for the production of the products and like goods. At present, one of the mills is shut down due to lack of work. Loss of the Titan contracts would have resulted in a 50 per cent reduction at the other plant and a lay-off of at least 300 Algoma employees.

23 Algoma also cited that Sairex had inappropriately delayed in bringing this motion, as it had been aware of Algoma's dealings with Titan since at least December 27, 1990. Sairex's position was that it was trying to sort out the situation, it was being supplied a constant stream of disinformation and it took some time, after it finally realized on March 27 through April 19 that it was all to no avail, to retain and instruct German and Canadian legal counsel.

24 Algoma claims that the status quo had been for the last half-year that it sold to Titan for the P.R.C. and not through Sairex. Titan claims that an injunction against it would harm its other business in the P.R.C.

25 Mr. Thompson candidly admitted that his clients were looking for an out with respect to Sairex. That apparently was why the Calgary meeting grabbed at the thought of the Rotec deal providing them an excuse. One can only wonder why this conclusion was reached instantaneously in a 15-minute meeting and not at least referred to legal counsel. One is astounded that Sairex was never in formed directly. One is baffled by the duplicity involved in having Potter take Levy to conclude a deal initiated by Sairex with the unspoken assumption, it appears, that Sairex would not find out or, if it did find out, complain. It would be naive to think that all business transactions (especially international ones) are transacted on the up-and-up. This one, however, is clearly at the lower end of the ethical scale. In conclusion, it was not very ethical and not very smart. It

was dumb. But can the defendants and Algoma thread their way through the legal eye of the needle?

26 They have thrown the kitchen sink at Sairex. I must consider this in respect to whether Sairex has an appropriate case against Algoma. Algoma's position vis-à-vis Sairex's capacity is essentially as follows:

(1) An injunction would be of a mandatory nature to force Algoma to deal with Sairex exclusively, a deal that it claims it never agreed to. It contracted with AG. It never agreed to deal exclusively with Sairex and it never consented to the transfer. Given:

(a) the nature of the agreement (including the fact that it was to be handled by Sairex),

(b) the fact that all dealings after October 3, 1989 were with Sairex, not AG,

(c) Algoma was notified that AG was not going to be involved, there being no complaint about this by Algoma,

(d) the June 15, 1990 letter advised Algoma that AG was no longer a shareholder of Sairex, and

(e) Algoma continuing to be governed by a carbon-copy agreement as to the U.S.S.R., I think that Algoma would have great difficulty in claiming it has no contractual relationship with Sairex. See *Chomedy Aluminum Co. v. Belcourt Construction (Ottawa) Ltd.* (1979), 24 O.R. (2d) 1, 97 D.L.R. (3d) 170 (C.A.); *R.G. McLean Ltd. v. Canadian Vickers Ltd.*, [1971] 1 O.R. 207, 15 D.L.R. (3d) 15 (C.A.), *Chitty on Contracts*, 26th ed. (1989), pp. 1068-1069 and *Fisher v. Rosenberg* (1960), 67 Man. R. 336 (Q.B.) at p. 339.

(2) Algoma says that if the letter did operate as a valid assignment, it was an equitable assignment, since it was not a notice in writing in the terms of the agreement. Therefore, AG is a necessary party to any proceedings brought to enforce the agreement and Sairex is unable to maintain these proceedings in its own name.

However, I note that *DiGulio v. Boland*, [1958] O.R. 384, 13 D.L.R. (2d) 510 (C.A.) referred to situations at p. 402 [O.R.] where the court permitted the assignor to be added nunc pro tunc. While, in light of my view of the other points, this is not necessary here, it may be prudent to do so. I would grant leave to do so.

(3) The October 3, 1989 letter amounted to an unequivocal assertion by AG that it was no longer a party to the agreement and no longer had any obligations under it. This repudiation was accepted by Algoma by its conduct.

In my view Algoma's actions up to December 1990 (some 15 months later) as to the P.R.C. contract and until now (Potter being in the U.S.S.R. now with Sairex) as to the U.S.S.R. contract disentitle it for delay from adopting such position successfully.

(4) Sairex must obtain leave of the court pursuant to s. 11 of C.C.A.A. in order to bring these proceedings against Algoma. Leave should be refused:

(a) the status quo should be maintained for the period in which the proposed agreement is being developed for approval by the company's creditors;

(b) the injunction remedy would seriously impair the company's ability to continue in business during this period;

(c) the court should weigh the relative degrees of prejudice that would flow; and

(d) in this case all three of these factors favour Algoma over Sairex in a refusal for leave.

I found *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 105 (C.A.) and the cases therein referred to very helpful. I do, however, note that: "In cases not involving the supply or receipt of goods or services, no doubt judicial exercise of the discretion would produce a result appropriate to the circumstances." (pp. 113-114 [B.C.L.R.]).

I would also note that the court in that case at p. 116 did not feel that it required much reflection on the part of a trial judge to conclude that the equities fell on the side of postponement of steps to be taken to realize a $36 million debt when the companies involved in the C.C.A.A. there comprised approximately $3 billion of public and private investment, the other 95.5 per cent in value of the secured and unsecured debt and there were 1500 persons directly employed in the enterprise.

In this case Sairex's lost commission on the Algoma deals is in the neighbourhood of $600,000 and it appears to be a very much smaller operation than Algoma. Algoma is critically dependent on its P.R.C. business continuing as to at least the 300 employees directly involved and it appears many more would be indirectly involved. I would not be inclined to give Sairex leave, having weighed their respective positions. However, I would think that public policy also dictates that a company under C.C.A.A. protection or about to apply for it should not be allowed to engage in very offensive business practices against another and thumb its nose at the world from the safety of the C.C.A.A. However, it does not appear that Algoma's dominant purpose was to harm Sairex (it does not appear to have been even a significant purpose) but rather it was to save a few dollars for its own benefit. The harm to Sairex was incidental to Algoma's benefit. I would think that such benefit was neither very well thought out or longlived. I also note that Algoma continues to depend on Sairex for the U.S.S.R. I will return to the subject of leave under the C.C.A.A. later.

Let me now turn to the injunction issues.

Galligan J. for the Divisional Court in *Bank of Montreal v. James Main Holdings Ltd.* (1982), 28 C.P.C. 157 (Ont.) said at pp. 160-161, before proceeding reluctantly and hesitating expressing his opinion as to the meaning of the document:

In cases of clear breach Courts are inclined to grant injunctions enforcing negative covenants until trial. In such cases the inquiry as to the adequacy of damages as a remedy, and into the balance of convenience, do not have the importance that they otherwise do: see *Doherty v. Allman* (Allen) (1878), 3 A.C. 709; *Hampstead and Suburban Properties v. Diomedous*, [1969] 1 Ch. 248, [1968] 3 All E.R. 545; *Br. Amer. Oil Co. v. Hey*, [1941] O.W.N. 397, [1941] 4 D.L.R. 725; *Brown v. Bryant* (1979), 11 B.C.L.R. 364 (S.C.) ; and *Hardee Farms Int. v. Cam & Crank Grinding*, [1973] 2 O.R. 170, 10 C.P.R. (2d) 42, 33 D.L.R. (3d) 266.

. . . . .

It seems to me, from a review of the cases mentioned above, that the ordinary tests to be satisfied for the granting of interlocutory injunctions do not apply when the application is for restraint of breach until trial of a negative covenant. In such cases the Court is not as concerned about the adequacy of damages as a remedy, nor about the balance of convenience as in the ordinary case, but I think it must be satisfied that there is a *clear* breach of the covenant. In such a case I do not think that a Court ought to grant an interlocutory judgment if only a triable issue is shown, because cases in which Courts grant interlocutory injunctions when only a triable issue is shown, engage in a careful weighing of the adequacy of damages as a remedy, and particularly, the balance of convenience.

I think in this case, before issuing an interlocutory injunction, the Court must be satisfied that there is to be a *clear* breach of the undertaking.

. . . . .

> It seems to me that where an applicant seeks an interlocutory injunction restraining until trial the breach of a negative covenant, unless it can show inadequacy of damages as a remedy and that the balance of convenience favours it, it must satisfy the Court that there is or is about to be a clear breach of that covenant. It is not sufficient merely to establish a triable issue on the question of breach of covenant and then be entitled to an interlocutory injunction.

[Emphasis in original.]

27 I would note that the court is not to be as concerned about the adequacy of damages as a remedy nor about the balance of convenience — but it should not be unconcerned about such.

28 Cory J., for the court, in *Yule Inc. v. Atlantic Pizza Delight Franchise (1968) Ltd.* (1977), 17 O.R. (2d) 505, 35 C.P.R. (2d) 273, 80 D.L.R. (3d) 725 (Div. Ct.) canvassed the question of negative covenants at pp. 508-509 [O.R.]:

> The approach to contracts that do not provide for such personal service has not been as narrow. For example, the Courts have inferred from a positive covenant granting exclusive and sole authority to sell a product, a negative covenant that such sole and exclusive authority to sell will not be granted to another. The negative covenant so inferred has been enforced by injunctive relief: see *Chitty on Contracts*, 23rd ed. (1968), p. 1562.
>
> In this case the contract gives sole and exclusive authority to the plaintiff with regard to certain matters. It would be unduly technical and restricting if the Court were to find that because of the positive wording of the covenant it could not infer the negative. It is eminently sensible and logical to conclude that if an exclusive and sole authority is given to the plaintiff that there must be inferred a negative covenant that the defendants will not terminate that authority and grant it to themselves or others. There are a number of authorities with factual situations similar to this case wherein the Courts have inferred and enforced the negative aspect of a grant of sole and exclusive authority: see *Evans Marshall & Co. Ltd. v. Bertola S.A. et al.*, (1973) 1 W.L.R. 349; *North West Beverages Ltd. v. Pepsi-Cola Canada Ltd.* (1971), 20 D.L.R. (3d) 341; *Avnet-International Products (Canada) Ltd. v. NTN Bearing Corp. of Canada Ltd.* (1972), 6 C.P.R. (2d) 148; *Baxter Motors Ltd. v. American Motors (Canada) Ltd.* (1973), 40 D.L.R. (3d) 450, 13 C.P.R. (2d) 264, [1973] 6 W.W.R. 501.

29 In my view, given my thoughts on Sairex's status, Sairex appears to have a reasonably strong case as to breach by Algoma.

30 However, I must go on to consider irreparable harm and balance of convenience. Certainly Sairex's losses on its commission are easily calculated. Sairex itself twice demanded that "on business concluded via Titan *or any other company* for China market commission shall be payable to Sairex" (emphasis added). I would conclude that Sairex's main concern was the protection of its commission. As to its suggestion that it lost business and face vis-à-vis its other manufacturers, I view this with considerable scepticism.

31 On questioning it was conceded that Sairex's business was more in the nature of "chunky soup" than a continuous flow of "consommé" and that it could not realistically expect to get all the business it put in for. However, more to the point, I do not find it at all surprising that Sairex's suggestions to and demands of Minnmetals, culminating in the June 25, 1991 letter threatening to bring in Minnmetals as a defendant in these proceedings, has had a chilling effect on Sairex's Chinese business.

32 However, I would think it important for Minnmetals to completely understand that Algoma's switch to Titan from Sairex was not apparently precipitated by anything wrong that Sairex did in 1990. Algoma merely wanted to gain a little extra margin in its sales to the P.R.C. As noted, Algoma still relies on Sairex for the Soviet market.

33 As to delay, Sairex knew that there was something rotten in the relationship starting December 27, 1990. Even on its explanation of the January 15, 1991 meeting, Algoma was known by it to be dealing with them from the bottom of the deck. In any event, it should have been more than abundantly clear on March 27, 1991, when the March 14 letter through Pruden-

tial as Algoma's appointed agent was received, that it was all over vis-à-vis the P.R.C. (and on the basis of Sairex's version of the January 15 meeting, Algoma was continuing to bald-facedly lie directly to Sairex).

34 Rather than institute legal action or even consult legal counsel, Sairex continued to take another path — seeing if it could put some pressure on Algoma through Minnmetals. Given that Sairex knew that Algoma was in serious financial trouble, was in fact under the protection of the C.C.A.A. where timing is critical and was continuing to negotiate with Minnmetals through Titan, I think that this delay until the end of June militates against an injunction being granted.

35 By this time the status quo had been Algoma-Titan for a half-year — a very long time in the circumstances of the financial situation and even more so in light of the relatively short time remaining on the contract, even if it were to proceed on a natural expiration on September 22, 1991.

36 However, I must also look at the question of whether notice has been given under this contract. I believe that there is considerable merit in the position that Sairex was in fact notified of an early termination with its receipt on March 27 of the March 14 letter. If so, then the agreement would terminate on September 27 or about one month from now. Even if this notice were found to be technically invalid, what would stop Algoma from giving the six months' notice now?

37 The agreement does not specify that Algoma be dissatisfied with Sairex but only the results; its position is that the results are better with Titan's lower compensation schedule.

38 The *James Main* case, supra, held that the argument that if no injunction were granted, the defendant might be impecunious at the time of trial was not germane to a consideration of the balance of convenience.

39 I am therefore of the view that on the balance of convenience and irreparable-harm tests, an injunction should not issue. Such consideration also persuades me that even if I were inclined to grant leave pursuant to the C.C.A.A. it should not be to allow Sairex to now pur sue its claim for an injunction.

40 Should leave, however, be granted to Sairex to now pursue its claim for damages? I note that such would not be as simple as collecting a sum of money, say, on a promissory note. There may be some question of allowing Sairex to at least start its engine. However, I must be cognizant of the fact that activity on Sairex's part would likely require activity on Algoma's part — thereby requiring the deployment of executive time in this matter which can be pursued after Algoma comes out from its C.C.A.A. shell, rather than such executives spending their time on the restructuring process or general operations of making and selling steel at a critical time. It would also result in legal expense and a possible diversion of legal talent.

41 Therefore, while I have considerable sympathy for Sairex's position, I would dismiss its motion: (i) for leave to appeal under the C.C.A.A. to add Algoma to its proceedings against the others and (ii) for interlocutory injunction against Algoma, Dofasco, Prudential and Titan. I was advised in June that Algoma would make available to Sairex specifics of any contracts that it enters into as to the P.R.C. so as to enable Sairex to calculate its loss of commissions; to maintain confidentiality the disclosure should be that which is necessary to make the calculation and not details of the order itself.

42 Costs are to be in the cause. The parties may speak to me further if they wish to fix the amounts.

Motion dismissed.

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1984 CarswellBC 588, 54 C.B.R. (N.S.) 28, 56 B.C.L.R. 342, [1984] 6 W.W.R. 435

1984 CarswellBC 588, 54 C.B.R. (N.S.) 28, 56 B.C.L.R. 342, [1984] 6 W.W.R. 435

Major, Re

Re MAJOR

British Columbia Supreme Court

Wood J.

Heard: August 22 and 30, 1984
Judgment: September 7, 1984
Judgment: August 30, 1984
Docket: Vancouver No. 1188/84

Counsel: *A.S. Angus*, for applicants Pannu.

P.J. Stanford, for respondents trustee in bankruptcy and Gestas Corporation Ltd.

J.D. Truscott, for Law Society of British Columbia, intervener.

Subject: Corporate and Commercial; Insolvency; Property; Civil Practice and Procedure

Bankruptcy --- Property of bankrupt — Choses in action — Insurance policies of bankrupt — Liability insurance.

Practice --- Judgments and orders — Declaratory judgments or orders — Availability — General.

Property of bankrupt — Assets vesting in trustee — Insurance policies and claims — Proceeds of solicitor's professional liability insurance — Applicants suing solicitor for breach of fiduciary duty — Solicitor's assignment into bankruptcy not affecting beneficial interest of third parties under insurance policy — Applicants obtaining declaration that liability insurance proceeds payable to them, not to bankrupt's estate, in event action successful.

The applicants were plaintiffs in an action in which they claimed damages for breach of a fiduciary duty alleged to have been owed to them by the bankrupt when he acted as their solicitor in a real estate transaction. The solicitor made an assignment for the general benefit of creditors, however there were no funds in the bankrupt estate available for distribution to the unsecured creditors. The applicants sought an order pursuant to s. 49 of the Bankruptcy Act permitting them to continue the action against the bankrupt, and also sought a declaration that they, not the bankrupt's estate, should enjoy the benefit of a policy of professional liability insurance issued to the Law Society of British Columbia in the event that they either settled their action or obtained judgment against the bankrupt at trial. The trustee of the bankrupt estate argued that the application for declaratory relief was premature or, in the alterna-

tive, that the bankrupt's estate was entitled to any proceeds payable under the policy.

Held:

Declaration granted.

The applicants were entitled to know whether the judgment sought against the bankrupt, if obtained, would result in anything more than symbolic relief, and the early determination of that issue was of great practical importance. The declaratory relief sought was not premature and the court had the discretion to grant such relief if the applicants were otherwise entitled to it. To permit the estate of the bankrupt to receive the proceeds of the insurance policy would result in an injustice to the applicants for whose benefits one would have expected that the insurance policy was intended. Such an undesirable result was avoided by the express wording of the insuring agreement. The interests of justice and the spirit of the agreement demanded that the applicants should have the declaration they sought. The beneficial interest of a third party under an insurance policy which can be enforced against an insurer in a court of equity, cannot be effected by the assignment into bankruptcy of the insured who had no proprietary interest in the proceeds of that insurance. The applicants were entitled to solicitor-and-client costs against the trustee and, if the estate of the bankrupt did not have sufficient funds to meet those costs, they were to be paid by the trustee personally.

Cases considered:

Employer's Liability Assur. Corp. v. Lefaivre, [1930] S.C.R. 1, 11 C.B.R. 290, [1930] 1 D.L.R. 689 — *applied*

Gandy v. Gandy (1885), 30 Ch. D. 57 (C.A.) — *applied*

Harrington Motor Co., Re; Ex parte Chaplin, [1928] Ch. 105 (C.A.) — *considered*

Post Office v. Norwich Union Fire Ins. Soc., [1967] 2 Q.B. 363, [1967] 2 W.L.R. 709, [1967] 1 All E.R. 577 (C.A.) — *considered*

Prov. Treas. for Man. v. Min. of Fin. for Can.; A.G. Man. v. Min. of Fin. for Can., [1943] S.C.R. 370, 24 C.B.R. 320, [1943] 3 D.L.R. 673 — *referred to*

Solosky v. R., [1980] 1 S.C.R. 821, 16 C.R. (3d) 294, 50 C.C.C. (2d) 495, 105 D.L.R. (3d) 745, 30 N.R. 380, affirming [1978] 2 F.C. 632, 41 C.C.C. (2d) 49, 86 D.L.R. (3d) 316, 22 N.R. 34 — *applied*

Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3, s. 49.

Rules considered:

British Columbia Supreme Court Rules, Sched. C.

Application for ordering continuing action against bankrupt solicitor and for declaration of entitlement to proceeds of bankrupt's professional liability insurance.

***Wood J.* (Memorandum to counsel):**

1 This matter originally came on for hearing before me on 22nd August 1984 in the presence of counsel for the applicants and the respondents, the trustee in bankruptcy and the Gestas Corporation, both of whom were represented by the same counsel. After some argument, I became concerned that the application raised issues of some considerable importance and concern for the Law Society of British Columbia. I directed that proceedings be adjourned and that counsel contact the law society with my invitation to intervene should it see fit. I also expressed concern that the interests of the respondent trustee and the respondent insurer were sufficiently in conflict that they should not be represented by the same counsel.

2 The application was reconvened on 30th August 1984 with counsel for the intervenor law society present. At the close of argument on that day I delivered judgment orally, granting the applicants the relief requested. The attached are my reasons as requested by counsel.

***Wood J.* (orally):**

3 The applicants Sarjit Singh Pannu and Gurdev Kaur Pannu are the plaintiffs in an action commenced in this court on 12th March 1982 by which they claim damages for breach of a fiduciary duty said to have been owed to them by the bankrupt when he acted as their solicitor in a real estate transaction in 1976. They seek an order, pursuant to s. 49 of the Bankruptcy Act, R.S.C. 1970, c. B-3, permitting them to continue the action against the bankrupt who made an assignment for the general benefit of creditors on 20th July 1984. That application is not opposed.

4 They also seek a declaration that they, and not the estate of the bankrupt, should enjoy the benefit of a policy of professional liability insurance issued to the Law Society of British Columbia (the "named insured") by a consortium of underwriters managed by the Gestas Corporation Ltd. (the "insurer"), in the event that they either reach a compromise settlement of their action or obtain judgment against the bankrupt at trial.

5 A trustee in bankruptcy opposes the second application on two grounds. As a preliminary objection, it is argued that the application for declaratory relief should be dismissed as being premature. Alternatively, on the substantive issue, the trustee argues that the estate of the bankrupt is entitled to whatever proceeds may become payable by virtue of the terms of the policy of insurance in question.

6 I shall deal first with the argument that the application for declaratory relief is premature. The trial of the plaintiffs' action is set to commence on 3rd October 1984. The trustee says that until the plaintiffs have judgment in that action, the insurer is under no obligation to pay in accordance with the terms of the policy. Any dispute over who should have the benefit of the policy is thus contingent upon the outcome of the litigation, and it is argued that declaratory relief should not be granted when the dispute which it seeks to set at rest has not yet arisen and may not, in fact, arise.

7 There are no funds in the bankrupt's estate available for distribution to the unsecured creditors, whose claims presently exceed $131,000. The trial of the action against the bankrupt is expected to last three to four days and will involve considerable expense for the plaintiffs, who are people of limited means. They cannot afford to pursue their right of action against the bankrupt if the only result will be to benefit the unsecured creditors of his estate.

8 In *Solosky v. R.*, [1980] 1 S.C.R. 821, 16 C.R. (3d) 294, 50 C.C.C. (2d) 495, 105 D.L.R. (3d) 745, 30 N.R. 380, the appellant, who was an inmate of a federal penitentiary, sought a declaration that future correspondence between himself and his solicitor be delivered without being opened or read by prison staff engaged in the censorship of inmate correspondence pursuant to regulations [Penitentiary Service Regulations, C.R.C. 1978 c. 1251] promulgated under the Penitentiary Act, R.S.C. 1970, c. P-6. The Federal Court of Appeal [[1978] 2 F.C. 632, 41 C.C.C. (2d) 49, 86 D.L.R. (3d) 316, 22 N.R. 34] held, inter alia, that to make such an order with respect to correspondence not yet written would be to grant declaratory relief with respect to an issue the future existence of which was purely

hypothetical.

9 An appeal was taken to the Supreme Court of Canada. In speaking to this issue for the court, Dickson J., as he then was, said, at pp. 830-31:

> Declatory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a "real issue" concerning the relative interests of each has been raised and falls to be determined.
>
> The principles which guide the court in exercising jurisdiction to grant declarations have been stated time and again. In the early case of *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.*, [1921] 2 A.C. 438, in which parties to a contract sought assistance in construing it, the Court affirmed that declarations can be granted where real, rather than fictitious or academic, issues are raised. Lord Dunedin set out this test (at p. 448):
>
> > The question must be a real and not a theoretical question, the person raising it must have a real interest to raise it, he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.
>
> In *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government*, [1958] 1 Q.B. 554, (rev'd [1960] A.C. 260, on other grounds), Lord Denning described the declaration in these general terms (p. 571):
>
> > ... if a substantial question exists which one person has a real interest to raise, and the other to oppose, then the court has a discretion to resolve it by a declaration, which it will exercise if there is good reason for so doing.
>
> The jurisdiction of the court to grant declaratory relief was again stated, in the broadest language, in *Pharmaceutical Society of Great Britain v. Dickson*, [1970] A.C. 403 (H.L.), a case in which the applicant sought a declaration that a proposed motion of the pharmaceutical society, if passed, would be *ultra vires* its objects and in unreasonable restraint of trade. In the course of his judgment, Lord Upjohn stated, at p. 433:
>
> > A person whose freedom of action is challenged can always come to the court to have his rights and position clarified, subject always, of course, to the right of the court in exercise of its judicial discretion to refuse relief in the circumstances of the case.

10 In my view, these very broad descriptions of the court's discretionary jurisdiction to grant declaratory relief, adopted and applied by the Supreme Court of Canada in the above passages, are determinative of the preliminary issue raised by the trustee in this application. A substantial question exists to be determined. The applicants have a real interest in the outcome, as does the trustee. Indeed, the issue is one of public importance.

11 There is good reason to resolve the question now. The Pannus are entitled to know now whether the judgment which they seek against the bankrupt, if obtained, will result in anything more than symbolic relief. Serious settlement discussions are unlikely to take place unless and until the substantive issue raised in this application is resolved. The early determination of that issue is therefore of great practical importance.

12 I am satisfied that the declaratory relief sought is not premature, and that I have the discretion to grant such relief if the applicants are otherwise entitled to it.

13 The trustee's position is that if the applicants obtain judgment against the bankrupt they simply become unse-

cured creditors of his estate and that the proceeds of the insurance would then form part of that estate. Reliance is placed upon the decision in *Re Harrington Motor Co.; Ex parte Chaplin*, [1928] Ch. 105 (C.A.). There the applicant had recovered judgment against the company as a result of injuries he sustained when struck by one of its vehicles. The company was insured under a policy which provided for indemnification of all sums which it became legally liable to pay in such circumstances. Before paying the applicant's judgment, however, the company went bankrupt and the insurers then paid the policy proceeds to the liquidator. The Court of Appeal upheld the trial judge, who had dismissed Chaplin's application for declaratory relief and for an order that the liquidator pay the proceeds of the policy to him. The reasons for dismissing the appeal are illustrated, in a nutshell, by the following passage from the judgment of Lord Hanworth M.R. found at pp. 113-14:

> The money which is being received and which will be distributed by the liquidator is a sum which the debtors, the company, have secured should be paid to them in certain events, but which has been secured by their own contract made with the insurance company, and not by any intervention of the creditor, Mr. Chaplin, although it was in consequence of an accident which he suffered that the loss arose, in respect of which the insurance company has made the payment.

14 Commenting on this decision 40 years later, Lord Denning M.R. in *Post Office v. Norwich Union Fire Ins. Soc.*, [1967] 2 Q.B. 363, [1967] 2 W.L.R. 709, [1967] 1 All E.R. 577 (C.A.), said at p. 373:

> In the days before the Act of 1930, when an injured person got judgment against a wrongdoer who was insured, and the wrongdoer then went bankrupt, the injured person had no direct claim against the insurance moneys. He could only prove in the bankruptcy. The insurance moneys went into the pool for the benefit of the general body of creditors: see *In Re Harrington Motor Co. Ltd. ex parte Chaplin*, [1928] 1 Ch. 105, 44 T.L.R. 58, C.A., applied in *Hood's Trustees v. Southern Union General Insurance Co. of Australasia*, [1928] 1 Ch. 793, C.A. That was so obviously unjust that Parliament intervened. In the Act of 1930 the injured person was given a right against the insurance company. Section 1 says that: "Where under any contract of insurance a person ... is insured against liabilities to third parties which he may incur," then in the event of the insured becoming bankrupt if he is an individual, or, in the case of the insured being a company, in the event of a winding-up.
>
> > if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred.

15 The trustee argues that no similar legislation has been effected in Canada and that therefore the Court of Appeal result in the *Harrington Motor* case is determinative of the issue raised in the application before me.

16 The insuring agreement in effect in this case reads, in part, as follows:

> The *Insurers* agree with the *Named Insured*, named in the Declarations made a part thereof, and in consideration of the payment of the premium and in reliance upon the statement in the Declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:
>
> **Insuring Agreements**
>
> I. — To pay on behalf of the *Insured* all sums which the *Insured* shall become legally obligated to pay as damages because of any act or omission of the *Insured*,or of any other person for whose acts or omissions the *Insured* is legally responsible, and arising out of the performance of professional services for others in the *Insured's* capacity as a lawyer but only in his capacity as a member of the Law Society of British Columbia.

17 The "*Insured*" to whom reference is made in this agreement includes each solicitor who is a member of the Law Society of British Columbia and who holds a valid certificate of insurance issued under the policy. It is common ground that the bankrupt was an insured under this policy at the time he acted for the applicants in 1976.

18 This agreement obligates the insurer to pay, on the insured's behalf, any claim which he may become legally liable to pay. It thus secures a benefit for third persons, such as the applicants in this case, for whom the insured performs professional services in his capacity as both a lawyer and a member of the Law Society of British Columbia.

19 A similar contract of insurance was in effect in *Employer's Liability Assur. Corp. v. Lefaivre*, [1930] S.C.R. 1, 11 C.B.R. 290, [1930] 1 D.L.R. 689. In that case the Supreme Court of Canada addressed the question of who was entitled to the proceeds of a policy of insurance taken out by an employer for the benefit of employees who were injured on the job, when that employer had made an assignment in bankruptcy after an employee was injured. The employee obtained judgment against the trustee who, in turn, brought action against the insurer, who had refused to pay anyone for reasons that do not concern the issues in this case.

20 The insuring agreement there obligated the insurer [pp. 694-95]:

> ... (a) to pay "to every person entitled to claim under the Workmen's Compensation Act promptly and in the manner therein specified, the total amount payable or such instalments as may be declared due..."
>
> ... (b) "to compensate the owner for losses suffered by him as a result of the responsibility imposed on him by law for damages resulting from injuries suffered by his employees whilst legally employed, wherever such injuries took place, provided it be within the territorial limits of the Dominion of Canada or of the United States of America."

21 The trustee's action against the insurer succeeded at trial and was upheld on appeal. In the Supreme Court of Canada, where he also succeeded, the trustee argued that the proceeds of the policy should be paid to the benefit of the bankrupt's estate. The court disagreed. Speaking for the majority, Rinfret J., as he then was, said at pp. 700-701 (translation):

> The injured Levesque was not paid. As the policy in question is one of guaranty, we believe that the intention of the contract is that the amount of the insurance should be for the benefit of the victim of the accident. We do not share the fear of the company that it may be forced to pay a second time. We believe that the right to sue, given to the employee in the case we have discussed, creates only an alternative obligation and that the company is freed from it by doing one of the two things which were the object to that contract (Civil Code, art. 1093). But the interests of justice and the spirit of the agreement in question demand that the amount of the insurance due be paid to the victim of the accident. The two parties have recognized this...
>
> Levesque was not a party to the case and so we foresee difficulties in the execution of the judgment if we order payment direct to him. But as the plaintiff is an officer of the Court, we maintain the action, declaring however that the trustee shall receive the amount for the benefit of the creditor Levesque and with instructions to hold this amount apart from the other assets of the bankrupt estate, and to hand it to Levesque.

22 To permit the estate of the bankrupt to receive the proceeds of the policy of insurance in this case would result in an injustice to the applicants, for whose benefit one would have expected that the policy was intended. The other creditors of the estate would gain a windfall from the misfortune of the applicants as a result of a policy of insurance from which no one ever intended them to benefit.

23 Fortunately, such an undesirable result is avoided by the express wording of the insuring agreement in this case. I conclude that, as in the *Employer's Liability* case, supra, this policy is worded in such a way as to evidence its

intention that the proceeds of the insurance should be for the benefit of those who suffer a loss or damage as a result of the culpable acts or omissions of the insured. That being the case, I am bound to get effect to the conclusion of the court in the *Employer's Liability* case. To paraphrase Rinfret J., the interests of justice and the spirit of the agreement in question demand that the applicants have the declaration which they seek.

24 I am reinforced in this conclusion by those cases which hold that a third person who is not a party to a contract of indemnity or guaranty, but who has a beneficial interest thereunder as a cestui que trust, can sue in a court of equity to enforce such contract to his benefit. The rule in this regard was stated by Cotton L.J. in *Gandy v. Gandy* (1885), 30 Ch. D. 57 at 66-67 (C.A.):

> Now, of course, as a general rule, a contract cannot be enforced except by a party to the contract; and either of two persons contracting together can sue the other, if the other is guilty of a breach of or does not perform the obligation of that contract. But a third person — a person who is not a party to the contract — cannot do so. That rule, however, is subject to this exception: if the contract, although in form it is with *A.*, is intended to secure a benefit to *B.*, so that *B.* is entitled to say he has a beneficial right as *cestui que trust* under that contract; then *B.* would, in a Court of Equity, be allowed to insist upon and enforce the contract. That, in my opinion, is the way in which the law may be stated.

This statement of the law was approved by the Supreme Court of Canada in *Prov. Treas. for Man. v. Min. of Fin. for Can.; A.G. Man. v. Min. of Fin. for Can.*, [1943] S.C.R. 370, 24 C.B.R. 320, [1943] 3 D.L.R. 673, per Hudson J. at p. 378.

25 It follows that the beneficial interest of a third party under a policy of insurance, which can be enforced against an insurer in a court of equity, cannot be affected by the assignment into bankruptcy of the insured who has no proprietary interest in the proceeds of that insurance.

26 The applicants will have a declaration that they are entitled to the benefit of any moneys which may become payable, as a consequence of the pursuit of their action. No. C821214 against the bankrupt Gerald Alan Major, pursuant to a certain contract of insurance, being policy No. 077-020-477, between the Gestas Corporation as managers for the insurers named therein and the Law Society of British Columbia, as the named insured.

27 After hearing the submissions of counsel and reviewing the authorities cited by them on the matter of costs, I have decided that the applicants are entitled to solicitor/client costs against the trustee, as taxed or agreed upon, pursuant to Sched. C of the British Columbia Supreme Court Rules. This application raised a matter of considerable public importance and, although of necessity, it was brought under the bankruptcy proceedings, the issues raised are so inextricably bound up with as to be inseparable from the issues raised in the action brought against the bankrupt by the applicants. In the event that the estate of the bankrupt no longer has sufficient funds to meet these costs, I direct that they be paid by the trustee personally.

28 The Law Society of British Columbia, who supported the applicants, seeks no costs. I make no order as to the costs of the respondent insurer, who was represented throughout by counsel for the trustee.

Application allowed.

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2007 CarswellNS 251, 2007 NSCA 68, [2007] I.L.R. I-4601, 32 C.B.R. (5th) 1, 50 C.C.L.I. (4th) 17, 814 A.P.R. 286, 255 N.S.R. (2d) 286, 284 D.L.R. (4th) 113

2007 CarswellNS 251, 2007 NSCA 68, [2007] I.L.R. I-4601, 32 C.B.R. (5th) 1, 50 C.C.L.I. (4th) 17, 814 A.P.R. 286, 255 N.S.R. (2d) 286, 284 D.L.R. (4th) 113

Buchanan, Re

Thomas W. Buchanan and The Dominion of Canada General Insurance Company, a body corporate, and Rexel North America Inc., a body corporate under the laws of the Dominion of Canada (Appellants) v. Superline Fuels Inc. (Respondent)

Nova Scotia Court of Appeal

Cromwell, Saunders, Oland JJ.A.

Heard: October 17, 2006
Judgment: June 6, 2007
Docket: C.A. 266625, 26629, 266631, 26635

Proceedings: affirming *Buchanan, Re* (2006), 19 C.B.R. (5th) 67, *(sub nom. Buchanan v. Superline Fuels Inc)* 240 N.S.R. (2d) 390, *(sub nom. Buchanan v. Superline Fuels Inc)* 763 A.P.R. 390, 2006 NSSC 51, 2006 CarswellNS 72 (N.S. S.C.)

Counsel: David Coles, Q.C., Brian Casey, Shelly Martin (Articled Clerk) for Appellant, Rexel North America Inc.

W. Augustus Richardson, Lisa Richards for Appellants, Buchanan, Dominion of Canada

Wendy Johnston, Q.C., Stephen Kingston for Respondent, Superline Fuels

Michael Brooker, Q.C. for Marsha Watkins (not participating)

Subject: Civil Practice and Procedure; Insolvency; Insurance; Contracts

Bankruptcy and insolvency --- Effect of bankruptcy on other proceedings — Proceedings against bankrupt — After discharge of bankrupt

Plaintiff company contracted with owner to install oil tank — Plaintiff entered into subcontract with defendant to install tank — Leak was discovered in installed tank, which plaintiff paid substantial amount of money to remedy — Plaintiff brought action against defendant and insurer — Defendant made assignment in bankruptcy — Plaintiff was granted order to continue action against defendant — Defendant was discharged — Plaintiff's application to continue action was granted — Trial judge found discharge did not affect plaintiff's right to proceed against defendant in effort to obtain judgment, which could then be enforced against insurer — Trial judge found that order entitled

plaintiff to recover proceeds of defendant's third party liability insurance only, and that plaintiff would have to file separate claim as unsecured creditor after obtaining judgment if wished to participate in distribution of proceeds of bankruptcy — Trial judge found injured party had proprietary interest in insurance proceeds, not insured — Trial judge found disallowing action would allow insurer to escape its responsibilities under policy — Defendants appealed — Appeal dismissed — Discharge did not prevent plaintiff from continuing with action — Trial judge misinterpreted leave order, which did not affect substantive rights between parties — Sections 145 and 133 of Bankruptcy and Insolvency Act, which allows for certain claims covered by insurance to continue in spite of bankruptcy, are not applicable to policies of general commercial liability — Amounts paid under s. 145 of Act are made to third parties on behalf of insured, while amounts paid to insured — Debt did not have to be satisfied by defendant, but underlying legal obligations were not extinguished — Obligation to pay proceeds of insurance claim still existed for purposes of insurance policy — Allowing action to continue was in accordance with principles of Act — Allowing claim did not affect distribution of bankrupt's property or impede financial rehabilitation — Result would not tempt claimants to delay proceedings until after discharge — Fact that judgment had not been entered or settlement reached did not change fact that insurer was legally obligated to pay legitimate claims on insured's policy — Supplier of part, who had been added as third party, was not prejudiced.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Leave by judge

Claims against insurer of bankrupt.

Insurance --- Contracts of insurance — General principles

Plaintiff company contracted with owner to install oil tank — Plaintiff entered into subcontract with defendant to install tank — Leak was discovered in installed tank, which plaintiff paid substantial amount of money to remedy — Plaintiff brought action against defendant and insurer — Defendant made assignment in bankruptcy — Plaintiff was granted order to continue action against defendant — Defendant was discharged — Plaintiff's application to continue action was granted — Trial judge found discharge did not affect plaintiff's right to proceed against defendant in effort to obtain judgment, which could then be enforced against insurer — Trial judge found that order entitled plaintiff to recover proceeds of defendant's third party liability insurance only, and that plaintiff would have to file separate claim as unsecured creditor after obtaining judgment if wished to participate in distribution of proceeds of bankruptcy — Trial judge found injured party had proprietary interest in insurance proceeds, not insured — Trial judge found disallowing action would allow insurer to escape its responsibilities under policy — Defendants appealed — Appeal dismissed — Discharge did not prevent plaintiff from continuing with action — Provision in policy that bankruptcy did not relieve insurer of obligations did not constitute waiver of right to rely on discharge as defence — Waiver clause could not uphold decision of trial judge in itself — Clause which stated that bankruptcy of insured did not relieve insurer's obligations was not waiver of right to rely on discharge as defence — Waiver was intended for benefit of insured, not third parties — Discharge was complete bar against bankrupt, but not insurer — Fact that judgment had not been entered or settlement reached did not change fact that insurer was legally obligated to pay legitimate claims on insured's policy.

Cases considered by *Oland J.A.*:

Bell ExpressVu Ltd. Partnership v. Rex (2002), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 166 B.C.A.C. 1, 271 W.A.C. 1, 18 C.P.R. (4th) 289, 100 B.C.L.R. (3d) 1, 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — referred to

Bristol-Myers Squibb Co. v. Canada (Attorney General) (2005), 2005 SCC 26, 2005 CarswellNat 1261, 2005 CarswellNat 1262, 253 D.L.R. (4th) 1, [2005] 1 S.C.R. 533, 39 C.P.R. (4th) 449, 334 N.R. 55 (S.C.C.) — considered

Builders Contract Management Ltd. v. Simcoe & Erie General Insurance Co. (1993), 16 C.C.L.I. (2d) 84, 110 Sask. R. 175, [1993] I.L.R. 1-2994, 1993 CarswellSask 95 (Sask. Q.B.) — referred to

Chaplin v. Harrington Motor Co. (1927), [1928] Ch. 105 (Eng. C.A.) — considered

Co-Operative Avicole de St-Isidore Ltd. v. Co-operators General Insurance Co. (1997), 44 C.C.L.I. (2d) 1, 1997 CarswellOnt 2277, (sub nom. *Co-opérative Avicole de St-Isidore Ltd. v. Co-operators General Insurance Co.)* 32 O.T.C. 81 (Ont. Gen. Div.) — considered

Dutchak Estate v. Seidle (1998), 1998 CarswellSask 722, (sub nom. *Kowtzen v. Seidle)* 176 Sask. R. 99 (Sask. Q.B.) — referred to

Eurasia Auto Ltd. v. M & M Welding & Supply (1985) Inc. (1991), 1991 CarswellAlta 306, 5 C.B.R. (3d) 227, 1 C.C.L.I. (2d) 203, 119 A.R. 348 (Alta. Master) — referred to

Geary v. C & K Mufflers (June 6, 2006), Doc. 267105 (U.S. Mich. Ct. App.) — considered

Handelman, Re (1997), 1997 CarswellOnt 2891, 48 C.B.R. (3d) 29 (Ont. Bktcy.) — considered

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — referred to

Husky Oil Operations Ltd. v. Minister of National Revenue (1995), 1995 CarswellSask 739, 1995 CarswellSask 740, 188 N.R. 1, 24 C.L.R. (2d) 131, 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 107 W.A.C. 81, [1995] 3 S.C.R. 453, [1995] 10 W.W.R. 161 (S.C.C.) — considered

J & P Holdings Ltd. v. Saskatchewan Mutual Insurance Co. (1990), 1990 CarswellSask 120, [1990] I.L.R. 1-2651, 84 Sask. R. 52, 44 C.C.L.I. 205 (Sask. Q.B.) — considered

Kryspin, Re (1983), 40 O.R. (2d) 424, 44 C.B.R. (N.S.) 232, 142 D.L.R. (3d) 638, 1983 CarswellOnt 158 (Ont. Bktcy.) — considered

Letovsky v. Mutual Motor Freight Ltd. (1958), 37 C.B.R. 83, 66 Man. R. 311, 26 W.W.R. 433, 16 D.L.R. (2d) 355, 1958 CarswellMan 2 (Man. Q.B.) — considered

Major, Re (1984), 56 B.C.L.R. 342, 54 C.B.R. (N.S.) 28, 1984 CarswellBC 588, [1984] 6 W.W.R. 435 (B.C. S.C.) — followed

Maritime Drywall Ltd., Re (1979), 1979 CarswellNS 298, 37 N.S.R. (2d) 488, 67 A.P.R. 488 (N.S. T.D.) — considered

McMurachy v. Red River Valley Mutual Insurance Co. (1994), [1994] 6 W.W.R. 99, 92 Man. R. (2d) 225, 61 W.A.C. 225, 115 D.L.R. (4th) 220, 22 C.C.L.I. (2d) 1, [1994] I.L.R. 1-3093, 1994 CarswellMan 126 (Man. C.A.) — considered

McMurachy v. Red River Valley Mutual Insurance Co. (1994), 24 C.C.L.I. (2d) 198n, [1994] 9 W.W.R. lxxiii (S.C.C.) — referred to

2007 CarswellNS 251, 2007 NSCA 68, [2007] I.L.R. I-4601, 32 C.B.R. (5th) 1, 50 C.C.L.I. (4th) 17, 814 A.P.R. 286, 255 N.S.R. (2d) 286, 284 D.L.R. (4th) 113

Miller, Re (2001), 2001 CarswellOnt 2834, 27 C.B.R. (4th) 107 (Ont. S.C.J.) — followed

Musser v. Musser (2003), 2003 Ohio 1440 (U.S. Ohio Ct. App.) — referred to

Northern Assurance Co. v. Brown (1956), [1956] S.C.R. 658, 3 D.L.R. (2d) 705, [1956] I.L.R. 1-229, 1956 CarswellOnt 76 (S.C.C.) — referred to

Qualiglass Holdings Inc. v. Zurich Indemnity Co. of Canada (2004), 16 C.C.L.I. (4th) 95, 8 C.B.R. (5th) 111, 47 Alta. L.R. (4th) 325, 368 A.R. 171, [2004] I.L.R. I-4329, [2006] 3 W.W.R. 505, 2004 CarswellAlta 1013, 2004 ABQB 577 (Alta. Q.B.) — considered

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 50 C.B.R. (3d) 163, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, (sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006 (S.C.C.) — referred to

Simonelli v. Mackin (2003), 39 C.B.R. (4th) 297, (sub nom. *Simonelli (Bankrupt), Re)* 320 A.R. 330, (sub nom. *Simonelli (Bankrupt), Re)* 288 W.A.C. 330, 2003 CarswellAlta 176, 2003 ABCA 47 (Alta. C.A. [In Chambers]) — referred to

Skenandoa Rayon Corp. v. Halifax Fire Ins. Co. (1935), 245 A.D. 279, 281 N.Y.S. 193 (U.S. N.Y.A.D. 4th Dept.) — referred to

Somersall v. Friedman (2002), [2002] I.L.R. I-4114, 292 N.R. 1, 2002 SCC 59, 25 M.V.R. (4th) 1, 2002 CarswellOnt 2550, 2002 CarswellOnt 2551, [2002] 3 S.C.R. 109, 39 C.C.L.I. (3d) 1, (sub nom. *Scottish & York Insurance Co. v. Somersall)* 215 D.L.R. (4th) 577, 163 O.A.C. 201, [2002] R.R.A. 679 (S.C.C.) — considered

Vandepitte v. Preferred Accident Insurance Co. of New York (1931), [1932] S.C.R. 22, [1932] 1 D.L.R. 107, 1931 CarswellBC 117 (S.C.C.) — considered

Woodworth v. J.S. McMillan Fisheries Ltd. (2000), 21 C.B.R. (4th) 314, 28 C.C.L.I. (3d) 187, 2000 CarswellBC 2550, 82 B.C.L.R. (3d) 381, 2000 BCSC 1783 (B.C. S.C.) — considered

Statutes considered:

Automobile Insurance Act, S.N.S. 1932, c. 5

s. 24 — considered

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 2 "claim provable in bankruptcy", "provable claim" or "claim provable" — considered

s. 2 "property" — referred to

s. 30 — referred to

s. 69.3 [en. 1992, c. 27, s. 36(1)] — considered

s. 69.3(1) [en. 1992, c. 27, s. 36(1)] — considered

s. 69.4 [en. 1992, c. 27, s. 36(1)] — considered

s. 121(1) — considered

s. 121(2) — considered

s. 135(1) — considered

s. 135(1.1) [en. 1997, c. 12, s. 89(1)] — considered

s. 145 — considered

s. 158(d) — considered

s. 178(1) — referred to

s. 178(2) — considered

s. 183(1) — considered

s. 193 — considered

s. 193(a) — considered

s. 193(b) — considered

s. 193(c) — considered

s. 193(d) — considered

s. 193(e) — considered

Insurance Act, S.B.C. 1925, c. 20

s. 24 — considered

Insurance Act, R.S.N.S. 1989, c. 231

s. 28 — considered

s. 28(1) — considered

2007 CarswellNS 251, 2007 NSCA 68, [2007] I.L.R. I-4601, 32 C.B.R. (5th) 1, 50 C.C.L.I. (4th) 17, 814 A.P.R. 286, 255 N.S.R. (2d) 286, 284 D.L.R. (4th) 113

s. 133 — considered

s. 133(1) — considered

s. 133(3) — considered

APPEAL by defendant from judgment reported at *Buchanan, Re* (2006), 19 C.B.R. (5th) 67, (sub nom. *Buchanan v. Superline Fuels Inc)* 240 N.S.R. (2d) 390, (sub nom. *Buchanan v. Superline Fuels Inc)* 763 A.P.R. 390, 2006 NSSC 51, 2006 CarswellNS 72 (N.S. S.C.), granting plaintiff's application to continue action arising out of installation of oil tank despite discharge from bankruptcy.

Oland J.A.:

Introduction

1 An absolute order of discharge releases a bankrupt from all claims provable in bankruptcy. But how does that order affect a claimant which, before the bankrupt made an assignment in bankruptcy, brought an action against him but had not obtained judgment before the absolute discharge order, and where, at all material times, the bankrupt had insurance against the type of loss claimed? Does the order act as a complete defence to the claim? Or can a claim against the insurer survive that order? These are the main issues to be determined on this appeal.

Background

2 The facts giving rise to this litigation are not in dispute. They were set out in *Buchanan, Re*, 2006 NSSC 51 (N.S. S.C.), the decision in the Supreme Court of Nova Scotia in Bankruptcy and Insolvency (the "Bankruptcy Court") under appeal. Following are extracts from the summary by Justice Donald M. Hall:

> ¶ 3 . . . In November, 1999, Superline, through one of its divisions, registered as Discount Fuels (Discount), contracted with a home owner, Marsha Watkins (Watkins) for the supply and installation of an oil tank at Watkins' residence for domestic heating purposes. Superline, through Discount, then entered into a subcontract with Buchanan, who was carrying on business under the firm name "Sable Heating and Ventilation" (Sable), to supply and install the oil tank.
>
> ¶ 4 Approximately nine months later a leak was discovered in the oil filter on the line leading from the tank to the interior of the house. The leak caused significant contamination of the soil in the vicinity of the oil tank for which Superline accepted responsibility and paid a substantial sum of money to remedy the problem.
>
> ¶ 5 Superline, however, determined that the leak had been caused by a pinched gasket in the oil filter installed by Discount [sic.] Superline contended that Discount [sic] was negligent in the manner in which it completed the installation of the oil tank and was responsible for the damage and demanded full compensation from Discount [sic] for its remediation costs.
>
> ¶ 6 Buchanan denied responsibility for the oil leak. At the time he had a policy of insurance in place with [The Dominion of Canada General Insurance Company] which covered him for such claims. Once Buchanan became aware of Superline's claim he informed Dominion of the claim. . . .
>
> ¶ 7 As a result of Buchanan's and Dominion's denial of liability, Superline commenced an action on December 6, 2001, against Buchanan claiming damages including reimbursement of its expenses in remedying the loss caused by the oil spill.

¶ 8 Buchanan filed a defence to the action on January 31, 2002, denying any responsibility for Buchanan's [sic] loss. At the same time Buchanan initiated a third party proceeding against Rexel North America Inc., (Rexel) and Roby Metals Ltee (Roby), the supplier and manufacturer respectively, of the alleged defective filter. Rexel filed a defence to the third party action. Roby, which subsequently made an assignment in bankruptcy, did not.

. . . . .

¶ 11 In the meantime, on January 25, 2002, Buchanan had made an assignment in bankruptcy. The claims of Superline were listed as a "contingent" claim.

¶ 12 Under date of April 4, 2002, Superline obtained an order *ex parte* before Nathanson, J., of this Court, which provided, in part, as follows:

> IT IS ORDERED THAT Superline Fuels Inc. be and is hereby granted leave to continue an action in the Supreme Court of Nova Scotia against Thomas W.J. Buchanan.
>
> AND IT IS ORDERED THAT the right of Superline Fuels Inc. to proceed with this action pursuant to this Order shall be for the purpose only of the limits of the insurance policy of the bankrupt, Thomas W.J. Buchanan, and subject to any coverage limits thereto.
>
> AND IT IS FURTHER ORDERED that the time for filing any claim which Superline Fuels Inc. may have as an unsecured creditor after the judgment pursuant to the action against the bankrupt, Thomas W.J. Buchanan, pursuant to subsection 124(1) of the *Bankruptcy and Insolvency Act* be and same is hereby extended until it shall have been ascertained what amount Superline Fuels Inc. shall receive under its judgment.

¶ 13 Apparently Buchanan made an application in April or May, 2003, for an absolute discharge from bankruptcy. The application came before Kennedy, C.J. of this Court, who granted an order under date of May 6, 2003, which contained the following provision:

> AND IT IS FURTHER ORDERED that upon the Court being satisfied that the Bankrupt has completed the above stated terms that an Absolute Order of Discharge shall issue; provided that, pending, the issuance of the Absolute Order of Discharge, either Superline Fuels Inc., or the Bankrupt or his insurer, the Dominion of Canada General Insurance Company, may apply to this Honourable Court for a declaration as to the effect, if any, of the conditional or absolute discharge of the Bankrupt on any and all claims of Superline Fuels Inc. against the Bankrupt, but for greater certainty, any such application shall not restrict or affect the administration by the Trustee of the Bankrupt's Estate including the distribution of any dividends to unsecured creditors.

¶ 14 An absolute order discharging Buchanan was granted by the Registrar in Bankruptcy on November 26, 2004. The order repeated the above clause in the following terms:

> AND IT IS FURTHER ORDERED that an Absolute Order of discharge shall issue, provided that, pending the issuance of the Absolute Order of discharge, either Superline Fuels Inc., or the Bankrupt or his insurer, the Dominion of Canada General Insurance Company, may apply to this Honourable Court for a declaration as to the effect, if any, of the Absolute discharge of the Bankrupt on any and all claims of Superline Fuels Inc. against the Bankrupt, but for greater certainty any such application shall not restrict or affect the administration by the Trustee of the Bankrupt's Estate including the distribution of any dividends to unsecured creditors.

3 As noted in this extract, when Buchanan made an assignment into bankruptcy in January 2002, his statement of affairs showed the disputed claim by Superline as "contingent." Most actions against a bankrupt are automatically stayed by the bankruptcy proceedings (s. 69.3 of the *Bankruptcy and Insolvency Act*, R.S. 1985, c. B-3, s. 1; 1992, c. 27, s. 2 (the "*BIA*")), but a creditor may apply to the court for leave to continue its claim (s. 69.4). Superline applied *ex parte* for a declaration that the statutory stay be lifted with respect to its claim. The April 2002 order issued by Nathanson, J. (the "Leave Order") granted Superline leave to continue its action against Buchanan.

4 Superline consented to the May 6, 2003 conditional discharge order granted by Kennedy, C.J. which provided *inter alia* that, pending the issuance of the absolute order for discharge, Superline, Buchanan or Dominion could apply for a declaration as to the effect, if any, of the discharge of Buchanan on Superline's claims against him. No such application was made prior to the November 26, 2004 absolute order of discharge (the "Discharge Order"). Only after the issuance of that Discharge Order did Superline apply for such a declaration pursuant to s. 183(1) of the *BIA*.

The Decision of the Bankruptcy Judge

5 The bankruptcy judge heard three applications — one by each of Superline, Buchanan, and Dominion. First, Superline had applied for a declaration pursuant to s. 183(1) of the *BIA* as to the effect, if any, of Buchanan's bankruptcy on its claims against him. Justice Hall granted its application. His order dated May 19, 2006 provided that Buchanan's absolute bankruptcy discharge shall not operate to limit, restrict or relieve Dominion of any liability or obligation it may have to pay, on behalf of Buchanan, any third party in respect of the proceedings pertaining to the fuel leak and soil contamination, where the liability arises pursuant to the commercial general liability policy issued by Dominion to Buchanan (the "Policy").

6 Second, Buchanan had applied to amend his defence to provide that he had been released from further liability as a consequence of his discharge from bankruptcy, and for an order striking out Superline's statement of claim and for summary judgment. Third, Dominion had applied for a declaration that Superline has no rights or cause of action against it pursuant to the Policy. The judge dismissed each of these applications by Buchanan and Dominion.

7 Rexel was represented at the hearing of the applications, and made submissions supporting Buchanan's position. Buchanan, Dominion and Rexel (the "appellants") apply for leave to appeal the decision and order relating to Superline's application; and, if granted, appeal that decision and order. Buchanan appeals from the dismissal of his applications. He and Dominion appeal from the decision and order dismissing Dominion's application.

Issues

8 With respect to the decision and order relating to Superline's application, the notices of appeal filed by the appellants set out multiple grounds of appeal. These can be combined and reworded as follows:

(1) Is leave required to appeal the order which granted Superline's application for a declaration and, if so, should leave be granted?

(2) Did the bankruptcy judge err in holding that the Leave Order affected the substantive rights of Buchanan and Dominion?

(3) Does the Discharge Order operate as a discharge of the claims of Superline against Buchanan as it relates to indemnity insurance which may be available to respond to the claims against him?

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(4) Does a provision in the Policy providing that bankruptcy of the insured does not relieve the insurer of its obligation mean that Dominion has waived its right to rely upon Buchanan's Discharge Order as a defence?

(5) Prior to any judgment being entered against Dominion, does Superline have rights directly against Dominion under the Policy it issued which names Buchanan as an insured?

(6) If Superline is entitled to proceed with its action, does this constitute prejudice to Rexel?

These issues incorporate the issues raised by Dominion in appealing the dismissal of its application.

9 The issues pertaining to Buchanan's appeal of the dismissal of his applications are:

(1) Whether leave should be granted with respect to his applications to amend his defence to provide that he had been released from further liability as a consequence of the company Discharge Order, and to strike out Superline's statements of claims and to provide for summary judgment, and

(2) If so, whether Buchanan is entitled to summary judgment against Superline, giving effect to that defence.

Standard of Review

10 Determining the test for appellate review requires consideration of the nature of the decision. This appeal does not challenge any of the bankruptcy judge's findings of fact or inferences of fact, nor does it involve questions of mixed fact and law. Rather, the critical issues are all questions of law. For such questions, the standard of review is correctness. See *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31 (S.C.C.).

Analysis

11 I begin with the issues which pertain to the decision and order granting Superline's application for a declaration. The first relates to leave to appeal.

(1) Is leave required to appeal the Order granting Superline's application for a declaration?

12 Section 193 of the *BIA* sets out when this court can hear an appeal from an order or decision of the bankruptcy court. It reads:

193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

(a) if the point at issue involves future rights;

(b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;

(c) if the property involved in the appeal exceeds in value ten thousand dollars;

(d) from the grant or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and

(e) in any other case by leave of a judge of the Court of Appeal.

(Emphasis added)

13 According to Buchanan and Dominion, no leave is necessary and the case at bar could come within s. 193(a) or (c). However, they candidly acknowledge that there are difficulties with their submissions.

14 In my view, it is not necessary to decide if those provisions apply in these circumstances. Assuming, without deciding, that none of s. 193(a), (b), (c) or (d) is applicable, I would grant leave to appeal the order granting Superline a declaration, pursuant to s. 193(e). The issues which are the subject of this appeal are important to all of the parties to this litigation and to the action itself, and the appeal is clearly not frivolous. See *Simonelli v. Mackin* (2003), 39 C.B.R. (4th) 297 (Alta. C.A. [In Chambers]).

(2) Did the bankruptcy judge err in holding that the Leave Order granting leave to Superline to continue its action affected the substantive rights of Buchanan and Dominion?

15 In my respectful view, in relying as he did on the Leave Order in deciding to grant Superline's application for a declaration, the bankruptcy judge erred.

16 In his decision, the judge made it clear that the Leave Order was one of the reasons for his granting Superline's application. After noting that the Trustee in Bankruptcy consented to the Leave Order, he continued:

> ¶ 31 This order has not been appealed nor varied in any way although there was a reference to it in the subsequent order for Buchanan's absolute discharge from bankruptcy. Thus the order continues in full force and effect and was not overridden by the subsequent absolute order of discharge.
>
> ¶ 32 Indeed, in referring to Superline's claim as it did in the order of discharge, in my view the court acknowledged that Superline's claim was still outstanding. It is not clear to me why the order provided that any of the interested parties may apply for a declaration as to the effect of the absolute discharge on Superline's claim in view of the previous order permitting Superline to continue its action. That order clearly provided that Superline would be entitled to recover the proceeds of Buchanan's third party liability insurance only and would have to file a separate claim as an unsecured creditor after obtaining judgment, it [sic] it wished to participate in the distribution of the proceeds of the bankruptcy. Superline did not and does not claim any relief under this latter provision. It was also suggested that it is now too late to make the application since the order stated that it may be made "pending" the issuance of the absolute order of discharge. I do not accept this argument. First, because such an application was immaterial since the order granted by Nathanson, J., clearly authorized Superline to proceed with its action, and second, the court could not have intended the result suggested by Mr. Darling since the order of absolute discharge was issued the very same day it was granted.
>
> ¶ 33 Accordingly, for these reasons and the principles enunciated in **Major** and **Miller**, it is my opinion that the absolute discharge does not affect Superline's right to proceed against Buchanan in an effort to obtain judgment against him which it may then enforce against Dominion, subject to the limits in the policy.
>
> (Emphasis added)

17 None of the parties had directed the bankruptcy judge to the Leave Order in either oral or written submissions on the issues before him, much less suggested that it might have the effect of authorizing Superline to proceed with its action, as stated in his decision. Nor had the judge himself raised this with the parties during the hearing.

18 The Leave Order is procedural, rather than substantive, in nature. Such an order is contemplated in s. 69.4 of

the *BIA*, and Superline applied for it pursuant to that provision. The relevant sections read:

> 69.3 (1) Subject to subsections (2) and (3) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or may commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged. . . .
>
> 69.4 A creditor who is affected by the operation of sections 69 to 69.3 or any other person affected by the operation of section 69.3 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
>
> (b) that it is equitable on other grounds to make such a declaration.

19 What a s. 69.4 declaration accomplishes is a lifting of the automatic stay imposed by s. 69.3. Thus, all the Leave Order did was to grant leave to Superline to continue its action against Buchanan, and thereby to claim whatever rights it might have against the insurance policy Dominion had issued to Buchanan. Contrary to the assertion by the bankruptcy judge, it did not clearly authorize Superline to proceed with its action. The Leave Order did not purport to, nor in law could it, determine the rights of Superline against Buchanan and Dominion.

20 Moreover, it appears from the judge's wording that he considered that the Leave Order continued to be effective after the Discharge Order and even beyond. This is not correct in law. The Discharge Order of November 26, 2004 discharged Buchanan. Afterwards, the trustee in bankruptcy completed his work, and was discharged. According to s. 69.3, the stay of proceedings against the bankrupt debtor ceased to apply on the discharge of the trustee. Thus, in stating that the Leave Order was not "overridden" by the Discharge Order and by implying that it continued in full force and effect, the bankruptcy judge erred.

21 Neither the wording nor the purpose of the Leave Order supports the judge's conclusion that the Leave Order determined that Superline was entitled to proceed pursuant to the Policy. However, as will be seen in the analysis of the next issue, the Leave Order was not the only basis for the judge's determination that the Discharge Order did not terminate Superline's claim.

(3) Does the Discharge Order operate as a discharge of the claims of Superline against Buchanan as it relates to indemnity insurance which may be available to respond to the claims against him?

22 In considering this issue, I will summarize the parties' arguments before the bankruptcy judge and his analysis, and then proceed to consider the relevant legislation, the case law, and the wording of the Policy itself.

23 Before the bankruptcy judge, Superline argued that its action against Buchanan was not affected by the Discharge Order. It submitted that although Buchanan is released, Superline's claim against Dominion, his insurer, survives. Buchanan and Dominion argued that that order discharged Buchanan from any further responsibilities for any debts or financial obligations incurred prior to his bankruptcy. In their view, Superline could no longer obtain judgment against Buchanan, and it followed that it could have no claim against Dominion under Buchanan's policy. In short, Buchanan and Dominion argued that they have a complete defence to Superline's claims arising from the oil spill.

24 The bankruptcy judge determined that the Discharge Order did not affect Superline's right to proceed against

Buchanan, in an effort to obtain a judgment against him which might be enforced against his insurer, Dominion. He stated that denial of such an opportunity because of Buchanan's bankruptcy would be unfair and unjust, and that it is the injured party, not the insured, who has the proprietary interest in the insurance proceeds. In deciding this issue, the judge mainly relied on:

> (1) the Leave Order. Earlier in this decision, I determined that he erred in relying on the Leave Order;
>
> (2) a line of cases, in particular *Major, Re* (1984), 54 C.B.R. (N.S.) 28 (B.C. S.C.) (Wood, J.) and *Miller, Re* (2001), 27 C.B.R. (4th) 107 (Ont. S.C.J.) (Deputy Registrar Sproat); and
>
> (3) the wording of the Policy itself.

25 The parties' positions on appeal could hardly be more opposite. The appellants submit that the bankruptcy judge erred by failing to give effect to the clear wording of s. 178(2) on the effect of a discharge from bankruptcy. They contend that the *BIA* does not create any exemption for claims which are insured and, as a consequence, after the Discharge Order, Superline cannot pursue a judgment against Buchanan, which it could enforce against Dominion. Moreover, according to the appellants, the fact that claims covered by certain other insurance policies are expressly unaffected by absolute discharge orders leads to an inference that claims covered by commercial general liability policies are affected by such orders. They say that *Major, Re*, supra is of little relevance; *Miller, Re*, supra is wrongly decided; and that, unless Superline proved its claim before Buchanan's discharge, its claim was released by it.

26 For its part, Superline argues that the effect of the appellants' submissions is to extinguish the liability of a bankrupt for all claims against him or her, even where that liability may be satisfied by third parties or property in which the bankrupt has no legal or beneficial interest. It says that s. 178(2) is not applicable in the circumstances of this case. This is because, urges Superline, the coverage provided by the Policy in relation to its property damage claim does not constitute "property" as defined in s. 2 of the *BIA*. Section 178(2) is not engaged at all, and consequently it could not act to discharge Superline's claim against Buchanan.

27 These arguments as to the effect of the Discharge Order and, in particular, whether it acts as a release of the claims of Superline against Buchanan, require an analysis and interpretation of the statutory provisions, and a consideration of case law. I begin my analysis by considering the relevant provisions of the *BIA* and principles of statutory interpretation.

(a) Bankruptcy and Insolvency Legislation

28 Central to the arguments on appeal is s. 178(2) of the *BIA* which sets out the effect of an order of absolute discharge. It provides:

> 178 (2) Claims released — Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.

Nothing in s. 178(1) applies to this appeal.

29 The definition section of the *BIA*, s. 2, states that:

> "claim provable in bankruptcy," "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor;

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It is uncontested that Superline's claim is one "provable" in bankruptcy.

30 Also relevant is s. 121 which reads in part:

> 121.(1) Claims provable — All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
>
> (2) Contingent and unliquidated claims — The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135. . . .

According to s. 135(1)(1.1), the trustee in bankruptcy determines whether any contingent claim is a provable claim and, if so, values it.

31 The "modern approach" to statutory interpretation is well established. In *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] S.C.J. No. 26 (S.C.C.), Binnie, J. described it as follows:

> ¶ 95 In his book *Construction of Statutes* (2nd ed. 1983), at p. 87, E.A. Driedger sets out this often-cited principle:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
> >
> > It is now well settled in law that this modern approach is the preferred method of statutory interpretation ... However, this framework need not be applied in a formulaic manner. The factors need not be canvassed separately in every case, given that they are very closely related and interdependent...[Emphasis added]

See also *Rizzo & Rizzo Shoes Ltd., Re* (1998), 154 D.L.R. (4th) 193 (S.C.C.) at ¶ 21; *Bell ExpressVu Ltd. Partnership v. Rex* (2002), 212 D.L.R. (4th) 1 (S.C.C.) at ¶ 26-28.

32 As indicated, the object of the legislation and the intention of Parliament in its enactment are factors to be considered in undertaking the interpretation of a statute. In *Husky Oil Operations Ltd. v. Minister of National Revenue* (1995), 128 D.L.R. (4th) 1 (S.C.C.), Iacobbuci, J. set out the objects of the *BIA* generally as follows at ¶ 7:

> **A. The purposes of federal bankruptcy legislation**
>
> At the outset, it is useful to remember that our bankruptcy system serves two distinct goals. The first is to ensure the equitable distribution of a bankrupt debtor's assets among the estate's creditors *inter se*. As one commentator has noted (Aleck Dadson, "Comment" (1986), 64 Can. Bar Rev. 755, at p. 755):
>
> > Bankruptcy serves this goal by replacing a regime of individual action with a regime of collective action. While the pre-bankruptcy regime of individual action allows creditors to pursue their separate and competing claims to the debtor's assets, bankruptcy's regime of collective action sorts out those diverse claims and deals with the debtor's assets in a way which brings benefits to creditors as a group (reduced costs, increased recovery). . . . The collectivization of insolvency proceedings can only be achieved by denying to creditors the use of pre-bankruptcy remedies.

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> See also Peter W. Hogg, *Constitutional Law of Canada* (3rd ed. (supplemented) (Scarborough), Ont.: Toronto, 1992), vol. 1, at p. 25-3 (looseleaf). The second goal of the bankruptcy system is the financial rehabilitation of insolvent individuals (Dadson, *supra*, at p. 755). This goal is furthered through the opportunity for an insolvent individual's discharge from outstanding debts.
>
> (Emphasis added)

See also *Houlden and Morawetz, The 2007 Annotated Bankruptcy and Insolvency Act*, (Toronto: Carswell, 2006) at pp. 2-3.

33 Those purposes of bankruptcy and insolvency legislation both relate to the property of the bankrupt. One seeks to effect a fair distribution of his or her assets among the bankrupt's creditors. The second relates to his or her financial rehabilitation, in order to allow him or her to start anew and protect any future property the bankrupt might acquire from existing creditors.

34 With the objects of the *BIA* in mind, I return to the express wording of s. 178(2) which is repeated for convenience:

> 178 (2) Claims released — Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.

It makes no mention of any exemption for a claim against a bankrupt which may be covered by a commercial general liability policy such as that issued by Dominion to Buchanan or, indeed, by any other insurance coverage.

35 The appellants argue that the existence of other provisions, namely s. 145 of the *BIA* and s. 133 of the *Insurance Act*, R.S.N.S. 1989, c. 231, as amended (the "*Insurance Act*"), buttress their argument that the Discharge Order acts as a complete defence to Superline's claim. They say that these other provisions lead to the inference that claims covered by commercial general liability insurance are caught by s. 178(2). With respect, for the reasons which follow, I am unable to agree.

(b) Section 145 of the BIA

36 The *BIA* contains an express exception to the application of s. 178(2) for claims against a bankrupt that may be covered by *automobile liability insurance*. Section 145 reads:

> 145. Proceeds of liability insurance policy on motor vehicles — Nothing in this Act affects the right afforded by provincial statute of any person who has a claim against the bankrupt for damages on account of injury to or death of any person, or injury to property, occasioned by a motor vehicle, or on account of injury to property being carried in or on a motor vehicle, to have the proceeds of any liability insurance policy applied in or toward the satisfaction of the claim.

However, the inference that the appellants submit should be drawn from its existence, namely, that the proceeds of commercial general liability insurance policies which are not specifically exempted in the *BIA*, must consequently be affected by an absolute order of discharge, does not withstand examination when the origins of s. 145 are considered.

37 Its legislative history clearly shows that s. 145 was intended to remedy an injustice flowing from the strict application of the common law. In *Letovsky v. Mutual Motor Freight Ltd.*, [1958] M.J. No. 4 (Man. Q.B.), the Manitoba Court of Queen's Bench observed at ¶ 55:

> This section [now s. 145] was first passed in 1931 when it became sec. 125A (1931, ch. 17, sec. 1). It was passed to remedy what was long recognized as an injustice. Formerly any money recovered under a claim against the insurer such as this would go to the trustee and enure for the benefit of all the creditors: See, for example, note in (1927) 71 Sol J 461.

38 Prior to the enactment of what is now s. 145, insurance proceeds payable directly to an insured under an automobile liability policy were pooled with the general assets of a bankrupt's estate and divided among his creditors, rather than delivered to the injured party. See, for example, *Chaplin v. Harrington Motor Co.* (1927), [1928] Ch. 105 (Eng. C.A.), where the applicant was injured in a motor vehicle accident involving Harrington Motor Company, Limited, which subsequently went into liquidation. Its insurance policy provided that, in the event of damage or loss, "the assured should be paid by the insurance company all sums which the assured would be legally liable to pay by way of compensation." The applicant applied for a determination as to whether he or the liquidator was entitled to the insurance proceeds. The court held that the insurance funds fell into the bankrupt's estate and was distributable among the creditors of the company *pari passu*. After commenting that the situation seemed to disclose a hardship, Atkin, L.J. continued at p. 118:

> But the position in law seems to me clearly to be that a third party in a case like the present has no claim in law or in equity of any sort against the insurance company, or against the money paid by the insurance company, nor has he any claim against the person who injures him, the assured, to direct the assured to pay over the sum of money received under the insurance policy to him. The amount that the assured in fact received is part of his general assets. As a general rule the expediency of that, I think, cannot be disputed. It obviously would disturb the whole practice of insurance if the claimant against the assured who caused the risk had a direct right of recourse against the insurance company, and we know that in actual practice the assured receives the money — the parties being solvent — and does not pay over necessarily that sum of money to the third party who is injured, but, of course, pays his claim out of his own assets and uses the insurance money, so far as it goes, because it does not always completely meet his liability. ...

39 Section 145 was the legislative response to *Chaplin v. Harrington Motor Co.*, supra. It removed the injustice flowing from a strict application of the common law which deprived innocent third party victims of motor vehicle accidents of insurance proceeds.

40 In addition to its particular legislative history, the argument for an inference based on the existence of s. 145 does not take into account a significant difference between automobile liability insurance and commercial general liability insurance. Unlike the former, generally policies pertaining to the latter do not provide for any payment of insurance proceeds directly *to an insured*. Instead, commercial general liability policies provide for payment *on behalf of an insured* to the injured third party.

41 This distinction was discussed by Cowan, C.J.T.D. in *Maritime Drywall Ltd., Re*, [1979] N.S.J. No. 718 (N.S. T.D.). There, funds were payable as a result of liability attributed to Maritime Drywall for damages suffered by a third party in a fire. The liability policy did not provide that the insurer was to pay any sums directly to the company. The trustee under a proposal filed by the company applied for an order requiring its insurer to pay moneys due under the liability policy directly to the trustee, claiming that the rights of the company vested in the trustee under the proposal.

42 Cowan, C.J.T.D. distinguished the principles set out in *Chaplin v. Harrington Motor Co.*, supra. Beginning at ¶ 17 he stated:

> Even if the Trustee were to be considered to be in the same position as if the company had made an assignment in bankruptcy as at the date of the proposal, and even if s. 50(5) of the *Bankruptcy Act* applied [now s. 71], with

> the result that all property of the debtor, Maritime Drywall, passed to and is vested in the Trustee, I am of the opinion that all that passed to and vested in the Trustee, with respect to the matter before me, was the right to step into the shoes of the Insured, Maritime Drywall, and to require the Insurer to carry out its obligations under the comprehensive liability rider, and to pay on behalf of the Insured the sums which the Insured has become obligated to pay, by reason of the liability imposed by law upon the Insured with respect to the claims of the claimants ...
>
> In my opinion, therefore, in the circumstances of this case, and having regard to the wording of the insuring agreements in the comprehensive liability rider of the policy in question, the Insurer may pay to the claimants the respective amounts agreed upon among them, with respect to their claims against Maritime Drywall, free and clear of any claim by the Trustee under the proposal in bankruptcy made by Maritime Drywall. [Emphasis added]

43 Accordingly, where a liability policy provides that payment shall be made *on behalf of an insured*, rather than *to an insured*, insurance proceeds do not vest in the trustee for distribution or payment. Rather, the trustee receives only the right to compel the insurer to pay the claimant on behalf of the bankrupt insurer.

44 Where s. 145 of the *BIA* was a legislative response to the common law pertaining to automobile liability insurance, and where the provisions pertaining to payment of insurance proceeds in such policies are different from those in commercial general liability policies, in my view, it is not appropriate to interpret s. 178(2) in light of s. 145.

(c) Section 133 of The Insurance Act

45 Similarly, the interpretation given to s. 178(2) should not be affected by the existence of s. 133 of our provincial *Insurance Act*. That provision was intended to remedy an inequity that arose in the context of claims arising out of motor vehicle accidents. The relevant portions of s. 133 read:

> 133 (1) Any person who has a claim against an insured, for which indemnity is provided by a contract evidenced by a motor vehicle liability policy, notwithstanding that that person is not a party to the contract, may, upon recovering a judgment therefor in any province of Canada against the insured, have the insurance money payable under the contract applied in or towards satisfaction of his judgment and of any other judgments or claims against the insured covered by the contract and may, on behalf of himself and all persons having such judgments or claims, maintain an action against the insurer to have the insurance money so applied.
>
> . . . . .
>
> (3) A creditor of the insured is not entitled to share in the insurance money payable under any contract unless his claim is one for which indemnity is provided by that contract. . . .

46 First proclaimed as part of *The Automobile Insurance Act* in 1932 (S.N.S. 1932, c.5) as s. 24, s. 133 was a legislative response to *Vandepitte v. Preferred Accident Insurance Co. of New York* (1931), [1932] S.C.R. 22 (S.C.C.). In that case, the Supreme Court of Canada considered the application of what was then s. 24 of the *British Columbia Insurance Act*, (1925, c.20) in the context of injuries arising out of a motor vehicle accident, which reads as follows:

> 24. Where a person incurs liability for injury or damage to the person or property of another and is insured against such liability and fails to satisfy a judgment awarding damages against him in respect of such liability, and an execution against him in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject

to the same equities as the insurer would have if the judgment had been satisfied.

That provision is virtually identical to s. 28 of the current *Insurance Act*.

47 In *Vandepitte*, supra the respondent was injured when the vehicle in which she was a passenger collided with one owned by Berry and operated, with his consent, by his daughter. After having obtained judgment against the daughter, the respondent's action against the owner's insurer to recover the amount of the judgment was unsuccessful. The court reasoned that there was no privity of contract between the daughter and the insurer. It ultimately concluded that s. 24 of the British Columbia legislation did not oblige the insurer to satisfy the judgment against the daughter, who was an unnamed insured.

48 As a result of *Vandepitte*, several provinces, including Nova Scotia, amended their insurance legislation. Locke, J. of the Supreme Court of Canada recounted the history of these changes in *Northern Assurance Co. v. Brown*, [1956] S.C.R. 658, [1956] S.C.J. No. 42 (S.C.C.), at pp. 665-667. The amendments enabled persons recovering judgments for damages for negligence against insured persons, named or unnamed, to access the insurance monies to the extent provided. In view of that specific and narrow objective, and the fact that s. 133 relates to motor vehicle liability insurance, it is not appropriate to draw any inference in regard to s. 178(2) of the *BIA* from the existence of that provision of the *Insurance Act*.

49 In summary, the existence of neither s. 145 of the *BIA* nor s. 133 of the *Insurance Act* leads to the inference that claims to the proceeds of a commercial general liability insurance policy are precluded by s. 178(2) of the *BIA*.

(d) Major, Re and Miller, Re

50 In granting Superline the declaration it sought, as well as relying on the Leave Order and the wording of the Policy, the judge relied on case law. It is helpful to set out relevant provisions of the Policy at this point, in order to provide context for my analysis of the jurisprudence. The insuring agreement contained in the Policy imposes two obligations on the insurer, Dominion. These are set out in Section I, Coverage A as follows:

> **1. Insuring Agreement.**
>
> a. We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of "bodily injury" or "property damage" to which this insurance applies. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS — COVERAGES A, B AND D. This insurance applies only to "bodily injury" and "property damage" which occurs during the policy period. The "bodily injury" or "property damage" must be caused by an "occurrence". The "occurrence" must take place in the "coverage territory". We will have the right and duty to defend any "action" seeking those compensatory damages . . . (Emphasis added)

I will call the first, the "duty to indemnify;" and the second, the "duty to defend."

51 It is noteworthy that the Policy does not specify whether any payments by the insurer are made on behalf of the insured, directly to the claimant, or otherwise. The parties to the appeal agree that any payments payable pursuant to the duty to indemnify would be made by the insurer to the claimant on behalf of the insured. For the purposes of this decision, I have accepted that position.

52 I turn then to the case law. Neither the bankruptcy judge nor this court was provided with any appellate decisions on the effect of an absolute order of discharge on claims against a bankrupt who had insurance coverage. In each of the two principal decisions the bankruptcy judge relied upon, *Major, Re*, supra and *Miller, Re*, supra the insuring agreement called on the insurer to pay "on behalf of" the insured.

53 In *Major, Re*, supra a solicitor who had been sued for breach of fiduciary duty made an assignment in bankruptcy. The plaintiffs sought leave to continue their action, and a declaration that any insurance proceeds belonged to them, rather than the trustee of the estate in bankruptcy. The British Columbia Supreme Court granted their application, holding that once the liability of the bankrupt insured was established, the insurance policy called for a payment by the insurer directly to the creditor. At ¶ 24, it commented:

> To permit the estate of the bankrupt to receive the proceeds of the policy of insurance in this case would result in an injustice to the applicants, for whose benefit one would have expected that the policy was intended. The other creditors of the estate would gain a windfall from the misfortune of the applicants as a result of a policy of insurance from which no one ever intended them to benefit.

The factual matrix of *Major, Re* was such that it was not necessary to address the effect of a discharge from bankruptcy on the liability of the insured.

54 The facts in *Miller, Re*, supra are closer to those which underlie this appeal. There the plaintiff, Walton, applied for leave to continue an action in negligence against Miller, a bankrupt lawyer who, at all material times, was insured under a liability insurance policy. Almost a year after Walton commenced her action, Miller made an assignment in bankruptcy. However, he did not give her notice of either the assignment or, months later, his automatic discharge. When she learned of his bankruptcy, Walton applied for leave to continue. Miller argued that, he having been discharged from bankruptcy, her claim against him had been released by s. 178(2) of the *BIA*.

55 Deputy Registrar Sproat of the Ontario Superior Court of Justice (In Bankruptcy and Insolvency) allowed the motion to continue the application and granted a declaration that, if successful in recovering damages from the lawyer's insurers, Walton, rather than the bankrupt's estate, was entitled to those proceeds. He stated:

> ¶ 29 Lastly, the effect of s. 178(2) of the BIA must be examined. That provision provides for a release of claims provable in bankruptcy. Counsel for Miller submits that the release has the effect of eliminating Miller's legal obligation to pay Walton. I am of the view that this is not the correct interpretation and effect of the provision.
>
> ¶ 30 The effect of Miller's bankruptcy and of s. 178(2) of the BIA is such that Miller will not and cannot be called upon to actually pay on the judgment. ...
>
> ¶ 31 The decision of Farley J. in *Re Handelman* [1997] O.J. No. 3599 (Ont. Bktcy.) is of assistance. In this case, Farley J. upheld Master Ferron's grant of leave to the creditor to proceed with an action against a discharged bankrupt. In doing so, Farley J. considered the decision of Catzman J. in *Re Kryspin* (1983), 40 O.R. (2d) 424 (Ont. Bktcy.) as to the effect of the predecessor to the present s. 178(2). Catzman J. held that the provision did not extinguish the debt but only operated to release the bankrupt from claims provable in bankruptcy. Farley J. noted further that the stay provision contained in the BIA only stayed "any remedy against the bankrupt's property ..." and the commencement or continuation of any action "for the recovery of a claim provable in bankruptcy" (see s. 69.3(1) of the BIA). On the basis of these authorities, I conclude that s. 178(2) does not have the effect of releasing Miller's legal obligation to pay but, rather, speaks to the fact that Walton does not have any ability to pursue remedies against Miller's property.
>
> (Emphasis added)

56 The Deputy Registrar also observed at ¶ 47 of *Miller, Re*, supra:

> I am of the view that the declaration sought by Walton [the third party] as to entitlement to the insurance proceeds should issue. I do so on the basis that the very purpose of the insurance policy is to benefit third parties

> who are affected by the errors and omissions of their solicitors. The other creditors of Miller should not benefit from the wrong, if proven, occasioned to Walton.

57 In his decision at ¶ 24, the bankruptcy judge also referred to *Eurasia Auto Ltd. v. M & M Welding & Supply (1985) Inc.*, [1991] A.J. No. 400 (Alta. Master). There the issue was whether any insurance money would go to the claimant or to the estate of the bankrupt. The general liability insurance coverage provided that the insurer would pay "on behalf of the insured all sums" which the insured shall become legally obligated to pay. As observed earlier, the insuring agreements in *Major, Re*, supra and *Miller, Re*, supra contained the same phraseology. Master Funduk stated:

> I see no difference between that and the insurance policies found in *Major, Re*, 54 C.B.R. (n.s.) 28 (B.C.S.C.) and the cases that decision relies on.
>
> If the bankrupt had not gone bankrupt it could not have demanded that the insurer pay it. The policy calls for something else.
>
> The bankruptcy does not (and cannot) change the terms of the policy. All that the Trustee can demand of the insurer is that it pay to the injured third party.
>
> If the insurance proceeds fell into the estate it would mean that creditors of the bankrupt would get money from an insurance policy for claims not covered by the policy.
>
> If the policy provided that the insurer would pay to the insured that might well result in a different conclusion, but that is not the case here. The bankrupt and (the Trustee) can only call on the insurer to perform its obligations as the parties agreed to. What they agreed to is that the insurer pay to the injured party.
>
> . . . . .
>
> I find that this is a Re Major situation. The Plaintiff does not have to share with other creditors if it gets a judgment which is covered by the policy. The insurer can pay directly to the Plaintiff in that case.

See also *Dutchak Estate v. Seidle*, [1998] S.J. No. 756 (Sask. Q.B.).

58 I am not persuaded that the bankruptcy judge erred by relying on the reasoning in *Miller, Re*, supra and the cases referred to therein and thereafter that, although s. 178(2) releases the bankrupt from claims provable in bankruptcy, it does not extinguish the debts that form the basis for such claims. In the appeal before us, this means that s. 178(2) releases Buchanan, from having to satisfy the debt, but it does not extinguish the underlying legal obligation. As I will explain, that underlying obligation survives for the purpose of the insurance policy and s. 28 of the *Insurance Act*, whether the extent of the obligation is crystalized by settlement or judicial determination before or after the order for discharge issues.

59 In reaching this conclusion, I have rejected the appellants' arguments that *Miller, Re*, supra was wrongly decided, and that Deputy Registrar Sproat erred in relying on *Kryspin, Re*, 44 C.B.R. (N.S.) 232, [1983] O.J. No. 2927 (Ont. Bktcy.) and *Handelman, Re* (1997), 48 C.B.R. (3d) 29 (Ont. Bktcy.)).

60 In *Handelman, Re*, supra at ¶ 6, Farley, J. stated that Catzman, J. correctly described the effect of s. 178(2) of the *BIA* (then s. 148(2)) in *Kryspin, Re*, supra. There a medical doctor who had executed general security agreements in favour of two banks made an assignment into bankruptcy. A dispute arose over whether payments by OHIP for services rendered by him should be payable to the doctor or to the banks. Before it resolved, the doctor obtained an

absolute order of discharge. In deciding that the assignments in the security agreements to the bank operate with respect to the OHIP payments for insured services performed by the doctor until his discharge from bankruptcy and thereafter were ineffective, Catzman, J. stated at ¶ 50:

> ¶ 50 In the interest of precision, it should be observed that s. 148(2) does not in terms purport to extinguish the debts owed by the bankrupt at the time of bankruptcy, but rather to release the bankrupt from all claims provable in bankruptcy other than those specified in s. 148(1). . . .

61 In both *Miller, Re*, supra and *Handelman, Re*, supra the bankrupt did not disclose the plaintiff's possible or contingent claim to the trustee and did not give notice of his bankruptcy to the plaintiff. Certainly equitable concerns were a factor in those cases; for example, Justice Farley in *Handelman, Re*, supra pointed out at ¶ 4 that s. 158(d) of the *BIA* creates a duty upon the bankrupt to advise the trustee of all assets and liabilities and that creditors must be alerted in some manner so they may prove their claims. However, it is my view that the fact that those discharges were obtained with a degree of stealth was not determinative of this issue. The reasoning in respect to s. 178(2) in those decisions can stand alone.

62 Furthermore, I do not accept that the bankruptcy judge erred by failing to follow *Woodworth v. J.S. McMillan Fisheries Ltd.* (2000), 21 C.B.R. (4th) 314 (B.C. S.C.). There, the plaintiff fell on property leased to a fishery company, which had a comprehensive general liability policy. The company subsequently filed a proposal which was approved by sufficient creditors, and then by the British Columbia Supreme Court. Only afterwards did the plaintiff commence her action in negligence, and apply for leave to pursue her claim so that she might access the insurance funds. While the British Columbia Supreme Court granted leave, it held that the fisheries company had a complete defence to the plaintiff's claim, despite the fact that it might be covered by insurance. It determined that the proposal was binding on all unsecured claims, even though the plaintiff had not participated in the proposal process.

63 In the course of his decision, the judge in *Woodworth*, supra wondered whether there really was a distinction between proposal and bankruptcy situations, and suggested that the same reasoning should apply to the bankruptcy of a company as to an individual. He asked himself:

> ¶ 24 . . . are not bankrupts effectively released from all pre-bankruptcy claims? Subsection 178(2) of the *Act* states that, with the exception of certain specified claims, an order of discharge from bankruptcy releases the bankrupt from all claims provable in bankruptcy. . .
>
> ¶ 25 . . . The rationale was that, as the claim against the bankrupt became a claim against the estate and could be asserted against the trustee and the estate, the discharge from bankruptcy did not affect the ability of the plaintiff to continue the action for the purpose of establishing liability. I have reservations about this rationale because, although the claim continues to exist within the bankruptcy estate despite the bankrupt's discharge, the assertion of the claim in an action is being done outside the bankruptcy estate. I also query whether the insurer would be required to pay after the bankrupt's discharge because, in the phraseology of Commonwealth's policy, the insured bankrupt would not be legally obligated to pay because the discharge from bankruptcy operated to release the bankrupt from the claim.

Later in my decision, I will address the meaning of "legally obligated to pay." For the present purposes of my examination of *Miller, Re*, supra and the reasoning in that and other cases, it is sufficient to note that these comments are clearly *obiter dicta*. Moreover, the appeal before us pertains, not to a proposal as in *Woodworth*, supra, but to a bankruptcy and the effect of a discharge from bankruptcy.

64 I conclude that the bankruptcy judge did not err in relying upon *Major, Re*, supra and *Miller, Re*, supra in granting Superline its application. Despite the issuance of the Discharge Order, Superline is not precluded from continuing its claim against Buchanan in an attempt to access the insurance proceeds. Such a conclusion accords with

the purposes of the *BIA* described earlier. It does not affect the orderly distribution of the bankrupt's property among his creditors nor, since the claim does not affect Buchanan or his assets, does it impede his financial rehabilitation.

65 Moreover, as the bankruptcy judge pointed out, policy reasons also support this conclusion. Were Superline not able to continue, Dominion would garner a windfall. The liability insurer would be permitted to obtain a financial benefit from the absolute discharge of its own insured. Finally, I do not accept the argument that if the bankruptcy judge's decision is upheld, both insured and uninsured claimants will delay proceeding until after a bankrupt's discharge, in order to increase the payment that might be received. Uninsured claims will not include features such as the payable on behalf of the insured characteristic, which was significant here. The same might be said of many insured claims and, of course, generally parties have an interest in concluding disputes and claims expeditiously and efficiently.

(4) Does a provision in the Policy providing that bankruptcy of the insured does not relieve the insurer of its obligation mean that Dominion has waived its right to rely upon Buchanan's Discharge Order as a defence?

66 In his decision, the bankruptcy judge referred to wording in the Policy in deciding that, despite the Discharge Order, Superline could still advance its claim. Section IV, Condition 1 of the insuring agreement (the "waiver clause") deals specifically with the effect of the bankruptcy of the insurer on the insurer's obligations:

> Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this rider.

As is apparent from these proceedings, notwithstanding his insolvency and bankruptcy, Dominion continues to provide a defence to Buchanan. Superline argues that the inclusion of the waiver clause in the Policy means that Dominion has waived its right to rely upon Buchanan's discharge from bankruptcy as a defence.

67 The bankruptcy judge quoted an extract from *Miller, Re*, supra on the interpretation of the waiver clause. In that decision, Deputy Registrar Sproat commented as follows at ¶ 28:

> Secondly, the LPIC insurance policy expressly provides that its obligations are unaffected by the bankruptcy of the insured. Counsel for Walton points to the following provision of the LPIC policy:
>
> > M. ... Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the insurer of any of its obligations hereunder.
>
> Thus, even if counsel for Miller is correct that s. 178(2) of the BIA operates as a release of the bankrupt's legal obligation to pay, it appears that LPIC has waived its right to rely upon the statutory release. ...

68 In *Insurance Law: A Guide to Fundamental Principles, Legal Doctrines and Commercial Practices* (St. Paul: West Publishing Co. 1988), Professor R. Keeton discussed the origins of such provisions regarding the effect of bankruptcy at pp. 377-8:

> In its original form, liability insurance was an agreement by an insurer to indemnify an insured against loss arising as a consequence of an insured's tort liability to a third person. As the relationship of the liability insurer to the insureds and the injured persons was originally structured, even after obtaining a tort judgment against an insured an injured victim was not entitled to proceed against the insurer when the insured either could not pay or did not pay. If the injured person sought payments directly from the insurer, the insurer could defend successfully because its obligation was only to the insured. ... The obvious inequity of such situations led to legislation in some states requiring that liability insurance contracts include a provision to the effect that the insolvency or bankruptcy of an insured shall not release an insurer from liability. In time, similar legislation almost certainly

> would have been adopted in every state had not insurers revised the standard policy forms used for liability insurance to provide coverage without regard to an insured's solvency.

69 In the text, *Commercial General Liability Insurance* (Markham: Butterworths, 2000), H. Sanderson et al. explained at p. 6 that the concept of comprehensive general liability insurance developed in the United States, grew during World War II, and became popular throughout that country and Canada thereafter. The authors noted:

> In Canada the effort to produce standard form CGL coverage for the Canadian insurance industry was undertaken by the Insurance Bureau of Canada (IBC). They have from time to time issued standard form wording of Comprehensive GL coverage which in large part has adopted the American forms, adapted to the Canadian legal environment. For this reason, American decisions interpreting CGL wording are commonly accepted by Canadian courts when they are called upon to interpret various provisions of a CGL policy.

70 In support of its argument that Dominion waived its right to rely on s. 178(2) and the Discharge Order, Superline relies upon *Geary v. C & K Mufflers* [, Doc. 267105 (U.S. Mich. Ct. App. 2006)], 2006 Mich. App. LEXIS 1800, where the Court of Appeals for Michigan considered the effect of a waiver clause. After the injured plaintiff obtained judgment against him, the defendant filed a voluntary petition for bankruptcy. The plaintiff sought relief from the automatic stay, and the bankruptcy court granted an order authorizing the plaintiff to "recover against any insurance policy issued [with the bankrupt] as the insured ..." After the defendant's discharge from bankruptcy, the plaintiff obtained a writ of garnishment against the defendant's insurer. The court rejected the insurer's argument that its obligations ended following the insured's discharge from bankruptcy. It stated at p. 6:

> We also conclude that the trial court properly rejected Secura's argument that Finney's bankruptcy discharge terminated its obligation to satisfy a judgment against its insured for bodily injury. The provision of the parties' contract that directly addresses this issue could not be clearer and governs. Section E(1) of Secura's business owners liability coverage form, captioned "Bankruptcy," plainly states, "Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this policy."

71 *Geary*, supra is consistent with the approach of other American courts interpreting bankruptcy provisions. See, for example, *Skenandoa Rayon Corp. v. Halifax Fire Ins. Co.*, 245 A.D. 279, 281 N.Y.S. 193 (U.S. N.Y.A.D. 4th Dept. 1935), N.Y. App. Div. LEXIS 10281, and *Musser v. Musser*, 2003 Ohio 1440 (U.S. Ohio Ct. App. 2003), 2003 Ohio App. LEXIS 1384.

72 There is, however, a factual distinction between the American cases cited and the situation which is the basis of the decision under appeal. In the American cases, the plaintiff had obtained judgment prior to the insured's bankruptcy. That same scenario appears to be what was contemplated in the passage quoted from Professor Keeton. For that reason, where judgment against the bankrupt has not been obtained, as is the situation in this appeal, it would not be appropriate to rely on the American cases in determining whether the waiver clause was intended to allow third parties who suffer loss at the hands of a bankrupt to recover directly from the bankrupt's liability insurer.

73 In my view, the waiver clause was not intended for the benefit of third parties. Rather, it was inserted for the benefit of the insured. It relates to the insurer's duty to indemnify (i.e., to pay all sums he becomes "legally obligated to pay" as compensatory damages), and the duty to defend (i.e., to defend an action seeking such damages) described earlier. The purpose of the waiver clause is to require the insurer to defend the insured despite his bankruptcy and, pursuant to the duty to indemnify, to pay any successful claims against the insured despite his bankruptcy.

74 Accordingly, I reject the argument that the waiver clause serves as an alternate ground for upholding the decision of the bankruptcy judge.

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(5) Prior to any judgment being entered against Dominion, does Superline have rights directly against Dominion under the Policy it issued which names Buchanan as an insured?

75 Pursuant to the duty to indemnify in the Policy, Dominion is not required to indemnify unless it is "legally obligated to pay." The only named insured in the Policy is Buchanan, operating as Sable Heating and Ventilation. Dominion did not guarantee Buchanan's obligations, or agree to indemnify any creditor, or to indemnify Superline with respect to any loss it may have suffered arising from his alleged negligence and breach of contract. According to the appellants, as Superline is a stranger to the insurance contract, it has no rights thereunder until judgment has been entered against Buchanan, or an agreement reached with the insured and insurer.

76 The issue then is this: what does "legally obligated to pay" in the duty to indemnify mean? In particular, is there any obligation to indemnify enforceable by Superline, prior to the liability of Buchanan being reduced to either a judgment or a settlement agreement to which Dominion is a party? While Superline has neither obtained judgment against Buchanan, nor settled its claim, Buchanan and Dominion certainly knew well before his Discharge Order of Superline's claim.

77 I begin my analysis with s. 28 of the *Insurance Act* which sets out when a claimant acquires a right to sue an insurer directly. It reads:

> **Action against insurer**
>
> 28 (1) Where a person incurs a liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against him in respect of his liability, and an execution against him in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.
>
> (2) This Section does not apply to motor vehicle liability policies.

78 Section 28(1) makes it clear that if, *before* the Discharge Order issued, it had obtained judgment against Buchanan which he did not satisfy, Superline would have been entitled to claim against Dominion to the limits of the Policy. The judgment against Buchanan would have been released by the Discharge Order, but Superline could continue directly against the insurer.

79 I turn then to an examination of the academic writing, the terms of the Policy, and the case law relevant to the interpretation of the phrase "legally obligated to pay" in the duty to indemnify.

80 The text *Snowden and Lichty: Annotated Commercial General Liability Policy*, looseleaf (Aurora: Canada Law Book Inc.), discusses the phrase "legally obligated to pay" at ¶ 7:20.1 as follows:

> **7:20.1 Meaning of "Legally Obligated to Pay"**
>
> At first glance and notwithstanding the absence of definition, one would not expect the courts to have difficulty attributing meaning to "legally obligated to pay". One Court has stated that a lay person would quite naturally and properly consider that a Court judgment to pay damages is a legal obligation. Where a Court judgment fixes the obligation of the insured to pay damages to a third party, there is a legal obligation.

That a prior judicial determination would create a legal obligation to pay is not surprising. It remains to be seen whether anything other than, or earlier than, a judgment is captured by that phrase.

81 Jurisprudence on the insurer's duty to indemnify as set out in the statement "We will pay all sums which you become legally obligated to pay . . . " is limited. The parties did not direct this court to any appellate decisions. *Builders Contract Management Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] S.J. No. 176 (Sask. Q.B.) is not helpful since its principal issue was when an insurance claim is made. However, a few lower court cases relating to the effect of limitation periods set out in the insurance policies themselves, such as those found in Section IV, Condition 6 of the Policy, and relating to releases, provide some guidance. I will review these briefly.

82 In *J & P Holdings Ltd. v. Saskatchewan Mutual Insurance Co.* (1990), 84 Sask. R. 52 (Sask. Q.B.) and *Co-Operative Avicole de St-Isidore Ltd. v. Co-operators General Insurance Co.*, 44 C.C.L.I. (2d) 1, [1997] O.J. No. 2550 (Ont. Gen. Div.), the insurance policies specified, *as a condition precedent*, that no action lies against the insurer until the amount of the insured's obligation to pay has been determined by judgment after trial or by written agreement of the insured, the claimant and the insurer. In *J & P Holdings*, supra when the sheriff was unable to execute on the applicant's judgment against the estate of a bankrupt contractor, the applicant brought an action against the contractor's insurer. It argued that J & P was out of time under the policy. The Saskatchewan Court of Queen's Bench decided that the applicant was not subject to the policy's limitation period, as provincial legislation governed the situation.

83 In *Co-Operative Avicole*, supra the plaintiff claimed indemnification against its own insurer, for its loss following a court judgment finding it liable for damages for breach of contract. That decision had been allowed in part on appeal. At ¶ 67, the judge stated:

> ¶ 67 Similarly, with respect to the one (1) year limitation period in the policy to take action against Cooperators, not only were they advised well before the trial judgment that they would look to Cooperators to indemnify them but action was taken before that judgment was finally dealt with by the Court of Appeal. No cases on point were cited at this hearing but it seems logical to me that the time when it can be said that St. Isidore "became legally obligated to pay" was when the appeal was decided and any further possible appeal period was exhausted. Had there been no appeal, St. Isidore's cause of action against it's [sic] insurer would have arisen only after the trial judgment was rendered and the appeal period had passed. It is significant, in my view, that the condition dealing with this limitation period utilizes the words "finally determined" when stipulating when an action is to lie against the insurer. (Emphasis added)

84 Section IV, Condition 6 of the Policy issued by Dominion to Buchanan provides:

> **6. Legal Action Against Us.**
>
> ***No person or organization has a right under this rider***
>
> a. To join us as a party or otherwise bring us into an "action" asking for compensatory damages from an insured; or
>
> b. To sue us on this rider unless all of its terms have been fully complied with.
>
> A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial; but we will not be liable for compensatory damages that are not payable under the terms of this rider or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative. Every "action" or proceeding against us shall be commenced within one year next after the date of such judgment or agreed settlement and not afterwards. If this Policy is governed by the law of Quebec every "action" or proceeding against us shall be commenced within three years from the time the right of action arises.

2007 CarswellNS 251, 2007 NSCA 68, [2007] I.L.R. I-4601, 32 C.B.R. (5th) 1, 50 C.C.L.I. (4th) 17, 814 A.P.R. 286, 255 N.S.R. (2d) 286, 284 D.L.R. (4th) 113

(Emphasis added)

85 Unlike that in *J & P Holdings*, supra and *Co-Operative Avicole*, supra the wording in Section IV, Condition 6 of the Policy does not require an agreed settlement or a final judgment after trial as firm conditions precedent to the right to sue. While its wording is not as rigorous, that Condition does stipulate that no organization has the right to sue the insurer *unless* it has complied with all the terms of the Policy, and that an organization may sue to recover on an agreed settlement or on "final judgment" after trial. In my view, that wording is sufficiently similar for the observations on "legally obligated to pay" in those decisions to be considered here.

86 In *Qualiglass Holdings Inc. v. Zurich Indemnity Co. of Canada*, 2004 ABQB 577 (Alta. Q.B.), after their lawyer advised their accountant of the plaintiffs' intention to seek compensation for alleged accounting errors, the accountant did not contact his errors and omissions insurer. The insurance lapsed. He later made an assignment into bankruptcy. The plaintiffs commenced their action; the insurers denied coverage. After obtaining judgment against the accountant, the plaintiffs brought an action against the insurer to recover the benefit of the insurance coverage related to its claim. In response to the insurer's argument that the claim was reported outside the time limit, the trial judge held:

> ¶ 58 In any event, Zurich's position is without merit. In the policy upon which the action is founded, Zurich first agreed to indemnify Chinnery in respect of ". . . all sums which the Insured shall be legally obliged to pay as damages because of any act or omission of the Insured . . .". Zurich also agreed, as an additional obligation under the policy, to defend any suit brought against Chinnery alleging liability for which Zurich agreed to indemnify Chinnery. When Zurich advised Chinnery on April 30, 1997 that coverage would be denied, there had been no determination that Chinnery was legally obliged to pay damages to Qualiglass. Chinnery may at that point have had a cause of action under the policy in respect of Zurich's failure to provide him with a defence of Qualiglass' claim, but he had, at that point, no claim for indemnity. His claim for indemnity did not arise until he was "legally obligated to pay" damages to Qualiglass. That occurred on March 28, 2001 when Qualiglass obtained judgment against Chinnery.
>
> ¶ 59 The cause of action pursued by Qualiglass in this action, Chinnery's cause of action for indemnity under the policy, arose on March 28, 2001. The limitation period in respect of that cause of action had not expired when this action was commenced on November 14, 2001. (Emphasis added)

87 In *McMurachy v. Red River Valley Mutual Insurance Co.* (1994), 115 D.L.R. (4th) 220 (Man. C.A.), leave to appeal dismissed [1994] S.C.C.A. No. 267 (S.C.C.), the facts underlying the timing issue included a settlement that did not include the insurer, and a release. A worker was seriously injured when constructing a home for the insured. After the insurer denied coverage, the worker settled his action against the insured, who assigned her cause of action against the insurer to the worker. The assignment was accompanied by a release. Before trial, the insurer conceded that it had wrongfully denied coverage to the insured. The trial judge dismissed the worker's action on the basis that the release meant that the insured had suffered no loss. In allowing the appeal, Scott, C.J.M. for the court stated at p. 227:

> It is my conclusion that the trial judge was in error when he dismissed the plaintiff's action on the overly simplistic basis that the insured "had suffered no loss". The insurer wrongfully repudiated its contractual liability to defend and indemnify its insured McMurachy. In order to protect herself from the exposure of significant personal liability, the insured entered into a settlement with the claimant which she was clearly entitled to do. At that moment, at the latest, the insurer's responsibility was fixed and the arrangement made thereafter for the assignment of the claim and the fixture [sic] protection of the insured, all arising from the breach of contract of the insurer, does not negate the insurer's obligation to indemnify under the terms of the policy. (Emphasis added)

2007 CarswellNS 251, 2007 NSCA 68, [2007] I.L.R. I-4601, 32 C.B.R. (5th) 1, 50 C.C.L.I. (4th) 17, 814 A.P.R. 286, 255 N.S.R. (2d) 286, 284 D.L.R. (4th) 113

88 In all these cases, judgment had already been obtained or a settlement reached. In the context of when limitation periods started to run, several courts have considered that an insurer became "legally obligated to pay" when liability had been determined by legal process. While, on a factual basis, *McMurachy* supra, is less relevant to this appeal than the other decisions reviewed, it does not suggest that the obligation to pay could arise any earlier than the settlement necessitated by the wrongful denial of coverage. Here, neither judgment nor settlement has been achieved. I also observe that none of these cases had to consider the effect of an order of absolute discharge on the duty to indemnify.

89 While no appellate decision considering the meaning of "legally obligated to pay" was brought to our attention, the court asked the parties for submissions in regard to *Somersall v. Friedman*, [2002] S.C.J. No. 60, 2002 SCC 59 (S.C.C.) in which the Supreme Court of Canada examined the meaning of the phrase "legally entitled to recover" in an insurance context. The Somersalls were injured in a car accident by Friedman, an underinsured driver. They brought an action against him, and later entered into a limits agreement with him. Among other things, it provided that Friedman would admit liability at trial, and that the Somersalls would not claim against him or his insurer in excess of Friedman's policy limit of $200,000. The Somersalls then sought to recover the remainder of their damages from their own insurer, pursuant to their underinsured driver coverage known as the SEF 44 endorsement. It obliges the insurer to:

> . . . indemnify each eligible claimant for the amount that such eligible claimant is legally entitled to recover from an inadequately insured motorist as compensatory damages in respect of bodily injury or death sustained by an insured person by accident arising out of the use or operation of an automobile. (Emphasis added)

90 The insurer argued that the limits agreement bound the Somersalls, and applied for a determination before trial of its liability on a question of law. The motions judge ruled that the Somersalls were no longer "legally entitled to recover" damages beyond those already recovered pursuant to that agreement. That ruling was overturned by the Ontario Court of Appeal.

91 In considering the scope and meaning of the phrase "legally entitled to recover," the Supreme Court of Canada examined the relevant time of the inquiry. Iacobucci, J. for the majority, stated:

> ¶ 29 Thus, it must be decided at which point in the past the inquiry must be conducted on the best reading of the contract. *The language of clause 2, in my view, clearly makes the time at which the insurer becomes subject to making the indemnity payment contemporaneous with the time at which the insured must be legally entitled to recover.* Whenever the insurer, under the contract, "shall indemnify", i.e., whenever the insurer's obligation comes into being, whatever legal entitlement there "is" at that time is the amount that the insurer must pay by way of indemnification.
>
> ¶ 30 *The question, therefore, is when the obligation to indemnify comes into being. In my view, the answer must be that the insurer becomes obliged to make the payment the moment the claim of the insured against the tortfeasor comes into being, that is, at the time of the accident.* At that moment, all of the conditions set out in the SEF 44 will be satisfied; death or bodily injury has occurred, negligently caused by an inadequately insured motorist. In other words, all of the conditions necessary to make out a claim in tort against the inadequately insured driver come into being at the moment of the accident. *The SEF 44 means to compensate the insured for the existence of such a claim against an inadequately insured driver. The obligation of the insurer, therefore, comes into being at the same time as the obligation of the tortfeasor to pay damages.* (Underlining in original; italics added)

92 The factual underpinnings of *Somersall*, supra prevent it from being determinative of the meaning of the phrase in the duty to indemnify which is under consideration. The phrase "legally entitled to recover" in the underinsured driver coverage endorsement considered in *Somersall*, supra is similar to the phrase "legally obligated to pay"

in the Policy, but the two are not identical. More significantly, the contexts are different. In *Somersall*, supra the court examined the meaning of a contract between an insurer and its insured, who had insured against their own injury. Here, the claimant, Superline, was not a party to the Policy between Buchanan and his insurer, Dominion. Furthermore, in *Somersall*, supra the question to be answered, namely when the liability of the person who caused the loss arises, is different from the question here, namely when the duty to indemnify arises. Finally, bankruptcy and absolute orders for discharge were not considerations in that decision.

93 In my opinion, based upon the interaction of s. 28 of the *Insurance Act*, s. 178(2) of the *BIA*, and the wording of the Policy, the fact that any judgment Superline may obtain against Buchanan must follow his Discharge Order does not prevent Superline from continuing its action against him, in an effort to access the insurance under the Policy. Allow me to elaborate.

94 Earlier in this decision, I determined that by following *Miller, Re*, supra and that line of cases, the bankruptcy judge did not err. In the result, s. 178(2) of the *BIA* released Buchanan from claims provable in bankruptcy, such as that asserted by Superline. Put another way, the Discharge Order prevents Superline from enforcing any judgment against Buchanan and his property. This, of course, reflects the objectives of our bankruptcy legislation as described in *Husky Oil Operations Ltd.*, supra quoted in ¶ 32 above. However, s. 178(2) does not extinguish Buchanan's underlying legal obligation, if any, to Superline. At all material times, Buchanan had insurance coverage, which would be paid to a successful claimant and not be available to his creditors, against the very types of claims Superline is advancing against him. The Leave Order granted Superline leave to continue its action for the very purpose of determining Buchanan's liability. Superline's action may continue in order to determine what, if anything, Buchanan was obligated to pay prior to the issuance of his Discharge Order.

95 As previously discussed, had Superline obtained judgment against Buchanan *before* his Discharge Order issued, it could have proceeded directly against Buchanan's insurer, Dominion, pursuant to s. 28(1) of the *Insurance Act*. Here, the Discharge Order preceded any judgment against Buchanan. An examination of that provision shows that the determinations made earlier in respect of s. 178(2) satisfy several of its conditions. It is reproduced again for convenience:

> **Action against insurer**
>
> 28 (1) Where a person incurs a liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against him in respect of his liability, and an execution against him in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.

96 Assuming that the continuation of its action against Buchanan allows Superline to satisfy the conditions in s. 28(1) for a direct action, the insurer could not rely on its own insured's bankruptcy to escape payment. According to s. 28(1), the claim is subject to the same equities the insurer would have "as if the judgment had been satisfied." If judgment had been obtained and satisfied, the waiver clause in the Policy would not assist to avoid liability. As discussed earlier, the waiver clause requires an insurer to defend its insured and to fulfill its duty to indemnify, despite the insured's bankruptcy.

97 Accordingly, whether Buchanan's liability was determined before, or will be determined after, his discharge from bankruptcy does not affect his insurer's obligation to indemnify. As in the analysis in *Somersall*, supra the question is when that duty arises. Given the wording in the duty to indemnify in the Policy, namely: "We will pay those sums that the insured becomes legally obligated to pay as compensatory damages . . ." and s. 28 reviewed above, the answer is at that point in time where "a person incurs a liability for injury or damage;" i.e. before discharge.

98 In conclusion, in my view, the fact that Superline has not entered judgment against Buchanan or reached a settlement with him and his insurer does not prevent it from proceeding against Buchanan. While his Discharge Order is a complete bar to enforcement of any judgment Superline may obtain against him, it does not preclude Superline from taking out judgment against him in order to continue against his insurer.

(6) If Superline is entitled to proceed with its action, does this constitute prejudice to Rexel?

99 As indicated in the background facts, after Superline commenced its action against Buchanan, Buchanan added Rexel and Roby Metals Ltée. as third parties. Roby Metals Ltée. subsequently declared bankruptcy; it is no longer involved in these proceedings.

100 Rexel points out that by third partying it, Buchanan had a contingent claim against it. It argues that as this constituted "property" as defined in s. 2 of the *BIA*, the Trustee could have settled that claim with Rexel or could have proceeded with the third party claim in litigation (s. 30 of the *BIA*). Since Superline did not proceed with its claim, neither Rexel nor the Trustee took any steps to deal with Buchanan's third party claim against Rexel. This, asserts Rexel, resulted in such prejudice to its position that Buchanan's bankruptcy and Discharge Order should prevent any future claim against it.

101 With respect, I cannot agree with Rexel's position. Buchanan's liability, if any, has not yet been determined. If found to be none, the third party claim will fail. If Buchanan is liable, then the extent of Rexel's liability, if any, will also be determined. At this point, where no findings of fact, much less any determination of liability, have been made, it is impossible to assess whether, as Rexel urges, there was a "real likelihood" that the third party claim could have been compromised for its nuisance value only.

102 It was not necessary to decide, and I make no comment whatsoever, as to whether Rexel's liability as third party, if any, survives the Discharge Order, nor as to any rights Dominion may have against Rexel.

Buchanan's Appeal Against Dismissal of its Applications

103 As set out earlier, Buchanan's appeal raises two issues:

(1) Whether leave should be granted with respect to his applications to amend his defence to provide that he had been released from further liability as a consequence of the company Discharge Order, and to strike out Superline's statements of claims and to provide for summary judgment, and

(2) If so, whether Buchanan is entitled to summary judgment against Superline, giving effect to that defence.

104 Having decided that the Discharge Order releases Buchanan and his property from any liability to Superline, I need not deal with these issues.

Disposition

105 I would grant the appellants leave to appeal the decision and order of the bankruptcy judge which provided that the Discharge Order shall not operate to limit, restrict or relieve Dominion of any liability or obligation it may have to pay, on behalf of Buchanan, any third party where the liability arises pursuant to the Policy, but would dismiss the appeal.

106 As is apparent from my review of the jurisprudence, the issues raised on this appeal were novel. In the cir-

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cumstances, there will be no order of costs.

Appeal dismissed.

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Genge v. Parrill

Steward Genge and Rick Genge (Appellants) and Lionel Barrett Parrill and Wilson Parrill (Respondents)

Newfoundland and Labrador Court of Appeal

M. Rowe, K.J. Mercer, L.D. Barry JJ.A.

Heard: December 5, 2007
Judgment: December 14, 2007
Docket: 06/102

Counsel: John R. Sinnott, Q.C. for Appellants

Colin Feltham for Respondents

Subject: Civil Practice and Procedure; Insolvency; Torts

Bankruptcy and insolvency --- Effect of bankruptcy on other proceedings — Proceedings against bankrupt — After discharge of bankrupt

P was rendered paraplegic after he was struck while driving automobile by snowmobile operated by S and owned by R — At time of collision, there was no insurance on snowmobile — At trial as to liability only, S and R were held 75 percent responsible for collision — Decision was appealed unsuccessfully to this court and leave to Supreme Court of Canada was denied — Following receipt of P's claim in respect of quantum of damages, S and R made assignment in bankruptcy — Upon S and R's discharge from bankruptcy, P sought to continue his action to obtain judgment as to quantum of damages — P sought to continue action not to enforce judgment against S and R, but rather to recover what he could from judgment recovery pursuant to Judgment Recovery (Nfld.) Ltd. Act ("JRA") — P's application to trial division to have judgment recovery joined in action as to P's damages was dismissed — S and R applied under R. 17A of Rules of the Supreme Court, 1986 to dismiss P's action on basis that they were discharged bankrupts and therefore, released from P's claims — S and R's submissions focused on whether P could proceed against judgment recovery by operation of s. 145 Bankruptcy and Insolvency Act ("BIA") — Judge dismissed S and R's application for summary judgment on basis that scheme established under JRA was covered by phrase "liability insurance policy" — S and R appealed — Appeal dismissed — S and R failed to show how applications judge erred — Discharge did not prevent P from continuing action — Although BIA releases bankrupt from claims provable in bankruptcy, it does not extinguish debts that form basis for such claims — S and R were released from having to satisfy debt, but it did not extinguish underlying legal obligation that survived for purpose of insurance policy.

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Cases considered by *M. Rowe J.A.*:

Buchanan, Re (2007), (sub nom. *Buchanan v. Superline Fuels Inc.*) [2007] I.L.R. I-4601, 2007 CarswellNS 251, 2007 NSCA 68, 32 C.B.R. (5th) 1, 50 C.C.L.I. (4th) 17, (sub nom. *Buchanan v. Superline Fuels Inc.*) 255 N.S.R. (2d) 286, (sub nom. *Superline Fuels Inc. v. Buchanan*) 284 D.L.R. (4th) 113, (sub nom. *Buchanan v. Superline Fuels Inc.*) 814 A.P.R. 286 (N.S. C.A.) — followed

Buchanan, Re (2007), 2007 CarswellNS 574, 2007 CarswellNS 575 (S.C.C.) — referred to

Duvall, Re (1992), 63 B.C.L.R. (2d) 97, 11 C.B.R. (3d) 264, 1992 CarswellBC 485 (B.C. S.C.) — referred to

Eurasia Auto Ltd. v. M & M Welding & Supply (1985) Inc. (1991), 1991 CarswellAlta 306, 5 C.B.R. (3d) 227, 1 C.C.L.I. (2d) 203, 119 A.R. 348 (Alta. Master) — referred to

Major, Re (1984), 56 B.C.L.R. 342, 54 C.B.R. (N.S.) 28, 1984 CarswellBC 588, [1984] 6 W.W.R. 435 (B.C. S.C.) — referred to

Yu v. Befus (2003), 2003 ABQB 451, 2003 CarswellAlta 1374, 38 Alta. L.R. (4th) 93, 344 A.R. 197, [2005] 3 W.W.R. 543 (Alta. Q.B.) — referred to

Statutes considered:

Automobile Insurance Act, R.S.N. 1970, c. 17

s. 24A [en. 1971, No. 74, s. 5] — referred to

Automobile Insurance Act, R.S.N. 1990, c. A-22

Generally — referred to

s. 26 — referred to

Automobile Insurance (Amendment) Act, S.N.L. 1994, c. 4

s. 5 — considered

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 69 — referred to

ss. 69-69.31 — referred to

ss. 69-69.4 — referred to

s. 69.3 [en. 1992, c. 27, s. 36(1)] — referred to

s. 69.4 [en. 1992, c. 27, s. 36(1)] — referred to

s. 121(1) — referred to

s. 145 — considered

s. 168.1(1)(f) [en. 1992, c. 27, s. 61(1)] — referred to

s. 168.1(4) [en. 1992, c. 27, s. 61(1)] — referred to

s. 178(1) — referred to

s. 178(2) — referred to

Interpretation Act, R.S.C. 1985, c. I-21

s. 12 — referred to

Judgment Recovery (Nfld.) Ltd. Act, R.S.N. 1990, c. J-3

Generally — referred to

s. 26 — referred to

s. 26(1) — referred to

s. 26(2) — referred to

s. 26(11) — referred to

Judicature Act, R.S.N. 1990, c. J-4

s. 97 — referred to

Rules considered:

Rules of the Supreme Court, 1986, S.N. 1986, c. 42, Sched. D

R. 17A [en. Nfld. Reg. 165/94] — considered

R. 17A.01(1) [en. Nfld. Reg. 165/94] — considered

R. 17A.03(1) [en. Nfld. Reg. 165/94] — considered

R. 17A.05(2) [en. Nfld. Reg. 165/94] — referred to

2007 CarswellNfld 383, 2007 NLCA 77, [2008] I.L.R. I-4665, 56 C.C.L.I. (4th) 161, 38 C.B.R. (5th) 224, 830 A.P.R. 199, 272 Nfld. & P.E.I.R. 199

APPEAL by driver and owner of snowmobile from decision of applications judge dismissing their application for summary judgment.

***M. Rowe J.A.*:**

Introduction

1 This decision deals with whether the province's (former) scheme for compensating victims of uninsured motorists under the *Judgment Recovery (Nfld.) Ltd. Act*, R.S.N.L. 1990, c. 9-3 comes within the meaning of "liability insurance policy" in s. 145 of the *Bankruptcy and Insolvency Act*, R.S.C., c. B-3.

Facts

2 In March 1990, Lionel Parrill (one of the Respondents, the other being his father Wilson Parrill) was driving an automobile that was struck by a snowmobile operated by Rick Genge (one of the Appellants) and owned by Steward Genge (the other Appellant). As a result of the collision, Lionel Parrill was rendered a paraplegic.

3 At the time of the collision, there was no insurance on the snowmobile operated by Rick Genge.

4 At a trial as to liability only, the Genges were held 75% responsible for the collision and, thus, Lionel Parrill's resulting injuries. That decision was appealed unsuccessfully to this Court. Leave to appeal to the Supreme Court of Canada was denied.

5 Following receipt of Mr. Parrill's claim in respect of the quantum of damages, the Genges made an assignment in bankruptcy in December 2001. In September 2002, the Genges were discharged from bankruptcy.

6 Lionel Parrill is seeking to continue his action against the Genges to obtain a judgment as to the quantum of damages. Mr. Parrill is doing so not so as to enforce the judgment against the Genges, but rather to recover what he can from Judgment Recovery pursuant to the *Judgment Recovery (Nfld.) Ltd. Act*, rep. by *Automobile Insurance (Amendment) Act*, S.N.L. 1994, c. 4, s.5.[FN1] (The maximum that Mr. Parrill could obtain from Judgment Recovery is $200,000.)

7 Mr. Parrill applied in the Trial Division to have Judgment Recovery joined in the action as to Mr. Parrill's damages; that application was denied.

8 In April 2006, the Genges applied under Rule 17A of the *Rules of the Supreme Court, 1986* to dismiss Mr. Parrill's action on the basis that the Genges are discharged bankrupts and, therefore, released from Mr. Parrill's claims. (Unless Mr. Parrill can obtain final judgment against the Genges, counsel state that Judgment Recovery will resist making payment to him.)

9 Rule 17A reads, in part:

> 17A.01(1) A ... defendant may ... apply to the Court ... seeking ... dismissal of ... the claim in the statement of claim ... .
>
> 17A.03(1) Where the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

10 On the Genges' application for summary judgment, submissions focused on whether Mr. Parrill could pro-

ceed against Judgment Recovery by operation of s. 145 of the *Bankruptcy and Insolvency Act*. That provision reads:

> 145. *Proceeds of liability insurance policy on motor vehicles* — Nothing in this Act affects the right afforded by provincial statute of any person who has a claim against the bankrupt for damages on account of injury to or death of any person, or injury to property, occasioned by a motor vehicle, or on account of injury to property being carried in or on a motor vehicle, to have the **proceeds of any liability insurance policy** applied in or toward the satisfaction of the claim.
>
> [Emphasis added.]

11 In an unreported decision, annexed hereto as appendix A, Green C.J.T.D. dismissed the Genges' application. He determined that upon proper application of the principles of statutory interpretation and consideration of the analysis in *Yu v. Befus*, 2003 ABQB 451, 344 A.R. 197 (Alta. Q.B.) the scheme established under the *Judgment Recovery (Nfld.) Ltd. Act* was covered by the phrase "liability insurance policy".

12 The Genges appealed that decision to this Court. However, the Appellants have failed to show how the Applications Judge erred. To the contrary, I would affirm his reasons for decision.

13 I would add only that the Nova Scotia Court of Appeal's decision in *Buchanan, Re*, 2007 NSCA 68, 255 N.S.R. (2d) 286 (N.S. C.A.), leave to appeal to S.C.C. refused, (S.C.C.) is further authority for the Applications Judge's interpretation of s. 145 of the *Bankruptcy and Insolvency Act*. There the defendant Buchanan (who had installed a leaky oil tank) had made an assignment in bankruptcy and been discharged after the plaintiff had brought action against Buchanan and his third party liability insurer. The Nova Scotia Court of Appeal held the discharge did not prevent the plaintiff from continuing the action. Oland J.A., for the Court, stated at para. 58:

> ... although s. 178(2) [of the **Bankruptcy and Insolvency Act**] releases the bankrupt from claims provable in bankruptcy, it does not extinguish the debts that form the basis for such claims. In the appeal before us, this means that s. 178(2) releases Buchanan from having to satisfy the debt, but it does not extinguish the underlying legal obligation. ...[T]hat underlying obligation survives for the purpose of the insurance policy ..., whether the extent of the obligation is crystallized by settlement or judicial determination before or after the order for discharge issues.

I agree with this reasoning.

14 The appeal is dismissed. The Respondents will have their costs in this Court on a party and party basis.

> In this application by the defendants for judgment on summary trial under Rule 17A, the defendants argue that the plaintiffs' right to claim damages for personal injury resulting from a collision between the plaintiffs' car and the defendants' uninsured snowmobile has been discharged by the defendants' bankruptcy and subsequent absolute discharge. It follows, counsel says, that the Court has no jurisdiction to set the assessment of damages down for hearing or to otherwise proceed to deal with the plaintiffs' claim. The plaintiffs reply that [sic] the argument that their right to pursue judgment against the defendants to enable them to claim against the province's unsatisfied judgment fund is preserved by Section 145 of the *Bankruptcy and Insolvency Act* [R.S.C. 1985, c. B-3]. Neither party took the position that it was inappropriate to decide the matters under Rule 17A, so I will therefore do so.
>
> The plaintiffs obtained an apportioned judgment against the defendants on issues of liability in 1994. Subsequently, in an effort to settle quantum, the plaintiffs submitted a quantification of the claimed damages. The defendants concluded that it would be impossible to pay an amount anywhere near the amount claimed and made an assignment in bankruptcy. The plaintiffs' claim was treated as a provable claim in bankruptcy, and the defen-

dants, as I noted, ultimately received their discharge.

Prior to receipt of the discharge, the plaintiffs made an application and received an order purportedly under Section 69 of the *Bankruptcy and Insolvency Act*, which relates to stays of proceedings on filing of a notice of intention to make a proposal. The application and order was for leave to continue the proceeding against the defendants on the ground that no creditors would be unduly prejudiced by the continuation of the action, that the continuation would not interfere with the administration of the bankrupts' estate, and that it would not give the plaintiffs an unfair advantage.

Counsel for the defendants has taken the position that the order, to be effective, would have had to have been made under Section 69.4 in relation to a 69.3 stay. Since it was not, he says, the statutory stay has never been lifted.

Having reviewed the transcript of the hearing when the application was made and taking into consideration the statutory structure of Sections 69 through to 69.4, it is obvious to me, and I believe it would also be obvious to the applications judge at the time, that the plaintiffs were intending to apply for the lifting of the statutory stay that would otherwise have applied under Section 69.3 upon the defendants' bankruptcies. Section 69, which I said relates to notices of intention to make a proposal, manifestly had no connection with the facts of this case. I am also satisfied that in making the order, the judge intended that the order be made under Section 69.4. That is the section that applies to all of the statutory stays that arise in various circumstances under Section 69 through to Section 69.31. Section 69.4 is the only section under which a lifting of the stay could be made. The language used by the plaintiffs in support of the application at the hearing was clearly intended to address the conditions that have to be met for the lifting of the stay under Section 69.4. Accordingly, if it were necessary for this decision, I would have concluded that the plaintiffs would be entitled to an order rectifying the order they obtained to clearly indicate that it was being made under Section 69.4; or, alternatively, I would have been prepared to grant an order for leave to continue the proceeding nunc pro tunc.

The real issue before the Court, however, is whether Section 145 of the *Bankruptcy and Insolvency Act* allows the plaintiffs' action to proceed notwithstanding the defendants' discharge. Clearly, the combined effect of Sections 121(1), 168.1(1)(f), 168.1(4), and Section 178(2) is to discharge a bankrupt from all claims provable in bankruptcy with only certain limited exceptions in Section 178(1), which do not apply here. Now, Section 145 reads:

> Nothing in this **Act** affects the right afforded by provincial statute of any person who has a claim against the bankrupt for damages on account of injury to or death of any person, or injury to property, occasioned by a motor vehicle, or on account of injury to property being carried in or on a motor vehicle, to have the proceeds of any liability insurance policy applied in or toward the satisfaction of the claim.

The plaintiffs say that they want to be able to pursue the claim against the defendants for the sole purpose of obtaining a judgment which would then entitle them to access the provisions of the *Judgment Recovery (Nfld.) Ltd. Act* [R.S.N.L. 1990, c. J-3] to obtain payment up to the statutory maximum on the basis that the defendants were uninsured at the time of the accident. They say that the Judgment Recovery scheme is, in effect, a form of uninsured driver liability insurance. Because the money recoverable would not form part of the defendants' bankrupt estates but would be paid directly to the plaintiffs, there is no prejudice to any creditors of the estates, and the purpose of the bankruptcy legislation would not be subverted.

Relying on *Yu v. Befus* [2003 ABQB 451, 344 A.R. 197 (Alta. Q.B.)], a decision of the Alberta Queen's Bench, they argue that the *Bankruptcy and Insolvency Act* should be given a purposive liberal interpretation in accordance with Section 12 of the *Interpretation Act* [R.S.C. 1985, c. I-21] so that the statutory scheme under the *Judgment Recovery (Nfld.) Ltd. Act* should be included within the phrase "liability insurance policy".

The defendants say, in contrast, that on a plain reading of the section, a statutory scheme that does not involve a policy or a contract of indemnity cannot be said on any realistic reading to be a liability insurance policy. Section 145 only exempts one narrow circumstance from the operation of the *Act*. It exempts only liability insurance proceeds regarding motor vehicle accidents, not liability insurance for professional malpractice or other types of liability insurance dealing with other circumstances. There is no reason, therefore, to suppose that Parliament intended to include statutory uninsured motorist schemes without expressly adverting to them.

As I indicated at the outset, I acknowledge that this is a difficult issue. On the one hand, there does not seem to be any good reason in principle why the plaintiffs should be deprived of the opportunity to avail of the statutory scheme if its operation would not adversely impact on the defendants, any more than a private insurance scheme would and if the policy of the *Bankruptcy and Insolvency Act* would not be subverted. On the other hand, it does seem a bit of a stretch to massage the language, read literally, to include the *Judgment Recovery* system. As I indicated, this is one of those cases where it would probably be desirable for the matter to be resolved by the Court of Appeal; but from my point of view, I believe a broad, liberal, purposive interpretation should be applied. The Judgment Recovery scheme is designed to take the place of insurance where none otherwise exists. It is intended to fill a gap in the private insurance regime to ensure that all persons injured on the highway by the fault of another have access to some compensation. It furthers the policy of requiring compulsory motor vehicle third party liability insurance for the protection of the public. In other words, it is intended to be insurance by another name. Indeed, compensation payable through the Judgment Recovery system is funded by insurance companies.

Allowing a plaintiff to access uninsured motorist coverage just as in the case of private insurance proceeds does not offend the principle that all creditors of the bankrupt should be treated equally, because in neither case will the proceeds form part of the bankrupt's estate. Furthermore, allowing a claim in these circumstances would be consistent with other cases such as *Major, Re* [(1984), 56 B.C.L.R. 342 (B.C. S.C.)], and *Eurasia Auto Ltd. v. M & M Welding & Supply (1985) Inc.* [(1991), 5 C.B.R. (3d) 227 (Alta. Master)], which deal with lifting of stays where a plaintiff is entitled to payment of proceeds of insurance on the basis that the proceeds are for the benefit of the person suffering the loss or damage as a result of the culpable acts or omissions of the insured. Such entitlement, these cases reasoned, could not be affected by the bankruptcy of the insured who had no proprietary interest in the insurance proceeds. The key in these cases [to] lifting a stay is whether the plaintiff had a direct cause of action against the insurer so that there was no possibility of the proceeds forming part of the bankrupt's estate to be used for other creditors. The same rationale applies to the claim to the proceeds of a liability insurance policy, and, for the reasons I will give in a moment, the statutory scheme under the *Judgment Recovery (Nfld.) Ltd. Act*. In each case the claimant has a direct claim to the proceeds, and they do not pass through the bankrupt's estate. Allowing the plaintiffs access to such proceeds is therefore completely consistent with the policy of the *Bankruptcy and Insolvency Act*. It is also consistent with the principles developed in such cases as *Duvall, Re* [(1992), 63 B.C.L.R. (2d) 97 (B.C. S.C.)], which was cited in argument, that allow a claimant to proceed against an insurer outside of Section 145 of the *Bankruptcy and Insolvency Act* in certain circumstances.

Now, if that were all to this case, the story would end there. I would be prepared to apply *Yu v. Befus* and allow the plaintiffs' claim to proceed; but there is a further dimension, however, which I must consider. Counsel for the defendants points out that there are important, significant differences between the private insurance scheme in Newfoundland and Labrador and the Judgment Recovery scheme. In the former, Section 24A (now Section 26) of the *Automobile Insurance Act* [R.S.N.L. 1990, c. A-22], provides that the insurer who pays out on behalf of its insured effectively causes a release of the plaintiffs' claim to the extent of the payment and is prevented from seeking to recover the amount of the payment from the insured. Under the Judgment Recovery scheme, however, Judgment Recovery is, upon paying the plaintiffs' judgment, deemed by Section 26(11) of the *Judgment Recovery (Nfld.) Ltd. Act*, to be the judgment creditor in the place of the plaintiff, and may seek to recover the amount from the uninsured driver. In addition, the company has the ability to arrange for the suspension of

the defendants' driver's licence if payment is not forthcoming. Counsel for the defendant argues: first, that this difference demonstrates that the Judgment Recovery scheme is not really insurance and therefore cannot fall within the words "liability insurance" in Section 145; and, secondly, he argues that this difference means that the defendants will be still exposed to potential liability in respect of a claim that should have been wiped out by his discharge, with the result that the policy of the *Bankruptcy and Insolvency Act* to permit rehabilitation of a bankrupt unfettered by past debts would be subverted. (I might just say parenthetically that there were other differences between the two schemes which were asserted by counsel for the defendants, as well, the main one being that Section 26 of the *Automobile Insurance Act* gives the claimant the right to sue the defendants' insurer directly, and he says that Section 26 of the *Judgment Recovery (Nfld.) Ltd. Act* does not do the same. I do not agree with this distinction. While Section 26(1) of the *Judgment Recovery (Nfld.) Ltd. Act* allows a claimant to apply to Judgment Recovery for payment, Subsection 26(2) requires the company to pay out within seven days after application. If Judgment Recovery failed to abide by its statutory obligations, I have no doubt the claimant could sue Judgment Recovery directly to enforce his claims. It is for this reason that I have referred above to the right of a claimant to sue Judgment Recovery directly.)

Now, returning to the two arguments made by counsel for the defendants on the basis of the difference between the two schemes relating to the right of Judgment Recovery to sue the uninsured driver but the lack of such an equivalent right under the private insurance scheme, I will deal with those two arguments. As to the first argument, I reject that argument. I do not consider it a fundamental aspect of an insurance scheme that the insurer, having paid an indemnity, must be precluded from suing his insured for recovery. Certainly, that is the current regime in Newfoundland and Labrador and perhaps in other provinces, but there is nothing to preclude the Newfoundland legislature from amending its *Automobile Insurance Act* tomorrow to allow such recovery. If it did, the regime would still fall under Section 145. Accordingly, the fact that this difference exists, does not make the Judgment Recovery scheme for that reason not an insurance scheme.

For the second argument, which has given me more difficulty, after careful consideration I have decided to reject it also. Judgment Recovery may only proceed to recover its payout from the defendants because it is statutorily subrogated to the plaintiffs' position. While it is true that the quantum of the plaintiffs' entitlement is not yet determined in this case and can only be embodied in a judgment after a damages hearing, the liability to pay that amount, whatever it may ultimately be, was established long before the bankruptcy. The damage judgment is fully derivative from that liability judgment. The ability of the plaintiffs to recover from the defendants, and hence the subrogated right of the company to recover from the defendants, may well be affected by the defendants' ultimate discharge. I reject the argument of the defendants which is based on the presupposition that Judgment Recovery will necessarily have a right to recover its payout from the defendants if the plaintiffs are paid out first. Section 26(1) of the *Judgment Recovery (Nfld.) Ltd. Act* refers to a final judgment, not necessarily an enforceable judgment. The enforceability of a plaintiff's judgment may be affected by all sorts of equities existing between the plaintiff and the defendant. There is nothing in the *Judgment Recovery (Nfld.) Ltd. Act* that says that in such circumstances the plaintiff would not be entitled to have his claim paid by Judgment Recovery, even though there may be some road blocks in the way of the plaintiff enforcing it directly against the defendant. The status of the judgment as between the plaintiffs and the defendants is therefore not the determining factor regarding the ability of the plaintiffs to claim against the company, so long as the judgment can be said to be a final judgment. The potential of the company proceeding against the defendants is therefore not a consideration at this point. That is a matter that should be dealt with if and when the company were to seek recovery from the defendants. As noted, such a claim would no doubt be resisted on the basis that the liability as against the defendants was wiped out by the defendants' discharge and that the company could have no greater right to recover than the plaintiff.

In any event, while it may not be strictly necessary, I believe it would be appropriate to order, pursuant to Section 97 of the *Judicature Act* and the inherent power of the Court to control its own process to prevent an abuse of process, that the plaintiffs may not proceed to execute on any judgment as to quantum that may be obtained as against the defendants but will be limited to making a claim under the *Judgment Recovery (Nfld.) Ltd. Act.*

While it would always be possible for Judgment Recovery (Nfld.) Ltd. to apply to lift such a stay if there were grounds to do so, until such an application were to be made and granted, the company would be statutorily subrogated to a judgment that would be subject to a stay of enforcement. That would be consistent with the intent of allowing the plaintiff to access the statutory compensation while at the same time not exposing the defendants to a liability in violation of the underlying policy of the *Bankruptcy and Insolvency Act*. While it is true that Judgment Recovery may, in these circumstances, be deprived of a right to statutory recovery, that comes about by virtue of the *Bankruptcy and Insolvency Act*. There may be many circumstances where Judgment Recovery is not able to recoup its payouts. If this issue had arisen before the defendants' discharge, the plaintiffs would have had a strong case to lift any statutory stay and proceed against the defendants with a view to accessing the Judgment Recovery fund on the basis of cases like *Re Major*, *Eurasia Auto Limited*, and *Re Duvall*. In such circumstances there would be no question that Judgment Recovery would nevertheless not be able to recoup its losses. Likewise, if the plaintiff had obtained judgment, made a claim to Judgment Recovery, and received payment before the defendants' assignment into bankruptcy, and the defendants thereafter made an assignment, Judgment Recovery's right to recovery would also have been frustrated. It should not be placed in a better position simply because the issue had arisen at a different time.

In the circumstances, therefore, I will dismiss the defendants' application under Rule 17A and make an order, to be in effect until otherwise ordered, that in proceeding against the defendants, the plaintiffs may not enforce any judgment against the defendants personally but may only make a claim with respect to payment of the judgment from Judgment Recovery.

As to costs, this is one of those rare cases where the Court should exercise its discretion under [Rule 17A.05(2)] and order that each party bear its own costs. The unusual nature of the issues in this case and the uncertainty of the law and the interpretation to be given to the relevant legislation justified the bringing of this application. In the words of the rule, it was "nevertheless reasonable" for the defendants to have made the application even though they were unsuccessful.

Appeal dismissed.

Appendix A

5.(1) The *Judgment Recovery (Nfld.) Ltd. Act* is repealed.

(2) Notwithstanding subsection (1), where an action is commenced under the *Judgment Recovery (Nfld.) Act* before the commencement of this Act, or where an accident involving an automobile occurs before the commencement of this Act, that action shall be governed by the *Judgment Recovery (Nfld.) Ltd. Act* and that Act shall be considered to be in force for the purpose of those actions until all those actions have been settled or dealt with in accordance with the *Judgment Recovery (Nfld.) Ltd. Act*.

FN1 S. 5 of the *Automobile Insurance Amendment Act* reads:

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1984 CarswellOnt 671, 7 C.C.L.I. 231, 47 O.R. (2d) 472, 11 D.L.R. (4th) 516, [1984] I.L.R. 1-1800, 4 O.A.C. 209, 47 O.R.(2d) 472

1984 CarswellOnt 671, 7 C.C.L.I. 231, 47 O.R. (2d) 472, 11 D.L.R. (4th) 516, [1984] I.L.R. 1-1800, 4 O.A.C. 209, 47 O.R.(2d) 472

Perry v. General Security Insurance Co. of Canada

PERRY et al. v. GENERAL SECURITY INSURANCE CO. OF CANADA et al.

Ontario Supreme Court, Court of Appeal

MacKinnon A.C.J.O., Arnup and Houlden JJ.A.

Heard: May 17, 1984
Judgment: July 25, 1984

Counsel: *Peter Webb, Q.C.* , and Steven Reisler, for appellants.

Brendan O'Brien, Q.C. , for respondents.

Subject: Insurance; Civil Practice and Procedure; Torts

Barristers and Solicitors --- Negligence — In real estate transactions — Mortgages — Providing ineffective mortgage security.

Insurance --- Claims — Notice and proof of loss — Relief against forfeiture.

Insurance --- Actions on policies — Third party proceedings — Recovery by third party from insurer.

Claim for relief from forfeiture dismissed.

The plaintiffs obtained a default judgment against an insured lawyer for the loss they suffered as a result of the lawyer's failure to investigate properly the title to land. When execution on this judgment was returned unsatisfied, the plaintiffs brought an action under s. 109 of the Insurance Act (Ontario) against the lawyer's insurer. The insurers successfully defended this action on the grounds that the lawyer did not incur liability "for injury or damage to the person or property" of the plaintiffs within the meaning of s. 109 of the Insurance Act; that the lawyer had forfeited his right to be indemnified by breach of the conditions of the policy, and that the plaintiffs were not entitled to claim relief from forfeiture under s. 106 of the Insurance Act. The plaintiffs appealed.

Held:

The appeal was dismissed.

1984 CarswellOnt 671, 7 C.C.L.I. 231, 47 O.R. (2d) 472, 11 D.L.R. (4th) 516, [1984] I.L.R. 1-1800, 4 O.A.C. 209, 47 O.R.(2d) 472

Per MacKinnon A.C.J.O. (Arnup J.A. concurring)

The words of s. 109 of the Act could not be interpreted to mean economic loss unrelated to physical damage to property. It would be a distortion of the language, and the legislative and judicial history of s. 109 and of the definition of the word "property" found in the Act to allow claimants in the position of the plaintiffs to recover against the insurer without any procedural protection or rights afforded to the insurer.

There was nothing in the agreed facts that would justify relief from forfeiture to the lawyer. This was a flagrant case of the flouting of the conditions of the policy by the lawyer. The plaintiffs "stood in the shoes" of the insured lawyer and their action was "subject to the same equities" as the insurer would have against the insured if the judgment had been satisfied by the insured and a claim then made under the policy against the insured.

Per Houlden J.A. (concurring in part)

The word "property" had no fixed legal meaning. The intention of the Legislature would be best achieved by giving the word a wide interpretation. The prime purpose of obtaining insurance coverage for all lawyers practising in Ontario, was to protect members of the public who suffer damage by acts or omissions of lawyers in the performance of their professional duties. If s. 109(1) of the Act did not extend to lawyers, liability insurance, then part of that protection would be lost. However, this was not a proper case to grant relief from forfeiture.

Cases considered:

Continental Casualty Co. v. Yorke, [1930] S.C.R. 180 , [1930] 1 D.L.R. 609 — *considered*

Crone v. Orion Ins. Co., [1965] 2 O.R. 431, 51 D.L.R. (2d) 27 (H.C.) , affirmed [1966] 1 O.R. 221, 53 D.L.R. (2d) 98 (C.A.) , affirmed [1967] S.C.R. 157, 60 D.L.R. (2d) 630, [1967] I.L.R. 1-179 — *considered*

Findlay v. Madill, 28 O.R. (2d) 673, 111 D.L.R. (3d) 180, [1980] I.L.R. 1-1181 (H.C.) [varied 32 O.R. (2d) 413, 123 D.L.R. (3d) 765n, [1981] I.L.R. 1-1466 (C.A.)] — *distinguished*

Frederick v. Aviation & Gen. Ins. Co., [1966] 2 O.R. 356 (C.A.) — *considered*

Fun Seekers Int. Ltd. v. Can. Indemnity Co., [1976] I.L.R. 1-799 (Alta. Q.B.) — *distinguished*

Hildon Hotel (1963) Ltd. v. Dom. Ins. Corp., 66 W.W.R. 289, 1 D.L.R. (3d) 214, [1969] I.L.R. 1-256 (B.C. S.C.) — *considered*

Jordan House Ltd. v. Menow, [1974] S.C.R. 239, 38 D.L.R. (3d) 105 — *followed*

Kallos v. Sask. Govt. Ins., [1984] 2 W.W.R. 183, 30 Sask. R. 185 (sub nom. Junet v. Sask. Govt. Ins.), 3 C.C.L.I. 65, 4 D.L.R. (4th) 34, [1984] I.L.R. 1-1740 (Q.B.) — *not followed*

Lunness, Re (1919), 46 O.L.R. 320, 51 D.L.R. 114 (C.A.) — *considered*

Markus v. West. Union Ins. Co. (1964), 48 W.W.R. 428, 46 D.L.R. (2d) 193 (Alta. C.A.) — *applied*

Meretzky v. Can. Surety Co. (1932), 41 O.W.N. 156 (C.A.) — *considered*

1984 CarswellOnt 671, 7 C.C.L.I. 231, 47 O.R. (2d) 472, 11 D.L.R. (4th) 516, [1984] I.L.R. 1-1800, 4 O.A.C. 209, 47 O.R.(2d) 472

Vandepitte v. Preferred Accident Ins. Corp. of New York, [1932] S.C.R. 22, [1932] 3 W.W.R. 573, [1933] 1 D.L.R. 289 , affirmed [1933] A.C. 70 (P.C.) *considered*

Statutes considered:

(Automobile) Insurance Act, S.O. 1932, c. 25, ss. 183(a), (h).

Insurance Act, S.O. 1924, c. 50, s. 80.

Insurance Act, S.O. 1931, c. 49, s. 7.

Insurance Act, S.O. 1934, c. 22, s. 2.

Insurance Act, S.O. 1937, c. 256, s. 205.

Insurance Act, R.S.O. 1960, c. 190, s. 95(1).

Insurance Act, R.S.O. 1970, c. 224, s. 103.

Insurance Act, R.S.O. 1980, c. 218, ss. 1(54), (55), 99, 106, 109, 209, 226.

Interpretation Act, R.S.O. 1980, c. 219, s. 10.

Liquor Licence Act, R.S.O. 1960, c. 218, s. 67.

Liquor Licence Act, R.S.O. 1980, c. 244, s. 53.

Authorities considered:

Crossley Vaines on Personal Property (5th ed., 1973), p. 3.Griffiths, W.D., "Automobile Insurance — Part III", [1962] Special Lectures L.S.U.C., p. 57 at 72-75.MacGillivray & Parkington on Insurance Law (6th ed., 1975), pp. 934-35, paras. 2246-48.Mitchell, George L., Q.C., "Rights of Unnamed Insureds and Third Parties", [1962] Special Lectures L.S.U.C., p. 331 at 336-38.

APPEAL from a judgment, reported at 1 C.C.L.I. 227, 42 O.R. (2d) 514, 149 D.L.R. (3d) 272, [1983] I.L.R. 1-1669 (H.C.) , dismissing judgment creditors' direct recourse action under s. 109 of the Insurance Act (Ontario) against a liability insurer.

***MacKinnon A.C.J.O. (Arnup J.A.* concurring):**

1 The issue before Mr. Justice R.E. Holland, sitting in Motions Court, and before this Court is whether, as clients and judgment creditors of a negligent solicitor, the appellants (plaintiffs) have a cause of action under s. 109 of the Insurance Act, R.S.O. 1980, c. 218, against the negligent solicitor's insurers (defendants/respondents). The learned Motions Court Judge, with obvious reluctance, came to the conclusion on an Agreed Statement of Facts that s. 109 conferred no cause of action upon the clients who had suffered loss as a result of the negligence of the solicitor and had successfully sued the solicitor for breach of contract. It is with equal reluctance that I have come to the same conclusion.

2 As did the Motions Court Judge, I use the current section numbers of the Insurance Act. Although they were

differently numbered at the time of the institution of the present action, the wording of the relevant sections is identical.

3 The parties presented the Agreed Statement of Facts to the Motions Court, as well as a Statement of Issues which outlined the questions of law which the Court was requested to answer. The agreed facts are as follows:

1. The Plaintiff, William Perry, resides in the City of Cambridge, in the Regional Municipality of Waterloo and Province of Ontario. The Plaintiff, Peter Stevens, resides in the Town of Collingwood, in the County of Simcoe and Province of Ontario.

2. The Defendants, with the exception of F.C. Maltman & Co. Ltd., are the insurers of solicitors practising law in the province of Ontario, through a policy of insurance entered into between the said Defendants and The Law Society of Upper Canada.

3. In or about the month of January, 1978, the Plaintiffs retained a solicitor, one James Kopinak, hereinafter referred to as 'Kopinak' to place a second mortgage in their favour against certain property located in the Regional Municipality of Waterloo. The Plaintiffs jointly advanced to the solicitor Kopinak, the sum of $40,000.00 in order to obtain the said mortgage. At all material times, Kopinak was a solicitor duly licensed to carry on the practice of law within the Province of Ontario. Kopinak acted in a solicitor-client relationship toward the Plaintiffs and, in writing, certified to the Plaintiffs that he had registered a good and valid second charge against the lands described in the mortgage. In fact, Kopinak failed to register a second charge in favour of the Plaintiffs, there being three mortgages and an agreement of purchase and sale registered against the title to the property in question prior to the mortgage in favour of the Plaintiffs.

4. As a result of power of sale proceedings taken by the first mortgagee, the sum of $19,858.84 was paid into Court, pursuant to the Order of His Honour Judge Salhany dated September 18, 1979. Subsequently, pursuant to the Order of Her Honour Judge Elizabeth Robson dated November 6, 1979, this sum of money was paid out to the second and third mortgagees, there being nothing available for distribution to the Plaintiffs as a fourth mortgagee apart from a small amount for costs of the application before Her Honour Judge Robson. In Affidavits filed for the purpose of the application before Her Honour Judge Robson, the intervening mortgagees claimed that they had not received payment for their mortgages.

5. On November 9, 1978, the solicitor for the Plaintiffs, being Steven Reisler, notified Kopinak in writing of the problem with respect to the second mortgage and requested that he notify F.C. Maltman & Co. Ltd. forthwith. On March 10, 1979, the said solicitor for the Plaintiffs telephoned F.C. Maltman & Co. Ltd. to notify them of the problem, and to ask if Kopinak had reported same. On April 23, 1979, the said solicitor for the Plaintiffs notified F.C. Maltman & Co. Ltd. in writing. This letter notified F.C. Maltman & Co. Ltd. that the plaintiffs had a claim against Kopinak, and requested Maltman's intervention.

6. On May 11, 1979, the said solicitor for the Plaintiffs notified Kopinak, in writing, that the Plaintiffs' solicitor had notified Maltman's of the claim. On May 7, 1979, an employee of F.C. Maltman & Co. Ltd. met with Kopinak to discuss another claim, at which time the said employee briefly discussed the subject matter of this action, and the employee undertook to let Kopinak have a copy of the Plaintiffs' solicitor [sic] letter. Kopinak was advised to consider the matter, and decide what he wanted to do. This meeting was followed up by a letter from the said employee of F.C. Maltman & Co. Ltd. to Kopinak dated May 9, 1979, inviting him to report the claim.

7. On September 5, 1979, the said Plaintiffs' solicitor notified F.C. Maltman & Co. Ltd. that the property had been sold by the first mortgagee, and that the sum of $19,858.84 was available for distribution to the subsequent encumbrancers. F.C. Maltman & Co. Ltd. were advised in the said letter that a Motion permitting the first mortgagee's solicitor to make the payment in would take place on September 18, 1979, in Kitchener.

8. On September 27, 1979, the Plaintiffs issued a Writ against Kopinak in the Supreme Court of Ontario. On the same date, the Plaintiffs' solicitor notified F.C. Maltman & Co. Ltd. that a Writ had been issued and, together with a Statement of Claim, was out for service on Kopinak. A copy of each of the said documents was forwarded to F.C. Maltman & Co. Ltd. under cover of a letter dated September 27, 1979.

9. On October 16, 1979, F.C. Maltman & Co. Ltd. was notified that the Defendant had not appeared nor filed a Statement of Defence, and the said F.C. Maltman & Co. Ltd. was invited to indicate its intention to defend the matter.

10. On October 30, 1979, F.C. Maltman & Co. Ltd. wrote to the Plaintiffs' solicitor, advising him that unless Kopinak reported the claim in accordance with condition 5 of the policy, F.C. Maltman & Co. Ltd. was unable to intervene. The letter also mentioned condition 7 of the policy. F.C. Maltman & Co. Ltd. reiterated its position, as above stated, in a letter dated January 15, 1980, to the Plaintiffs' solicitor.

11. On March 12, 1980, the Plaintiffs obtained a Default Judgment in the Supreme Court of Ontario against Kopinak in the amount of $40,000.00, together with interest thereon at the rate of 15-1/2 percent per annum, from October 16, 1978 to the date of Judgment, such interest being $9,249.09, for a total Judgment of $49,249.09. The Judgment further provided for post-judgment interest on the above amount at the rate of 15-1/2 percent per annum, and costs.

12. On March 31, 1980, the original Judgment, Certificate of Taxation, and copy of Writ of Execution were sent to the F.C. Maltman & Co. Ltd. together with a request for payment of same.

13. On April 2, 1980, F.C. Maltman & Co. Ltd. wrote to the Plaintiffs' solicitor advising that Kopinak had still not reported, and that until such time as Kopinak did so, there was nothing F.C. Maltman & Co. Ltd. could do about the matter.

14. On April 11, 1980, the Plaintiffs' solicitor advised Kopinak by telephone of the existence of the above-mentioned Judgment and further that F.C. Maltman & Co. Ltd. had received no report of the claim from him. During the course of this conversation, Kopinak advised the Plaintiffs' solicitor that he would report the claim immediately to F.C. Maltman & Co. Ltd.

15. On July 23, 1980, Kopinak telephoned F.C. Maltman & Co. Ltd. and discussed the matter with an employee of F.C. Maltman. Kopinak remarked that a claim was being made against him because of the priority of mortgages problem. Kopinak denied that the mortgage in question was not a valid second mortgage, and added that he would compose a full report. Subsequent to this conversation, F.C. Maltman & Co. Ltd. wrote to Kopinak enclosing, for his signature, a Non-Waiver Agreement. The said Non-Waiver Agreement was never signed nor returned to F.C. Maltman & Co. Ltd.

16. On July 22, 1980, a Writ of Nulla Bona was returned from the Sheriff of the Judicial District of Waterloo.

17. It is not alleged that the policy was invalid by reason of non-payment of premiums.

18. On October 23, 1980, F.C. Maltman & Co. Ltd. reported in writing to Gestas Corporation, the manager for the insurers under the policy.

19. The general procedure of F.C. Maltman & Co. Ltd. when a lawyer reports a claim to it, is as follows: (a) a file is opened up,

(b) an investigation is commenced,

(c) a report is made to Gestas Corporation.

This is a procedure, generally speaking, where there are no coverage problems. If it appears that the report is late, or for some other reason the claim may not be covered, it is routine to obtain a signed Non-Waiver Agreement before proceeding further. The investigation would normally consist of interviewing the insured lawyer, reviewing his file and, if necessary, engaging counsel to advise on questions of law. On occasion, the claimant's solicitor is spoken to.

20. Apart from the meeting on May 7, 1979, the telephone conversation of July 23, 1980 was the only verbal communication which took place between F.C. Maltman & Co. Ltd. and Kopinak regarding this matter. F.C. Maltman & Co. Ltd. opened up a file on the matter and, as above stated, reported to Gestas Corporation.

21. Kopinak did not respond to letters from F.C. Maltman & Co. Ltd. nor did he return their phone calls to provide the information which he said he would provide in a telephone conversation of July 23, 1980.

4 The questions of law which the parties outlined and asked the Court to determine are:

1. Upon the facts disclosed in the Agreed Statement of Facts, did Kopinak incur a liability for injury or damage to the person or property of the Plaintiffs within the meaning of Section 106(1) of the Insurance Act, R.S.O. 1970, Chapter 224 and amendments (now Section 109(1) R.S.O., 1980, Chapter 218) so as to make the said provision of the Insurance Act apply to the Judgment obtained by the Plaintiffs against Kopinak?

2. If the answer to the above question is in the affirmative, has Kopinak, by breach of the conditions of the insurance policy forfeited his right to be indemnified with respect to the said Judgment?

3. If Kopinak has forfeited his right to indemnity, can the Plaintiffs avail themselves of the right to claim relief from forfeiture under Section 103 of the Insurance Act, R.S.O. 1970, Chapter 224 and amendments (now Section 106, R.S.O. 1980, Chapter 218)?

5 As stated, the Motions Court Judge held that s. 109(1) did not apply to the judgment obtained by the appellants against their solicitor and he answered the first question in the negative. In view of his answer to question one, it was not necessary for him to answer questions two and three. However, in case the matter went further, the Motions Court Judge felt that he should state his views on questions two and three. He concluded that he was bound by Frederick v. Aviation & Gen. Ins. Co., [1966] 2 O.R. 356 (C.A.) , and that, on the equities, the appellants could not be granted relief from forfeiture under s. 106 of the Insurance Act (then s. 103). Question two was answered in the affirmative and question three in the negative. I should state that the appellants now agree that the solicitor had, by his breach of the conditions of the insurance policy, forfeited his right to be indemnified with respect to the appellants' judgment and that question two is properly answered in the affirmative. They argue, however, that that forfeiture does not, on the agreed facts, prevent the appellants from successfully claiming relief from forfeiture under s. 106. I shall deal with that argument later.

Section 109 of the Insurance Act

6 Section 109 reads:

109.-(1) Where a person incurs a liability for injury or damage to the person or property of another, and is in-

> sured against such liability, and fails to satisfy a judgment awarding damages against him in respect of his liability, and an execution against him in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.
>
> (2) This section does not apply to motor vehicle liability policies.

7 From the Agreed Statement of Facts, it is clear that the solicitor, in breach of his instructions, failed to place the requested second mortgage as security for the $40,000 advanced by the appellants to him for that purpose. The mortgage he did register was a fourth mortgage, subsequent as well to an agreement of purchase and sale. As a result of the exercise of its power of sale by the first mortgagee, there was no money available for distribution to the appellants.

8 It appears that if the appellants' security had been a second mortgage as required, there still would have been a considerable shortfall in the moneys available to pay it off after the sale by the first mortgagee. However, Mr. O'Brien for the respondents agreed that in view of the subsequent judgment secured against the solicitor by the appellants for the full amount of $40,000, the insurers, if liable under s. 109, would be liable for the total amount of the judgment.

9 As the Motions Court Judge pointed out, the policy here is styled "Lawyers' professional liability policy", commonly called an "errors and omissions" policy. The named insured is "The Law Society of Upper Canada" and the insured are described as "eligible members of the Law Society of Upper Canada, including Partnerships. ..." The individual coverage is set out as follows:

> To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of any act or omission of the Insured, or of any other person for whose acts or omissions the insured is legally responsible, and arising out of the performance or intended performance of professional services for others, or failure to perform such services as ought to have been performed, in the Insured's capacity as a lawyer except that, if the Insured is a member of any partnership, this coverage (A) shall not apply if one or more claims arising out of the same professional service are made (1) jointly or severally against two or more members of the partnership or against any member of the partnership and the partnership, (2) against the partnership or (3) against the Insured solely because he is a member of the partnership.

10 The appellants' position, simply stated, is that the solicitor's failure to follow their instructions caused them to lose $40,000. That loss was "injury or damage" to their "property" within the meaning of those words in s. 109. It is argued that the words "injury or damage to person or property" is the most comprehensive language that could have been used by the Legislature and was intended to cover "all types" of monetary liability. Section 99 of the Insurance Act states that, except where otherwise provided, the part of the Act under which s. 109 falls applies to every contract of insurance made in Ontario other than contracts of accident and sickness insurance, life insurance, and marine insurance. Accordingly, the appellants submit, s. 109 applies to errors and omissions insurance and to the factual situation in the instant case.

11 "Property" is defined in the definition section [s. 1(54)] of the Insurance Act as follows:

> 'property' includes profits, earnings and other pecuniary interests, and expenditure for rents, interest, taxes and other outgoings and charges and in respect of inability to occupy the insured premises, but only to the extent of express provision in the contract;

12 The appellants argue that they have lost a "pecuniary interest" and therefore there was injury or damage to their property. However, it appears to me that the definition section militates against the position of the appellants.

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That section refers to "inability to occupy the insured premises", and it states further that it is only covered "to the extent of express provision in the contract". The section refers to "*the* " insured premises, not to insured property, and it is difficult to see how there could be injury or damage *to* rents and taxes. The section must be read as a whole and there is nothing in the cover of the Law Society contract of insurance which remotely fits this description. Counsel for the appellants, in arguing for a fair, large and liberal interpretation of s. 109, referred the Court to the definition of "property" used by Mr. Justice Riddell in Re Lunness (1919), 46 O.L.R. 320 at 332, 51 D.L.R. 114 (C.A.) . The Court there was determining the intention of a testator when he spoke of "property situated in the Province of Ontario". Mr. Justice Riddell stated in this connection:

> No doubt 'property' is the most comprehensive of all the terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have: Langdale, M.R., in Jones v. Skinner (1835), 5 L.J.N.S. Ch. 87, 90 — and no doubt in a proper case the word will be so interpreted.

13 Counsel for the appellants pointed out that an Alberta trial Court had relied on this definition of "property" in Fun Seekers Int. Ltd. v. Can. Indemnity Co., [1976] I.L.R. 1-799, [1976] W.W.D. 153 (Alta. Q.B.) . However, it is to be noted that, in that case, the insurance coverage was for loss *of* money, securities and other property, not liability for injury or damage *to* property.

14 In looking at the scope of s. 109, I do not think the words of the section can be interpreted to mean economic loss unrelated to physical damage to property. As the Motions Court Judge pointed out, that view is supported by the interpretation placed on similar words found in the Liquor Licence Act by Laskin J., speaking for the majority of the Supreme Court of Canada in Jordan House Ltd. v. Menow, [1974] S.C.R. 239 at 246-47, 38 D.L.R. (3d) 105 .

15 The plaintiff Menow became intoxicated at the defendant hotel's (Jordan House) beverage room. He was ejected by an employee of the hotel and, while wandering home on foot, was struck near the centre line of the highway by a vehicle driven by Honsberger. Menow was awarded damages against the hotel and Honsberger under an equal apportionment of fault among all three parties.

16 Section 67 of the Liquor Licence Act, R.S.O. 1960, c. 218 (now s. 53 of the Liquor Licence Act, R.S.O. 1980, c. 244) which was considered by the Court read:

> s. 67 Where any person or his servant or agent sells liquor to or for a person whose condition is such that the consumption of liquor would apparently intoxicate him or increase his intoxication so that he would be in danger of causing injury to his person or injury or damage to the person or property of others, if the person to or for whom the liquor is sold while so intoxicated,
>
> (a) commits suicide or meets death by accident, an action under The Fatal Accidents Act lies against the person who or whose servant or agent sold the liquor; or
>
> (b) causes injury or damage to the person or property of another person, such other person is entitled to recover an amount to compensate him for his injury or damage from the person who or whose servant or agent sold the liquor.

17 On the appeal, counsel for Honsberger argued, as did counsel for the appellants in the instant case, that the word "property" found in s. 67(b) can have an extremely broad meaning and submitted that it could mean monetary loss of the kind claimed here. Laskin J., in dealing with this argument, said at pp. 246-47:

> Before dealing in more detail with this central question, I wish to refer to an issue raised by counsel for Honsberger in reliance on s. 67(b) of The Liquor Licence Act. If the judgments below stand so far as the hotel's liability is concerned, Honsberger would have the benefit of the Ontario Negligence Act in respect of any claim

> over against the hotel for the damages assessed against both defendants. But on the assumption that the hotel is exonerated here, the submission on behalf of Honsberger is that the unappealed affirmation of the judgment against him amounts to 'injury or damage to the ... property' of Honsberger, within s. 67(b), and thus entitles him to recover from the hotel the amount for which he has been held liable to Menow. The Court did not require counsel for the hotel to respond to this submission. It was of the opinion that s. 67(b) cannot be so interpreted. That provision does not entitle a blameworthy defendant to cast himself in the role of a plaintiff claiming not for damage suffered by it but rather for that suffered by the intoxicated person and for which it is in part responsible. *This is entirely apart from the attempt to read the word 'property' in a sense which is entirely foreign to its ordinary meaning as well as to the context in which it is used in s. 67(b).*

(emphasis added.)

18 Although the facts in the instant case are much more sympathetic to the appellants than the facts upon which Honsberger sought to rely in seeking to establish a claim under the then s. 67(b) of the Liquor Licence Act, to interpret the word "property" in s. 109 of the Insurance Act to cover the present claim would be, in the words of Laskin J., "an attempt to read the word 'property' in a sense which is entirely foreign to its ordinary meaning as well as to the context in which it is used. ..."

19 Originally, s. 109 applied to all types of insurance. As a result of a series of cases in the 1920s and early 1930s, its deficiencies with respect to automobile accident victims became apparent. As a result, the Insurance Act was amended in 1932 and 1935 (found in the 1937 Consolidation: c. 256, s. 205) to make special provision for third-party rights in such cases by permitting a person not a party to the contract of insurance who had a claim against the insured, by virtue of an accident caused by one driving the insured's automobile with his permission, to claim against the insurer. This is now embodied in detail in ss. 209 and 226 of the Insurance Act which also allows for an insurer who denies liability to be made a third party to any action in which a claim is made against the insured (ss. 226(14) and (15)).

20 The only authority to which we were referred that appears to have some resemblance to the case under review is Kallos v. Sask. Govt. Ins., [1984] 2 W.W.R. 183, 30 Sask. R. 185 (sub nom. Junet v. Sask. Govt. Ins.), 3 C.C.L.I. 65, 4 D.L.R. (4th) 34, [1984] I.L.R. 1-1740 , a recent judgment of the Saskatchewan Queen's Bench. In that case, a solicitor negligently failed to commence a motor-vehicle accident claim within the limitation period. The plaintiffs (clients) obtained a judgment against the solicitor. The learned trial Judge concluded that there was no reason for excluding claimants against an insurer pursuant to a solicitor's professional liability policy from the operation of s. 122 of the Saskatchewan [Insurance] Act, R.S.S. 1978, c. S-266, which is similar to s. 109 of our Insurance Act. He was of the view that, because s. 101 of the Saskatchewan Insurance Act (which is identical in its relevant parts to s. 99 of the Ontario Act) makes s. 122 applicable to every contract of insurance made in Saskatchewan, it therefore applied to solicitors' professional liability insurance. In considering the trial decision in the instant case, he felt that this argument had not been made before Holland J. and he refused to follow it, being of the view that there was no necessity for the clients to establish a causal connection between the act or omission of the solicitor and the damage or injury to persons or property.

21 We were advised that the successful argument made in Kallos was indeed made to the trial Judge in the instant case. In my view, no matter how sympathetic one may be to the appellants' position, it would be a distortion of the language, and the legislative and judicial history of s. 109, and of the definition of the word "property" found in the Act, to allow claimants in the position of the appellants to recover against the insurer without any procedural protection or rights afforded to the insurer. As previously stated, this problem was recognized and addressed with regard to third-party claims of motor-vehicle accident victims in the circumstances recited, and the Act was amended accordingly. Section 109, in its present form, does not allow the appellants to succeed in their claim against the insurer, and the first question must be answered in the negative.

Section 106 of the Insurance Act

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22 Having come to the same conclusion as the Motions Court Judge on the first question, it is not necessary to deal with the second and third questions posed. However, like the Motions Court Judge, I think it would be helpful to the parties and the profession to express my views on those questions, particularly on question three.

23 As stated, counsel for the appellant conceded that question two had to be answered in the affirmative. He agreed that the solicitor, by his breach of the policy conditions, had forfeited his right to be indemnified with respect to the judgment against him. However, Mr. Webb, on behalf of the appellants, argued that this forfeiture by the solicitor did not bar the appellants' right to claim relief from forfeiture under s. 103 (now s. 106) of the Insurance Act. Section 106 reads:

> 106. Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss and a consequent forfeiture or avoidance of the insurance in whole or in part and the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it considers just.

24 Section 109 makes any action against the insurer by a third party "subject to the same equities as the insurer would have if the judgment had been satisfied".

25 From the Agreed Statement of Facts, the appellants did their best to make the insurers aware of the potential claim against their insured. The appellants' position is that, had the insurers chosen to do so, they could have intervened and had themselves added as third parties. But there is, at present, no rule or Act that permits the insurer in such situations to be added as of right. Mr. Webb did not argue that in all cases the conduct of the lawyer in breach of the policy conditions would not prejudice the insurer, but submitted that there had to be, in each case, an assessment of the prejudice without laying down a general rule. In this connection, he pointed out that the Motions Court Judge had stated:

> The insurer knew all about this claim and there is really little, if any, prejudice to the insurer by reason of not being advised of the claim by the insured and by the failure of the insured to cooperate.

26 However, it is uncontested that this was a flagrant case of the flouting of the conditions of the policy by the solicitor. His ignoring of the claim and his failure to advise his insurers of the claim and to cooperate with them was, apparently, deliberate. There is nothing in the agreed facts that would justify granting relief from forfeiture to the solicitor. In Kallos, supra, the trial Judge held that the solicitor had not been in breach of any condition of the policy. He had given notice of the claim against him and offered to cooperate with the defendant insurer.

27 I agree with the Motions Court Judge that the claimants here "stand in the shoes" of the insured solicitor and s. 109 makes their action "subject to the same equities" as the insurer would have against the insured if the judgment had been satisfied by the insured and a claim then made under the policy by the insured. The appellants sought to rely on Markus v. West. Union Ins. Co. (1964), 48 W.W.R. 428, 46 D.L.R. (2d) 193 at 201 (Alta. C.A.) . But Smith C.J.A., speaking for the Court, made the position plain:

> It was contended by the appellant that (a) there is not power in the Court to relieve from forfeiture in favour of a third party and (b) that in respect of the two alleged breaches of statutory condition by Nagy there was no compliance by him, that it is only in case of 'imperfect compliance' that relief can be granted, and that consequently there is no power in the Court to grant the respondent relief under s. 287.
>
> The answer to the first of these two arguments, in my view, consists of statements of Kerwin, C.J.C., and Tritschler, J.A., in the Erickson case already quoted by me. In my view it is quite clear from that decision that

> the power to relieve from the forfeiture in favour of the third party is co-extensive with the power to relieve in favour of the insured. *In the case at bar I am satisfied that the power to relieve could and would be exercised in favour of the insured if he were a party to this action .*

(emphasis added.)

28 Nor do I find Findlay v. Madill, 28 O.R. (2d) 673, 111 D.L.R. (3d) 180, [1980] I.L.R. 1-1181 (H.C.) [varied 32 O.R. (2d) 413, [1981] I.L.R. 1-1466, 123 D.L.R. (3d) 765n (C.A.)], referred to by counsel for the appellants, helpful in the context of this case. That was a claim under what is now s. 226 of the Insurance Act and different considerations applied. Under the Act, the insurer had the right to defend, but exercised its option not to and the Court held it had not suffered prejudice. The Insurance Act makes it clear that in motor-vehicle accident claims the third party is not prejudiced in his claim to the insurance money by any act or default of the insured (s. 226(4)(b)).

29 Mr. Webb concedes that the onus is on the appellants to persuade the Court, if he is first able to persuade us that his clients are in a better position under s. 106 than is the solicitor, that there was no prejudice to the insurer. But, even accepting that the appellants are in a better position than the insured under s. 106, I am not persuaded that it can be said that there was no prejudice caused the insurer by the solicitor's failure to defend and to cooperate with the insurer. For one thing, on the face of the agreed facts, it appears that the judgment might, if defended, have been limited to some $19,000, the money available after satisfying the claims of the first mortgagee, rather than the $40,000 awarded.

30 In holding that the appellants stepped "into the shoes" of the insured solicitor, the Motions Court Judge was of the view, as noted earlier, that he was bound by the following statement of principle made by Schroeder J.A. in Frederick v. Aviation & Gen. Ins., supra, at p. 359:

> The effect of the section quoted is to place the plaintiffs in the shoes of the insured Ottawa Aero Services Ltd., and it operates as a statutory assignment of the benefits of the insurance policy in their favour. They have no higher rights under the policy than the insured would have, and their right of recovery is subject to all the equities existing between the insurer and the insured. The defendant denies liability to the plaintiffs upon the ground that Ottawa Aero Services Ltd. committed breaches of the policy conditions which disentitled it to indemnity thereunder.

31 Counsel for the appellants, in their Statement (although not in their oral submissions), argued that the Court in Frederick might have stated the law differently had the present s. 106 then been in force. However, when that case was decided, there was a provision for relief from forfeiture in the Act substantially the same as the present s. 106 and it cannot be distinguished on that basis.

32 To grant relief from forfeiture to a person not a party to the contract, when the insured could not be granted such relief, is, in effect, to remove any consideration of the equities between insured and insurer in the issue. Under such an interpretation and application of s. 106, the words "but subject to the same equities as the insurer would have" found in s. 109 can have no effect or meaning. I can see no reason to differ from Schroeder J.A.'s statement of principle, supra, and the third question must be answered in the negative.

33 On the facts of this case, the result is an unhappy one. It seems also to run counter to one of the purposes for the insistence by the Law Society of Upper Canada that its members assume this insurance as a condition of being licensed to practise. Surely one of the main reasons for such a condition was to ensure that members of the public, in the situation of the appellants, would be protected from loss caused by the negligent action or inaction of their solicitors. As noted during the course of the argument by my brother Arnup, it seems that the more negligent the solicitor is in carrying out his obligations to the insurer under the insurance contract (which could be, as in the instant case, merely an extension of the negligent manner in which he carries out his professional obligations generally), the less

possibility there is for the client to recover moneys payable under the insurance contract.

34 To deal with such situations as the present, it might be possible for the Law Society to be named in the policy, for the purpose of such claims, a partner of each practising solicitor. Its liability being limited to the amount of the cover in this way, it could be sued directly, with the solicitor, could advise the insurer of the claim, ensure the co-operation of the solicitor and, at the same time, ensure the fulfillment of one of the purposes of the compulsory insurance. Alternatively, the Legislature could amend the legislation, as it did for automobile accident victims, so that third parties will be enabled to claim against insurers regardless of the acts or defaults of the insured, subject to protection to the insurer similar to that afforded by the present s. 226 to motor vehicle liability insurers.

35 The situation revealed by this claim cannot be unique, and it is to be hoped that a prompt solution is provided by legislation or otherwise.

36 Mr. O'Brien advised the Court that his client would not be asking for costs, and the appeal is dismissed without costs.

Houlden J.A. **(concurring in part):**

37 I agree with MacKinnon A.C.J.O.'s interpretation of s. 106 of the Insurance Act, R.S.O. 1980, c. 218, and with his conclusion that this is not a proper case to grant relief from forfeiture. I do not, however, agree with his interpretation of s. 109(1) of the Insurance Act. Although the appeal must be dismissed, I would like to state briefly my views on the interpretation of the section.

38 At common law, an injured party had no cause of action against an insurer for damages awarded to him against an insured. The right of the insured to be indemnified by his insurer was personal to the insured, and there was no privity between the injured person and the insurer: MacGillivray & Parkington on Insurance Law, (6th ed., 1975), pp. 934-35, paras. 2246-48.

39 In 1924 a section was added to the Ontario Insurance Act to remedy this situation. Section 80 of the Insurance Act, S.O. 1924, c. 50 provided:

> 80. In any case in which a person insured against liability for injury or damage to persons or property of others has failed to satisfy a judgment obtained by a claimant for such injury or damage and an execution against the insured in respect thereof is returned unsatisfied, such execution creditor shall have a right of action against the insurer to recover an amount not exceeding the face amount of the policy or the amount of the judgment in the same manner and subject to the same equities as the insured would have if the said judgment had been satisfied.

To take advantage of the remedy provided by s. 80, the injured party had to obtain judgment against the insured, issue execution and obtain a nulla bona return before he could take proceedings directly against the insurer.

40 Section 80 and its successor sections applied to motor vehicle accident cases: see, for example, Continental Casualty Co. v. Yorke, [1930] S.C.R. 180 , [1930] 1 D.L.R. 609 , and Meretzky v. Can. Surety Co. (1932), 41 O.W.N. 156 (C.A.) . In 1931, the section was amended to its present wording, and subs. (2), which provides that the section does not apply to motor vehicle liability policies, was added to the section: see the Insurance Act, S.O. 1931, c. 49, s. 7.

41 The deletion of motor vehicle liability policies from the section resulted from the decision of the Privy Council in Vandepitte v. Preferred Accident Ins. Corp. of New York, [1933] A.C. 70 . In that case, the Court was concerned with s. 24 of the Insurance Act, S.B.C. 1925, c. 20 which was identical in wording with s. 109(1) of the Insurance Act. The Privy Council held, affirming the judgment of the Supreme Court of Canada, [1932] S.C.R. 22,

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[1932] 3 W.W.R. 573, [1933] 1 D.L.R. 289 , that s. 24 afforded no remedy to a person injured by an automobile driven by someone other than the insured, even though the driver was operating the vehicle with the permission of the insured. By ss. 183(a) and (h) of the (Automobile) Insurance Act, S.O. 1932, c. 25, this defect in the law was remedied: see article by W.D. Griffiths, "Automobile Insurance — Part III," in [1962] Special Lectures L.S.U.C. 57, Claims Under Insurance Policies. In 1935, the Insurance Amendment Act, S.O. 1935, c. 29, s. 35, permitted an insurer which denied liability under a motor vehicle policy to have itself added as a third party so that it could protect its interests when the main action was being tried: see article by Griffiths, op. cit., pp. 72-75. The present sections of the Insurance Act dealing with motor vehicle liability policies are ss. 209, 226, and 227. (For the differences between a claim under s. 109(1) and a claim under s. 226, see article by George L. Mitchell, Q.C., "Rights of Unnamed Insureds and Third Parties", in [1962] Special Lectures L.S.U.C. 331 at 336-38.) Section 109 of the Insurance Act reads as follows:

> 109. — (1) Where a person incurs a liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against him in respect of his liability, and an execution against him in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.
>
> (2) This section does not apply to motor vehicle liability policies.

42 The issue is: Did Kopinak incur a liability for damage to the property of the plaintiffs within the meaning of s. 109(1) when he failed to register the second mortgage for them against the property in Waterloo?

43 The plaintiffs suffered a substantial pecuniary loss as a result of Kopinak's negligence. In support of his contention that "property" in s. 109(1) includes such a loss, Mr. Reisler, who argued this portion of the appeal, relied on the definition of property in s. 1(54) of the Insurance Act, which is to this effect:

> 'property' includes profits, earnings and other pecuniary interests, and expenditure for rents, interest, taxes and other outgoings and charges and in respect of inability to occupy the insured premises, but only to the extent of express provision in the contract;

This definition was added to the Act by the Insurance Act, S.O. 1934, c. 22, s. 2. If the definition of "property" applies to "property" in s. 109(1), then the damage sustained by the plaintiffs comes within the section, since s. 1(54) states that "property" includes "other pecuniary interests".

44 Mr. O'Brien submitted, however, that s. 1(54) is only intended to apply to "property damage insurance" which is defined by s. 1(55) as follows:

> 'property damage insurance' means insurance against loss of or damage to property that is not included in or incidental to some other class of insurance defined by or under this Act;

While the Act is not as clear as it might be, I agree with MacKinnon A.C.J.O.'s analysis of s. 1(54) and with his conclusion that the subsection has no application to a policy of professional liability insurance.

45 There appear to be only two cases in which Courts have interpreted the word "property" in s. 109(1) or equivalent sections: one in Ontario and one in Saskatchewan. The Ontario case is Crone v. Orion Ins. Co., [1965] 2 O.R. 431, 51 D.L.R. (2d) 27 (H.C.) . In that case two individual plaintiffs and a corporate plaintiff sustained damage in an airplane crash. The three plaintiffs sued the owner of the airplane. When the owner did not defend the action, the plaintiffs obtained judgment and issued execution. The execution was returned unsatisfied. The three plaintiffs then took proceedings against the owner's insurer pursuant to what is now s. 109(1) of the Insurance Act (then s.

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95(1) of the Insurance Act, R.S.O. 1960, c. 190).

46 The claims of the individual plaintiffs were for bodily injuries, and they were allowed recovery from the insurer. The claim of the corporate plaintiff was, however, for loss of profits, and Stewart J., the trial Judge, held that the claim did not fall within the section. At p. 433 [O.R.] of his judgment, the learned Judge disposed of the claim of the corporate plaintiff in these words:

> Section 95 of the Insurance Act, R.S.O. 1960, c. 190, reads as follows:
>
> > 95(1) Where a person incurs a liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against him in respect of his liability, and an execution against him in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.
>
> I am invited to read the section so as to mean 'liability for injury to another or damage to the person or property of another' so that the loss of business of the company might come under the head of 'injury to another' but I do not feel that this is the true sense of the section, believing that the liability must be injury to the person or property of another or damage to the person or property of another. No claim for damage to the property, such as cameras etc., of the company was made in the original action and it is obvious that there was no damage to the person of the corporation.

It is clear that Stewart J. was of the opinion that "damage to property" in the section meant "damage to physical property".

47 An appeal was taken by the insurer in the Crone case to the Court of Appeal and to the Supreme Court of Canada, but as both these Courts were careful to point out, there was no cross-appeal by the corporate plaintiff: see Crone v. Orion Ins. Co., [1966] 1 O.R. 221 at 222, 53 D.L.R. (2d) 98 (C.A.) and Orion Ins. Co. v. Crone, [1967] S.C.R. 157 at 160, 60 D.L.R. (2d) 630, [1967] I.L.R. 1-179 ; Stewart J.'s interpretation of s. 109 was thus not considered by the Appellate Courts.

48 The Saskatchewan case is Kallos v. Sask. Govt. Ins., [1984] 2 W.W.R. 183, 30 Sask. R. 185 (sub nom. Junet v. Sask. Govt. Ins.), 3 C.C.L.I. 65, 4 D.L.R. (4th) 34, [1984] I.L.R. 1-1740 (Q.B.) . This involved s. 122(1) of the Saskatchewan Insurance Act, R.S.S. 1978, c. S-266, a section similar in wording to s. 80 of the Insurance Act, 1924. The plaintiffs had been injured in an automobile accident. They retained a solicitor to bring an action on their behalf against the party who caused their injuries. The solicitor failed to commence the action within the prescribed limitation period so that the plaintiffs' cause of action became statute barred. The plaintiffs sued the solicitor for negligence and recovered judgment. When they were unable to obtain payment from him, they brought action against the defendant's liability insurer. Maurice J. held that s. 122(1) of the Saskatchewan Act was wide enough to include the claim. Although I do not agree entirely with Maurice J.'s reasons for arriving at this conclusion, I do agree with his conclusion.

49 Mr. O'Brien sought to distinguish the Kallos case on the ground that in that case, unlike the present one, there had been actual injury or damage to the person and property of the plaintiffs. With respect, I do not think that this distinction is a valid one. The solicitor was not responsible for the property damage and bodily injuries sustained by the plaintiffs; rather, he was responsible for the pecuniary loss suffered by the plaintiffs by reason of his failure to bring the action in the limitation period.

50 In support of his contention that "property" in s. 109(1) means physical property and does not include pecuniary loss, Mr. O'Brien relied on the decision of Laskin J. in Jordan House Ltd. v. Menow, [1974] S.C.R. 239, 38

1984 CarswellOnt 671, 7 C.C.L.I. 231, 47 O.R. (2d) 472, 11 D.L.R. (4th) 516, [1984] I.L.R. 1-1800, 4 O.A.C. 209, 47 O.R.(2d) 472

D.L.R. (3d) 105 . In that case, the plaintiff Menow, on the evening in question, drank to excess in the hotel of the defendant Jordan House Ltd. At about 10 p.m., the plaintiff was ejected from the hotel by the defendant's employees who knew that the plaintiff was unable to take care of himself by reason of intoxication and that he would have to go home, probably by foot, by way of a main highway. On the way home, Menow was struck by the motor vehicle of the defendant Honsberger. The trial Judge apportioned liability equally between the plaintiff and the two defendants. The defendant Honsberger did not appeal the finding of negligence or the apportionment of one-third of the fault against him. The defendant hotel did appeal the finding of negligence against it.

51 Section 67(b) of the Liquor Licence Act, R.S.O. 1960, c. 218 (now s. 53 of the Liquor Licence Act, R.S.O. 1980, c. 244) provides:

> s. 67 Where any person or his servant or agent sells liquor to or for a person whose condition is such that the consumption of liquor would apparently intoxicate him or increase his intoxication so that he would be in danger of causing injury to his person or injury or damage to the person or property of others, if the person to or for whom the liquor is sold while so intoxicated,
>
> . . . . .
>
> (b) causes injury or damage to the person or property of another person, such other person is entitled to recover an amount to compensate him for his injury or damage from the person who or whose servant or agent sold the liquor.

In the Supreme Court of Canada, the defendant Honsberger argued that if the defendant hotel was exonerated of liability by the Court, then the judgment against him constituted injury or damage to his property within s. 67(b), and this entitled him to recover from the defendant hotel the amount for which he had been held liable to the plaintiff.

52 Laskin J. in holding that s. 67(b) could not be so interpreted said, at pp. 246-47:

> That provision does not entitle a blameworthy defendant to cast himself in the role of a plaintiff claiming not for damage suffered by it but rather for that suffered by the intoxicated person and for which it is in part responsible. This is entirely apart from the attempt to read the word 'property' in a sense which is entirely foreign to its ordinary meaning as well as to the context in which it is used in s. 67(b).

53 Notwithstanding the similarity of wording in the two statutes, I do not regard the above statement as a binding authority on the meaning of "property" in s. 109(1) of the Insurance Act. The context in which the words are used in the two statutes is quite different. Furthermore, s. 67(b) of the Liquor Licence Act applies to the situation where an intoxicated person "*causes* injury or damage to the ... property of another person" whereas s. 109(1) applies where a person "*incurs a liability* for injury or damage to the ... property of another". (The emphasis is mine.) In any event, Laskin J. did not purport to give a comprehensive definition of the word "property".

54 In Ontario, the Law Society has taken an active role with respect to professional liability insurance. It has entered into a policy with the defendant insurers which provides coverage for all lawyers practising in Ontario. The prime purpose of obtaining this coverage was, I believe, to protect members of the public who suffer damage by acts or omissions of members of the Society in the performance of their professional duties. If s. 109(1) does not extend to solicitors' liability insurance, then part of that protection is, of course, lost.

55 "Property" has no fixed legal meaning. As Crossley Vaines' Personal Property (5th ed., 1973) points out at p. 3:

1984 CarswellOnt 671, 7 C.C.L.I. 231, 47 O.R. (2d) 472, 11 D.L.R. (4th) 516, [1984] I.L.R. 1-1800, 4 O.A.C. 209, 47 O.R.(2d) 472

> 'Property' is a word of different meanings. It may mean a thing owned (my watch or my house is 'my property'); it may mean ownership itself as when I speak of my 'property' in my watch which may pass to the person to whom I sell the watch before I actually hand the watch over (the rules as to the 'passing of the property' in this sense are set out in the Sale of Goods Act, 1893 (a)); or it may even mean an interest in a thing less than ownership but nevertheless conferring certain rights, as when we speak of the 'property' or 'special property' of a bailee in the thing bailed. Bailment is explained in Chapter 6 and these different senses in which the word 'property' is used should emerge as our discussion proceeds. In English law, therefore, 'property' comprehends tangibles and intangibles, movables and immovables; it means a tangible thing (land or a chattel) itself, or rights in respect of that thing, or rights, such as a debt, in relation to which no tangible thing exists.

I would refer also to Hildon Hotel (1963) Ltd. v. Dom. Ins. Corp., 66 W.W.R. 289, 1 D.L.R. (3d) 214, [1969] I.L.R. 1-256 (B.C.S.C.) , and Fun Seekers Int. Ltd. v. Can. Indemnity Co., [1976] I.L.R. 1-799, [1976] W.W.D. 153 (Alta. Q.B.) on the meaning of "property". If damage to property in s. 109(1) is restricted to damage to physical property, then a claim against an insurer pursuant to a solicitors' professional liability insurance policy would not be covered. If the draftsman uses an abstract word, such as "property", without defining it, I believe that the Court should give the word the meaning which best carries out the purpose and intent of the statute: s. 10 of the Interpretation Act, R.S.O. 1980, c. 219. Section 109(1), as I have pointed out, was intended to overcome the defect in the common law which prevented an injured party from taking action directly against an insurer for damage caused by an insured. The intention of the Legislature is, I believe, best achieved by giving a wide interpretation to the word "property".

56 I would not, therefore, restrict damage to property in s. 109(1) to damage to the physical property of a third party. Rather I would interpret it as being wide enough to include damage to the pecuniary interests of a third party. If property in s. 109(1) is given this interpretation, then the section is wide enough to include within its operation the claim of a client against a solicitor pursuant to a professional liability insurance policy.

Arnup J.A. **(concurring):**

57 I have read the reasons prepared by MacKinnon A.C.J.O. and by Houlden J.A. I agree with them that this appeal must be dismissed.

58 I agree with the conclusion of MacKinnon A.C.J.O., concurred in by Houlden J.A., that the appellants can be in no better position than the insured solicitor with respect to forfeiture for breach of conditions of the policy, and that as the Insurance Act, R.S.O. 1980, c. 218 now stands, the appellants are not entitled to relief from forfeiture because the solicitor himself would not have been so entitled.

59 This is an unjust result. It makes no sense that the clients of a remorseful solicitor, who co-operated with the insurer and the new solicitors of his former clients, might in an appropriate case get relief from forfeiture, whereas the clients of a callous solicitor, who first botched his clients' affairs and then refused to lend them the slightest assistance in their efforts to recoup some of their loss, should find themselves helpless to secure relief from the forfeiture of his insurance, caused by him.

60 My brothers are in disagreement as to the answer to the first question formulated by the parties. In concise form that issue is: where a client has lost the $40,000 he gave his solicitor to put into a second mortgage, is that loss "injury or damage to ... [the client's] property" within the meaning of subs. 109(1) of the Insurance Act? It would be very satisfying to be able to answer that question: "Yes". One might support the answer, superficially, by saying: "Of course the loss is 'damage to property'. The client's assets have decreased by $40,000, and that loss was caused by the solicitor."

61 This can only be the correct answer if it is founded on subs. 109(1) of the Act. I am persuaded by the reasons of MacKinnon A.C.J.O. that the interpretation of "property" in that subsection, reading the subsection as a whole

1984 CarswellOnt 671, 7 C.C.L.I. 231, 47 O.R. (2d) 472, 11 D.L.R. (4th) 516, [1984] I.L.R. 1-1800, 4 O.A.C. 209, 47 O.R.(2d) 472

and in context, cannot be extended to cover the plaintiffs' loss. With great respect to my brother Houlden, he has agreed with MacKinnon A.C.J.O. that the definition of "property" in clause 1(54) of the Act (so as to include "other pecuniary interests") does not apply to a policy of professional liability insurance, but has then gone on to hold that "property" includes "pecuniary interests" even *without* the definition clause. I do not agree, because I think the conclusion is not consonant with a reading of subs. 109(1) as a whole.

62 Finally, I heartily endorse the view of MacKinnon A.C.J.O. that immediate action should be taken by the Law Society or the Legislature, or both, so that the present unfairness to innocent clients of insured solicitors can be ended.

Appeal dismissed.

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1992 CarswellOnt 163, 11 C.B.R. (3d) 11, 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303

1992 CarswellOnt 163, 11 C.B.R. (3d) 11, 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303

Algoma Steel Corp. v. Royal Bank

ALGOMA STEEL CORPORATION, LIMITED v. ROYAL BANK OF CANADA, MONTREAL TRUST COMPANY (Trustee of certain debentures issued by Algoma Steel Corporation, Limited under a certain trust indenture) and ROYAL BANK OF CANADA, CANADIAN IMPERIAL BANK OF COMMERCE, HONGKONG BANK OF CANADA, and TORONTO DOMINION BANK (in their capacity as holders of certain of the debentures issued pursuant to said trust indenture)

Ontario Court of Appeal

Krever, McKinlay and Labrosse JJ.A.

Heard: April 21-23, 1992
Judgment: April 30, 1992
Docket: Doc. CA C11707

Counsel: *D.J.T. Mungovan* and *Debbie A. Campbell* , for Kelsey-Hayes Canada Limited and Kelsey-Hayes Company.

M.E. Royce and *M.E. Barrack* , for Algoma Steel Corporation, Limited.

W.L.N. Somerville, Q.C. , and *B.H. Bresner* , for Royal Insurance Company of Canada.

R.N. Robertson, Q.C. , and *W.A. Apps* , for Dofasco Inc.

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act.

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

One of the creditors of the debtor company subject to a plan of arrangement under the *Companies' Creditors Arrangement Act* ("CCAA"), was involved in product liability litigation in the U.S. The creditor, the defendant in the U.S. litigation, alleged that the steel used in the defective part was a defective product manufactured by the debtor company. The creditor sought to claim contribution or indemnity from the debtor company in order to be able to pursue, under s. 132 of the *Insurance Act* (Ont.), the proceeds of the debtor company's product liability insurance policy.

After the creditor notified the debtor company of its claim, the debtor company responded by valuing the claim at one dollar. The creditor applied to the court, under s. 12(2)(iii) of the CCAA, for a determination of the amount of its claim. The value of the claim was confirmed.

In the CCAA proceedings, an order was made prohibiting the commencement or proceeding with any action or proceeding against the debtor company without leave of the court. The creditor brought a motion for leave to appeal and, if granted, an appeal from the order dismissing its motion for the valuation of its claim and for leave to bring proceedings against the debtor company.

Held:

Leave to appeal was granted and the appeal was allowed; leave to proceed granted.

Generally, a plan of arrangement is consensual and the result of agreement. If it is fair and reasonable, according to the court, it is not to be interfered with by the court unless (a) the CCAA authorizes the court to affect the plan and (b) there are compelling reasons justifying the court's action. The court should not interfere where to do so would prejudice the interests of the company or the creditors. Where no prejudice would result and the needs of justice are to be met, the court may act if the CCAA authorizes intervention. Section 11(*c*), depending on the language of the plan itself, enables the court, in an appropriate case, to amend the plan.

In this case, the necessary amendment to the plan would be minor. Further, to secure the integrity of the plan, only insurance proceeds that might become available to the debtor company were to be the subject of any recovery against the company to which the creditor might prove entitlement. To accomplish this, the order provided that neither the assets of the debtor company (other than the insurance proceeds), nor the assets of any other company that might become responsible for the liabilities of the debtor under the plan would be available to satisfy any judgment obtained by the creditor against the debtor company.

Statutes considered:

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

s. 11(c)

s. 12(2)(a)(iii)

Insurance Act, R.S.O. 1990, c. I.8 —

s. 132

s. 132(1)

Motion for leave to appeal and an appeal under the *Companies' Creditors Arrangement Act* .

Per curiam:

1 This is a motion for leave to appeal and, if leave is granted, an appeal, under the provisions of the *Companies' Creditors Arrangement Act* , R.S.C. 1985, c. C-36 (the "C.C.A.A."), from the order of Farley J. dismissing a motion for the valuation of the claim of Kelsey-Hayes Canada Limited ("Kelsey-Hayes") and for leave to bring proceedings against The Algoma Steel Corporation Limited ("Algoma"), the subject of a plan of arrangement under the C.C.A.A.

2 Kelsey-Hayes is involved in product-liability litigation in Missouri as a result of serious personal injuries suffered by a child when a wheel broke away from a Dodge truck and struck him. The wheel was manufactured by Kelsey-Hayes, against whom a Missouri jury awarded a verdict in excess of $4 million U.S. That verdict was set aside by the trial judge on the basis that Chrysler Corporation, the truck's manufacturer, had been improperly dismissed from the action at an earlier stage. The setting aside of the verdict was appealed to the Missouri Court of Appeals, but judgment on the appeal has been reserved. Kelsey-Hayes, the defendant in the Missouri litigation, alleges that the steel used for the manufacture of the errant wheel was a defective product of Algoma and seeks to claim contribution or indemnity from Algoma in order to be able to pursue, under s. 132 of the *Insurance Act* , R.S.O. 1990, c. I.8, the proceeds of a product-liability insurance policy by which Algoma is insured by the Royal Insurance Company of Canada ("Royal"). It also seeks relief under the plan of arrangement in respect of the amount of any liability Algoma may have to it in excess of the policy limits.

3 In the C.C.A.A. proceedings, an order was made by Montgomery J. in the terms of s. 11(*c*) of the C.C.A.A. that no action or other proceeding may be proceeded with or commenced against Algoma except with the leave of the court. It is common ground that Kelsey-Hayes, by reason of its claim against Algoma, is a known designated unsecured creditor of Algoma, as defined in the plan of arrangement. The plan of arrangement, which has been voted on by all classes of affected creditors, and sanctioned, subject to the outcome of this appeal, by an order of Farley J. dated April 26, 1992, provides that upon payment by Algoma to a trustee of a certain sum in payment of the claims of the specified unsecured creditors, "all Claims of Specified Unsecured Creditors will be released, discharged and cancelled."

4 After Kelsey-Hayes notified Algoma of the litigation in Missouri, of its allegation of defective steel against Algoma, and of its claim in the amount of the Missouri verdict, Algoma responded by valuing the claim at the sum of $1. Kelsey-Hayes thereupon applied to the court, under the provisions of s. 12(2)(*a*)(iii) of the C.C.A.A., for the determination of the amount of its claim. Before the application was heard, Kelsey-Hayes enlarged the relief sought to include that described above and Royal was brought into the proceedings. Mr. Justice Farley held that he had no authority to permit Kelsey-Hayes to proceed against Algoma and went on to confirm the valuation of the claim at $1. The essential issue in this appeal is whether, under the C.C.A.A., the fact that the plan of arrangement now exists prevents the court from permitting Algoma from being proceeded against by Kelsey-Hayes even to the limited extent of the insurance proceeds.

5 We are of the view that, however weak the evidence available on the application may have been with respect to the origin of the steel used in the manufacture of the wheel, and thus the case against Algoma, it cannot be said that the case is without any foundation or is frivolous. The fact that s. 12(2)(iii) provides that the amount of a creditor's claim, if not admitted by the company, "shall be determined by the court on summary application by the company or by the creditor," does not compel the court to determine the valuation summarily. The provision simply authorizes the proceedings to be brought summarily, that is, by way of originating notice of motion or application rather than by the lengthier, and more complicated, procedure of an action. In an appropriate case, therefore, there is no reason why the determination cannot be made after a trial either of an issue or an action, in the course of which production and discovery would be available. In the absence of such a trial, it cannot be said, in our view, that the valuation of the claim of Kelsey-Hayes against Algoma in the sum of $1 is correct.

6 The more difficult question is whether the court has jurisdiction to authorize proceedings now that the plan of arrangement is in place. It is submitted that it does not, because of the need for commercial certainty and because to do so would be to amend the plan of arrangement (which extinguishes the claims of all designated unsecured creditors, of which Kelsey-Hayes is certainly one). The plan of arrangement is a matter of contract, it is argued, and the court's jurisdiction is limited to sanctioning or refusing to sanction the arrangement arrived at contractually. There is much merit in this argument, but, in our view, it is not a complete answer.

7 Kelsey-Hayes does not deny that if the language of the plan of arrangement quoted above, extinguishing the claims of designated unsecured creditors, is unambiguous, as we believe it is, to grant the relief which it seeks would

require an amendment by the court of the plan of arrangement. We accept the submission that, generally speaking, the plan of arrangement is consensual and the result of agreement and that if it is fair and reasonable (an issue for the court to decide) it is not to be interfered with by the court unless (a) the Act authorizes the court to affect the plan and (b) there are compelling reasons justifying the court's action. Generally speaking again, the court ought not to interfere where to do so would prejudice the interests of the company or the creditors. But where no prejudice would result and the needs of justice are to be met, the court may act if the C.C.A.A., properly interpreted, authorizes intervention. In this connection, it may be relevant that, although it is hardly conclusive, Algoma's management information circular to creditors, shareholders and employees, which accompanied the proposed plan of arrangement, advised those persons, under the heading "Court Approval of the Plan" as follows:

> The authority of the Court is very broad under both the CCAA and the OBCA — Algoma has been advised by counsel that the Court will consider, among other things, the fairness and reasonableness of the Plan. The Court may approve the Plan as proposed *or as amended in any manner that the Court may direct* and subject to compliance with such terms and conditions, if any, as the Court thinks fit.

[Emphasis added.] We agree that the circular's statement that the court may direct an amendment of the plan does not, as a matter of law, make it so. The C.C.A.A. must be the authority for the jurisdiction and the critical issue is whether there is any provision in the Act that fairly gives rise to a power in the court to amend. In our view, there is such a provision and that provision, s. 11(*c*), depending on the language of the plan itself, may by necessary inference, in an appropriate case, enable the court to make an order, the technical effect of which is that the plan is amended. The relevant portion of the section reads as follows:

> whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> . . . . .
>
> (*c*) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company *except with the leave of the court* and subject to such terms as the court imposes.

[Emphasis added.]

8 As we have already pointed out, an order in the terms of this provision was made early in the proceedings by Montgomery J. The effect of the enactment and the order is to empower the court to grant leave to take proceedings against Algoma in appropriate circumstances. It was submitted that this power, having regard to the commercial realities reflected by the C.C.A.A., is one that may be exercised only before the creditors have voted to accept the plan of arrangement. No authority could be cited to support such a circumscription of the court's jurisdiction, unqualifiedly conferred by the statute. Nor, as a matter of principle, is there any reason to suggest that the scheme created by the C.C.A.A. contemplates a role for the court as a mere rubber stamp or one that is simply administrative rather than judicial. On the other hand, we have no doubt that, given the primacy accorded by the Act to agreement among the affected actors, the jurisdiction of the court is to be exercised sparingly and in exceptional circumstances only, if the result of the exercise is to amend the plan, even in merely a technical way. In this case, for example, it would be an unacceptable exercise of jurisdiction if the effect of granting leave to Kelsey-Hayes to proceed against Algoma would be to render vulnerable to possible execution any assets other than insurance proceeds, if any, that may be available under the policy by which Royal insured Algoma against product liability. If the leave granted could be so limited, and that is the difficulty that must be addressed, the plan of arrangement which, in its terms, extinguishes the claims of designated unsecured creditors, would undergo amendment in an insignificant and technical way only, as far as the other creditors are concerned.

9 The concern of prejudice must now be considered and the question asked whether any interests would be af-

fected detrimentally if Kelsey-Hayes were permitted to claim against Algoma to the extent only of recourse to the insurance proceeds. If to give leave had the effect of giving potential access to assets over and above the policy limits, there would indeed be prejudice to several interests and, moreover, the plan of arrangement would be significantly amended. On the premise that only the insurance proceeds were to be made potentially available to satisfy any judgment that Kelsey-Hayes may be awarded in its claim over against Algoma, it cannot be said that any interest is affected adversely except possibly that of Royal and that of Dofasco Inc. ("Dofasco"). It is to that issue that we now turn.

10 The potential liability of Royal to Kelsey-Hayes as insurer of Algoma arises out of the provisions of s.132(1) of the *Insurance Act* , which read as follows:

> Where a person incurs a liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against the person in respect of the person's liability, and an execution against the person in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.

Royal is potentially answerable to Kelsey-Hayes, a third party with respect to Algoma's policy of insurance only by virtue of this statutory provision but, in any third party claim against it, its liability is "subject to the same equities as the insurer would have if the judgment had been satisfied." Prejudice, in a legal sense, as far as Royal is concerned is non-existent.

11 The question of prejudice to Dofasco is more difficult. Its interest arises in this way. As part of the comprehensive restructuring scheme, of which the plan of arrangement is the central part, Algoma's assets are to be transferred to a new corporate entity, referred to in argument as New Algoma, in which Algoma's shareholders and creditors (whose claims are being compromised and otherwise discharged) are to receive shares. The funds to make this possible are to be supplied by Dofasco in the sum of $30 million. In return, Dofasco is to obtain Algoma's tax loss in the sum of $150 million. The result of these transactions as contemplated by the comprehensive scheme is that Algoma is to become devoid of assets and creditors, in short, that Algoma is to be made a "clean corporation," or a mere shell with a tax loss carryforward. Dofasco filed no material, and on the appeal filed no factum, showing any prejudice which it might suffer if leave to proceed is granted. Instead, in oral argument, it submitted that any such order would impair the integrity of the plan of arrangement and reduce the certainty that was necessary for the plan's success. In our view, no impairment will occur if an order is made subject to sufficient safeguards to limit any possible recovery to the insurance proceeds. We think a safeguard can be provided. The difficulty is in the language of s. 132 of the *Insurance Act* , which requires, as a condition precedent to a direct action against the insurer, that an execution against the insured be returned unsatisfied.

12 This very requirement makes the purpose of the section clear. It is to provide direct access to an insurer, by a person incurring the liability referred to in the section, in a situation where the insured is judgment proof, thus circumventing the normal operation of insurance contracts, which is solely to indemnify the insured against loss. To interpret the section in such a way as to apply only in the narrow situation where the insured is judgment proof (and therefore almost certainly insolvent), but not in situations where either the insured or its creditors have taken proceedings pursuant to federal insolvency statutes, would be to frustrate its objectives in a large percentage of situations where it would otherwise apply.

13 If the plaintiff in this case were successful in the Missouri action against Kelsey-Hayes and Kelsey-Hayes were successful in a permitted claim over for indemnity or contribution from Algoma, there could be no question that, notionally, the condition precedent of an unsatisfied judgment would be met because, prior to the plan, Algoma was insolvent and the commencement of proceedings under the C.C.A.A. rendered it judgment proof. To secure the certainty of the integrity of the plan, which Dofasco argues it needs in order to discharge its role in the scheme, we make clear our intention that only any insurance proceeds that may become available to Algoma are to be the subject

of any recovery against Algoma that Kelsey-Hayes may prove that it is entitled to. That is to be accomplished by providing in our order that neither the assets of Algoma (other than the insurance proceeds) nor the assets of any other corporation which may become responsible in any way for any liabilities of Algoma by virtue of the operation of the plan of arrangement or the more comprehensive scheme of restructuring, or any condition precedent thereto, shall be available to satisfy any judgment obtained as a result of any proceedings by Kelsey-Hayes against Algoma.

14 The justice of permitting an amendment to the plan as inconsequential as the one we permit in these exceptional circumstances is illustrated by the hypothetical case put in argument. Suppose a visitor had become quadriplegic as a result of an injury on the premises of Algoma under circumstances in which Algoma as occupier might be liable and suppose Algoma's potential liability was insured against by an appropriate insurance policy. To restrict the injured person, a known designated unsecured creditor under the terms of the plan of arrangement, to his or her compromised claim valued, without a trial, in a summary proceeding, would, in our view, be unacceptable. The actual situation before the court is analogous.

15 For these reasons, we grant leave to appeal, allow the appeal, set aside the order of Farley J. dated April 9, 1992, and grant leave to Kelsey-Hayes to proceed as it may be advised in the terms set out above.

Leave to appeal granted; appeal allowed; leave to proceed granted.

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2005 CarswellOnt 6818, 15 C.B.R. (5th) 307, 11 B.L.R. (4th) 185, 204 O.A.C. 205, 261 D.L.R. (4th) 368, 78 O.R. (3d) 241

2005 CarswellOnt 6818, 15 C.B.R. (5th) 307, 11 B.L.R. (4th) 185, 204 O.A.C. 205, 261 D.L.R. (4th) 368, 78 O.R. (3d) 241

Stelco Inc., Re

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC., AND OTHER APPLICANTS LISTED IN SCHEDULE "A"

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36 AS AMENDED

Ontario Court of Appeal

Goudge, Sharpe, Blair JJ.A.

Heard: November 14, 2005
Judgment: November 17, 2005
Docket: CA C44436, M33171

Proceedings: additional reasons at *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 6510, 15 C.B.R. (5th) 305 ((Ont. C.A.)); affirmed *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 6483, 15 C.B.R. (5th) 297 ((Ont. S.C.J. [Commercial List]))

Counsel: Paul Macdonald, Andrew Kent, Brett Harrison for Informal Independent Converts' Committee

Michael E. Barrack, Geoff R. Hall for Stelco Inc.

Robert Staley, Alan Gardner for Senior Debenture Holders

Fred Myers for Her Majesty the Queen in Right of Ontario, Superintendent of Financial Services

Ken Rosenberg for United Steelworkers of America

A Kauffman for Tricap Management Ltd.

Kyla Mahar for Monitor

2005 CarswellOnt 6818, 15 C.B.R. (5th) 307, 11 B.L.R. (4th) 185, 204 O.A.C. 205, 261 D.L.R. (4th) 368, 78 O.R. (3d) 241

Murray Gold for Salaried Retirees

Heath Whitley for CIBC

Steven Bosnick for U.S.W.A. Loc. 5328, 8782

Subject: Insolvency; Civil Practice and Procedure

Bankruptcy and insolvency --- Proposal — Practice and procedure

Leave to appeal order made in Companies' Creditors Arrangement Act proceeding — S Inc. presented Proposed Plan of Compromise or Arrangement (Plan) to its unsecured creditors for approval — Plan included subordinated debenture holders, senior debt holders, and trade creditors in same group for purposes of voting on Plan — Prior to vote on Plan, subordinated debenture holders brought motion seeking order classifying themselves as separate class for voting purposes on basis that they had different interests from rest of group — Supervising judge dismissed motion — Subordinated debenture holders sought leave to appeal dismissal of motion — Leave to appeal granted — Leave is only sparingly granted with regard to orders made in Companies' Creditors Arrangement Act (CCAA) proceedings because of their "real time" dynamic and because of generally discretionary character underlying many of orders made by supervising judges in such proceedings — Here, leave to appeal was granted because proposed appeal raised issue of significance to practice, namely nature of common interest test to be applied by courts for purposes of classification of creditors in CCAA proceedings — Where there is urgency that leave application be expedited in public interest, court will do so in this area of law as it does in other area; however, where what is involved is essentially attempt to review discretionary order made on facts of case, in tightly supervised process with which judge is intimately familiar, collapsed process that was made available in this particular situation will not generally be afforded — Issues raised on this appeal, and timing factor involved, warranted expedited procedure that was ordered.

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

S Inc. presented Proposed Plan of Compromise or Arrangement (Plan) to its unsecured creditors for approval — Plan included subordinated debenture holders, senior debt holders, and trade creditors in same group for purposes of voting on Plan — Prior to vote, subordinated debenture holders brought motion seeking order classifying themselves as separate class for voting purposes on basis that they had different interests from rest of group — Supervising judge dismissed motion — Subordinated debenture holders appealed from dismissal of motion — Appeal dismissed — No error could be found in supervising judge's factual findings or in his exercise of discretion in determining that subordinated debenture holders should remain in same class as other creditors — There was no material distinction between legal rights of subordinated debenture holders and those of senior debt holders vis-à-vis S Inc. — Supervising judge was correct in law in applying principles dealing with commonality of interest test as summarized in recent case, which principles were cited with approval by Court of Appeal in another recent decision — Principles applied by supervising judge were not inconsistent with earlier decision of present court in other case dealing with common interest test, because differing interests in question were not different legal interest as between two creditors; they were different legal interests as between each of creditors and debtor company — Case cited by subordinated debenture holders did not deal with issue of whether creditors with divergent interests as amongst themselves, as opposed to divergent legal interests vis-à-vis debtor company, could be forced to vote as members of common class — Creditors should be classified in accordance with their contract rights, i.e., according to their respective interests in debtor company — To hold classification and voting process hostage to vagaries of potentially infinite variety of disputes, as between already disgruntled creditors who had been caught in maelstrom of Companies' Creditors Arrangement Act (CCAA) restructuring, would run risk of hobbling that process unduly and could lead to very type of fragmentation and multiplicity of discrete classes or sub-classes of classes that judges have warned

might well defeat purpose of CCAA.

Cases considered by *Blair J.A.*:

Campeau Corp., Re (1991), 10 C.B.R. (3d) 100, 86 D.L.R. (4th) 570, 1991 CarswellOnt 155 (Ont. Gen. Div.) — referred to

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

Canadian Airlines Corp., Re (2000), 2000 ABCA 149, 2000 CarswellAlta 503, 80 Alta. L.R. (3d) 213, 19 C.B.R. (4th) 33, 261 A.R. 120, 225 W.A.C. 120 (Alta. C.A. [In Chambers]) — referred to

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

Fairview Industries Ltd., Re (1991), 11 C.B.R. (3d) 71, (sub nom. *Fairview Industries Ltd., Re (No. 3))* 109 N.S.R. (2d) 32, (sub nom. *Fairview Industries Ltd., Re (No. 3))* 297 A.P.R. 32, 1991 CarswellNS 36 (N.S. T.D.) — referred to

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20, 1988 CarswellAlta 319 (Alta. Q.B.) — referred to

Northland Properties Ltd., Re (1988), 31 B.C.L.R. (2d) 35, 73 C.B.R. (N.S.) 166, 1988 CarswellBC 556 (B.C. S.C.) — referred to

Northland Properties Ltd., Re (1989), (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* 34 B.C.L.R. (2d) 122, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* 73 C.B.R. (N.S.) 195, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* [1989] 3 W.W.R. 363, 1989 CarswellBC 334 (B.C. C.A.) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282, 1990 CarswellOnt 139 (Ont. C.A.) — considered

NsC Diesel Power Inc., Re (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295, 1990 CarswellNS 33 (N.S. T.D.) — referred to

Pacific Coastal Airlines Ltd. v. Air Canada (2001), 2001 BCSC 1721, 2001 CarswellBC 2943, 19 B.L.R. (3d) 286 (B.C. S.C.) — considered

Savage v. Amoco Acquisition Co. (1988), 59 Alta. L.R. (2d) 260, 68 C.B.R. (N.S.) 154, 40 B.L.R. 188, (sub nom. *Amoco Acquisition Co. v. Savage)* 87 A.R. 321, 1988 CarswellAlta 291 (Alta. C.A.) — referred to

Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621, 1991 CarswellOnt 220 (Ont. Gen. Div.) — referred to

Sovereign Life Assurance Co. v. Dodd (1892), [1891-94] All E.R. Rep. 246, [1892] 2 Q.B. 573 (Eng. C.A.) — considered

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2005 CarswellOnt 1188, 2 B.L.R. (4th) 238, 9

2005 CarswellOnt 6818, 15 C.B.R. (5th) 307, 11 B.L.R. (4th) 185, 204 O.A.C. 205, 261 D.L.R. (4th) 368, 78 O.R. (3d) 241

C.B.R. (5th) 135, 196 O.A.C. 142 (Ont. C.A.) — referred to

Wellington Building Corp., Re (1934), 16 C.B.R. 48, [1934] O.R. 653, [1934] 4 D.L.R. 626, 1934 CarswellOnt 103 (Ont. S.C.) — referred to

Woodward's Ltd., Re (1993), 20 C.B.R. (3d) 74, 84 B.C.L.R. (2d) 206, 1993 CarswellBC 555 (B.C. S.C.) — referred to

Statutes considered:

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

Generally — referred to

Joint Stock Companies Arrangements Act, 1870 (33 & 34 Vict.), c. 104

Generally — referred to

ADDITIONAL REASONS to judgment reported at *Stelco Inc., Re* (2005), 2005 CarswellOnt 6510, 15 C.B.R. (5th) 305 (Ont. C.A.).

***Blair J.A.*:**

Background

1 This appeal arises out of the reorganization of Stelco Inc., and related companies, pursuant to the *Companies' Creditors Arrangement Act* ("CCAA").[FN1] Stelco has been in the midst of this fractious process for approximately twenty-one months. Justice Farley has been the supervising judge throughout.

2 Stelco has presented a Proposed Plan of Compromise or Arrangement to its creditors for their approval. The vote was scheduled for Tuesday, November 15, 2005. On Thursday, November 10, a group of creditors known as the Informal Independent Converts' Committee ("the Converts' Committee) sought an order from the supervising judge, amongst other things, classifying the Subordinated Debenture Holders whom they represent as a separate class for voting purposes. Justice Farley dismissed the motion. In the face of the pending vote, the Converts' Committee sought leave to appeal on Thursday afternoon (The courts were closed on Friday, November 11, for Remembrance Day). Rosenberg J.A. dealt with the matter and directed that the application for leave, and if leave be granted, the appeal, be heard by a panel of this court on Monday, November 14, 2005.

3 This panel heard the application for leave and the appeal on Monday. We concluded that leave should be granted, but that the appeal must be dismissed, and at the conclusion of argument — and in order to clarify matters so that the vote could proceed the following day — we issued a brief endorsement with our decision, but indicating that more detailed reasons would follow.

4 The endorsement read as follows:

> In our view, the appellants have not demonstrated a different legal interest from the other unsecured creditors vis à vis the debtor, nor any basis for setting aside the finding of Farley J. that there are no different practical interests such that the appellants deserve a separate class. We see no legal error or error in principle in his exercise of discretion.

Leave to appeal is granted, but the appeal must therefore be dismissed. Because of the importance of the issue for Ontario practice in this area, we propose to expand somewhat on these reasons in due course.

5 These are those expanded reasons.

Facts

6 Stelco's Proposed Plan is made to unsecured creditors only. It is not intended to affect the claims of secured creditors.

7 The Converts' Committee represents unsecured creditors who hold $90 million of convertible unsecured subordinated debentures issued by Stelco pursuant to a Supplemental Trust Indenture dated January 21, 2002, and due in 2007. With interest, the claims of the Subordinated Debenture Holders now amount to approximately $110 million. Those claims are subordinated to approximately $328 million in favour of Senior Debt Holders. In addition, Stelco has unsecured trade debts totalling approximately, $228 million. In the Proposed Plan, these three groups of unsecured creditors — the Subordinated Debenture Holders (represented by the Converts' Committee), the Senior Debt Holders, and the Trade Creditors — have all been included in the same class for the purposes of voting on the Proposed Plan or any amended version of it.

8 The Converts' Committee takes issue with this, and seeks to have the Subordinated Debenture Holders classified as a separate class of creditors for voting purposes. They argue that their interests are different than those of the Bondholders and that creditors who do not have common interests should not be classified in the same group for voting purposes. They submit, therefore, that the supervising judge erred in law in not granting them a separate classification. In that regard, they rely upon this court's decision in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.). They also argue that the supervising judge was wrong, on the facts contained in the record, in finding that the Subordinated Debenture Holders and the Bondholders did not have conflicting interests.

9 In making their argument about a different interest, the appellants rely upon their status as subordinated debt holders as shaped particularly by Articles 6.2 and 6.3 of the Supplemental Trust Indenture. In essence those provisions reinforce the subordinated nature of their debt. They stipulate (a) that if the Subordinated Debenture Holders receive any payment from Stelco, or any distribution from the assets of Stelco, before the Senior Debt is fully paid, they are obliged to remit any such payment or distribution to the Senior Debt Holders until the latter have been paid in full (Art. 6.2(3)), but (b) that no such payment or distribution by Stelco shall be deemed to constitute a payment on the Subordinated Debenture Holders' debt (Art. 6.3). The parties refer to these provisions as the "Turnover Payment" provisions.

10 In short, although Stelco is obliged to pay both groups of creditors in full, as between the Subordinated Debenture Holders and the Senior Debt Holders, the latter are entitled to be paid in full before the former receive anything. The Supplemental Trust Indenture makes it clear that the provisions of Article 6 "are intended solely for the purpose of defining the relative rights of [the Subordinated Debenture Holders] and the holders of the Senior Debt" (Art. 6.3).

11 The appellants contend that the Turnover Payment provisions distinguish their interests from those of the Subordinated Debenture Holders when it comes to voting on Stelco's Proposed Plan. They say that the Subordinated Debenture Holders' interest in maximizing the amounts to be made available to unsecured creditors ends once they have received full recovery, in part as a result of the Turnover Payments that the Subordinated Debenture Holders will be required to make from their portion of the funds. On the other hand, the Subordinated Debenture Holders will have an interest in seeking more because their recovery, for practical purposes, will have only begun once that

point is reached.

12 The respondents submit, for their part, that the appellants are seeking a separate classification for a collateral purpose, i.e., so that they will be able to veto the Proposed Plan, or at least threaten to veto it, unless they are granted a benefit to which they are not entitled — the elimination of their subordinated position by virtue of the Turnover Payment provisions.

13 Farley J. rejected the appellants' arguments. The thrust of his decision in this regard is found in paragraphs 13 and 14 of his reasons:

> [13] I would note as well that the primary and most significant attribute of the ConCom debt and that of the BondCom debt/Senior Debt[FN2] plus the trade debt vis-à-vis Stelco is that it is all unsecured debt. Thus absent valid reason to have separate classes it would be reasonable, logical, rational and practical to have all this unsecured debt in the same class. Certainly that would avoid any unnecessary fragmentation — and in this respect multiplicity of classes does not mean that that fragmentation starts only when there are many classes. Unless more than one class is necessary, fragmentation would start at two classes. Fragmentation if necessary, but not necessarily fragmentation.
>
> [14] Is it necessary to have more than one class? Firstly, it would not appear to me that as between Stelco and the unsecured creditors overall there is any material distinction. Secondly, there would not appear to me to be any confiscation of any rights (or the other side of the coin any new imposition of obligations) upon the holders of the ConCom debt. The subrogation issue was something which these holders assumed on the issue of that debt. Thirdly, I do not see that there is a realistic conflict of interest. Each group of unsecured creditors including the ConCom debt holders and the BondCom debt holders has the same general interest vis-à-vis Stelco, namely to extract from Stelco through the Plan the maximum value in the sense of consideration possible. . . . That situation is not impacted for our purposes here in this motion by the possibility that in a subsequent dispute between the ConCom holders and the BondCom holders there may be a difference of opinion as to the variation of the consideration obtained.

14 We agree with his conclusion and see no basis to interfere with his findings in that regard.

The Leave Application

15 The principles to be applied by this court in determining whether leave to appeal should be granted to someone dissatisfied with an order made in a CCAA proceeding are not in dispute. Leave is only sparingly granted in such matters because of their "real time" dynamic and because of the generally discretionary character underlying many of the orders made by supervising judges in such proceedings. There must be serious and arguable grounds that are of real and significant interest to the parties. The court has assessed this criterion on the basis of a four-part test, namely,

a) whether the point on appeal is of significance to the practice;

b) whether the point is of significance to the action;

c) whether the appeal is *prima facie* meritorious or frivolous; and

d) whether the appeal will unduly hinder the progress of the action.

See *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 24; *Country Style Food Services Inc., Re*, [2002]

O.J. No. 1377, 158 O.A.C. 30 (Ont. C.A. [In Chambers]) at para. 15; *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 33 (Alta. C.A. [In Chambers]) at para. 7.

16 Here, we granted leave to appeal because the proposed appeal raised an issue of significance to the practice, namely the nature of the "common interest" test to be applied by the courts for purposes of the classification of creditors in CCAA proceedings. Although the law seems to have progressed in the lower courts along the lines developed in Alberta, beginning with the decision of Paperny J. in *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), this court has not dealt with the issue since its decision in *Nova Metal Products Inc. v. Comiskey (Trustee of)*, *supra*, and the Converts' Committee argues that the Alberta line of authorities is contrary to *Nova Metal Products Inc.*

17 A brief further comment respecting the leave process may be in order.

18 The court recognizes the importance of its ability to react in a responsible and timely fashion to the appellate needs arising in the "real time" dynamics of CCAA restructurings. Often, as in the case of this restructuring, they involve a significant public dimension. For good policy reasons, however, appellate courts in Canada — including this one — have developed relatively stringent parameters for the granting of leave to appeal in CCAA cases. As noted, leave is only sparingly granted. The parameters as set out in the authorities cited above remain good law.

19 Merely because a corporate restructuring is a big one and money is no object to the participants in the process, does not mean that the court will necessarily depart from the normal leave to appeal process that applies to other cases. In granting leave to appeal in these circumstances, we do not wish to be taken as supporting a notion that the fusion of leave applications with the hearing of the appeal in CCAA restructurings — particularly in major ones such as this one involving Stelco — has become the practice. Where there is an urgency that a leave application be expedited in the public interest, the court will do so in this area of the law as it does in other areas. However, where what is involved is essentially an attempt to review a discretionary order made on the facts of the case, in a tightly supervised process with which the judge is intimately familiar, the collapsed process that was made available in this particular situation will not generally be afforded.

20 As these reasons demonstrate, however, the issues raised on this particular appeal, and the timing factor involved, warranted the expedited procedure that was ordered by Justice Rosenberg.

The Appeal

No Error in Law or Principle

21 Everyone agrees that the classification of creditors for CCAA voting purposes is to be determined generally on the basis of a "commonality of interest" (or a "common interest") between creditors of the same class. Most analyses of this approach start with a reference to *Sovereign Life Assurance Co. v. Dodd* (1892), [1891-94] All E.R. Rep. 246 (Eng. C.A.), which dealt with the classification of creditors for voting purposes in a winding-up proceeding. Two passages from the judgments in that decision are frequently cited:

At pp. 249-250 Lord Esher said:

> The Act provides that the persons to be summoned to the meeting, all of whom, it is to be observed, are creditors, are persons who can be divided into different classes, classes which the Act[FN3] recognizes, though it does not define. The creditors, therefore, must be divided into different classes. What is the reason for prescribing such a course? It is because the creditors composing the different classes have different interests, and, therefore, if a different state of facts exists with respect to different creditors, which may affect their minds and judgments differently, they must be separated into different classes.

At p. 251, Bowen L.J. stated:

> The word "class" used in the statute is vague, and to find out what it means we must look at the general scope of the section, which enables the court to order a meeting of a "class of creditors" to be summoned. It seems to me that we must give such a meaning to the term 'class' as will prevent the section being so worked as to produce confiscation and injustice, and that we must confine its meaning to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

22 These views have been applied in the CCAA context. But what comprises those "not so dissimilar" rights and what are the components of that "common interest" have been the subject of debate and evolution over time. It is clear that classification is a fact-driven exercise, dependent upon the circumstances of each particular case. Moreover, given the nature of the CCAA process and the underlying flexibility of that process — a flexibility which is its genius — there can be no fixed rules that must apply in all cases.

23 In *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), Paperny J. nonetheless extracted a number of principles to be considered by the courts in dealing with the commonality of interest test. At para. 31 she said:

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

24 In developing this summary of principles, Paperny J. considered a number of authorities from across Canada, including the following: *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.); *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.); *Fairview Industries Ltd., Re* (1991), 11 C.B.R. (3d) 71 (N.S. T.D.); *Woodward's Ltd., Re* (1993), 84 B.C.L.R. (2d) 206 (B.C. S.C.); *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 166 (B.C. S.C.); *Northland Properties Ltd., Re* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.); *NsC Diesel Power Inc., Re* (1990), 79 C.B.R. (N.S.) 1 (N.S. T.D.); *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154 (Alta. C.A.), (*sub nom. Amoco Acquisition Co. v. Savage*); *Wellington Building Corp., Re* (1934), 16 C.B.R. 48 (Ont. S.C.). Her summarized principles were cited by the Alberta Court of Appeal, apparently with approval, in a subsequent *Canadian Airlines Corp., Re* decision: *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 33 (Alta. C.A. [In Chambers]) at para. 27.

2005 CarswellOnt 6818, 15 C.B.R. (5th) 307, 11 B.L.R. (4th) 185, 204 O.A.C. 205, 261 D.L.R. (4th) 368, 78 O.R. (3d) 241

25 In the passage from his reasons cited above (paragraphs 13 and 14) the supervising judge in this case applied those principles. In our view he was correct in law in doing so.

26 We do not read the foregoing principles as being inconsistent with the earlier decision of this court in *Nova Metal Products Inc. v. Comiskey (Trustee of)*. There the court applied a common interest test in determining that the two creditors in question ought not to be grouped in the same class of creditors for voting purposes. But the differing interests in question were not different legal interests as between the two creditors; they were different legal interests as between each of the creditors and the debtor company. One creditor (the Bank) held first security over the debtor company's receivables and the other creditor (RoyNat) held second security on those assets; RoyNat, however, held first security over the debtor's building and realty, whereas the Bank was second in priority in relation to those assets. The two creditors had differing commercial interests in how the assets should be dealt with (it was in the interests of the bank, with a smaller claim, to collect and retain the more realizable receivable assets, but in the interests of RoyNat to preserve the cash flow and have the business sold as a going concern). Those differing commercial interests were rooted in differing legal interests as between the individual creditors and the debtor company, arising from the different security held. Because of the size of its claim, RoyNat would dominate any group that it was in, and Finlayson J.A. was of the view that RoyNat, as the holder of second security, should not be able to override the Bank's legal interest as the first secured creditor with respect to the receivables by virtue of its voting rights. On the basis that there was "no true community of interest" between the secured creditors (p. 259), given their different legal interests, he ordered that the Bank be placed in a separate class for voting purposes.

27 *Nova Metal Products Inc. v. Comiskey (Trustee of)* did not deal with the issue of whether creditors with divergent interests as amongst themselves — as opposed to divergent legal interests vis-à-vis the debtor company — could be forced to vote as members of a common class. Nor did it apply an "identity of interest" test — a test that has been rejected as too narrow and too likely to lead to excessive fragmentation: see *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia, supra,*); *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., supra*; *Fairview Industries Ltd., Re, supra*; *Woodward's Ltd., Re, supra.* In our view, there is nothing in the decision in *Nova Metal Products Inc.* that is inconsistent with the evolutionary set of principles developed in the Alberta jurisprudence and applied by the supervising judge here.

28 In addition to commonality of interest concerns, a court dealing with a classification of creditors issue needs to be alert to concerns about the confiscation of legal rights and about avoiding what the parties have referred to as "a tyranny of the minority". Examples of the former include *Nova Metal Products Inc. v. Comiskey (Trustee of)* [FN4] and *Wellington Building Corp., Re, supra*[FN5]. Examples of the latter include *Sklar-Peppler, supra*[FN6] and *Campeau Corp., Re* (1991), 10 C.B.R. (3d) 100 (Ont. Gen. Div.)[FN7].

29 Here, as noted earlier in these reasons, the respondents argue that the appellants are seeking a separate classification in order to extract a benefit to which they are not entitled, namely a concession that the Turnover Payment requirements of their subordinated position be extinguished by the Proposed Plan, thus avoiding their obligation to transfer payments to the Senior Debt Holders until they have been paid in full, and freeing up all of the distribution the appellants will receive from Stelco for payment on account of their own claims. On the other hand, the appellants point to this conflict between the Subordinated Debenture Holders and the Senior Debt Holders as evidence that they do not have a commonality of interest or the ability to consult together with a view to whatever commonality of interest they may have vis-à-vis Stelco.

30 We agree with the line of authorities summarized in *Canadian Airlines Corp., Re* and applied by the supervising judge in this case which stipulate that the classification of creditors is determined by their legal rights in relation to the debtor company, as opposed to their rights as creditors in relation to each other. To the extent that other authorities at the trial level in other jurisdictions may suggest to the contrary — see, for example *NsC Diesel Power Inc., Re, supra* — we prefer the Alberta approach.

31 There are good reasons for such an approach.

2005 CarswellOnt 6818, 15 C.B.R. (5th) 307, 11 B.L.R. (4th) 185, 204 O.A.C. 205, 261 D.L.R. (4th) 368, 78 O.R. (3d) 241

32 First, as the supervising judge noted, the CCAA itself is more compendiously styled "An act to facilitate compromises and arrangements between companies and their creditors". There is no mention of dealing with issues that would change the nature of the relationships as between the creditors themselves. As Tysoe J. noted in *Pacific Coastal Airlines Ltd. v. Air Canada*, [2001] B.C.J. No. 2580 (B.C. S.C.) at para. 24 (after referring to the full style of the legislation):

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

33 In this particular case, the supervising judge was very careful to say that nothing in his reasons should be taken to determine or affect the relationship between the Subordinate Debenture Holders and the Senior Debt Holders.

34 Secondly, it has long been recognized that creditors should be classified in accordance with their contract rights, that is, according to their respective interests in the debtor company: see Stanley E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947) 25 Can. Bar. Rev. 587, at p. 602.

35 Finally, to hold the classification and voting process hostage to the vagaries of a potentially infinite variety of disputes as between already disgruntled creditors who have been caught in the maelstrom of a CCAA restructuring, runs the risk of hobbling that process unduly. It could lead to the very type of fragmentation and multiplicity of discrete classes or sub-classes of classes that judges and legal writers have warned might well defeat the purpose of the Act: see Stanley Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", *supra*; Ronald N. Robertson Q.C., "Legal Problems on Reorganization of Major Financial and Commercial Debtors", Canadian Bar Association — Ontario Continuing Legal Education, 5th April 1983 at 19-21; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, *supra*, at para. 27; *Northland Properties Ltd., Re*, *supra*; *Sklar-Peppler*, *supra*; *Woodward's Ltd., Re*, *supra*.

36 In the end, it is important to remember that classification of creditors, like most other things pertaining to the CCAA, must be crafted with the underlying purpose of the CCAA in mind, namely facilitation of the reorganization of an insolvent company through the negotiation and approval of a plan of compromise or arrangement between the debtor company and its creditors, so that the debtor company can continue to carry on its business to the benefit of all concerned. As Paperny J. noted in *Canadian Airlines Corp., Re*, "the Court should be careful to resist classification approaches that would potentially jeopardize viable Plans."

Discretion and Fact Finding

37 Having concluded that the supervising judge made no error in law or principle in his approach to the classification issue, we can find no error in his factual findings or in his exercise of discretion in determining that the Subordinate Debenture Holders should remain in the same class as the Senior Debt Holders and Trade Creditors in the circumstances of this case.

38 We agree that there is no material distinction between the legal rights of the Subordinated Debenture Holders and those of the Senior Debt Holders vis-à-vis Stelco. Each is entitled to be paid the monies owing under their respective debt contracts. The only difference is that the former creditors are subordinated in interest to the latter and have agreed to pay over to the latter any portion of their recovery received until the Senior Debt has been paid in full. As between the two groups of creditors, this merely reflects the very deal the Subordinated Debenture Holders bought into when they purchased their subordinated debentures. For that reason, the supervising judge was also enti-

tled to determine that this was not a case involving any confiscation of legal rights.

39 Finally, the supervising judge's finding that there is no "realistic conflict of interest" between the creditors is supported on the record. Each has the same general interest in relation to Stelco, namely to be paid under their contracts, and to maximize the amount recoverable from the debtor company through the Plan negotiation process. We do not accept the argument that the Senior Debt Holder's efforts will be moderated in some respect because they will be content to make their recovery on the backs of the Subordinated Debenture Holders through the Turnover Payment process. In order to carry the class, the Senior Debt Holders will require the support of the Trade Creditors, whose interest is not affected by the subordination agreement. Thus the Senior Debt Holders will be required to support the maximization approach.

40 We need not deal with whether a realistic and genuine conflict of interest, produced by different legal positions of creditors vis-à-vis each other, could ever warrant separate classes, as we are satisfied that even if it could, this is not such a case.

Disposition

41 Accordingly, we would not interfere with the supervising judge's decision that the appellants had not made out a case for a separate class. The appeal is therefore dismissed.

***Goudge J.A.*:**

I agree.

***Sharpe J.A.*:**

I agree.

Application granted; appeal dismissed.

FN1 R.S.C. 1985, c. C-36, as amended.

FN2 Farley J. uses the term "ConCom debt" to refer to the debt represented by the Converts' Committee (i.e., that of the Subordinated Debenture Holders), and the term "BondCom debt" to refer to that of the Senior Debt Holders.

FN3 The *Joint Stock Companies Arrangement Act*, 1870.

FN4 A second secured creditor with superior voting power was separated from a first secured creditor for voting purposes, in order prevent the former from utilising its superior voting strength to adversely affect the latter's prior security position.

FN5 The court refused to allow subsequent mortgagees to vote in the same class as a first mortgagee because in the circumstances the subsequent mortgagees would be able to use their voting power to destroy the priority rights and security of the first mortgagee.

FN6 Borins J., as he then was, warned against the dangers of "excessive fragmentation" and of creating "a special class simply for the benefit of the opposing creditor, which would give that creditor the potential to exercise an unwarranted degree of power".

2005 CarswellOnt 6818, 15 C.B.R. (5th) 307, 11 B.L.R. (4th) 185, 204 O.A.C. 205, 261 D.L.R. (4th) 368, 78 O.R. (3d) 241

FN7 Montgomery J. declined to grant a separate classification to a minority group of creditors who would use that classification to extract benefits to which it was not otherwise entitled.

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2009 CarswellAlta 1269, 2009 ABQB 490, [2009] A.W.L.D. 3785, 57 C.B.R. (5th) 205, 479 A.R. 318

SemCanada Crude Co., Re

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

And In the Matter of a Plan of Compromise or Arrangement of SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options, Inc., 319278 Nova Scotia Company and 1380331 Alberta ULC

Alberta Court of Queen's Bench

B.E. Romaine J.

Heard: August 5, 2009
Judgment: August 24, 2009
Docket: Calgary 0801-08510

Counsel: A. Robert Anderson, Q.C., Rupert Chartrand, Michael De Lellis, Cynthia L. Spry, Douglas Schweitzer for Applicants

David R. Byers, for Bank of America

Patrick T. McCarthy, Josef A. Krüger for Monitor

Douglas S. Nishimura for ARC Resources Ltd., City of Medicine Hat, Black Rider Resources Inc. Wolf Coulee Resources Inc., Orleans Energy Ltd., Crew Energy Inc., Trilogy Energy LP

Brendan O'Neill, Jason Wadden for Fortis Capital Corp.

Sean Fitzgerald for Tri-Ocean Engineering Ltd.

Dean Hutchison for Crescent Point Energy Trust, Enbridge Pipelines Inc.

Caireen Hanert for Bellamount Exploration Ltd., Enersul Limited Partnership

Bryce McLean for DPH Focus Corporation

Aubrey Kauffman for BNP Paribas

2009 CarswellAlta 1269, 2009 ABQB 490, [2009] A.W.L.D. 3785, 57 C.B.R. (5th) 205, 479 A.R. 318

Subject: Insolvency

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

S brought application for various relief related to holding of meetings of creditors to consider three plans to restructure and distribute assets of Companies' Creditors Arrangement Act ("CCAA") applicants, including applications for orders authorizing establishment of single class of creditors for each plan for purpose of considering and voting on plan — Applications granted — There was no good reason to exclude secured lenders and noteholders from single classification of voters in proposed plans, nor to create separate class for their votes — There were no material distinctions between claims of these two creditors and claims of remaining unsecured creditors that were not more properly subject of sanction hearing, apart from deferred issue of whether secured lenders were entitled to vote their entire guarantee claim — No rights of remaining unsecured creditors were being confiscated by proposed classification, and no injustice arose, particularly given separate tabulation of votes which enabled voice of remaining unsecured creditors to be heard and measured at sanction hearing — There were no conflicts of interest so over-riding as to make consultation impossible — While there were differences of interest and treatment among affected creditors in class, these were issues that would be addressed at sanction hearing — Approval of proposed classification in context of integrated plans was in accordance with spirit and purpose of CCAA.

Cases considered by *B.E. Romaine J.*:

Campeau Corp., Re (1991), 10 C.B.R. (3d) 100, 86 D.L.R. (4th) 570, 1991 CarswellOnt 155 (Ont. Gen. Div.) — considered

Canadian Airlines Corp., Re (2000), 80 Alta. L.R. (3d) 213, 2000 ABCA 149, 2000 CarswellAlta 503, 19 C.B.R. (4th) 33, 261 A.R. 120, 225 W.A.C. 120 (Alta. C.A. [In Chambers]) — considered

Canadian Airlines Corp., Re (2000), 2000 CarswellAlta 919, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, 2000 ABCA 238, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]) — followed

Canadian Airlines Corp., Re (2000), 88 Alta. L.R. (3d) 8, 2001 ABCA 9, 2000 CarswellAlta 1556, [2001] 4 W.W.R. 1, 277 A.R. 179, 242 W.A.C. 179 (Alta. C.A.) — referred to

Canadian Airlines Corp., Re (2001), 2001 CarswellAlta 888, 2001 CarswellAlta 889, 275 N.R. 386 (note), 293 A.R. 351 (note), 257 W.A.C. 351 (note) (S.C.C.) — referred to

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20, 64 Alta. L.R. (2d) 139, 1988 CarswellAlta 319 (Alta. Q.B.) — considered

San Francisco Gifts Ltd., Re (2004), 5 C.B.R. (5th) 92, 42 Alta. L.R. (4th) 352, 2004 ABQB 705, 2004 CarswellAlta 1241, 359 A.R. 71 (Alta. Q.B.) — referred to

San Francisco Gifts Ltd., Re (2004), 2004 ABCA 386, 2004 CarswellAlta 1607, 5 C.B.R. (5th) 300, 42 Alta. L.R. (4th) 371, 361 A.R. 220, 339 W.A.C. 220 (Alta. C.A.) — considered

SemCanada Crude Co., Re (2009), 2009 CarswellAlta 167, 2009 ABQB 90, 52 C.B.R. (5th) 131 (Alta. Q.B.) — referred to

Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 1991 CarswellOnt 220, 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621 (Ont. Gen. Div.) — considered

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

Woodward's Ltd., Re (1993), 20 C.B.R. (3d) 74, 84 B.C.L.R. (2d) 206, 1993 CarswellBC 555 (B.C. S.C.) — considered

Statutes considered:

Bankruptcy Code, 11 U.S.C.

s. 503(b)(9) — referred to

Chapter 7 — referred to

Chapter 11 — referred to

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

Generally — referred to

s. 6 — referred to

s. 11(1) — referred to

s. 22(2) [rep. & sub. 2007, c. 36, s. 71] — referred to

APPLICATION for orders authorizing establishment of single class of creditors for three plans to restructure and distribute assets for purpose of considering and voting on plans.

***B.E. Romaine J.*:**

Introduction

1 The SemCanada Group applied for various relief related to the holding of meetings of creditors to consider three plans to restructure and distribute assets of the CCAA applicants, including applications for orders authorizing the establishment of a single class of creditors for each plan for the purpose of considering and voting on the plans. I granted the applications, and these are my reasons.

Relevant Facts

2 On July 22, 2008, SemCanada Crude Company ("SemCanada Crude") and SemCAMS ULC ("SemCAMS") were granted initial Orders pursuant to s. 11(1) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36, as amended (the "CCAA").

3 On July 30, 2008, the CCAA proceedings of SemCAMS and SemCanada Crude and the bankruptcy proceed-

ings of SemCanada Energy Company ("SemCanada Energy") A.E. Sharp Ltd. ("AES") and CEG Energy Options, Inc. ("CEG") which had been commenced on July 24, 2008 were procedurally consolidated for the purpose of administrative convenience.

4 In addition, CCAA protection was granted to two affiliated companies, 3191278 Nova Scotia Company (A319") and 1380331 Alberta ULC ("138"). SemCanada Energy, AES, CEG, 319 and 138 are collectively referred to as the "SemCanada Energy Companies". The CCAA applicants are collectively referred to as the "SemCanada Group".

5 On July 22, 2008, SemGroup L.P. and its direct and indirect subsidiaries in the United States (the "U.S. Debtors") filed voluntary petitions to restructure under Chapter 11 of the U.S. Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware.

6 According to the second report of the Monitor, the financial problems of the SemGroup arose from a failed trading strategy and the volatility of petroleum products prices, leading to material margin calls related to large futures and options positions on the NYMEX and OTC markets, resulting in a severe liquidity crisis. SemGroup's credit facilities were insufficient to accommodate its capital needs, and the corporate group sought protection under Chapter 11 and the CCAA.

7 The SemCanada Group are indirect, wholly-owned subsidiaries of SemGroup LP. The SemCanada Group is comprised of three separate businesses:

(a) SemCanada Crude, a crude oil marketing and blending operation;

(b) the SemCanada Energy Companies, whose business was gas marketing, including the purchase and sale of gas to certain of its four subsidiaries as well as to SemCAMS; and

(c) SemCAMS, whose business consists of ownership interests in large gas processing facilities located in Alberta, as well as agreements to operate these facilities.

8 SemCrude, L.P. as U.S. borrower and a predecessor company of SemCAMS as Canadian borrower, certain U.S. SemGroup corporations and Bank of America as administrative agent for a syndicate of lenders (the "Secured Lenders") entered into a credit agreement in 2005 (the "Credit Agreement"). The Credit Agreement provides four different credit facilities. There are no advances outstanding with respect to the Canadian term loan facility, but in excess of U.S. $2.9 billion is owing under the U.S. term loan facility, the working capital loan facility and the revolver loan.

9 Five of the SemCanada Group, including SemCanada Crude, SemCanada Energy and SemCAMS, have provided a guarantee of all obligations under the Credit Agreement to the Secured Lenders, who rank as senior secured lenders, and under a US $600 million bond indenture issued by SemGroup. The guarantee is secured by a security and pledge agreement (the "Security Agreement") signed by the five members of the SemCanada Group.

10 The SemCanada Energy Companies were liquidated or have ceased operations and no longer have significant ongoing operations. As a result of liquidation proceedings and the collection of outstanding accounts receivable, the SemCanada Energy Companies hold approximately $113 million in cash. An application to distribute that cash to the Secured Lenders was adjourned *sine die* on January 19, 2009: *SemCanada Crude Co., Re*, 2009 ABQB 90 (Alta. Q.B.).

11 Originally, SemCAMS and SemCanada Crude proposed to restructure their businesses as stand-alone operations without further affiliation with the U.S. Debtors and accordingly sought bids in a solicitation process under-

taken in early 2009. Unfortunately, no acceptable bids were received. It also became apparent that, as SemCanada Crude's business was closely integrated with certain North Dakota transportation rights and assets owned by the U.S. Debtors, restructuring SemCanada Crude's operations on a stand alone basis would be problematic. The SemCanada Group turned to the alternative of joining in the restructuring of the entire SemGroup through concurrent and integrated plans of arrangement in both Canada and the United States.

Summary of the U.S. and Canadian Plans

12 The U.S. and Canadian plans are complex and need not be described in their entirety in these reasons. For the purpose of these reasons, the relevant aspects of the plans are as follows:

1. The disclosure statement relating to a joint plan of affiliated U.S. Debtors was approved for distribution to creditors by the U.S. Bankruptcy Court on July 21, 2009. Under the Chapter 11 process, meetings of creditors are not necessary. Voting takes place through a notice and balloting mechanism that has been approved by the U.S. Court and September 3, 2009 has been set as the voting deadline for acceptance or rejection of the U.S. plan.

2. The total distributable value of the SemGroup for the purpose of the plans is expected to be US $2.3 billion, consisting of US $965 million in cash, US $300 million in second lien term loan interests and US $1.035 billion in new common stock and warrants of the U.S. Debtors.

3. The SemCanada Group will contribute approximately US $161 million in available cash to the U.S. plan and US $54 million is expected to be received from SemCanada Crude relating to crude oil settlements that will occur after the effective date of the plans, being cash received from prepayments that are outstanding on the implementation date which will be replaced with letters of credit or other post-plan financing.

4. Approximately US $50 million will be retained by the corporate group for working capital and general corporate purposes, including for the post plan cash needs of SemCAMS and SemCanada Crude.

5. Certain U.S. causes of action will be contributed to a "litigation trust" and will be distributed through the U.S. Plan, including to the Secured Lenders on their deficiency claims. No value has been placed on the litigation trust by the U.S. Debtors. The Monitor reports that it is unable to make an informed assessment of the value of the litigation trust assets as the trust is a complicated legal mechanism that will likely require the expenditure of significant time and professional fees before there will be any recovery.

6. The U.S. plan contains a condition precedent that, on the effective date of the plan, the restructured corporate group will enter into a US $500 million exit financing facility, which will apply to all post-restructuring affiliates, including SemCAMS and SemCanada Crude, and which will allow the corporate group to re-enter the crude marketing business in the United States and to continue operations in Canada.

7. It is expected that the Secured Lenders will receive cash, second lien term loan interests and equity in priority to unsecured creditors on their secured guarantee claims of US $2.9 billion, which will leave them with a deficiency of approximately US $1.07 billion on the secured loans. The Secured Lenders are entitled under the U.S. Plan to a share in the litigation trust on their deficiency claim. If certain other classes of creditors do not vote to approve the U.S. plan, the Secured Lenders may also receive equity of a value up to 4.53% of their deficiency, subject to other contingencies. The Monitor reports that the Secured Lenders are thus estimated to recover approximately 57.1% of their estimated claims of US $2.1 billion on secured working capital claims and 73.3% of their estimated claims of US $811 million on secured revolver/term claims. The Monitor estimates that the Secured Lenders will recover no value on their deficiency claims, assuming no reallocation of equity from other categories of debtors and no value for the litigation trust.

8. The holders of the US $600 million bonds (the "Noteholders") are entitled to receive common shares and warrants in the restructured corporate group, plus an interest in the litigation trust and certain trustee fees, for an estimated recovery of 8.34% on their claims of US $610 million under the U.S. plan, assuming all classes of Noteholders approve the plan and no value is given to the litigation trust. Depending on certain contingencies, the range of recovery is 0.44$ to 11.02% of their claim. Noteholders are treated more advantageously under the plans than general unsecured creditors in recognition that the Senior Notes are jointly and severally guaranteed by 23 U.S. debtors and the Canadian debtors, while in most instances only one SemGroup debtor is liable with respect to each ordinary unsecured creditor. In addition, the Noteholders have waived their right to receive distributions under the Canadian plans.

9. Under the U.S. Plan, general unsecured creditors will receive common shares, warrants and an interest in the litigation trust. Depending on the level of approval, recovery levels will range from 0.08% to 8.03% on claims of US $811 million. The Monitor reports that it expects recovery to general unsecured creditors under the U.S. Plan to be 2.09% of their claim.

10. Pursuant to section 503(b)(9) of the U.S. Bankruptcy Code, entities that provided goods to the U.S. Debtors in the ordinary course of business that were received within 20 days of the filing of Chapter 11 proceedings are entitled to a priority claim that ranks above the claims of the Secured Lenders.

11. There are 3 Canadian plans. As the Secured Lenders will be entitled to some recovery in respect of their deficiency claim and the Noteholders will be entitled to some recovery on their unsecured claim under the U.S. Plan, the Secured Lenders and the Noteholders are deemed to have waived their rights to any additional recovery under the Canadian plans for the most part. However, the votes of the Secured Lenders and the Noteholders entitled to vote on the U.S. Plan are deemed to be votes for the purpose of the Canadian plans, both with respect to numbers of parties and value of claims, and are to be included in the single class of "Affected Creditors" entitled to vote on the Canadian plans. Originally, the Canadian plans provided that the value attributable to the Secured Lenders' votes would be based on the full amount of their guarantee claim, approximately US $2.9 billion, and not only on their deficiency claim of approximately US $1.07 billion. Thus, the aggregate value of the Secured Lenders' voting claims would be:

a) US $2.939 billion for the SemCAMS plan;

b) US $2.939 billion less C $145 million for the SemCanada Crude plan, recognizing that the Secured Lenders would be entitled to receive C $145 million in respect of a negotiated Lenders' Secured Claim under the SemCanada Crude plan; and

c) US $2.939 billion less C $108 million for the SemCanada Energy plan, recognizing that the Secured Lenders will receive that amount in respect of a negotiated Lenders' Secured Claim under the SemCanada Energy plan.

At the conclusion of the classification hearing, the CCAA applicants proposed a revision to the proposed orders which stipulates that, if the approval of a plan by the creditors would be determined by the portion of the votes cast by the Secured Lenders that represents an amount of indebtedness that is greater than their estimated aggregate deficiency after taking into consideration the payments they are to receive under the U.S. plan and the Canadian plans, the Court shall determine whether the voting claim of the Secured Lenders should be limited to their estimated deficiency claim.

12. Only "Ordinary Creditors" receive any distribution under the Canadian Plans. Ordinary Creditors are defined as creditors holding "Affected Claims" other than the Secured Lenders, Noteholders, CCAA appli-

cants and U.S. Debtors. Each plan provides that the Affected Creditors of the CCAA applicant will vote at the Creditors' Meeting as a single class.

13. The SemCAMS plan will be funded by a cash advance from SemCanada Crude and establishes two pools of cash. One pool will fund the full amount of secured claims which have not been paid prior to the implementation date of the plan up to the realizable value of the property secured, and the other pool will fund distributions to ordinary unsecured creditors. Ordinary unsecured creditors will receive cash subject to a maximum total payment of 4% of their proven claims. The Monitor estimates that the distribution will equal 4% of claims unless claims in excess of the current highest estimate are established.

14. The SemCanada Crude plan also establishes two pools of cash, one for secured claims and one for ordinary unsecured creditors. Again, the distribution to ordinary unsecured creditors is estimated to be 4% of claims unless claims in excess of the current highest estimate against SemCanada Crude are established.

15. Any cash remaining in SemCanada Crude after deducting amounts necessary to fund the above-noted payments to secured and unsecured ordinary creditors of SemCAMS and SemCanada Crude, unaffected claims and administrative costs, less a reserve for disputed claims, will be paid to the Secured Lenders through the U.S. plan as part of the payment on secured debt.

16. The SemCanada Energy distribution plan is funded from the cash received from the liquidation of the assets of the companies. It also establishes two pools of cash, one of which will be used to pay secured ordinary creditors and a one of which will be used to pay cash distributions to ordinary unsecured creditors. The Monitor estimates that the distribution to ordinary unsecured creditors will be in the range of 2.16% to 2.27% of their claims, unless claims in excess of the current maximum estimate are established. Any amounts outstanding after payment of these claims, unaffected claims and administration costs will be paid to the Secured Lenders. The proposed lower amount of recovery is stated to be in recognition of the fact that the SemCanada Energy Companies have been liquidated and have no going concern value.

17. As this summary indicates, the U.S. Plan and the Canadian plans are closely integrated and economically interdependent. Each of the plans requires that the other plans be approved by the requisite number of creditors and implemented on the same date in order to become effective. The receipt of at least $160 million from the SemCanada Group is a condition precedent to the implementation of the U.S. Plan.

18. The Monitor reports that the SemCanada Group has indicated that there is no viable option to the proposed plans and that a formal liquidation under bankruptcy legislation would provide a lower recovery to creditors. The Monitor notes that the rationale for the treatment of the Secured Lenders and the ordinary unsecured creditors under the plans is that the Secured Lenders have valid and enforceable secured claims, and that, in the event of the liquidation of the Canadian companies, the Secured Lenders would be entitled to all proceeds, resulting in no recovery to ordinary creditors. Therefore, reports the Monitor, the CCAA plans are considered to be better than the alternative of a liquidation. The Secured Lenders derive some benefit from the plans through the preservation of the going concern value of SemCAMS and SemCanada Crude and by having a prompt distribution of funds held by the SemCanada Energy Companies.

19. The Monitor notes that the distribution to the SemGroup unsecured creditors under the U.S. plan is viewed as better than a liquidation, and that, therefore, given the effect of the U.S. Bankruptcy Code's "cram-down" provisions, it is likely that the U.S. plan will be confirmed. The Monitor comments that the proposed distribution to ordinary unsecured creditors under the CCAA plans is considered to be fair as it is comparable to and potentially slightly more favourable than the distributions being made to the U.S. ordinary unsecured creditors.

Positions of Various Parties

13 The SemCanada Group applied for orders

a) accepting the filing of, in the case of SemCAMS and SemCanada Crude, proposed plans of arrangement and compromise, and in the case of SemCanada Energy, a proposed plan of distribution;

b) authorizing the calling and holding of meetings of the Canadian creditors of these three CCAA applicants;

c) authorizing the establishment of a single class of creditors for each plan for the purpose of considering and voting on the plans;

d) approving procedures with respect to the calling and conduct of such meetings; and

e) other non-contentious enabling relief.

14 Certain unsecured creditors of the applicants objected to the proposed classification of creditors, submitting that the Secured Lenders should not be allowed a vote in the same class as the unsecured creditors either with respect to the secured portion of their overall claim or any deficiency in their claims that would remain unpaid, and that the Noteholders should not be allowed a vote in the same class as the rest of the unsecured creditors.

15 As noted previously, the CCAA applicants proposed a revision to the proposed orders at the conclusion of the classification hearing which would allow the Court to consider whether the voting claim of the Secured Lenders should be limited to their estimated deficiency claim. The objecting creditors continued to object to the proposed classification, even if eligible votes were limited to the deficiency claim of the Secured Lenders.

Analysis

16 Section 6 of the CCAA provides that, where a majority in number representing two-thirds in value of "the creditors or class of creditors, as the case may be" vote in favour of a plan of arrangement or compromise at a meeting or meetings, the plan of arrangement may be sanctioned by the Court. There is little by way of specific statutory guidance on the issue of classification of claims, leaving the development of this issue in the CCAA process to case law. Prior decisions have recognized that the starting point in determining classification is the statute itself and the primary purpose of the statute is to facilitate the reorganization of insolvent companies: Paperny, J. in *Canadian Airlines Corp., Re* (2000), 20 C.B.R. (4th) 46 (Alta. C.A. [In Chambers]), leave to appeal refused (2000), 20 C.B.R. (4th) 46 (Alta. C.A. [In Chambers]), affirmed [2001] 4 W.W.R. 1 (Alta. C.A.), leave to appeal to SCC refused [2001] S.C.C.A. No. 60 (S.C.C.) at para. 14. As first noted by Forsyth, J. in *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20, 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566 (Alta. Q.B.) at page 28, and often repeated in classification decisions since, "this factor must be given due consideration at every stage of the process, including the classification of creditors..."

17 Classification is a key issue in CCAA proceedings, as a proposed plan must achieve the requisite level of creditor support in order to proceed to the stage of a sanction hearing. The CCAA debtor seeks to frame a class or classes in order to ensure that the plan receives the maximum level of support. Creditors have an interest in classifications that would allow them enhanced bargaining power in the negotiation of the plan, and creditors aggrieved by the process may seek to ensure that classification will give them an effective veto (see *Rescue: The Companies' Creditors Arrangement Act*, Janis P. Sarra, 2007 ed. Thomson Carswell at page 234). Case law has developed from the comments of the British Columbia Court in *Woodward's Ltd., Re* (1993), 84 B.C.L.R. (2d) 206 (B.C. S.C.) warning against the danger of fragmenting the voting process unnecessarily, through the identification of principles ap-

plicable to the concept of "commonality of interest" articulated in *Canadian Airlines Corp., Re* and elaborated further in Alberta in *San Francisco Gifts Ltd., Re*, 2004 CarswellAlta 1241, [2004] A.J. No. 1062 (Alta. Q.B.), leave to appeal refused (2004), 5 C.B.R. (5th) 300 (Alta. C.A.).

18 The parties in this case agree that "commonality of interest" is the key consideration in determining whether the proposed classification is appropriate, but disagree on whether the plans as proposed with their single class of voters meet that requirement. It is clear that classification is a fact-driven inquiry, and that the principles set out in the case law, while useful in considering whether commonality of interest has been achieved by the proposed classification, should not be applied rigidly: *Canadian Airlines Corp., Re* at para. 18; *San Francisco Gifts Ltd., Re* at para. 12; *Stelco Inc., Re* (2005), 15 C.B.R. (5th) 307 (Ont. C.A.) at para. 22.

19 Although there are no fixed rules, the principles set out by Paperny, J. in para. 31 of *Canadian Airlines Corp., Re* provide a useful structure for discussion of whether to the proposed classification is appropriate:

1. Commonality of interest should be viewed based on the non-fragmentation test, not on the identity of interest test.

20 Under the now-rejected "identity of interest" test, all members of the class had to have identical interests. Under the non-fragmentation test, interests need not be identical. The interests of the creditors in the class need only be sufficiently similar to allow them to vote with a common interest: *Woodward's Ltd., Re* at para. 8.

21 The objecting creditors submit that the creation of two classes rather than one cannot be considered to be fragmentation. The issue, however, is not the number of classes, but the effect that fragmentation of classes may have on the ability to achieve a viable reorganization. As noted by Farley, J. in para. 13 of his reasons relating to the classification of creditors in *Stelco Inc., Re*, as endorsed by the Ontario Court of Appeal:

> ...absent valid reason to have separate classes it would be reasonable, logical, rational and practical to have all this unsecured debt in the same class. Certainly that would avoid fragmentation - and in this respect multiplicity of classes does not mean that fragmentation starts only when there are many classes. Unless more than one class is necessary, fragmentation would start at two classes. Fragmentation if necessary, but not necessarily fragmentation.

2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.

22 The classification of creditors is viewed with respect to the legal rights they hold in relation to the debtor company in the context of the proposed plan, as opposed to their rights as creditors in relation to each other: *Woodward's Ltd., Re* at para. 27, 29; *Stelco Inc., Re* at para. 30. In the proposed single classification, the rights of the creditors in the class against the debtor companies are unsecured (other than the proposed votes attributable to the secured portion of the debt of the Secured Lenders, which will be discussed separately).

23 With respect to the Secured Lenders' deficiency claim, there is a clear precedent for permitting a secured creditor to vote a substantial deficiency claim as part of the unsecured class: *Campeau Corp., Re* (1991), 10 C.B.R. (3d) 100 (Ont. Gen. Div.); *Canadian Airlines Corp., Re*, supra.

24 The classification issues in the *Campeau Corp., Re* restructuring were similar to the present issues. In *Campeau Corp., Re*, a secured creditor, Olympia & York, was included in the class of unsecured creditors for the deficiency in its secured claim, which represented approximately 88% of the value of the unsecured class. The Court rejected the submission that the legal interests of Olympia & York were different from other unsecured creditors in the class. Montgomery, J. noted at para. 16 that Olympic & York's involvement in the negotiation of the plan was

necessary and appropriate given that the size of its claims would allow it a veto no matter how the classes were constituted and that its co-operation was necessary for the success of both the U.S. and Canadian plans.

25 In the same way, the size and scope of the Secured Lenders claim makes their participation in the negotiation and endorsement of the proposed plans essential. That participation does not disqualify them from a vote in the process, nor necessitate their isolation in a special class. While under the integrated plans, the Secured Lenders will receive a different kind of distribution on their unsecured deficiency claim (a share of the litigation trust), that is an issue of fairness for the sanction hearing and does not warrant the establishment of a separate class.

26 The interests of the Noteholders are unsecured. While it is true that under the integrated plans, the Noteholders would be entitled to a higher share of the distribution of assets than ordinary unsecured creditors, the rationale for such difference in treatment relates to the multiplicity of debtor companies that are indebted to the Noteholders, as compared to the position of the ordinary unsecured creditors. That difference, while it may be subject to submissions at the sanction hearing, is an issue of fairness, and not a difference material enough to warrant a separate class for the Noteholders in this case. A separate class for the Noteholders would only be necessary if, after considering all the relevant factors, it appeared that this difference would preclude reasonable consultation among the creditors of the class: *San Francisco Gifts Ltd., Re* at para. 24.

27 The question arises whether the fact that the Secured Lenders and the Noteholders have waived their rights to recover under the Canadian plans should result in either the requirement of separate classes or the forfeiture of their right to vote on the Canadian plans at all.

28 This is a unique case: a cross-border restructuring with separate but integrated and interdependent plans that are designed to comply with the restructuring legislation of two jurisdictions. As the applicants point out, the co-ordinated structure of the plans is designed to ensure that the Secured Lenders and the Noteholders receive sufficient recoveries under the U.S. plan to justify the sacrifices in recovery that result from their waiver of distributions under the Canadian plans. In considering the context of the proposed classification, it would be unrealistic and artificial to consider the Canadian plans in isolation, without regard to the commercial outcome to the creditors resulting from the implementation of the plans in both jurisdictions. Thus, the fact that the distributions to Secured Lenders and Noteholders will take place through the operation of the U.S. plan, and that the effective working of the plans require them to waive their rights to receive distributions under the Canadian plans does not deprive them of the right to an effective voice in the consideration of the Canadian plans through a meaningful vote.

29 It is not sufficient to say that the Secured Lenders and the Noteholders have a vote in the U.S. plans. The "cram down" power which exists under Chapter 11 of the U.S. Bankruptcy Code includes a "best interests test" that requires that if a class of holders of impaired claims rejects the plan, they can be "crammed down" and their claims will be satisfied if they receive property of a value that is not less than the value that the class would receive or retain if the debtor were liquidated under Chapter 7 of the U.S. Bankruptcy Code. Thus, the votes available to the Secured Lenders and the Noteholders with respect to their claims under the U.S. Plan do not give them the right available to creditors under Canadian restructuring law to vote on whether a proposed plan should proceed to the next step of a sanction hearing There is no reason to deprive the Secured Lenders and the Noteholders of that right as creditors of the Canadian debtors, even if the distributions they would be entitled to flow through the U.S. plan. The question becomes, then, whether that right should be exercised in a class with other unsecured creditors as proposed or in a separate class.

30 It is noteworthy that the proposed single classification does not have the effect of confiscating the legal rights of any of the unsecured creditors, or adversely affecting any existing security position. It is in fact arguable that seeking to exclude the Secured Lenders and the Noteholders from the class prejudices these similarly-placed creditors by denying them a meaningful voice in the approval or rejection of the plans in Canada.

31 A number of cases suggest that the Court should also consider the rights of the parties in liquidation in determining whether a proposed classification is appropriate: *Woodward's Ltd., Re* at para. 14; *San Francisco Gifts Ltd., Re* at para. 12.

32 Under a liquidation scenario, the Secured Lenders would be entitled to nearly all of the proceeds of the liquidated corporate group, other than the relatively few secured claims that have priority. This suggests that the Secured Lenders are entitled to a meaningful vote with respect to both the U.S. plan and the Canadian plans.

3. The commonality of interests is to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate organizations if possible.

4. In placing a broad and purposive interpretation on the CCAA, the Court should be careful to resist classification approaches that would potentially jeopardize viable plans.

33 The Ontario Court of Appeal in *Stelco Inc., Re* cautioned that, in addition to considering commonality of interest issues, the court in a classification application should be alert to concerns about the confiscation of legal rights and should avoid "a tyranny of the minority", citing the comments of Borins, J. in *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.), where he warned against creating "a special class simply for the benefit of the opposing creditor, which would give that creditor the potential to exercise an unwarranted degree of power": *Stelco Inc., Re* at para 28.

34 Excluding of the Secured Lenders and the Noteholders from the proposed single class would allow the objecting creditors to influence the voting process to a degree not warranted by their status. It is true that if the Secured Lenders and the Noteholders are not excluded from the class, even if only the votes related to the Secured Lenders' deficiency claim are tabulated, the positive vote will likely be enough to allow the proposed plans to proceed to a sanction hearing. It is also true that the Secured Lenders and the Noteholders may have been part of the negotiations that led to the proposed plans. Neither of those factors standing alone is sufficient to warrant a separate class unless rights are being confiscated or the classification creates an injustice.

35 The structure of the classification as proposed creates in effect what was imposed by the Court in *Canadian Airlines Corp., Re*, a method of allowing the "voice" of ordinary unsecured creditors to be heard without the necessity of a separate classification, thus permitting rather than ruling out the possibility that the plans might proceed to a sanction hearing. Given that the votes of the Secured Lenders and the Noteholders on the U.S. plan will be deemed to be votes of those creditors on the Canadian plans, there will be perforce a separate tabulation of those votes from the votes of the remaining unsecured creditors. In accordance with the revision to the plans made at the end of the classification hearing, there will be a separate tabulation of the votes of the Secured Lenders relating to the secured portion of their claims and the votes relating to the unsecured deficiency.

36 The situation in this classification dispute is essentially the same as that which faced Paperny, J. in *Canadian Airlines Corp., Re*. Fragmenting the classification prior to the vote raises the possibility that the plans may not reach the stage of a sanction hearing where fairness issues can be fully canvassed. This would be contrary to the purpose of the CCAA. This is particularly an issue recognizing that the U.S. plan and the Canadian plans must all be approved in order for any one of them to be implemented. Conrad, J.A. in denying leave to appeal in *San Francisco Gifts Ltd., Re*, 2004 ABCA 386 (Alta. C.A.) at para. 9 noted that the right to vote in a separate class and thereby defeat a proposed plan of arrangement is the statutory protection provided to the different classes of creditors, and thus must be determined reasonably at the classification stage. However, she also noted that "it is important to carefully examine classes with a view of protecting against injustice": para. 10. In this case, the goals of preventing confiscation of rights and protecting against injustice favour the proposed single classification.

37 This is the "pragmatic" factor referred to in *Campeau Corp., Re* at para. 21.The CCAA judge must keep in

mind the interests of all stakeholders in reviewing the proposed classification, as in any step in the process. If a classification prevents the danger of a veto of a plan that promises some better return to creditors than the alternative of a liquidating insolvency, it should not be interfered with absent good reason. The classification hearing is not the only avenue of relief for aggrieved creditors. If a plan received the minimum required level of approval by vote of creditors, it must still be approved at a hearing where issues of fairness must be addressed.

5. Absent bad faith, the motivations of the creditors to approve or disapprove [of the Plan] are irrelevant.

38 As noted in *Canadian Airlines Corp., Re* at para. 35, fragmenting a class because of an alleged conflict of interest not based on legal rights is an error. The issue of the motivation of a party to vote for or against a plan is an issue for the fairness hearing. There is no doubt that the various affected creditors in the proposed single class may have differing financial or strategic interests. To recognize such differences at the classification stage, unless the proposed classification confiscates rights, results in an injustice or creates a situation where meaningful consultation is impossible, would lead to the type of fragmentation that may jeopardize the CCAA process and be counterproductive to the legislative intent to facilitate viable reorganizations.

6. The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.

39 The issue of meaningful consultation was addressed by both the supervising justice and the Court of Appeal in *San Francisco Gifts Ltd., Re*. In that case, Topolniski, J. noted that two corporate insiders that the proposed plan had included in the classification of affected creditors held claims that were uncompromised by the plan, that they gave up nothing, and that it "stretches the imagination to think other creditors in the class could have meaningful consultation [with them] about the Plan": para. 49. Her decision to place these parties in a separate class was confirmed by the Court of Appeal, which commented that Topolniski, J. was "absolutely correct" to find no ability to consult "between shareholders whose debts would not be cancelled and other unsecured creditors whose debts would be": para. 14.

40 That is not the situation here. The deficiency claims of the Secured Lenders and the unsecured claims of the Noteholders are being compromised in the U.S. plan, and there is nothing to block consultations among affected creditors on the basis of dissimilarity of legal interests. While there are differences in the proposed distributions on the unsecured claims, they are not so major that they would preclude consultation.

41 The objecting creditors point to statements made by counsel for the Secured Lenders during the classification application about the alternatives to approval of the plans, which they submit indicates the impossibility of consultation. These comments were made in the context of advocacy on behalf of the proposed classification, and I do not take them as a clear statement by the Secured Lenders that they would refuse to consult with the other creditors.

Secured Portion of Secured Lenders' Claim

42 The CCAA applicants and the Secured Lenders submit that it would be unfair and inappropriate to limit the votes of the Secured Lenders in the Canadian plans to the amount of the deficiency in their secured claim, rather than the entire amount owing under the guarantee. They argue that, by endorsing the plans, the Secured Lenders have in effect elected to treat their entire claim under the guarantee as unsecured with respect to the Canadian plans, except for relatively small negotiated secured claims under the SemCanada Crude plan and the SemCanada Energy plan. They also submit that the fact that under bankruptcy law, a creditor of a bankrupt debtor is entitled to prove for the full amount of its debt in the estates of both the debtor and a bankrupt guarantor of the debt justifies granting the Secured Lenders the right to vote the full amount of the guarantee claim, even if part of the claim is to be recovered through the U.S. plan, as long as they do not actually recover more than 100 cents on the dollar.

43 It became apparent during the course of the classification hearing that it may not matter whether the plans are approved by the requisite number of creditors and value of their claims if the Secured Lenders are only entitled to vote the deficiency portion of their claims or the full amount of their claims. It was this that led to the revision in the language of the voting provisions of the plans. I defer a decision on the question of whether or not the Secured Lenders are entitled to vote the entire amount of their guarantee claims until after the vote has been conducted and the votes separately tabulated as directed. As noted by the Court of Appeal in *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 33 (Alta. C.A. [In Chambers]) at para. 39, such a deferral of a voting issue is not an error of law and is in fact consistent with the purpose of the CCAA.

Recent Amendments

44 The following amendment to the CCAA that has been proclaimed in effect from September 18, 2009 sets out certain factors that may be considered in approving a classification for voting purposes:

> 22.2 (2)**Factors** - For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account:
>
> (a) the nature of the debts, liabilities or obligations giving rise to their claims;
>
> (b) the nature and rank of any security in respect of their claims;
>
> (c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and
>
> (d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed. (R.S.C. 2005, c. 47, s. 131, amended R.S.C. 2007, Bill C -12, c.36, s.71)

45 These factors do not change in any material way the factors that have been identified in the case law and discussed in these reasons nor would they have a material effect on the consideration of the proposed classification in this case.

Creditors with Claims in Process

46 Two creditors advised that, because their claims of secured status had not yet been resolved with the applicants and the Monitor, they were not in a position to evaluate whether or not to object to the proposed classification. The plans were revised to ensure that the votes of creditors whose status as secured creditors remains unresolved until after the meetings of creditors be recorded with votes of creditors with disputed claims and reported to the Court by the Monitor if these votes affect the approval or non-approval of the plan in question.

Conclusion

47 In summary, I have concluded that there is no good reason to exclude the Secured Lenders and the Noteholders from the single classification of voters in the proposed plans, nor to create a separate class for their votes. There are no material distinctions between the claims of these two creditors and the claims of the remaining unsecured creditors that are not more properly the subject of the sanction hearing, apart from the deferred issue of whether the Secured Lenders are entitled to vote their entire guarantee claim. No rights of the remaining unsecured creditors are being confiscated by the proposed classification, and no injustice arises, particularly given the separate tabulation of votes which enables the voice of the remaining unsecured creditors to be heard and measured at the sanction hearing. There are no conflicts of interest so over-riding as to make consultation impossible. While there are differences

of interests and treatment among the affected creditors in the class, these are issues that will be addressed at the sanction hearing. Approval of the proposed classification in the context of the integrated plans is in accordance with the spirit and purpose of the CCAA.

Applications granted.

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2000 CarswellAlta 623, 19 C.B.R. (4th) 12

2000 CarswellAlta 623, 19 C.B.R. (4th) 12

Canadian Airlines Corp., Re

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

In the Matter of the Business Corporations Act (Alberta) S.A. 1981, c. B-15, As Amended, Section 185

In the Matter of Canadian Airlines Corporation and Canadian Airlines International Ltd.

Alberta Court of Queen's Bench

Paperny J.

Judgment: May 12, 2000[FN*]
Docket: Calgary 0001-05071

Proceedings: refused leave to appeal *Canadian Airlines Corp., Re*, 2000 ABCA 149, 80 Alta. L.R. (3d) 213 (Alta. C.A. [In Chambers])

Counsel: *A.L. Friend, Q.C.*, *H.M. Kay, Q.C.*, and *R.B. Low, Q.C.*, for Canadian Airlines.

V.P. Lalonde and *Ms M. Lalonde*, for AMR Corporation.

S. Dunphy, for Air Canada.

P.T. McCarthy, Q.C., for PricewaterhouseCoopers.

D. Nishimura, for Resurgence Asset Management LLC.

E. Halt, for Claims Officer.

A.J. McConnell, for Bank of Nova Scotia Trust Company of New York and Montreal Trust Co. of Canada.

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Creditors of corporation gave corporation concessions worth $200 million in exchange for assurance from airline that creditors would cease to be affected by CCAA proceedings — Concessions were reflected in promissory notes assigned to airline in exchange for its guarantee of aircraft leases — Representative of 60 per cent of unsecured noteholders in corporation brought application for order that all unsecured claims held or controlled by airline be placed in separate class from other unsecured claims for voting purposes, and for order striking portion of reorganization plan — Application dismissed — Class of creditors should include all those with commonality of interest — Commonality of interest refers to rights creditor has vis-à-vis debtor — "Interest" does not include personality or identity of creditor, and absent bad faith, motivation of creditor for supporting plan is not classification issue — Proper point at which to consider effect of airline's status as assignee of unsecured debt was at fairness hearing — Legal rights of unsecured noteholders and airline were essentially same — Votes cast by airline should be tabulated separately to provide evidentiary record for fairness hearing — Propriety of airline voting to share in pool of cash funded by it for benefit of unsecured creditors was also issue best considered at fairness hearing — Provision of plan that released directors, officers and others should not be struck at classification stage as fairness of proposed compromises or claims was issue for fairness hearing — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Cases considered by *Paperny J.*:

Fairview Industries Ltd., Re (1991), 11 C.B.R. (3d) 71, (sub nom. *Fairview Industries Ltd., Re (No. 3))* 109 N.S.R. (2d) 32, (sub nom. *Fairview Industries Ltd., Re (No. 3))* 297 A.P.R. 32 (N.S. T.D.) — considered

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20, 72 C.R. (N.S.) 20 (Alta. Q.B.) — considered

Northland Properties Ltd., Re (1988), 31 B.C.L.R. (2d) 35, 73 C.B.R. (N.S.) 166 (B.C. S.C.) — considered

Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, 34 B.C.L.R. (2d) 122, 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363 (B.C. C.A.) — considered

NsC Diesel Power Inc., Re (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (N.S. T.D.) — considered

Savage v. Amoco Acquisition Co. (1988), 59 Alta. L.R. (2d) 260, 68 C.B.R. (N.S.) 154, 40 B.L.R. 188, (sub nom. *Amoco Acquisition Co. v. Savage)* 87 A.R. 321 (Alta. C.A.) — considered

Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621 (Ont. Gen. Div.) — considered

Sovereign Life Assurance Co. v. Dodd (1891), [1891-4] All E.R. Rep. 246, [1892] 2 Q.B. 573 (Eng. C.A.) — applied

Wellington Building Corp., Re, 16 C.B.R. 48, [1934] O.R. 653, [1934] 4 D.L.R. 626 (Ont. S.C.) — distinguished

Woodward's Ltd., Re (1993), 20 C.B.R. (3d) 74, 84 B.C.L.R. (2d) 206 (B.C. S.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

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

Generally — considered

s. 5.1 [en. 1997, c. 12, s. 122] — referred to

s. 5.1(3) [en. 1997, c. 12, s. 122] — considered

APPLICATION by unsecured creditors of corporation for order that unsecured claims held by Air Canada should be placed in separate class from other unsecured creditors, and for order striking portion of reorganization plan.

***Paperny J.* (orally):**

1 Resurgence Asset Management LLC "Resurgence" appeared on behalf of holders of approximately 60 percent of the unsecured notes issued by Canadian Airlines Corporation in the total amount of $100 million U.S. These unsecured note holders are proposed to be classified as unsecured creditors in the plan that is the subject of these proceedings.

2 Resurgence applied for the following relief:

1. An order lifting the stay of proceedings against Canadian Airlines Corporation and Canadian Airlines International Ltd. (respectively "CAC" and "CAIL" and collectively called "Canadian") to permit Resurgence to commence and proceed with an oppression action against Canadian, Air Canada and others.

2. Further, and in the alternative, Resurgence sought the same relief described in item one above in the context of the C.C.A.A. proceedings.

3. An order that any and all unsecured claims held or controlled, directly or indirectly by Air Canada shall be placed in a separate class and either not allowed to be voted at all, or, alternatively, allowed to be voted in separate class from all other affected unsecured claims.

4. An order that there be a separation in class between creditors of CAC and CAIL

5. An order striking Section 6.2(2)(ii) of the plan on the basis that it is contrary to the C.C.A.A.

3 Resurgence abandoned the application described in item 1 above, and the application in item 2 was addressed in my ruling given May 8, 2000, in these proceedings.

Standing

4 Prior to dealing with the remaining issues of classification, voting and Section 6.2(2)(ii) of the plan, the issue of standing needs to be addressed. This was a matter of some debate, largely in the context of the first two applications. Canadian argued that Resurgence was only a fund manager and did not hold the unsecured notes, beneficially or otherwise, and, accordingly, did not have standing to make any of the applications. The evidence establishes that Resurgence is not the legal owner and the evidence of beneficial ownership is equivocal.

5 Canadian has not raised this issue on any of the previous occasions on which Resurgence has been before the court in these proceedings. There has been a consent order involving Resurgence and Canadian.

6 In my view, it is not appropriate now for Canadian to suggest that Resurgence does not represent the interests of the holders of 60 percent of the unsecured notes and essentially seek a declaration that Resurgence is a stranger to these proceedings.

7 I am not prepared to dismiss the applications of Resurgence on classification, voting and amending the plan out of hand on the basis of standing.

8 Resurgence was also supported in these applications by the senior secured note holders. For the purposes of these applications, I accept that Resurgence is representing the interests of 60 percent of the unsecured note holders.

Classification of Air Canada's Unsecured Claim

9 By my April 14, 2000 order in these proceedings, I approved transactions involving CAIL, a large number of aircraft lessors and Air Canada, which achieved approximately $200 million worth of concessions for CAIL. In exchange for granting the concession, each creditor received a guarantee from Air Canada and the assurance that the creditor would immediately cease to be affected by the C.C.A.A. proceedings.

10 These concessions or deficiency claims were quantified and reflected in promissory notes which were assigned to Air Canada in exchange for its guarantee of the aircraft leases. The monitor approved the method of quantifying these claims and recognized the value of the concessions to Canadian. In that order I reserved the issue of classification and voting to be determined at some later date. The plan provides for two classes of creditors, secured and unsecured.

11 The unsecured class is composed of a number of types of unsecured claims, including aircraft financings, executory contracts, unsecured notes, litigation claims, real estate leases and the deficiencies, if any, of the senior secured note holders.

12 In one portion of the application, Resurgence seeks to have Air Canada vote the promissory notes in separate class and relied on several factors to distinguish the claims of other Affected, Unsecured Creditors from Air Canada's unsecured claim, including the following:

> 1. The Air Canada appointed board caused Canadian to enter into these C.C.A.A. proceedings under which Air Canada stands to gain substantial benefits in its own operations and in the merged operations and ownership contemplated after the compromise of debts under the plan.
>
> 2. Air Canada is providing the fund of money to be distributed to the Affected Unsecured Creditors and will, therefore, end up paying itself a portion of that money if it is included in the Affected Unsecured Creditors' class and permitted to vote.
>
> 3. Air Canada gave no real consideration in acquiring the deficiency claims and manufactured them only to secure a 'yes' vote.

13 Air Canada and Canadian argue that the legal right associated with Air Canada's unsecured promissory notes and with the other Affected, Unsecured Claims, are the same and that the matters raised by Resurgence, as relating to classification, are really matters of fairness, more appropriately dealt with at the fairness hearing. Air Canada and Canadian emphasized that classification must be determined according to the rights of the creditors, not their per-

sonalities.

14 The starting point in determining classification is the statute under which the parties are operating and from which the court obtains its jurisdiction. The primary purpose of the C.C.A.A. is to facilitate the re-organization of insolvent companies, and this goal must be given proper consideration at every stage of the C.C.A.A. process, including classification of claims; see, for example, *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.)

15 Beyond identifying secured and unsecured classes, the C.C.A.A. does not offer any guidance to the classification of claims. The process, instead, has developed in the case law.

16 A frequently cited description of the method of classification of creditors for the purposes of voting on a plan, under the C.C.A.A., is *Sovereign Life Assurance Co. v Dodd* (1891), [1892] 2 Q.B. 573 (Eng. C.A.).

17 At page 583 (Q.B.), Bowen, L.J. stated:

> The word 'class' is vague and to find out what is meant by it, we must look at the scope of the section which is a section enabling the court to order a meeting of a class of creditors to be called. It seems plain that we must give such a meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with the view to their common interest.

This test has been described as the "commonality of interest" test. All counsel agree that this is the test to apply in classification of claims under the C.C.A.A. However, there is a dispute on the types of interests that are to be considered in determining commonality.

18 Generally, the cases hold that classification is a fact-driven determination unique to the circumstances of every case, upon which the court should be loathe to impose rules for universal application, particularly in light of the flexible and remedial jurisdiction involved; see, for example, *Re Fairview Industries Ltd.* (1991), 11 C.B.R. (3d) 71 (N.S. T.D.)

19 The majority of the cases presented to me, held that commonality of the interest is to be determined by the rights the creditor has vis-a-vis the debtor. Courts have also found it helpful to consider the context of the proposed plan and treatment of creditors under a liquidation scenario. In the absence of bad faith, motivation for supporting or rejecting a plan is not a classification issue in the authorities.

20 In considering what interests are included in the commonality of interest test, Forsyth J., in *Norcen Energy Resources Ltd.* (Supra) had to determine whether all the secured creditors of the company ought to be included in one class. The creditors all had first-charge security and the same method of valuation was applied to each secured claim in order to determine security value under the plan. The distinguishing features were submitted to be based on the difference in the security held, including ease of marketability and realization potential. In holding that a separate class was not necessary, Forsyth J., said at page 29:

> Different security positioning and changing security values are a fact of life in the world of secured financing. To accept this argument would again result in a different class of creditor for each secured lender.

In doing so, Forsyth J. rejected the "identity of the interest" approach in which creditors in a class must have identical interests.

21 It was also submitted in *Norcen Energy Resources Ltd.* that since the purchaser under the plan had made financing arrangements with the Royal Bank, the bank had an interest not shared by the other secured creditors. Forsyth J., held that in the absence of any allegation that the Royal Bank was not acting bona fide in considering the benefit of the plan, the secured creditors could not be heard to criticize the presence of the Royal Bank in their class.

22 Forsyth J., also emphasized in *Norcen Energy Resources Ltd.* that the commonality test cannot be considered without also considering the underlying purpose of the C.C.A.A., which is to facilitate reorganizations of insolvent companies. To that end, the court should not approve a classification scheme which would make a reorganization difficult, if not impossible, to achieve. At the same time, while the C.C.A.A. grants the court the authority to alter the legal rights of parties other than the debtor company without their consent, the court will not permit a confiscation of rights or an injustice to occur.

23 The *Norcen Energy Resources Ltd.* approach was specifically adopted in British Columbia in *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.), where it was held that various mortgagees with different mortgages against different properties were included in the same class.

24 In *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154 (Alta. C.A.) the Alberta Court of Appeal rejected the argument that shareholders who have private arrangements with the applicant or who are brokers or officers or otherwise in a special position vis-a-vis the debtor company, should be put in a special category.

25 At page 158 the court stated in regard to the test applied to classification:

> We do not think that this rule justifies the division of shareholders into separate classes on the basis of their presumed prior commitment to a point of view. The state of facts, common to all, is that they are all offered this proposal, face as an alternative the break-up of this apparently insolvent company and hold shares that appear to be worthless on break-up. In any event, any attempt to divide them on the basis suggested, would be futile. One would have as many groups as there are shareholders.

The commonality of interest test was addressed by the British Columbia Supreme Court in *Re Woodward's Ltd.* (1993), 84 B.C.L.R. (2d) 206 (B.C. S.C.). Tysoe J. rejected the identity of interest approach and held that it was permissible to include creditors with different legal rights in the same class, so long as their legal rights were not so dissimilar that it was still possible for them to vote with a common interest.

26 Tysoe J. went on to find that legal interests should be considered in the context of the proposed plan and that it was also necessary to examine the legal rights of creditors in the context of the possible failure of the plan.

27 In other words, "interest" for the purpose of classification does not include the personality or identity of the creditor, and the interests it may have in the broader commercial sphere that might influence its decision or predispose it to vote in a particular way; rather, "interest" involves the entitlement of the debt holder viewed within the context of the provisions of the proposed plan. In that regard, see *Woodward's Ltd.* at page 212.

28 In *Fairview Industries Ltd.* , the court held that in classification there need not be a commonality of interest of debts involved, so long as the legal interests were the same. Justice Glube (as she then was) stated that it did not automatically follow that those with different commercial interests, for example, those with security on "quick" assets, are necessarily in conflict with those with security on "fixed" assets. She stated that just saying there is a conflict is insufficient to warrant separation.

29 In *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.) at 626 like *Norcen Energy Resources Ltd.*, the "identity of interests" approach was rejected. The court preserved a class of creditors which included debenture holders, terminated employees, realty lessors and equipment lessors.

30 Borins J. held that not every difference in the nature of the debt warrants a separate class and that in placing a broad and purposive interpretation on the C.C.A.A., the court should "take care to resist approaches which would potentially jeopardize a potentially viable plan." He observed that "excessive fragmentation is counterproductive to the legislative intent to facilitate corporate reorganization" and that it would be "improper to create a special class simply for the benefit of an opposing creditor which would give that creditor the potential to exercise an unwarranted degree of power." (p. 627).

31 In summary, the cases establish the following principles applicable to assessing commonality of interest:

1. Commonality of interest should be viewed on the basis of the non-fragmentation test, not on an identity of interest test;

2. The interests to be considered are the legal interests the creditor holds qua creditor in relationship to the debtor company, prior to and under the plan as well as on liquidation;

3. The commonality of these interests are to be viewed purposively, bearing in mind the object of the C.C.A.A., namely to facilitate reorganizations if at all possible;

4. In placing a broad and purposive interpretation on the C.C.A.A., the court should be careful to resist classification approaches which would potentially jeopardize potentially viable plans.

5. Absent bad faith, the motivations of the creditors to approve or disapprove are irrelevant.

6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.

32 With this background, I will make several observations relating to the reasons asserted by Resurgence that distinguish Air Canada from the rest of the Affected Unsecured Creditors.

33 The first two reasons given relate to interests of Air Canada extraneous to its legal rights as a unsecured creditor. The third reason relates largely to the further assertion that Air Canada should not be allowed to vote at all. The matter of voting is addressed more specifically later in these reasons.

34 The factors described by Resurgence distinguish between Air Canada and other unsecured creditors relate largely to the fact that Air Canada is the assignee of the unsecured debt. In my view, that approach is to be discouraged at the classification stage. To require the court to consider who holds the claim, as distinct from what they hold, at that point would be untenable. I note that Mr. Edwards recognizes in 1947 in his article, "*Reorganizations under the Companies Creditors Arrangement Act*", (1947), 25 Cdn. Bar Rev. 587, and observe this concern is heightened in the current commercial reality of debt trading.

35 Resurgence also asserted that a court should avoid placing creditors with a potential conflict of interest in the same class and relies on *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1 (N.S. T.D.), a case in which the court considered a potential conflict of interest between subcontractors and direct contractors. To the extent this case can be seen as decided on the basis of the distinct legal rights of the creditors, I agree with the result. To the extent that the case determined that a class could be separated based on a conflict of interest not based on legal right, I disagree. In my view, this would be the sort of issue the court should consider at the fairness hearing.

36 Resurgence also relied on the decisions of the British Columbia Supreme Court in *Re Northland Properties*

Ltd. (1988), 73 C.B.R. (N.S.) 166 (B.C. S.C.), a case decided prior to *Norcen Energy Resources Ltd.*. In that case the court held that a subsidiary wholly owned by Northland Bank was incorporated to purchase certain bonds from Northland in exchange for preferred shares and was not entitled to vote. The court found that would be tantamount to Northland Bank voting in its own reorganization and relied on *Re Wellington Building Corp.*, [1934] O.R. 653, 16 C.B.R. 48 (Ont. S.C.) In this regard. I would note that the passage relied upon at page 5 in that case, in *Wellington Building Corp* (Supra) dealt with whether the scheme, as proposed, was unfair.

37 All creditors proposed to be included in the class of Affected, Unsecured Creditors, are all unsecured and are treated the same under the plan. All would be treat similarly under the BIA. The plan provides that they will receive 12 cents on the dollar. The Monitor opined that in liquidation unsecured creditors would realize a maximum of 3 cents on the dollar. Their legal interests are essentially the same. Issue is taken with the presence of Air Canada, supporter and funder of the plan, also having taken an assignment of a substantial, unsecured claim. However, absent bad faith, who creditors are is not relevant. Air Canada's mere presence in the class does not in and of itself constitute bad faith.

38 Further, all of these methods of distinguishing Air Canada's unsecured claim at their core are fundamentally issues of fairness which will be addressed by the Court at the fairness hearing on June 5, 2000. I am prepared to give serious consideration to these matters at that time and direct that there be a separate tabulation of the votes cast by Air Canada arising from any assignments of promissory notes they have taken, so that there is an evidentiary record to assist me in assessing the fairness of the vote when and if I am called upon to sanction the plan. This approach was taken by Justice Forsyth in *Norcen Energy Resources Ltd.*, and in my view is consistent with the underlying purpose of the C.C.A.A. I wish to emphasize that the concerns raised by Resurgence will form part of the assessment of the overall fairness of the plan.

39 Permitting the classification to remain intact for voting purposes will not result in a confiscation of rights of or injustice to the unsecured note holders. Their treatment does not at this point depart from any other Affected Unsecured Creditors and recognizes the similarity of legal rights. Although based on different legal instruments, the legal rights of the unsecured note holders and Air Canada are essentially the same. Neither has security, nor specific entitlement to assets. Further, the ability of all of the Affected Unsecured Creditors to realize their claims against the debtor companies, depend in significant part, on the company's ability to continue as a going concern.

40 The separate tabulation of votes will allow the "voice" of unsecured creditors to be heard, while at the same time, permit rather than rule out the possibility that a plan might proceed.

41 It is important to preserve this possibility in the interests of facilitating the aim of the C.C.A.A. and protecting interests of all constituents. To fracture the class prior to the vote, may have the effect of denying the court jurisdiction to consider sanctioning a plan which may pass the fairness test but which has been rejected by one creditor. This would be contrary to the purpose of the C.C.A.A.

Separating the Claims Against CAC and CAIL

42 Resurgence briefly argued that since Air Canada's debt is owed by CAIL only, it could only look to CAIL's assets in a bankruptcy and would not be able to look to any CAC assets. In contrast, Resurgence suggested that the unsecured note holders are creditors of both CAIL under a guarantee, and CAC under the notes. Resurgence submitted that the resulting difference in legal rights destroys the commonality of interests.

43 There is insufficient evidence to suggest that the unsecured note holders are also creditors of CAIL. Counsel referred only to a statement made by Mr. Carty on cross-examination that there was an "unsecured guarantee". However, no documents have been brought to my attention that would support this statement and, in of itself, the statement is not determinative. In any case, I do not have sufficient evidence before me to conclude that there would

be a meaningful difference in recoveries for unsecured creditors of CAC and CAIL in the event of bankruptcy. I, therefore, cannot conclude on this basis that rights are being confiscated, unlike Tysoe J.'s ability to do so in *Re Woodward's Ltd.* Simply looking to different assets or pools of assets will not alone fracture a class; some unique additional legal right of value in liquidation going unrecognized in a plan and not balanced by others losing rights as well is needed on the analysis of Tysoe J.

44 I recognize the struggle between the unsecured note holders, represented by Resurgence on one side, and Air Canada and Canadian on the other. Resurgence fears the inclusion of Air Canada and the Affected Unsecured Creditors' class will swamp the vote. Air Canada and Canadian fear that exclusion of Air Canada will result in the voting down of a plan which, in their view, otherwise stands a realistic chance of approval. As unsecured creditors, they do share similar legal rights. As supporters or opponents of the plan, they may well have distinctly different financial or strategic interests. I believe that in the circumstances of this case, these other interests and their impact on the plan, are best addressed as matters of fairness at the June 5, 2000 hearing, and in this way, the concerns will be heard by the court without necessarily putting an end to the entire process.

Voting

45 Although my decision on classification makes it clear that I will permit Air Canada to vote on the plan, I wish to comment further on this issue. Air Canada submitted that it should be entitled to vote the face value of the promissory notes which represent deficiency claims assigned to it from aircraft lessors in the same fashion as any other creditor who has acquired the claims by assignment. All parties accept that deficiency claims such as these would normally be included and voted upon in an unsecured claims class. The request by Resurgence to deny them a vote would have the effect of varying rights associated with those notes.

46 The concessions achieved in the re-negotiation of the aircraft leases, represent value to CAIL. The methodology of calculation of the claims and their valuation was reviewed by the Monitor and this is not being challenged. Rather, it is because it is Air Canada that now holds them, that it is objectionable to Resurgence. Resurgence asserts that Air Canada manufactured the assignment so it could preserve a 'yes' vote. This, in my view, is a matter going to fairness. Is it fair for Air Canada to vote to share in the pool of cash funded by it for the benefit of unsecured creditors? That matter is best resolved at the fairness hearing.

47 Resurgence relied on *Northland Properties Ltd.* in which a wholly owned subsidiary of the debtor company was not allowed to vote because to do so would amount to the debtor company voting in its own reorganization. The corporate relationship between Air Canada and CAIL can be distinguished from the parent and wholly owned subsidiary in *Northland Properties Ltd.*. Air Canada is not CAIL's parent and owns 10 percent of a numbered company which owns 82 percent of CAIL. Further, as noted above, the court in *Northland Properties Ltd.* apparently relied on the passage from *Wellington Building Corp* which indicated in that case the court was being asked to approve a plan as fair. Again, the basis on which Resurgence seeks to deprive Air Canada of its vote is really an issue of fairness.

Section 6(2)(2) of the Plan

48 Resurgence wishes me to strike out Section 6(2)(2) of the plan, which essentially purports to provide a release by affected creditors of all claims based in whole or in part on any act, omission transaction, event or occurrence that took place prior to the effective date in any way relating to the debtor companies and subsidiaries, the C.C.A.A. proceeding or the plan against:

1. The debtor companies and its subsidiaries;

2. The directors, officers and employees;

3. The former directors, officers and employees of the debtor companies and its subsidiaries; or

4. The respective current and former professionals of the entities, including the Monitor, its counsel and its current officers and directors, et cetera. Resurgence submits that this provision constitutes a wholesale release of directors and others which is beyond that permitted by Section 5.1 of the C.C.A.A. CAIL and CAC submit that the proposed release was not intended to preclude rights expressly preserved by the statute and are prepared to amend the plan to state this.

49 Section 5.1(3) of the C.C.A.A. provides that the court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

50 In this application of Resurgence, the court must deal with two issues: One, what releases are permitted under the statute; and, two, what releases ought to be permitted, if any, under the plan.

51 In my view, I will be in a better position to assess the fairness of the proposed compromise of claims which is drafted in extremely broad terms, when I consider the other issues of fairness raised by Resurgence. Accordingly, I leave that matter to the fairness hearing as well.

52 In summary, the application contained in paragraph (d) of the Resurgence Notice of Motion is dismissed. The application in paragraph (e) is adjourned to June 5, 2000.

Application dismissed.

FN* Leave to appeal refused 2000 ABCA 149, 80 Alta L.R. (3d) 213, 19 C.B.R. (4th) 33 (Alta C.A. [In Chambers]).

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2004 CarswellAlta 1607, 2004 ABCA 386, [2005] A.W.L.D. 6, 5 C.B.R. (5th) 300, [2005] A.W.L.D. 710, 361 A.R. 220, 339 W.A.C. 220, 42 Alta. L.R. (4th) 371

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2004 CarswellAlta 1607, 2004 ABCA 386, [2005] A.W.L.D. 6, 5 C.B.R. (5th) 300, [2005] A.W.L.D. 710, 361 A.R. 220, 339 W.A.C. 220, 42 Alta. L.R. (4th) 371

San Francisco Gifts Ltd., Re

San Francisco Gifts Ltd., San Francisco Retail Gifts Incorporated (previously called San Francisco Gifts Incorporated), San Francisco Gift Stores Limited, San Francisco Gifts (Atlantic) Limited, San Francisco Stores Ltd., San Francisco Gifts & Novelties Inc., San Francisco Gifts & Novelty Merchandising Corporation (previously called San Francisco Gifts and Novelty Corporation), San Francisco (The Rock) Ltd. (previously called San Francisco Newfoundland Ltd.) and San Francisco Retail Gifts & Novelties Limited (previously called San Francisco Gifts & Novelties Limited) (Applicants) and Oxford Properties Group Inc., Ivanhoe Cambridge 1 Inc., 20 Vic Management Ltd., Morguard Investments Ltd., Morguard Real Estate Investments Trust, Riocan Property Services, and 1113443 Ontario Inc. (Respondents)

Alberta Court of Appeal

Conrad J.A.

Heard: November 24, 2004
Judgment: December 2, 2004
Docket: Edmonton Appeal 0403-0325-AC

Proceedings: refused leave to appeal *San Francisco Gifts Ltd., Re* (2004), 2004 ABQB 705, 2004 CarswellAlta 1241 (Alta. Q.B.)

Counsel: R.T.G. Reeson, Q.C. for Applicants

J.H.H. Hockin for Respondents

M.J. McCabe, Q.C. for Court Appointed Monitor

Subject: Civil Practice and Procedure; Insolvency

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Leave by judge

SF group of companies was composed of operating company and several nominee companies — Operating company held all of SF's assets and was one hundred per cent owned by L Corp. — L Corp. was wholly owned by BS, who was also president and sole director of nearly all SF group of companies — BS and L Corp. were operating company's only secured creditors — On January 7, 2004, SF group of companies was granted protection under

2004 CarswellAlta 1607, 2004 ABCA 386, [2005] A.W.L.D. 6, 5 C.B.R. (5th) 300, [2005] A.W.L.D. 710, 361 A.R. 220, 339 W.A.C. 220, 42 Alta. L.R. (4th) 371

Companies' Creditors Arrangement Act ("CCAA") — On June 22, 2004, operating company was permitted to file plan of compromise or arrangement and submit it to its creditors for consideration and voting — Plan classified BS and L Corp. as "unaffected creditors", meaning that their claims survived reorganization and they would vote as unsecured creditors — On July 14, 2004, group of six objecting landlords asked court to create separate classes of creditors — Court removed BS and L Corp. from unsecured creditors class, placing them in separate class for voting purposes — SF group of companies applied for leave to appeal — Application dismissed — In arriving at her decision to place BS and L Corp. in separate class, chambers judge relied on different treatment afforded BS and L Corp. under plan — BS and L Corp. would be unaffected by bankruptcy of SF companies, whereas all other creditors in class would receive nothing — BS and L Corp. were in position to control vote and cancel all unsecured creditors' debt but their own — Under those circumstances, there would be no meaningful consultation about plan — Chambers judge correctly held that there was no "commonality of interest" between BS and L Corp. and other creditors — While questions of class in CCAA proceedings were important, application for leave failed to establish that appeal was prima facie meritorious.

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

SF group of companies was composed of operating company and several nominee companies — Operating company held all of SF's assets and was one hundred per cent owned by L Corp. — L Corp. was wholly owned by BS, who was also president and sole director of nearly all SF group of companies — BS and L Corp. were operating company's only secured creditors — On January 7, 2004, SF group of companies was granted protection under Companies' Creditors Arrangement Act ("CCAA") — On June 22, 2004, operating company was permitted to file plan of compromise or arrangement and submit it to its creditors for consideration and voting — Plan classified BS and L Corp. as "unaffected creditors", meaning that their claims survived reorganization and they would vote as unsecured creditors — On July 14, 2004, group of six objecting landlords asked court to create separate classes of creditors — Court removed BS and L Corp. from unsecured creditors class, placing them in separate class for voting purposes — SF group of companies applied for leave to appeal — Application dismissed — In arriving at her decision to place BS and L Corp. in separate class, chambers judge relied on different treatment afforded BS and L Corp. under plan — BS and L Corp. would be unaffected by bankruptcy of SF companies, whereas all other creditors in class would receive nothing — BS and L Corp. were in position to control vote and cancel all unsecured creditors' debt but their own — Under those circumstances, there would be no meaningful consultation about plan — Chambers judge correctly held that there was no "commonality of interest" between BS and L Corp. and other creditors — While questions of class in CCAA proceedings were important, application for leave failed to establish that appeal was prima facie meritorious.

Cases considered by *Conrad J.A.*:

Liberty Oil & Gas Ltd., Re (2003), 44 C.B.R. (4th) 96, 2003 ABCA 158, 2003 CarswellAlta 684 (Alta. C.A.) — followed

Royal Bank v. Fracmaster Ltd. (1999), 1999 CarswellAlta 539, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.*) 244 A.R. 93, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.*) 209 W.A.C. 93, 11 C.B.R. (4th) 230 (Alta. C.A.) — considered

Sovereign Life Assurance Co. v. Dodd (1892), [1891-94] All E.R. Rep. 246, [1892] 2 Q.B. 573 (Eng. C.A.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

2004 CarswellAlta 1607, 2004 ABCA 386, [2005] A.W.L.D. 6, 5 C.B.R. (5th) 300, [2005] A.W.L.D. 710, 361 A.R. 220, 339 W.A.C. 220, 42 Alta. L.R. (4th) 371

Generally — referred to

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

Generally — considered

Tariffs considered:

Alberta Rules of Court, Alta. Reg. 390/68

Sched. C, Tariff of Costs, column 1 — referred to

APPLICATION by insolvent group of companies for leave to appeal from judgment reported at *San Francisco Gifts Ltd., Re* (2004), 5 C.B.R. (5th) 92, 42 Alta. L.R. (4th) 352, 359 A.R. 71, 2004 ABQB 705, 2004 CarswellAlta 1241 (Alta. Q.B.) with respect to classes of creditors under *Companies' Creditors Arrangement Act*.

***Conrad J.A.*:**

I. Introduction

1 The San Francisco group of companies ("San Francisco") seeks leave to appeal an order finding Barry Slawsky ("Slawsky") and Laurier Investments Corp. ("Laurier") do not share a "commonality of interest" with other unsecured creditors, and placing them in a separate class for purposes of voting on a plan of arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

II. Facts

2 San Francisco is composed of the operating company, San Francisco Gifts Ltd., and several nominee companies. The operating company holds all of San Francisco's assets and is 100% owned by Laurier. Laurier is wholly owned by Slawsky, who is also the president and sole director of nearly all of the San Francisco group of companies. Slawsky and Laurier are San Francisco's only secured creditors. In addition, they have substantial unsecured debt with the company.

3 On January 7, 2004, San Francisco was granted protection under the *CCAA*. The initial order was extended, and San Francisco remains in business. On June 22, 2004, San Francisco was permitted to file a Plan of Compromise or Arrangement ("Plan") and submit it to its creditors for consideration and voting. The Plan classified Slawsky and Laurier as "unaffected creditors," meaning that their claims survive the reorganization. Slawsky and Laurier would not share in the distribution of $500,000.00; however, they would value their security and vote as unsecured creditors.

4 On July 14, 2004, a group of six objecting landlords asked the Court to create a separate class or classes for landlords and any similarly-affected parties, to assist the Court-appointed monitor in identifying and preserving creditor claims, and to remove any "related parties" from the unsecured creditors class (or, alternatively, deny them a vote).

III. Decision Below

5 The motion was heard on September 1 and 2, 2004. In a reserved written judgment, the supervising chambers justice declined to create a separate class for landlords, but made provision for preserving certain landlords' claims

relating to the right to distrain. The decision removed Slawsky and Laurier from the unsecured creditors class, placing them in a separate class for voting purposes, and awarded costs against San Francisco under Column 1. It is the removal of Slawsky and Laurier from the unsecured creditors class for which San Francisco seeks leave to appeal. If granted leave to appeal, San Francisco asks this Court to also review the costs award.

6 The chambers justice focused on the lack of "commonality of interest" between Slawsky and Laurier and the rest of the unsecured creditors. Her concerns centred on the different treatment afforded Slawsky and Laurier. Although Slawsky and Laurier would not share in the $500,000.00 distribution, their debt would not be compromised. If the reorganization failed and San Francisco became bankrupt, Slawsky and Laurier would be unaffected, whereas the rest of the unsecured creditors would receive nothing. The chambers justice concluded at para. 49 of her reasons that in light of their divergent interests, "[i]t stretches the imagination to think that other creditors in the class could have meaningful consultations about the Plan with Barry Slawsky and, through him with Laurier."

IV. Test for Leave to Appeal

7 Any person dissatisfied with an order under the *CCAA* is permitted an appeal of that order on obtaining leave: *CCAA*, s.13. The test for leave to appeal is set out in *Liberty Oil & Gas Ltd., Re* (2003), 44 C.B.R. (4th) 96, 2003 ABCA 158 (Alta. C.A.) at paras. 15 and 16:

> The test for granting leave, as articulated in this Court, involves a single criterion subsuming four factors. The single criterion is that there must be serious and arguable grounds that are of real and significant interest to the parties . . . .
>
> The four factors subsumed in an assessment whether the criterion is present are:
>
> (1) Whether the point on appeal is of significance to the practice;
>
> (2) Whether the point raised is of significance to the action itself;
>
> (3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
>
> (4) Whether the appeal will unduly hinder the progress of the action . . . .

V. Standard of Review

8 In considering whether the appeal is *prima facie* meritorious, it is necessary to consider the standard of review the Court would apply if leave was granted. This Court has stated that the supervising chambers justice in a *CCAA* matter is tasked with an ongoing management process similar to that of a judge in the course of a trial: *Liberty Oil & Gas Ltd., Re*, *supra* at para. 20. Consequently, the reviewing court will only interfere with the decision where the chambers justice "acted unreasonably, erred in principle or made a manifest error": *Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93 (Alta. C.A.) at para. 3.

VI. Decision

9 The applicants' main complaints are that the chambers justice erred in her application of the common-law "commonality of interests" test and she misunderstood the facts. The *CCAA* does not explicitly state what factors differentiate creditors so as to place them in separate classes for voting purposes. But in determining issues relating to class, it is important to recognize that the right to vote as a separate class and thereby defeat a proposed plan of arrangement is the statutory protection provided to the different classes of creditors. While fairness on many issues

is assessed again at a later stage, it is the initial placing within a separate class that provides this non-discretionary right to creditors.

10 To give effect to this protection, a "commonality of interests" test was developed. The foundation for the "commonality of interests" test is that the classes must be structured so as to "prevent a confiscation and injustice" and to enable the members to "consult together with a view to their common interest": *Sovereign Life Assurance Co. v. Dodd*, [1892] 2 Q.B. 573 (Eng. C.A.), at 583. It follows that it is important to carefully examine classes with a view to protecting against injustice, and not simply rely on fairness being evaluated later.

11 The means of preventing confiscation and injustice raises some very interesting issues when it comes to determining who should be in a separate class for voting purposes. Unlike the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, the *CCAA* does not specifically provide for treatment of related parties. While unsecured creditors and shareholders have similar legal rights with respect to debts owing, a shareholder *qua* shareholder has other legal rights that may impact on, or make impossible, the ability of the class to hold a common interest. This is an important issue that has not yet been addressed by this Court. As interesting and important as that issue is, however, it is not the issue on this appeal and resolution of the issue must wait to another day.

12 The chambers judge did not need to, and did not, make her decision on commonality of interest based merely on the fact that Slawsky and Laurier were shareholders. Rather, in arriving at her decision to place the shareholders in a separate class, the chambers judge relied on the different treatment afforded Slawsky and Laurier under the Plan. She stated (at para. 49):

> Here, there is no compromise by Slawsky or Laurier. Further, they would, but for a security position shortfall, be unaffected by a bankruptcy of the companies, whereas all of the other creditors in the class would receive nothing. Slawsky has created a Plan which gives him voting rights that he doubtless wants to employ if he senses the need to sway the vote. In return, he gives up nothing. It stretches the imagination to think that other creditors in the class could have meaningful consultations about the Plan with Slawsky and, through him, with Laurier. For that reason, Slawsky and Laurier must be placed in a separate class.

13 I do not accept the applicants' argument that the chambers judge failed to understand that Slawsky and Laurier *had* given up something in that the Plan did not provide for their participation in the $500,000.00 available for distribution. This judge was alive to that element of the Plan. When she said that "he gives up nothing," she was referring to the fact that under the Plan the shareholders' debt remains outstanding and is not compromised, unlike the other unsecured creditors' debt. In short, Slawsky and Laurier may be in a position to control the vote and cancel all unsecured creditors' debt but their own. Under these circumstances, there would be no meaningful consultation about the Plan.

14 In my view, the chambers judge was absolutely correct in her assessment that it stretches the imagination to think that there would be meaningful consultation about the Plan between shareholders whose debts would not be cancelled and other unsecured creditors whose debts would be. Certainly, bearing in mind the standard of review, there is absolutely no merit to this appeal.

15 Thus, while I acknowledge that questions of class are important, both to the practice and the parties, this application for leave must fail because it fails to establish that the appeal is *prima facie* meritorious.

16 In the result, the chambers judge did not err in principle, she did not misunderstand the evidence, and her decision to remove Slawsky and Laurier from the class of unsecured creditors was correct. In my view, any other decision would have resulted in an injustice to the other unsecured creditors. At a minimum, bearing in mind the standard of review, there is no chance of success on the appeal.

2004 CarswellAlta 1607, 2004 ABCA 386, [2005] A.W.L.D. 6, 5 C.B.R. (5th) 300, [2005] A.W.L.D. 710, 361 A.R. 220, 339 W.A.C. 220, 42 Alta. L.R. (4th) 371

17 Leave to appeal is denied.

(Counsel speaks to costs)

18 Costs are allowed to the Respondent in Column 1 and I allow costs for the filing of their Memorandum, notwithstanding the red stamp.

Application dismissed.

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2001 CarswellAlta 1488, 2001 ABQB 983, [2002] A.W.L.D. 43, 29 C.B.R. (4th) 236, [2002] 3 W.W.R. 373, 98 Alta. L.R. (3d) 277, 306 A.R. 124

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2001 CarswellAlta 1488, 2001 ABQB 983, [2002] A.W.L.D. 43, 29 C.B.R. (4th) 236, [2002] 3 W.W.R. 373, 98 Alta. L.R. (3d) 277, 306 A.R. 124

Ontario v. Canadian Airlines Corp.

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

AND IN THE MATTER OF THE BUSINESS CORPORATIONS ACT (ALBERTA), S.A. 1981, c. B.-15, AS AMENDED, SECTION 185;

AND IN THE MATTER OF CANADIAN AIRLINES CORPORATION AND CANADIAN AIRLINES INTERNATIONAL LTD.;

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO (Applicant) and CANADIAN AIRLINES CORPORATION AND CANADIAN AIRLINES INTERNATIONAL LTD. (Respondents)

Alberta Court of Queen's Bench

Romaine J.

Judgment: November 16, 2001
Docket: Calgary 0001-05071

Counsel: *Larry B. Robinson, Michael D. Aasen*, for Her Majesty the Queen in Right of the Province of Ontario

Chris Simard, for Canadian Airlines Corporation and Canadian Airlines International Ltd.

Sean Dunphy, for Air Canada

Subject: Corporate and Commercial; Insolvency; Provincial Tax

Banking and banks --- Letters of credit

Company self-assessed its tax liabilities and made instalment payments under provincial statutes — Province assessed company for taxes owing — Company filed notices of objections and appeals were ongoing — Company provided province with letters of credit to secure assessments under appeal — Until decisions were rendered in tax appeals, no amounts were payable and province was precluded from drawing on letters of credit — Company received protection under Companies' Creditors Arrangement Act — Company included province in list of "affected unsecured claims" — Province's claim was for greater amount than letters of credit — Company's plan of compro-

mise and arrangement was approved — Province brought application for declaration that debt secured by letters of credit was not compromised by plan — Issue arose as to appropriate characterization of portion of province's claim under letters of credit — Claim was secured — Letters of credit were not simply payment devices — Letters of credit provided province with form of security subject to conditions — That insolvency was irrelevant to letter of credit was reflected in s. 11.2 of Act — Province's forbearance in accepting letters of credit in lieu of cash was not waiver of anything other than immediate right to be paid — No evidence that in accepting letters of credit, province agreed to have its claims treated as unsecured — That no immediate enforcement rights of province were being compromised by plan did not convert nature of province's interest to unsecured claim — No implied agreement between province and company that debt underlying secured claims could be compromised by intervening events other than tax appeals — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.2.

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Effect of arrangement — General

Company self-assessed its tax liabilities and made instalment payments under provincial statutes — Province assessed company for taxes owing — Company filed notices of objections and appeals were ongoing — Company provided province with letters of credit to secure assessments under appeal — Company received protection under Companies' Creditors Arrangement Act — Company included province in list of "affected unsecured claims" — Province's claim was for greater amount than letters of credit — Company's plan of compromise and arrangement was approved — Province brought application for declaration that debt secured by letters of credit was not compromised by plan — Application granted — Plan made no express reference to letters of credit — Company provided no evidence that compromise of entirety of province's claim was required for company's ongoing survival or formed integral part of whole plan — No evidence that interpreting plan in manner proposed by province would be prejudicial to company — No evidence of prejudice to company's creditors — No suggestion of damage to integrity of plan — Disregarding letters of credit in company's insolvent circumstances was inconsistent with rationale of particular security devices — Compromising entirety of province's claim was inconsistent with general concept of plan — Company's interpretation resulted in anomalous treatment of secured creditor under plan — No evidence that any other secured creditor was included in "affected unsecured creditors" list — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Cases considered by *Romaine J.*:

Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 11, 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303 (Ont. C.A.) — considered

Algoma Steel Corp. v. Royal Bank (1992), 94 D.L.R. (4th) vii, 10 O.R. (3d) xv, (sub nom. *Royal Insurance Co. of Canada v. Kelsey-Hayes Canada Ltd.)* 145 N.R. 391 (note), (sub nom. *Royal Insurance Co. of Canada v. Kelsey-Hayes Canada Ltd.)* 59 O.A.C. 326 (note) (S.C.C.) — referred to

Armbro Enterprises Inc., Re (1993), 22 C.B.R. (3d) 80 (Ont. Bktcy.) — distinguished

Canada Deposit Insurance Corp. v. Canadian Commercial Bank, (sub nom. *Barclays Bank of Canada v. Canadian Commercial Bank (Liquidation))* 232 A.R. 235, (sub nom. *Barclays Bank of Canada v. Canadian Commercial Bank (Liquidation))* 195 W.A.C. 235, (sub nom. *Barclays Bank of Canada v. Canadian Commercial Bank (Liquidator of))* 173 D.L.R. (4th) 309, (sub nom. *Barclays Bank of Canada v. Canadian Commercial Bank (Liquidator of))* 70 Alta. L.R. (3d) 69, [1999] 10 W.W.R. 704, 10 C.B.R. (4th) 70 (Alta. C.A.) — referred to

Canadian Airlines Corp., Re, 2000 ABQB 442, [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201 (Alta. Q.B.) — considered

2001 CarswellAlta 1488, 2001 ABQB 983, [2002] A.W.L.D. 43, 29 C.B.R. (4th) 236, [2002] 3 W.W.R. 373, 98 Alta. L.R. (3d) 277, 306 A.R. 124

Canadian Airlines Corp., Re (2000), 2001 ABCA 9, 2000 CarswellAlta 1556, 277 A.R. 179, 242 W.A.C. 179, 88 Alta. L.R. (3d) 8, [2001] 4 W.W.R. 1, [2000] A.J. No. 1028 (Alta. C.A.) — referred to

Canadian Airlines Corp., Re, 2001 CarswellAlta 888, 2001 CarswellAlta 889, [2001] S.C.C.A. No. 60 (S.C.C.) — referred to

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136 (B.C. C.A.) — considered

Horizon Village Corp., Canada, Re (1991), 8 C.B.R. (3d) 25, 82 Alta. L.R. (2d) 152, 122 A.R. 348 (Alta. Q.B.) — considered

Keddy Motor Inns Ltd., Re (1992), 90 D.L.R. (4th) 175, 13 C.B.R. (3d) 245, 6 B.L.R. (2d) 116, (sub nom. *Keddy Motor Inns Ltd., Re (No. 4))* 110 N.S.R. (2d) 246, (sub nom. *Keddy Motor Inns Ltd., Re (No. 4))* 299 A.P.R. 246 (N.S. C.A.) — considered

Lindsay v. Transtec Canada Ltd. (1994), 28 C.B.R. (3d) 110, 5 C.C.P.B. 219, [1995] 2 W.W.R. 404, 99 B.C.L.R. (2d) 73 (B.C. S.C.) — considered

Lindsay v. Transtec Canada Ltd., 2 B.C.L.R. (3d) 304, [1995] 4 W.W.R. 364, 31 C.B.R. (3d) 157 (B.C. C.A.) — referred to

Meridian Development Inc. v. Toronto Dominion Bank, [1984] 5 W.W.R. 215, 52 C.B.R. (N.S.) 109, 32 Alta. L.R. (2d) 150, 53 A.R. 39, 11 D.L.R. (4th) 576 (Alta. Q.B.) — considered

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20, 72 C.R. (N.S.) 20 (Alta. Q.B.) — considered

NsC Diesel Power Inc., Re (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (N.S. T.D.) — considered

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1, (sub nom. *Olympia & York Developments Ltd., Re)* 12 O.R. (3d) 500 (Ont. Gen. Div.) — considered

Ontario v. Canadian Airlines Corp. (2000), (sub nom. *Canadian Airlines Corp., Re)* 276 A.R. 273 (Alta. Q.B.) — considered

366604 Alberta Ltd. (Trustee of) v. Pensionfund Properties Ltd. (1996), 39 C.B.R. (3d) 134 (Alta. Q.B.) — considered

366604 Alberta Ltd. (Trustee of) v. Pensionfund Properties Ltd. (1998), (sub nom. *366604 Alberta Ltd. (Bankrupt) v. Pensionfund Properties Ltd.)* 228 A.R. 59, (sub nom. *366604 Alberta Ltd. (Bankrupt) v. Pensionfund Properties Ltd.)* 188 W.A.C. 59, 7 C.B.R. (4th) 42 (Alta. C.A.) — referred to

885676 Ontario Ltd. (Trustee of) v. Frasmet Holdings Ltd. (1993), 17 C.B.R. (3d) 64, 12 O.R. (3d) 62, 99 D.L.R. (4th) 1, 30 R.P.R. (2d) 1 (Ont. Gen. Div. [Commercial List]) — considered

Statutes considered:

2001 CarswellAlta 1488, 2001 ABQB 983, [2002] A.W.L.D. 43, 29 C.B.R. (4th) 236, [2002] 3 W.W.R. 373, 98 Alta. L.R. (3d) 277, 306 A.R. 124

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

Generally — considered

s. 6 — considered

s. 7 — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

Corporations Tax Act, R.S.O. 1990, c. C.40

s. 81 [rep. & sub. 1994, c. 14, s. 39(1)] — considered

s. 103 — considered

Retail Sales Tax Act, R.S.O. 1990, c. R.31

ss. 18-20 — referred to

s. 18(9) [en. 1994, c. 13, s. 13] — referred to

s. 19(1) [rep. & sub. 1999, c. 9, s. 186] — referred to

s. 19(4) [am. 1994, c. 13, s. 14(2)] — referred to

s. 20(10) [am. 1994, c. 13, s. 15(3)] — referred to

s. 37(2) — considered

APPLICATION by province for declaraion that portion of debt secured by letters of credit was not compromised by company's plan of compromise and arrangement.

Romaine J.:

INTRODUCTION

1 Her Majesty the Queen in Right of the Province of Ontario ("Ontario") seeks an order for the following relief:

a. a declaration that the portion of the debt owed by Canadian Airlines International Ltd. ("Canadian") to Ontario as secured by three letters of credit is not compromised by the Amended and Restated Plan of Compromise and Arrangement (the "Plan") filed by Canadian Airlines Corporation and Canadian Airlines International Ltd. on May 25, 2000;

b. in the alternative, a declaration that the Plan allows the tax liability secured by the letters of credit to be considered a secured claim and that Canadian is liable for the full amount thereof up to the face value of the letters of credit;

c. in the further alternative, an order varying the Plan to permit the tax liability secured by the letters of credit to be considered a secured claim and directing that Canadian is liable for the full amount thereof up to the value of the letters of credit.

FACTS

2 The relationship between the parties and the background to this application were set out succinctly by Paperny J.(as she then was) in an earlier, related application as follows:

Canadian Airlines International Ltd. ("Canadian") has followed a practice of self-assessing its tax liabilities and has made installment payments of tax under two Ontario statutes, the Retail Sales Tax Act and the Corporations Tax Act. Pursuant to an ongoing auditing process, Ontario has assessed Canadian for taxes owing under these two statutes. The assessments date back as far as 1981. Following the assessments, Canadian filed eight notices of objection and appeals are ongoing. Canadian has provided Ontario with three separate letters of credit to secure the assessments under appeal. The letters of credit have been renewed at least once.

Ontario estimates the total assessments at approximately $2 million. This may be subject to adjustment due to ongoing audits and the failure of Canadian to have completed its 1999 and 2000 tax returns. Canadian has disputed these assessments from the outset and as stated in the affidavit of Nhan Le, Canadian's Director of Taxation, is of the view that its liability to Ontario for these taxes is contingent and negligible. In short, the tax liability of Canadian to Ontario has been in dispute for several years.

Canadian received court protection under the Companies' Creditors Arrangement Act on March 24, 2000.

Canadian included Ontario in its list of "Affected Unsecured Claims" and quantified Ontario's claim at zero. Contrary to paragraph 27 of the March 24, 2000 order, Ontario was not served with a copy.

Ontario did not receive a copy of the March 24, 2000 order until it received it as part of the voting package sent out in accordance with my April 7, 2000 order in these proceedings. The package was mailed on April 25, 2000, the last possible day under the terms of the April 7, 2000 order and arrived in the mail room of the Corporations Tax Branch of the Revenue Division of Ontario on May 2, 2000, three days before the Claims Bar Date set in that order. The Revenue Division has nine branches. According to the affidavit of Rosita Vinkovic, Senior Collections Officer for the Bankruptcy and Insolvency Unit in the Collections and Compliance Branch of the Ministry of Finance, the normal procedure is for insolvency related documents to be mailed directly to the Insolvency Unit, not to the Corporations Tax Branch. According to Ms. Vinkovic, a notice to this effect was published by the Minister of Finance in a 1997 newsletter of the Canadian Insolvency Practitioners' Association. . .

The voting package did not make its way to the Insolvency Unit until May 18, 2000. Despite extensive inquiries, Ms. Vinkovic has been unable to determine the reason for this delay. The collection officer in the Insolvency Unit that received the package on May 18, 2000 did not have an opportunity to review it in its entirety until May 23, 2000, the first business day after the long weekend (and the date that a second package was sent by the monitor to the Ministry of Finance public inquiry desk and directly routed to the Insolvency Unit).

As Senior Collections Officer, Ms. Vinkovic was assigned to handle the matter on May 25, 2000. She immediately noted the May 5, 2000 Claims Bar Date and a proof of claim along with copies of the letters of credit were faxed to the monitor that same day. The amount claimed was expressed as preliminary due to the ongoing audit, which was lengthy due to the extent of Canadian's operations and its failure to timely respond to requests for information and documents. The monitor initially advised Ms. Vinkovic that the claim would not be accepted as it was past the Claims Bar Date, but changed its position upon being advised of the related security.

> On June 19, 2000, nearly one month later, Ontario received a letter from Canadian's counsel advising that its claim would not be accepted because it was submitted after the Claims Bar Date. Ms. Vinkovic was away on vacation from June 23, 2000 until July 10th. On her return on the 10th she read the June 19th letter and immediately sent a request for assistance to Joel Weintraub, Senior Legal Counsel in the Legal Services Branch. Mr. Weintraub contacted the Alberta firm that had handled a similar claim for the BC government and a request was sent to the Assistant Deputy Attorney General for Ontario to authorize the retention of outside counsel. Mr. Robinson advised that he was retained September 14, 2000 and immediately advised Canadian's counsel of his intention to bring [an application to extend time to file a proof of claim] but that it would take some time to prepare the necessary material and have it sworn. *Ontario v. Canadian Airlines Corp.* (2000), 276 A.R. 273 (Alta. Q.B.) paras.2 - 9;

3 Paperny J. heard the application to extend time to file a proof of claim and granted leave to Ontario to file its claim on November 7, 2000. She found that in the circumstances, Ontario's delay in filing its claim was due to inadvertence and not an attempt to circumvent the CCAA process or gain an advantage over other creditors. She also found that Canadian had contributed to the delay by its conduct: Canadian failed to serve Ontario with the March 24, 2000 order, it did not mail the voting package until the last possible day, it mailed it to the wrong office and waited until the last day of the sanction hearing, nearly one month after receiving Ontario's claim, to notify Ontario that its claim was rejected . She found no prejudice to Canadian or Air Canada, the funder of the Plan as they were specifically aware of the existence of Ontario's claim, and were, in fact, attempting to use the delay to avoid resolving the dispute with Ontario. Paperny J. found for these reasons it was not unfair to the funder of the Plan, Air Canada, to deal with Ontario's claim after the claims bar date.

4 The proof of claim faxed by Ontario to the monitor on May 25, 2000 divided Ontario's claim between an unsecured portion and a secured portion, and referred to a letter of credit. As it had been prepared in a hurry, the amount claimed was in error. Paperny J. allowed Ontario to file an amended claim and also allowed further amendments that may become necessary due to the late filing of Canadian's 1999 and 2000 tax returns. Ontario's amended claim is for $2,064,444.19. The three letters of credit lodged with Ontario total $1,248,324.84.

5 Canadian's position is that the effect of its Plan is that the debt due to Ontario, once quantified, is compromised in its entirety from $1.00 of proven claim to $0.14, as with all other Affected Unsecured Claims, and that the letters of credit only facilitate the payment of the reduced indebtedness. Ontario's position is that the only amount that is compromised by the Plan is the deficiency remaining after applying the amount of security represented by the letters of credit held by Ontario.

6 The Plan was approved at a meeting of affected creditors held on May 26, 2000, and was sanctioned by Paperny J. on June 27, 2000 after an extensive hearing that commenced on June 5, 2000. The last day of the hearing was June 19, 2000, the same day that Canadian advised Ontario that it was rejecting its claim as being out of time and not prepared in the proper form. Although there is no question that Canadian was aware of Ontario's claim and the provision of letters of credit, there is no reference to the letters of credit in the Plan or in the evidence that was put before the court in the sanction hearing.

ISSUES

7 The issues that arise in this application are as follows:

(1) What is the appropriate characterization of the letters of credit?

(2) What is the effect of the Plan on Ontario's claim and the letters of credit?

(3) If the Plan compromises the whole of Ontario's claim, should Ontario be granted relief from such compro-

mise, in the form of an amendment to the Plan?

ANALYSIS

1. What is the appropriate characterization of the letters of credit?

8 The parties agreed that the letters of credit held by Ontario are not obligations that are compromised by the Plan: *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 11 D.L.R. (4th) 576 (Alta. Q.B.); Section 11.2 of the *Companies Creditors Arrangement Act*, R.C.C. 1985 c.C-36, as amended. However, Canadian submitted that the Plan compromises the underlying debt, and the letters of credit operate only to facilitate the payment of Ontario's post-compromise debt and have no other effect on the nature of Ontario's claim. This interpretation of the nature of the letters of credit and the limitation of their effect is the expressed rationale for the inclusion of Ontario's claim in the "Affected Unsecured Claims" category and the lack of any reference to the letters of credit in the Plan that was put before the court for sanction.

9 Canadian submitted that such possession does not convert what it characterizes as an unsecured claim into some kind of secured claim. It argued that, since the letters of credit are not security interests in the assets of Canadian, but rather separate obligations between the relevant banks and Ontario, Ontario's claim is not secured.

10 I disagree with Canadian's characterization of the letters of credit and their effect on the nature of the relationship between Canadian and Ontario.

11 In suggesting that Ontario's claim is unsecured, Canadian appears to be including in the definition of "secured" the requirement that any security must be in the assets of Canadian. While that may be so in the context of the Plan drafted by Canadian, letters of credit are commonly used and recognized by the courts as a form of security: *885676 Ontario Ltd. (Trustee of) v. Frasmet Holdings Ltd.* (1993), 17 C.B.R. (3d) 64 (Ont. Gen. Div. [Commercial List]) at para. 35; *Meridian Development Inc.*, supra, at pp. 585 and 587; *Canada Deposit Insurance Corp. v. Canadian Commercial Bank* (1999), 232 A.R. 235 (Alta. C.A.). As pointed out by Blair, J. in *Frasmet*, supra, at para. 27:

> [t]here is a fundamental difference between a letter of credit, which is a very specialized form of security, and a guarantee, which is not a form of security at all (except in a loose, non-legal sense of the term).

12 Wachowich J. (as he then was) recognized the distinction between the use of letters of credit as security and as guarantees at p. 585 of *Meridian Development Inc.*:

> [*Aspen Planners Ltd. v. Commerce Masonry & Forming Ltd.* (1979), 100 D.L.R. (3d) 546 (Ont. H.C.)], as do the English cases cited by counsel, exemplifies the more traditional use of the letter to guarantee payment in commercial transactions where goods and services are bought and sold.
>
> Here, however, a more novel use has been made of the letter of credit as a security device...

13 Kevin McGuinness, in his text ***The Law of Guarantee*** (Scarborough: Carswell, 1996) emphasizes the difference between the payment and security functions of letters of credit at 815:

> In the case of a traditional letter of credit...[it] provides a payment facilitating mechanism...Thus the letter of credit is not intended as a security for payment...
>
> In contrast, a stand-by credit is not furnished as a means of making payment, but as a method of providing security against the possibility of default.

Although Canadian agreed that the letters of credit it posted are "standby" (or security) letters of credit, it attempts to characterize them as simply payment devices. I do not agree.

14 While counsel for Air Canada also submitted that a letter of credit is basically a guarantee, that is not how it was characterized in *Frasmet*, supra and *Meridian Development Inc.*, supra and properly so, since an irrevocable standby letter of credit such as those held by Ontario represents the equivalent of cash, the advance of which is subject to the satisfaction of certain conditions.

15 The legislation under which the tax is payable to Ontario and the letters of credit were posted confirm that the letters of credit were provided as security. The *Corporations Tax Act, R.S.O. 1990, c. C-40*, as amended by S.O. 1994, c. 14, s. 39(1) provides in s. 81 that:

> Every corporation shall pay, immediately on receipt of a notice of assessment or reassessment or of a statement of account in respect of a taxation year, any part of the tax, interest, penalties and any other amounts then unpaid in respect of the taxation year, whether or not an objection to or an appeal from an assessment in respect of the taxation year is outstanding.

16 Section 103 of that Act provides that the Minister may accept security in lieu of this immediate payment:

> The Minister may, if he or she considers it advisable, accept security for the payment of taxes by a corporation by way of a mortgage or other charge of any kind upon the property of the corporation or of any other person, or by way of a guarantee of the payment of the taxes by another person.

17 The *Retail Sales Tax Act,* R.S.O. 1990, c. R-31, as amended by S.O. 1994, c. 13, ss 13, 14(2), 15(3), S.O. 1999, C. 9, s. 186 contains similar provisions for the immediate payment of assessed tax notwithstanding an objection by the taxpayer in ss. 18-20. Section 37(2) provides that "[w]here the Minister considers it advisable to do so, the Minister may accept security for the payment of taxes in any form that the Minister considers satisfactory".

18 In short, although Ontario's claim may not have been characterized as "secured" by Canadian in the Plan, the letters of credit provide Ontario with a form of security, albeit subject to certain conditions.

19 The letters of credit require Ontario to provide either a drawing certificate stating that the amount being drawn is "due and payable in accordance with the provisions of the [Ontario Retail Sales] Act" and remains unpaid, or a written demand stating that the amount demanded is "payable and the taxpayer has failed to pay it." The parties agreed that until decisions have been rendered in the tax appeals, no amounts are payable, and Ontario is therefore precluded from drawing on the letters of credit until that time. Canadian submitted that the effect of this agreed-upon forbearance by Ontario is that the underlying debt is subject, not only to potential reduction by virtue of the tax appeals in Ontario, but also to reduction by compromise in the CCAA proceedings. To hold otherwise, Canadian suggested, flies in the face of the explicit wording of the letters of credit and is an attempt to improve Ontario's pre-CCAA entitlement.

20 A finding that the requirement to provide a written confirmation of the amount of debt owing prior to drawing on a letter of credit renders the underlying debt subject to compromise through CCAA proceedings would undermine the commercial purpose of such instruments and frustrate their objectives. It would render any security provided by a letter of credit meaningless in the very situation it has been obtained to alleviate. As stated by Blair J. in *Frasmet*, supra at para. 36:

> In the case at bar, the stated purpose of the letter of credit is to secure Standford's obligations under the lease. It can scarcely be gain-said that an event which is sure to impair a tenant's ability to honour its obligations under

> the lease is its bankruptcy. Why should Frasmet, which had obtained for itself a stand-by letter of credit as collateral security in connection with the lease transaction, be precluded from calling upon that security when the very kind of situation for which security is most likely necessary arises? In my view, in the circumstances of this case, it should not be so precluded.

21 In *Frasmet*, supra, while the tenant's bankruptcy terminated its continuing obligations to pay rent, Blair J. found that there were other obligations under the lease that arose upon default, including accelerated rent, damages arising out of the breach and the landlord's right to recoup capital expenditures on leasehold improvements made at the outset of the lease. Blair J. allowed the landlord to draw upon the letter of credit, stating at para. 40 that:

> [w]hile the bankruptcy of Stanford and the subsequent disclaimer of the lease by the Trustee may release the Tenant and its Trustee from those obligations, they cannot in my opinion, deprive the landlord from having resort to the security for which it bargained in order to protect itself in the case of the very kind of eventuality which has occurred.

22 Similarly, in *366604 Alberta Ltd. (Trustee of) v. Pensionfund Properties Ltd.* (1996), 39 C.B.R. (3d) 134 (Alta. Q.B.), aff'd(1998), 7 C.B.R. (4th) 42 (Alta. C.A.), Smith J. found that the bankruptcy of a tenant did not affect the right of a landlord to call on a letter of credit issued as security for the repayment of a cash inducement. Smith J. found that the landlord was entitled to call on the letter of credit "irrespective of any dispute arising as to entitlement to the fund." (p.137). A letter of credit is "a form of security which may be called upon by the secured creditor when the event for which the security has been given occurs, without regard to the circumstances existing between the parties to the underlying transaction": *Frasmet*, para. 35.

23 That insolvency is irrelevant to a letter of credit is reflected in s. 11.2 of the CCAA:

> No order may be made under section 11 staying or restraining any action, suit or proceeding against a person, other than a debtor company in respect of which an application has been made under this Act, who is obligated under a letter of credit or guarantee in relation to the company.

24 Canadian submited that, as the provision of a letter of credit involves three separate contracts (*Meridian Development Inc.*, supra at 586), it is necessary that I determine the terms of the contract between Ontario and Canadian. Canadian suggested that, based on the specific wording of the letters of credit, I should find that one term of such contract is that Ontario could not call on the letters of credit as long as they were kept current and until the final amount of tax debt owing by Canadian to Ontario was determined. Canadian then submitted that I should take an additional step and find that Ontario's forbearance is subject, not only to the result of the tax appeals, but to reduction of the claims pursuant to compromise in these proceedings. The argument is that, since Ontario has by its forbearance waived its right to immediate payment of the tax assessed, it has somehow without more left itself open to reduction of its claim through the Plan.

25 The answer to this argument again lies with the nature of the letters of credit and the nature of Canadian's obligation to the taxing authorities. Had Ontario not accepted the letters of credit from Canadian, Canadian would have been obliged to pay the entire amount of tax assessed pending the outcome of its appeals of the assessments, resulting in no debt to be compromised. Forbearance by Ontario in recognition of the possibility that Canadian's appeals of the assessments may be successful is not the equivalent of acceptance of the risk of Canadian's intervening insolvency. As set out by Lazar Sarna in the text ***Letters of Credit : The Law and Current Practice*** at p. 5-25 (quoted in *366604 Alberta Ltd. (Trustee of) v. Pensionfund Properties Ltd.*, supra at para. 11 (Q.B.):

> . . .[O]ne of the fundamental commercial reasons for the use of the letter of credit mechanism is to secure anticipated payments in a manner which would not rely upon the will, status or financial faith of the applicant.

2001 CarswellAlta 1488, 2001 ABQB 983, [2002] A.W.L.D. 43, 29 C.B.R. (4th) 236, [2002] 3 W.W.R. 373, 98 Alta. L.R. (3d) 277, 306 A.R. 124

26 I cannot find that Ontario's forbearance in accepting the letters of credit in lieu of cash was a waiver of anything other than an immediate right to be paid. Its forbearance is to delay such right until after the appeals have been concluded, for the amount determined to be payable on appeal. There is no evidence of any greater forbearance, either in the letters of credit or otherwise before me, and certainly no evidence that, in accepting the letters of credit, Ontario agreed to have its claims treated as unsecured. The nature of the letters of credit dictates the opposite conclusion, as does Ontario's response to that characterization when it finally became aware of how it was being treated under the Plan.

27 Canadian also sought to draw a distinction between Ontario's claim and other secured claims by noting that this is not a case in which Canadian has committed an act of default under a security agreement such that Ontario would be in a position to enforce its security rights. Ontario must still wait for the outcome of the tax appeals before drawing on the letters of credit. However, the fact that no immediate enforcement rights of Ontario are being compromised by the Plan does not convert the nature of Ontario's interest from a secured claim to an unsecured claim.

28 Canadian submitted that Ontario is seeking relief from the terms of its own letters of credit, in that it is asking to change the terms of the bargain it struck with Canadian upon acceptance of the letters of credit. I reject that submission and find the converse; Ontario is asking that the bargain be honoured. Ontario did not ask for any amendment to the letters of credit, but for recognition of the secured nature of part of its claim. Ontario argued that once that question is settled, the letters of credit can be exercised in due course after the appeals have been concluded and any difficulty arising from the necessity of making representations in a draw-down certificate or written demand will be resolved.

29 For the reasons discussed, I find that a portion of Ontario's claim is indeed secured, and that there was no implied agreement between Ontario and Canadian that the debt underlying the secured portion of the claims could be compromised by intervening events other than the tax appeals.

30 Despite this, there is no reference to the letters of credit anywhere in the Plan, nor any suggestion that Ontario's claim may be anything other than entirely unsecured. It is clear that Canadian had full knowledge of the letters of credit, and of the position taken by Ontario in its May 25, 2000 form of claim, that it was secured for part of its claim.

31 The court sanctioning the Plan did not have knowledge of Ontario's position, or the form of security that distinguished Ontario's claim from other, apparently unsecured claims in the same category. It is clear that the court proceeded on the assumption that Ontario's claim was completely unsecured, on the basis of an aggressive characterization of the letters of credit by Canadian. The question then becomes, what effect does the Plan have on Ontario's claim and the letters of credit? Specifically, it must be determined whether an interpretation of the Plan which disregards the security arrangements made between these parties should be adopted.

2. What is the effect of the Plan on Ontario's claim and the letters of credit?

32 After court approval of a CCAA plan, an application for directions may be made if a difficulty arises in its interpretation or application: *Re Horizon Village Corp., Canada* (1991), 8 C.B.R. (3d) 25 (Alta. Q.B.).

33 In that case, Wachowich J. (as he then was) was asked to interpret a court-sanctioned plan with respect to a federal tax rebate that had arisen in favour of the debtor company. The court-appointed manager sought a declaration that the rebate formed part of the estate of the debtor company. A secured creditor argued that it was entitled to the rebate because it held an assignment of the rebate as collateral security. Wachowich J. found in favour of the secured creditor.

34 He stated that as a starting point in such applications, the court must always keep in mind the purpose and

effect of the CCAA: para. 5. He referred to the wide scope of the legislation in granting protection to debtor companies and enabling them to continue carrying on business. Commensurate with the court's protection of debtors under the CCAA, Wachowich J. noted, is the court's desire not to prejudice creditors: para. 7, quoting from *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1 (N.S. T.D.) at p. 6: "[the CCAA] was, in my view, never intended to disadvantage any group which, but for the Act, would have enjoyed rights and priorities vis-a-vis the debtor or the debtor's assets."

35 Wachowich J. found that the plan before him did not expressly refer to either the secured creditor's collateral security interest in the rebate, nor to the rebate itself. The rebate was not a source of funds contemplated by the plan. He considered, however, that the collateral security interest or the rebate might be impliedly included in the plan. He held that the court will be reluctant to imply terms which will alter the legal relationship between parties, but will do so if the purposes of the CCAA and any plan made under the CCAA will be defeated without such implied terms. He concluded that there were no implied inclusions in regard to the rebate, specifically rejecting that the rebate was impliedly caught by the plan's use of the words "proceeds of sale" or "funds generated".

36 The aim of minimizing prejudice to creditors embodied in the CCAA is a reflection of the cardinal principle of insolvency law: that relative entitlements created before insolvency are preserved: R. Goode, ***Principles of Corporate Insolvency Law***, 2nd ed. (London:Sweet & Maxwell, 1997) at 54. While the CCAA may qualify this principle, it does so only when it is consistent with the purpose of facilitating debtor reorganization and ongoing survival, and in the spirit of what is fair and reasonable.

37 Paperny J. (as she then was) also discussed the purpose of the CCAA in *Re Canadian Airlines Corp.* (2000), 265 A.R. 201 (Alta. Q.B.), aff'd [2000] A.J. No. 1028 (Alta. C.A.), leave refused [2001] S.C.C.A. No. 60 (S.C.C.). At para. 95, she stated that the purpose of the CCAA is to facilitate the reorganization of debtor companies for the benefit of a broad range of constituents.

38 Paperny J. also noted at para. 95 that, in dealing with applications under the CCAA, the court has a wide discretion to ensure the objectives of the CCAA are met. At para. 94, she identified guidance for the exercise of this discretion in *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.) at p. 9 as follows:

> "Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the Companies' Creditors Arrangement Act. Fairness is the quintessential expression of the court's equitable jurisdiction - although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation which make its exercise an exercise in equity - and "reasonableness" is what lends objectivity to the process.

39 In addition to the purposes of the CCAA and the principles which guide the court's role in proceedings under that statute, the overall purpose and intention of the plan in question will also be considered by the court when faced with disputes in interpretation: *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C. S.C.), aff'd(1995), 31 C.B.R. (3d) 157 (B.C. C.A.)

40 With these guiding principles in mind, I now turn to the interpretation of the Plan.

41 As referenced above, Canadian submitted that the Plan must be interpreted as compromising the entirety of Ontario's claim, not just the portion remaining after the application of letters of credit. Its position is summarized in a letter sent by its counsel to Ontario's counsel, Exhibit "C" to the affidavit of Ontario's deponent, Susan Scarlett:

> ...We note that, in Canadian's...Plan, ..., approved by the Order of Madam Justice M.S. Paperny dated June 27, 2000, all Affected Unsecured Creditors (i.e. holders of Affected Unsecured Claims- art. 1.1) are to receive

> $0.14 for each $1.00 of Proven Unsecured Claim (arts. 1.1, 5.1(a)). "Affected Unsecured Claims" is defined in art. 1.1 as "all Claims listed in Part I of the Affected Unsecured Claims List or all Claims of any Person listed in Part II of the Affected Unsecured Claims List...". Your client is covered by each alternative branch in that definition. Listed at para. 2 of Part I of the Unsecured Claims List is "Claims in respect of any Tax Claims including, without limitation, those Claims listed on Part "II" to this Schedule "B". As well, Ontario is a person listed in Part II of the Affected Unsecured Claims List. The definition of "Tax Claim" (at art. 1.1 of the Plan) includes the following words:
>
> > "Tax Claims" means any and all Claims for Taxes by any...provincial...authority, agency or government (including, without limitation, any and all Claims for Taxes by ...Her Majesty the Queen in right of any province or territory of Canada...) ... in respect of any taxation year or period ending on or before the Effective Date...
>
> Thus, the entirety of your client's claim is an Affected Unsecured Claim, and your client will receive in payment thereof, $0.14 per $1.00 of Proven Claim.

42 Ontario suggested that the Plan should be interpreted as including the secured portion of its claim in the "Noteholders Claims List" under the Plan, which is characterized as secured. It pointed out that the Plan defines the "Noteholders Claims List" as "the list of Affected Secured Note Claims attached hereto as Schedule "C", as amended or supplemented from time to time as provided in the Creditors' Meetings Order". From that language, Ontario submitted that it is clear that the list of Noteholders was not intended to be complete or final. It also suggested that the secured portion of Ontario's claim could be considered to be an "unknown" claim in accordance with the definition of "Claims" under the Plan, and that, therefore, the addition of its claim to the Noteholders Claims List would not offend the Plan as sanctioned.

43 I disagree with Canadian's suggestion that its interpretation is the only or most reasonable interpretation of the Plan. I also do not find the interpretation suggested by Ontario to be persuasive. I do agree, however, with Ontario's position as reflected in the first ground of relief sought in this application, as paraphrased at the outset of these reasons: the Plan only compromises the balance of Ontario's claim after the letters of credit are applied. In my view, the language of the Plan, the general concept of the Plan as a whole and the purpose and philosophy of the CCAA support this result.

44 Although the Plan is capable of the interpretation that Canadian suggested, I find that interpretation should not be adopted in view of the purpose of the CCAA and the whole of the Plan itself. Specifically:

a. The Plan makes no express reference to the letters of credit. Implying that the treatment of Ontario's claim is entirely unsecured is not necessary to avoid defeating the purpose of the CCAA and the Plan. Canadian has not suggested nor provided any evidence that the compromise of the entirety of Ontario's claim is required for its ongoing survival, or formed an integral part of the whole of the Plan.

b. Not only is there is no evidence or suggestion that interpreting the Plan in the manner Ontario proposed would be prejudicial to Canadian or Air Canada, there is no evidence of prejudice to Canadian's creditors, nor can there be any suggestion of damage to the integrity of the Plan.

c. While certainly the alteration of legal relationships between creditors and debtors is a necessary incident of CCAA plans, the court also endeavours to minimize to the extent possible prejudice to creditors: *Horizon Village Corp., Canada (Re)*, supra. Canadian's interpretation is inconsistent with this goal.

d. The premise of Canadian's position is that the Plan compromises only the underlying debt to Ontario and leaves intact the letters of credit, which are mere payment devices. This wholly disregards the reality of the se-

curity Canadian granted to Ontario pre-CCAA to avoid immediate payment of assessed tax, as well as the entire concept of the Plan, described below. This technical approach is to be discouraged in CCAA proceedings: *Lindsay v. Transtec Canada Ltd.*, supra at para. 26.

e. Disregarding the letters of credit in Canadian's insolvent circumstances is wholly inconsistent with the rationale of these particular security devices. Letters of credit are obtained to secure payments in a manner that does not rely on the financial position of the applicant. As recognized in s. 11.2 of the CCAA, letters of credit are designed to operate outside and not be subject to the compromises typically involved in insolvency.

f. Compromising the entirety of Ontario's claim, which in effect deprives Ontario of much of the value of its security, is inconsistent with the general concept of the Plan. This was to compromise the claims of certain of Canadian's unsecured creditors to the extent of 86 cents per dollar of proven claims (with no cap on total proven unsecured claims) and to compromise the claims of Affected Secured Noteholders to the extent of 3 cents per dollar of proven claims and allowing those secured creditors to receive the unsecured dividend on the deficiency.

g. Canadian's interpretation results in anomalous treatment of a secured creditor and tax claimant under the Plan. It treats a secured creditor as an unsecured creditor in compromising its entire claim at 14 cents on the dollar, while only the deficiency portion of the other secured creditors under the Plan (Affected Secured Noteholders) are treated in this fashion. Further, there is no evidence that any other secured creditor is included in the Affected Unsecured Creditors list, except for Ontario and the Affected Secured Noteholders (and then only to the extent of the deficiency). Similarly, there is no evidence that any other tax claimant was secured but deprived of that security by having the entirety of its claim compromised.

For these reasons and the reasons that follow, Canadian's interpretation is not fair and reasonable.

45 As noted, I am not persuaded by Ontario's suggested interpretation of the Plan. It would be a strained interpretation to include Ontario's secured claim with those of the Affected Secured Noteholders. It is not consistent with the overall concept of the Plan, as described above. It also appears that it is no longer possible to amend the Noteholders Claims List, since the power to do so expired on May 15, 2000.

46 However, the Plan can and should be interpreted as excluding secured claims from compromise as "Affected Unsecured Claims". Rather, the only secured claims compromised under the terms of the Plan are those of the Affected Secured Noteholders. These notes represented a principal debt to Canadian of US$ 175,000,000.00 with a provision that could increase the obligation to US $190,000,000.00. It is obvious why the compromise of those secured claims was integral to the success of the Plan and the ability of Canadian to carry on business.

47 While the Plan's definition of "Claim" is broad and refers to both unsecured and secured claims, the way the Plan was drafted requires that the term "Claim" be used in relation to both the secured (the "Affected Secured Note Claims") and the unsecured (the "Affected Unsecured Claims") claims. These two categories constitute the classification of compromised claims under the Plan (Section 5.1). It is true that "Tax Claims" are included within the definition of "Affected Unsecured Claims" and arguably the use of the word "Claims" in conjunction with "Tax" could incorporate a compromise of a secured claim. That result, however, amounts to including the whole of an apparently isolated secured claim, which is not an Affected Secured Note Claim, in a group of unsecured claims. There is no evidence before me to suggest that there are any other creditors in the Affected Unsecured Claims List that hold security, except for Ontario and creditors holding Senior Secured Notes, to the extent of any deficiency only. There is no other reference in the Plan that would suggest that the Affected Unsecured Creditors include secured claims.

48 The interpretation of the Plan to exclude compromise of secured claims except for those of Affected Secured Noteholders is consistent with the purposes of the CCAA, as well as the Plan itself. The letters of credit are not Ca-

nadian's property and there is no evidence or suggestion that their intended use by Ontario will operate to defeat any aspect of the Plan, nor to prejudice Canadian's ongoing operations. The purpose of the CCAA to facilitate reorganization and ongoing survival of debtor companies is honoured. Honouring Ontario's secured claim is consistent with the general concept of compromising only the claims of unsecured creditors and Affected Secured Noteholders in the Plan.

49 Interpretation of the Plan in this way does not result in an enhancement of Ontario's rights or special treatment under the Plan. It honours the clear security arrangements made prior to the CCAA proceedings and treats the deficiency in a manner identical to the unsecured claims of all affected creditors.

50 Canadian emphasized in its written submissions that it was not compromising a secured claim in its proposed treatment of Ontario under the Plan. Not only did Canadian reject Ontario as a secured creditor, it stressed that the only compromise was of the underlying debt to Ontario. In substance, however, what Canadian hopes to achieve from its suggested interpretation is the effective disregard of Ontario's security. If Canadian had intended to compromise a secured claim within the Affected Unsecured Claims category, this should have been expressed clearly within the terms of the Plan, Ontario should have been expressly notified in a timely fashion, and the court should have been alerted to this anomalous treatment in the sanction hearing. Canadian did none of these things. It now relies on an interpretation of the language of the Plan to support its purported compromise of the whole of Ontario's claim without regard to its security. While I appreciate that CCAA proceedings necessarily change debtor-creditor relationships, this must be done clearly and fairly. Under the circumstances, the court cannot condone the change Canadian is seeking vis-a-vis Ontario's claim.

51 In summary, the evidence is clear that the letters of credit were granted by Canadian well prior to the March 24, 2000 stay order. Ontario's secured claim is not mentioned in the Plan, and the security would be effectively stripped of its value by the application of the Plan as proposed by Canadian, in a fashion that is aberrant to the treatment of any other creditor under the Plan and inconsistent with its general concept. This cannot be right and can be avoided by a reasonable interpretation of the Plan that is consistent with the general concepts of both the CCAA and the Plan.

52 This conclusion is strengthened by the role that Canadian played in the delay surrounding the submission of Ontario's claim, discussed further below.

3. Should Ontario be granted relief from the complete compromise of its claim under the Plan, in the form of an amendment to the Plan?

53 If I was unable to interpret the Plan in a manner which compromises only the unsecured portion of Ontario's claim, I would in any event have considered it appropriate to direct an amendment to the terms of the Plan to effect this result.

54 The Ontario Court of Appeal considered the question of whether the court has jurisdiction to amend a plan of arrangement in *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 11 (Ont. C.A.), leave refused (1992), 10 O.R. (3d) xv (S.C.C.)

55 In that case, the plan of arrangement had been voted upon by creditors and sanctioned by the court, subject to the outcome of the appeal. The court found that, generally speaking, a plan of arrangement is consensual and the result of agreement, and that a plan found to be fair and reasonable ought not be amended by the court unless jurisdiction is found in the CCAA and there are compelling reasons to do so. The court also found that, generally speaking, the court ought not interfere by amendment in situations where to do so would prejudice the interests of the company or the creditors. In the facts of the *Algoma* situation, the court found that an amendment would be insignificant and technical as far as other creditors were concerned, and allowed the plan to be amended.

56 Sections 6 and 7 of the CCAA deal with the authority of the court to sanction a plan of arrangement, and to alter or modify its terms. Section 7 provides that, when an amendment is proposed at any time after meetings of creditors have been summoned, the court may adjourn those meetings or may direct that no adjournment of the meetings or convening of additional meetings is necessary if the court is of the opinion that the creditors or shareholders are not adversely affected by the amendment proposed. Section 7 also provides that any arrangement so altered or modified may be sanctioned under section 6. The Plan was in fact amended pursuant to the authority of Section 7 in this manner by Paperny, J. Section 6 and 7 offer no guidance on whether a court-sanctioned plan may be subsequently amended.

57 As mentioned, the CCAA confers broad discretion on the court and is to be afforded a large and liberal interpretation: *Re Canadian Airlines Corp.*, supra at para 95; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.). It is silent, however, on many procedural issues. Given the lack of legislative guidance, the courts have used the basic purpose of the CCAA as a guide to its application and the exercise of its discretion in disposing of applications under the Act: *Re Canadian Airlines Corp.*, supra at para. 95. The keynote concepts of fairness and reasonableness have been recognized as the driving force behind the CCAA and the court's interpretation and application of the Act: *Re Canadian Airlines Corp.* at para. 95, *Olympia & York Developments Ltd. v. Royal Trust Co.*, supra at p. 9.

58 I have already described that the purposes of the CCAA are honoured in the interpretation of the Plan that would compromise only the unsecured portion of Ontario's claim. Those purposes are equally honoured in an amendment to the Plan to achieve this result. Further, the concepts of fairness and reasonableness are also recognized in such an amendment, in contrast to the existing effect of the Plan if my interpretation were not possible.

59 It would not be fair to Ontario, given the pre-existing arrangements made with Canadian to secure the payment of tax and the process by which it found itself faced with Canadian's attempt to compromise the entirety of its claim (discussed further below), to allow Canadian to succeed in this regard. Moreover, it is not unfair to either Canadian or Air Canada to allow an amendment to effect the result that only the deficiency portion of Ontario's claim is compromised as an unsecured claim. Canadian and Air Canada were well aware of the letters of credit and that Ontario had submitted a form of claim that recognized this security. There is no evidence or assertion of unfairness to any other party.

60 It would similarly not be reasonable to deprive Ontario of its security, as I found would be the effective result if Canadian's interpretation of the Plan were to prevail. While Canadian argued that the security itself is not compromised, that argument does not recognize the reality that if the letters of credit are to be treated as the simple payment mechanisms that Canadian asserted they were, their value is essentially reduced, cent for cent, in a manner identical to unsecured claims under the Plan. Ultimately, the letters of credit would be deprived of their value by Ontario's treatment under the Plan. This is not a reasonable result in view of the whole of the Plan and the anomalous treatment Canadian would have the court inflict on Ontario's secured claim.

61 The CCAA authorizes the court to amend a plan in appropriate circumstances, where there are compelling reasons to do so. Although the Act does not expressly state that such amendment could take place after the Plan is sanctioned, as pointed out in *Algoma*, supra there is no reason to suggest that the CCAA "contemplates a role for the court as a mere rubber stamp or one that is simply administrative rather than judicial." (p.103). While the circumstances justifying an amendment after a sanction hearing ought to be truly exceptional, in recognition of the potential violence done to the laudable goal of commercial certainty, there is no reason why subsequent amendments should be conclusively foreclosed in every case, without examination of the particular circumstances.

62 Are there compelling circumstances in this case that would justify a subsequent amendment? Ontario submitted that there are, in that it would be unfair to compel Ontario to be bound by the unilateral characterization of its

claim by Canadian.

63 The process established by the April 7, 2000 order setting out the claims procedure was unique, in that it allowed Canadian to list its creditors under categories reflecting its opinion of their status. A creditor that did not agree with Canadian's characterization of the nature or amount of its claim was required to file a Dispute Notice.

64 In Ontario's case, for the reasons set out in Paperny J.'s findings of fact, the claims bar date intervened. Ontario filed a Dispute Notice on the basis of a partially secured claim. Ontario did not become aware that Canadian was rejecting its claim as being out of time until the last day evidence was presented at the sanction hearing, and no evidence of Ontario's position was presented to the court at the hearing.

65 While Ontario must bear some responsibility for its systemic internal delays, and while it would have been prudent for Ontario to have been represented at the hearing or to have followed-up its Dispute Notice to ensure that Canadian was in agreement with its claim, it was not aware of the position Canadian would take with respect to the validity of its claim until after the time it would have had an opportunity to appear at the sanction hearing. I note that in Canadian's June 19, 2000 letter to Ontario, it did not suggest that it was also taking the position that the security would not be honoured as originally intended by the parties. This was only raised after Canadian failed to have Ontario's claim barred in the late claim application.

66 Ontario never had a realistic opportunity to present its position to the court before the Plan was sanctioned, and the court was completely unaware of any issue involving the nature of Ontario's claim. It must surely never be the case that a creditor in CCAA proceedings is deprived of the opportunity to present its submissions on the nature and amount of its claim by reasons of procedural irregularities that do not arise from a lack of diligence or good faith. The wide scope and protection offered by the CCAA should not be allowed to operate to disadvantage or prejudice creditors without a fair hearing of their concerns and submissions.

67 This is not a situation, as in *Re Armbro Enterprises Inc.* (1993), 22 C.B.R. (3d) 80 (Ont. Bktcy.), where the creditor had several opportunities to make submissions to the court and to appeal its classification and failed to pursue these options. While it is true that Ontario was aware of its proposed classification under the Plan, and also aware of the sanction hearing at which classification was to be approved, it had taken action to place its position on classification before the monitor and Canadian by filing its Dispute Notice. At the least, it was entitled to assume that, if Canadian disagreed with its position, it would give Ontario notice prior to the conclusion of the sanction hearing. It was not Ontario that was "lying in the weeds" in this case, delaying in the hopes of gaining an advantage.

68 There is no prejudice to other creditors if the Plan is amended as sought by Ontario. As was the case in *Algoma*, supra, the letters of credit are not the property of Canadian and there is no evidence or suggestion that there will be any prejudice or impairment of operations as a result of drawing on the letters of credit. Both Canadian and Air Canada were aware of Ontario's claim, and cannot be said to be prejudiced except to the extent that they disagree with the characterization of the claim. Paperny, J. specifically found no prejudice in the late claim application and also found that Canadian and Air Canada were attempting to use the delay to avoid resolving the dispute with Ontario. As I have stated previously, this is not an attempt by Ontario to improve its pre-insolvency rights, but merely to enforce them.

69 Canadian submitted that Ontario's request for amendment of the Plan is a procedurally improper method of attacking the sanction order. The Canadian process was unusual in that the classification of creditors was approved in the sanction order, and not previously. Canadian submitted that Ontario should have appealed the sanction order as it was the order approving the classification, relying on *Re Keddy Motor Inns Ltd.* (1992), 13 C.B.R. (3d) 245 (N.S. C.A.).

70 The rationale of that case is that, while the proper procedure for attacking a classification order is by way of

appeal from that order and not a subsequent sanction order, because of the overall supervisory duty of the court to ensure fairness of a plan, the court can intervene in the subsequent appeal of the sanction order "if necessary to avert substantial injustice" (para.21). In *Re: Keddy Motor Inns*, supra, the court found the circumstances did not warrant intervention.

71 Shortly before the sanction order was issued, Ontario was advised by Canadian that its claim would not be accepted because it was submitted after the claims bar date. Ontario's next step was to pursue its application for extension of time to file a proof of claim. It was successful in that application, and filed its amended claim, continuing to assert secured status. The decision of Paperny J. allowing Ontario's application does not restrict Ontario to making its claim as an "Affected Unsecured Creditor". In fact, in the decision, Paperny J. refers several times to the letters of credit as "security" for the assessments under appeal. It is arguable that, had Ontario chosen to appeal the sanction order because of the classification of its claim, it would have faced the objection that it lacked status as its claim was time-barred. The process followed by Ontario is not a collateral attack on the sanction order, but the logical outcome of the procedure followed to re-establish its claim.

72 Canadian also submitted that Ontario's classification as an "Affected Unsecured Creditor" is appropriate because it is in the same classification as other Tax Claimants, citing the principle of "commonality of interest" as enunciated by Forsyth, J. in *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.). This is not, however, a case of a secured creditor attempting to be distinguished from other secured creditors, but of a secured creditor attempting to be characterized as secured. The distinction between a secured claim and an unsecured claim is surely sufficient to overcome the "commonality of interest" test.

73 Were it necessary, I would direct that the Plan be amended to provide that the portion of Ontario's claim that is secured by the letters of credit not be compromised.

CONCLUSION

74 In conclusion, I find that the Plan compromises only the unsecured portion of Ontario's claim. If I was unable to make that finding, I would have found compelling reasons in these very unusual circumstances for the court to take the extraordinary step of amending the Plan, even after its sanction. To do otherwise would be to allow Ontario to be prejudiced by a process that was flawed in its operation with respect to Ontario's claim. Canadian and Air Canada were aware both of Ontario's claim and its characterization of its security and there is no prejudice to either of them in the interpretation I have found, nor the amendment to effect it, if necessary. Canadian did not suggest nor is there any evidence of prejudice to the other creditors arising from this interpretation or amendment.

Application granted.

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1993 CarswellOnt 182, 17 C.B.R. (3d) 1, (sub nom. Olympia & York Developments Ltd., Re) 12 O.R. (3d) 500

1993 CarswellOnt 182, 17 C.B.R. (3d) 1, (sub nom. Olympia & York Developments Ltd., Re) 12 O.R. (3d) 500

Olympia & York Developments Ltd. v. Royal Trust Co.

Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re plan of arrangement of OLYMPIA & YORK DEVELOPMENTS LIMITED and all other companies set out in Schedule "A" attached hereto

Ontario Court of Justice (General Division)

R.A. Blair J.

Heard: February 1 and 5, 1993
Oral reasons: February 5, 1993
Written reasons: February 24, 1993
Judgment: February 24, 1993
Docket: Doc. B125/92

Counsel: [List of counsel attached as Schedule "A" hereto.]

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Approval by Court — "Fair and reasonable".

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Plan of arrangement — Sanctioning of plan — Unanimous approval of plan by all classes of creditors not being necessary where plan being fair and reasonable.

Under the protection of the *Companies' Creditors Arrangement Act* ("CCAA"), O & Y negotiated a plan of arrangement. The final plan of arrangement was voted on by the numerous classes of creditors: 27 of the 35 classes voted in favour of the plan, eight voted against it. O & Y applied to the court under s. 6 of the CCAA for sanctioning of its final plan.

Held:

The application was allowed.

In considering whether to sanction a plan of arrangement, the court must consider whether: (1) there has been strict compliance with all statutory requirements; (2) all materials filed and procedures carried out are authorized by the CCAA; and (3) the plan is fair and reasonable.

The court found that the first two criteria had been complied with. O & Y met the criteria for access to the protection of the CCAA, the creditors were divided into classes for the purpose of voting and those classes had voted on the plan. All meetings of creditors were duly convened and held pursuant to the court orders pertaining to them. Further, nothing had been done or purported to have been done that was not authorized by the CCAA.

In assessing whether a plan is fair and reasonable, the court must be satisfied that it is feasible and that it fairly balances the interests of all of the creditors, the company and its shareholders. One important measure of whether a plan is fair and reasonable is the parties' approval of the plan and the degree to which approval has been given. With the exception of the eight classes of creditors that did not vote to accept the plan, the plan met with the overwhelming approval of the secured creditors and unsecured creditors.

While s. 6 of the CCAA makes it clear that a plan must be approved by at least 50 per cent of the creditors of a particular class representing at least 75 per cent of the dollar value of the claims in that class, the section does not make it clear whether the plan must be approved by *every* class of creditors before it can be sanctioned by the court. A court would not sanction a plan if the effect of doing so were to impose it upon a class or classes of creditors who rejected it and to bind them by it. However, in this case, the plan provided that the claims of the creditors who rejected the plan were to be treated as "unaffected claims" not bound by its provisions. Further, even if they approved the plan, secured creditors had the right to drop out at any time by exercising their realization rights. Finally, there was no prejudice to the eight classes of creditors that did not approve the plan because nothing was being imposed upon them that they had not accepted and none of their rights were being taken away.

Cases considered:

Alabama, New Orleans, Texas & Pacific Junction Railway Co., Re, 2 Meg. 377, [1886-90] All E.R. Rep. Ext. 1143, [1891] 1 Ch. at 231 (C.A.) — *referred to*

Campeau Corp., Re (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.) — *referred to*

Canadian Vinyl Industries Inc., Re (1978), 29 C.B.R. (N.S.) 12 (Que. S.C.) — *referred to*

Dairy Corp. of Canada, Re, [1934] O.R. 436, [1934] 3 D.L.R. 347 (C.A.) — *referred to*

École Internationale de Haute Esthétique Edith Serei Inc. (Receiver of) c. Edith Serei Internationale (1987), Inc. (1989), 78 C.B.R. (N.S.) 36 (C.S. Qué.) — *referred to*

Keddy Motor Inns Ltd., Re (1992), 13 C.B.R. (3d) 245, 90 D.L.R. (4th) 175, 6 B.L.R. (2d) 116, 110 N.S.R. (2d) 246, 299 A.P.R. 246 (C.A.) — *referred to*

Langley's Ltd., Re, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.) — *referred to*

Multidev Immobilia Inc. v. S.A. Just Invest, 70 C.B.R. (N.S.) 91, [1988] R.J.Q. 1928 (S.C.) — *considered*

NsC Diesel Power Inc. (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (T.D.) — *referred to*

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.), affirmed (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*) 73 C.B.R. (N.S.) 195, 34 B.C.L.R. (2d) 122, [1989] 3 W.W.R. 363 (C.A.) — *referred to*

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey*) 41

O.A.C. 282, 1 O.R. (3d) 289 (C.A.) — *considered*

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 2 C.B.R. (3d) 303, 51 B.C.L.R. (2d) 193 (C.A.) [leave to appeal to S.C.C. refused (1991), 7 C.B.R. (3d) 164 (note), 55 B.C.L.R. xxxiii (note), 135 N.R. 317 (note)] — *considered*

Wellington Building Corp., Re, 16 C.B.R. 48, [1934] O.R. 653, [1934] 4 D.L.R. 626 (S.C.) — *considered*

Statutes considered:

Companies Act, The, R.S.O. 1927, c. 218.

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

s. 4

s. 5

s. 6

Joint Stock Companies Arrangements Act, 1870 (U.K.), 33 & 34 Vict., c. 104.

Application for sanctioning of plan under *Companies' Creditors Arrangement Act.*

***R.A. Blair J.*:**

1 On May 14, 1992, Olympia & York Developments Limited and 23 affiliated corporations ("the Applicants") sought, and obtained an Order granting them the protection of the *Companies' Creditors Arrangement Act* [R.S.C. 1985, c. C-36] for a period of time while they attempted to negotiate a Plan of Arrangement with their creditors and to restructure their corporate affairs. The Olympia & York group of companies constitute one of the largest and most respected commercial real estate empires in the world, with prime holdings in the main commercial centres in Canada, the U.S.A., England and Europe. This empire was built by the Reichmann family of Toronto. Unfortunately, it has fallen on hard times, and, indeed, it seems, it has fallen apart.

2 A Final Plan of Compromise or Arrangements has now been negotiated and voted on by the numerous classes of creditors. 27 of the 35 classes have voted in favour of the Final Plan; 8 have voted against it. The Applicants now bring the Final Plan before the Court for sanctioning, pursuant to section 6 of the *Companies' Creditors Arrangement Act.*

The Plan

3 The Plan is described in the motion materials as "the Revised Plans of Compromise and Arrangement dated December 16, 1992, as further amended to January 25, 1993". I shall refer to it as "the Plan" or "the Final Plan". Its purpose, as stated in Article 1.2,

> ... is to effect the reorganization of the businesses and affairs of the Applicants in order to bring stability to the Applicants for a period of not less than five years, in the expectation that all persons with an interest in the Applicants will derive a greater benefit from the continued operation of the businesses and affairs of the Applicants on such a basis than would result from the immediate forced liquidation of the Applicants' assets.

4 The Final Plan envisages the restructuring of certain of the O & Y ownership interests, and a myriad of individual proposals — with some common themes — for the treatment of the claims of the various classes of creditors which have been established in the course of the proceedings.

5 The contemplated O & Y restructuring has three principal components, namely:

1. The organization of O & Y Properties, a company to be owned as to 90% by OYDL and as to 10% by the Reichmann family, and which is to become OYDL's Canadian Real Estate Management Arm;

2. Subject to certain approvals and conditions, *and provided the secured creditors do not exercise their remedies against their security*, the transfer by OYDL of its interest in certain Canadian real estate assets to O & Y properties, in exchange for shares; and,

3. A GW reorganization scheme which will involve the transfer of common shares of GWU holdings to OYDL, the privatization of GW utilities and the amalgamation of GW utilities with OYDL.

6 There are 35 classes of creditors for purposes of voting on the Final Plan and for its implementation. The classes are grouped into four different categories of classes, namely by claims of project lenders, by claims of joint venture lenders, by claims of joint venture co-participants, and by claims of "other classes".

7 Any attempt by me to summarize, in the confines of reasons such as these, the manner of proposed treatment for these various categories and classes would not do justice to the careful and detailed concept of the Plan. A variety of intricate schemes are put forward, on a class by class basis, for dealing with the outstanding debt in question during the 5 year Plan period.

8 In general, these schemes call for interest to accrue at the contract or some other negotiated rate, and for interest (and, in some cases, principal) to be paid from time to time during the Plan period if O & Y's cash flow permits. At the same time, O & Y (with, I think, one exception) will continue to manage the properties that it has been managing to date, and will receive revenue in the form of management fees for performing that service. In many, but not all, of the project lender situations, the Final Plan envisages the transfer of title to the newly formed O & Y Properties. Special arrangements have been negotiated with respect to lenders whose claims are against marketable securities, including the Marketable Securities Lenders, the GW Marketable Security and Other Lenders, the Carena Lenders and the Gulf and Abitibi Lenders.

9 It is an important feature of the Final Plan that secured creditors are ceded the right, if they so choose, to exercise their realization remedies at any time (subject to certain strictures regarding timing and notice). In effect, they can "drop out" of the Plan if they desire.

10 The unsecured creditors, of course, are heirs to what may be left. Interest is to accrue on the unsecured loans at the contract rate during the Plan period. The Final Plan calls for the administrator to calculate, at least annually, an amount that may be paid on the O & Y unsecured indebtedness out of OYDL's cash on hand, and such amount, if indeed such an amount is available, may be paid out on court approval of the payment. The unsecured creditors are entitled to object to the transfer of assets to O & Y Properties if they are not reasonably satisfied that O & Y Properties "will be a viable, self-financing entity". At the end of the Plan period, the members of this class are given the option of converting their remaining debt into stock.

11 The Final Plan contemplates the eventuality that one or more of the secured classes may reject it. Section 6.2 provides,

a) that if the Plan is not approved by the requisite majority of holders of any Class of Secured Claims before January 16, 1993, the stay of proceedings imposed by the initial CCAA order of May 14, 1992, as amended, shall be automatically

lifted; and,

b) that in the event that Creditors (other than the unsecured creditors and one Class of Bondholders' Claims) do not agree to the Plan, any such Class shall be deemed not to have agreed to the Plan and to be a Class of Creditors not affected by the Plan, *and that the Applicants shall apply to the court for a Sanction Order which sanctions the Plan only insofar as it affects the classes which have agreed to the Plan.*

12 Finally, I note that Article 1.3 Of the Final Plan stipulates that the Plan document "constitutes a separate and severable plan of compromise and arrangement with respect to each of the Applicants."

The Principles to be Applied on Sanctioning

13 In *Nova Metal Products Inc. v. Comiskey (Trustee of)* (sub nom. *Elan Corp. v. Comiskey*) (1990), 1 O.R. (3d) 289 (C.A.), Doherty J.A. concluded his examination of the purpose and scheme of the *Companies' Creditors Arrangement Act*, with this overview, at pp. 308-309:

Viewed in its totality, the Act gives the court control over the initial decision to put the reorganization plan before the creditors, the classification of creditors for the purpose of considering the plan, conduct affecting the debtor company pending consideration of that plan, and the ultimate acceptability of any plan agreed upon by the creditors. The Act envisions that the rights and remedies of individual creditors, the debtor company, and others may be sacrificed, at least temporarily, in an effort to serve the greater good by arriving at some acceptable reorganization which allows the debtor company to continue in operation: *Icor Oil & Gas Co. v. Canadian Imperial Bank of Commerce (No. 1)* (1989), 102 A.R. 161 (Q.B.), at p. 165.

14 Mr. Justice Doherty's summary, I think, provides a very useful focus for approaching the task of sanctioning a Plan.

15 Section 6 of the CCAA reads as follows:

6. Where a majority in number representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, *the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding*

(*a*) *on all the creditors or the class of creditors*, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, *and on the company*; and

(*b*) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the *Bankruptcy Act* or is in the course of being wound up under the *Winding-up Act*, on the trustee in bankruptcy or liquidator and contributories of the company. (Emphasis added)

16 Thus, the final step in the CCAA process is court sanctioning of the Plan, after which the Plan becomes binding on the creditors and the company. The exercise of this statutory obligation imposed upon the court is a matter of discretion.

17 The general principles to be applied in the exercise of the Court's discretion have been developed in a number of authorities. They were summarized by Mr. Justice Trainor in *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.) and adopted on appeal in that case by McEachern C.J.B.C., who set them out in the following fashion at (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.), p. 201:

The authorities do not permit any doubt about the principles to be applied in a case such as this. They are set out over and over again in many decided cases and may be summarized as follows:

(1) there must be strict compliance with all statutory requirements;

(2) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the C.C.A.A.;

(3) The plan must be fair and reasonable.

18 In an earlier Ontario decision, *Re Dairy Corp. of Canada*, [1934] O.R. 436 (C.A.), Middleton J.A. applied identical criteria to a situation involving an arrangement under the Ontario *Companies Act*. The N.S.C.A. recently followed *Re Northland Properties Ltd.* in *Re Keddy Motor Inns Ltd.* (1992), 13 C.B.R. (3d) 245 (N.S.C.A.). Farley J. did as well in *Re Campeau Corp.*, [1992] O.J. No. 237 (Ont. Ct. of Justice, Gen. Div.) [now reported at 10 C.B.R. (3d) 104].

Strict Compliance with Statutory Requirements

19 Both this first criterion, dealing with statutory requirements, and the second criterion, dealing with the absence of any unauthorized conduct, I take to refer to compliance with the various procedural imperatives of the legislation itself, or to compliance with the various orders made by the court during the course of the CCAA process: See *Re Campeau, supra.*

20 At the outset, on May 14, 1992 I found that the Applicants met the criteria for access to the protection of the Act — they are insolvent; they have outstanding issues of bonds issued in favour of a trustee, and the compromise proposed at that time, and now, includes a compromise of the claims of those creditors whose claims are pursuant to the trust deeds. During the course of the proceedings Creditors' Committees have been formed to facilitate the negotiation process, and creditors have been divided into classes for the purposes of voting, as envisaged by the Act. Votes of those classes of creditors have been held, as required.

21 With the consent, and at the request of, the Applicants and the Creditors' Committees, The Honourable David H.W. Henry, a former Justice of this Court, was appointed "Claims Officer" by Order dated September 11, 1992. His responsibilities in that capacity included, as well as the determination of the value of creditors' claims for voting purposes, the responsibility of presiding over the meetings at which the votes were taken, or of designating someone else to do so. The Honourable Mr. Henry, himself, or The Honourable M. Craig or The Honourable W. Gibson Gray — both also former Justices of this Court — as his designees, presided over the meetings of the Classes of Creditors, which took place during the period from January 11, 1993 to January 25, 1993. I have his Report as to the results of each of the meetings of creditors, and confirming that the meetings were duly convened and held pursuant to the provisions of the Court Orders pertaining to them and the CCAA.

22 I am quite satisfied that there has been strict compliance with the statutory requirements of the *Companies' Creditors Arrangement Act.*

Unauthorized conduct

23 I am also satisfied that nothing has been done or purported to have been done which is not authorized by the CCAA.

24 Since May 14, the court has been called upon to make approximately 60 Orders of different sorts, in the course of exercising its supervisory function in the proceedings. These Orders involved the resolution of various issues between the creditors by the court in its capacity as "referee" of the negotiation process; they involved the approval of the "GAR" Orders negotiated between the parties with respect to the funding of O & Y's general and administrative expenses and restructuring

costs throughout the "stay" period; they involved the confirmation of the sale of certain of the Applicants' assets, both upon the agreement of various creditors and for the purposes of funding the "GAR" requirements; they involved the approval of the structuring of Creditors' Committees, the classification of creditors for purposes of voting, the creation and defining of the role of "Information Officer" and, similarly, of the role of "Claims Officer". They involved the endorsement of the information circular respecting the Final Plan and the mailing and notice that was to be given regarding it. The Court's Orders encompassed, as I say, the general supervision of the negotiation and arrangement period, and the interim sanctioning of procedures implemented and steps taken by the Applicants and the creditors along the way.

25 While the court, of course, has not been a participant during the elaborate negotiations and undoubted boardroom brawling which preceded and led up to the Final Plan of Compromise, I have, with one exception, been the Judge who has made the orders referred to. No one has drawn to my attention any instances of something being done during the proceedings which is not authorized by the CCAA.

26 In these circumstances, I am satisfied that nothing unauthorized under the CCAA has been done during the course of the proceedings.

27 This brings me to the criterion that the Plan must be "fair and reasonable".

Fair and reasonable

28 The Plan must be "fair and reasonable". That the ultimate expression of the Court's responsibility in sanctioning a Plan should find itself telescoped into those two words is not surprising. "Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the *Companies' Creditors Arrangement Act*. "Fairness" is the quintessential expression of the court's equitable jurisdiction — although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation make its exercise an exercise in equity — and "reasonableness" is what lends objectivity to the process.

29 From time to time, in the course of these proceedings, I have borrowed liberally from the comments of Mr. Justice Gibbs whose decision in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.) contains much helpful guidance in matters of the CCAA. The thought I have borrowed most frequently is his remark, at p. 116, that the court is "called upon to weigh the equities, or balance the relative degrees of prejudice, which would flow from granting or refusing" the relief sought under the Act. This notion is particularly apt, it seems to me, when consideration is being given to the sanctioning of the Plan.

30 If a debtor company, in financial difficulties, has a reasonable chance of staving off a liquidator by negotiating a compromise arrangement with its creditors, "fairness" to its creditors as a whole, and to its shareholders, prescribes that it should be allowed an opportunity to do so, consistent with not "unfairly" or "unreasonably" depriving secured creditors of their rights under their security. Negotiations should take place in an environment structured and supervised by the court in a "fair" and balanced — or, "reasonable" — manner. When the negotiations have been completed and a plan of arrangement arrived at, and when the creditors have voted on it — technical and procedural compliance with the Act aside — the plan should be sanctioned if it is "fair and reasonable".

31 When a plan is sanctioned it becomes binding upon the debtor company and upon creditors of that company. What is "fair and reasonable", then, must be addressed in the context of the impact of the plan on the creditors and the various classes of creditors, in the context of their response to the plan, and with a view to the purpose of the CCAA.

32 On the appeal in *Re Northland Properties Ltd., supra*, at p. 201, Chief Justice McEachern made the following comment in this regard:

> ... there can be no doubt about the purpose of the C.C.A.A. It is to enable compromises to be made for the common bene-

> fit of the creditors and of the company, particularly to keep a company in financial difficulties alive and out of the hands of liquidators. To make the Act workable, it is often necessary to permit a requisite majority of each class to bind the minority to the terms of the plan, but the plan must be fair and reasonable.

33 In *Re Alabama, New Orleans, Texas & Pacific Junction Railway Co.*, [1891] 1 Ch. at 231 (C.A.), a case involving a scheme and arrangement under the *Joint Stock Companies Arrangements Act, 1870* [(U.K.), 33 & 34 Vict., c. 104], Lord Justice Bowen put it this way, at p. 243:

> Now, I have no doubt at all that it would be improper for the Court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that class as such, otherwise the sanction of the Court would be a sanction to what would be a scheme of confiscation. The object of this section is not confiscation ... Its object is to enable compromises to be made which are for the common benefit of the creditors as creditors, or for the common benefit of some class of creditors as such.

Again at p. 245:

> It is in my judgment desirable to call attention to this section, and to the extreme care which ought to be brought to bear upon the holding of meetings under it. It enables a compromise to be forced upon the outside creditors by a majority of the body, or upon a class of the outside creditors by a majority of that class.

34 Is the Final Plan presented here by the O & Y Applicants "fair and reasonable"?

35 I have reviewed the Plan, including the provisions relating to each of the Classes of Creditors. I believe I have an understanding of its nature and purport, of what it is endeavouring to accomplish, and of how it proposes this be done. To describe the Plan as detailed, technical, enormously complex and all-encompassing, would be to understate the proposition. This is, after all, we are told, the largest corporate restructuring in Canadian — if not, worldwide — corporate history. It would be folly for me to suggest that I comprehend the intricacies of the Plan in all of its minutiae and in all of its business, tax and corporate implications. Fortunately, it is unnecessary for me to have that depth of understanding. I must only be satisfied that the Plan is fair and reasonable in the sense that it is feasible and that it fairly balances the interests of all of the creditors, the company and its shareholders.

36 One important measure of whether a Plan is fair and reasonable is the parties' approval of the Plan, and the degree to which approval has been given.

37 As other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspects of the Plan, descending into the negotiating arena and substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas.

38 This point has been made in numerous authorities, of which I note the following: *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175, at p. 184 (B.C.S.C.), affirmed (1989), 73 C.B.R. (N.S.) 195, at p. 205 (B.C.C.A.); *Re Langley's Ltd.*, [1938] O.R. 123 (C.A.), at p. 129; *Re Keddy Motor Inns Ltd.* (1992), 13 C.B.R. (3d) 245; *École Internationale de Haute Esthétique Edith Serei Inc. (Receiver of) c. Edith Serei Internationale (1987) Inc.* (1989), 78 C.B.R. (N.S.) 36 (C.S. Qué.).

39 In *Re Keddy Motors Inns Ltd., supra*, the Nova Scotia Court of Appeal spoke of "a very heavy burden" on parties seeking to show that a Plan is not fair and reasonable, involving "matters of substance", when the Plan has been approved by the requisite majority of creditors (see pp. 257-258). Freeman J.A. stated at p. 258:

> The Act clearly contemplates rough-and-tumble negotiations between debtor companies desperately seeking a chance to survive and creditors willing to keep them afloat, but on the best terms they can get. What the creditors and the company

must live with is a plan of their own design, not the creation of a court. The court's role is to ensure that creditors who are bound unwillingly under the Act are not made victims of the majority and forced to accept terms that are unconscionable.

40 In *École Internationale, supra* at p. 38, Dugas J. spoke of the need for "serious grounds" to be advanced in order to justify the court in refusing to approve a proposal, where creditors have accepted it, unless the proposal is unethical.

41 In this case, as Mr. Kennedy points out in his affidavit filed in support of the sanction motion, the final Plan is "the culmination of several months of intense negotiations and discussions between the applicants and their creditors, [reflects] significant input of virtually all of the classes of creditors and [is] the product of wide-ranging consultations, give and take and compromise on the part of the participants in the negotiating and bargaining process." The body of creditors, moreover, Mr. Kennedy notes, "consists almost entirely of sophisticated financial institutions represented by experienced legal counsel" who are, in many cases, "members of creditors' committees constituted pursuant to the amended order of may 14, 1992." Each creditors' committee had the benefit of independent and experienced legal counsel.

42 With the exception of the 8 classes of creditors that did not vote to accept the Plan, the Plan met with the overwhelming approval of the secured creditors and the unsecured creditors of the Applicants. This level of approval is something the court must acknowledge with some deference.

43 Those secured creditors who have approved the Plan retain their rights to realize upon their security at virtually any time, subject to certain requirements regarding notice. In the meantime, they are to receive interest on their outstanding indebtedness, either at the original contract rate or at some other negotiated rate, and the payment of principal is postponed for a period of 5 years.

44 The claims of creditors — in this case, secured creditors — who did not approve the Plan are specifically treated under the Plan as "unaffected claims" i.e. claims not compromised or bound by the provisions of the Plan. Section 6.2(C) of the Final Plan states that the applicants may apply to the court for a sanction Order which sanctions the Plan only insofar as it affects the classes which have agreed to the Plan.

45 The claims of unsecured creditors under the Plan are postponed for 5 years, with interest to accrue at the relevant contract rate. There is a provision for the administrator to calculate, at least annually, an amount out of OYDL's cash on hand which may be made available for payment to the unsecured creditors, if such an amount exists, and if the court approves its payment to the unsecured creditors. The unsecured creditors are given some control over the transfer of real estate to O & Y Properties, and, at the end of the Plan period, are given the right, if they wish, to convert their debt to stock.

46 Faced with the prospects of recovering nothing on their claims in the event of a liquidation, against the potential of recovering something if O & Y is able to turn things around, the unsecured creditors at least have the hope of gaining something if the Applicants are able to become the "self-sustaining and viable corporation" which Mr. Kennedy predicts they will become "in accordance with the terms of the Plan."

47 Speaking as co-chair of the Unsecured Creditors' Committee at the meeting of that Class of Creditors, Mr. Ed Lundy made the following remarks:

Firstly, let us apologize for the lengthy delays in today's proceedings. It was truly felt necessary for the creditors of this Committee to have a full understanding of the changes and implications made because there were a number of changes over this past weekend, plus today, and we wanted to be in a position to give a general overview observation to the Plan.

The Committee has retained accounting and legal professionals in Canada and the United States. The Co-Chairs, as well as institutions serving on the Plan and U.S. Subcommittees with the assistance of the Committee's professionals have worked for the past seven to eight months evaluating the financial, economic and legal issues affecting the Plan for the unsecured creditors.

In addition, the Committee and its Subcommittees have met frequently during the CCAA proceedings to discuss these issues. Unfortunately, the assets of OYDL are such that their ultimate values cannot be predicted in the short term. As a result, the recovery, if any, by the unsecured creditors cannot now be predicted.

The alternative to approval of the CCAA Plan of arrangement appears to be a bankruptcy. The CCAA Plan of arrangement has certain advantages and disadvantages over bankruptcy. These matters have been carefully considered by the Committee.

After such consideration, the members have indicated their intentions as follows ...

Twelve members of the Committee have today indicated they will vote in favour of the Plan. No members have indicated they will vote against the Plan. One member declined to indicate to the committee members how they wished to vote today. One member of the Plan was absent. Thank you.

48 After further discussion at the meeting of the unsecured creditors, the vote was taken. The Final Plan was approved by 83 creditors, representing 93.26% of the creditors represented and voting at the meeting and 93.37% in value of the Claims represented and voting at the meeting.

49 As for the O & Y Applicants, the impact of the Plan is to place OYDL in the position of property manager of the various projects, in effect for the creditors, during the Plan period. OYDL will receive income in the form of management fees for these services, a fact which gives some economic feasibility to the expectation that the company will be able to service its debt under the Plan. Should the economy improve and the creditors not realize upon their security, it may be that at the end of the period there will be some equity in the properties for the newly incorporated O & Y Properties and an opportunity for the shareholders to salvage something from the wrenching disembodiment of their once shining real estate empire.

50 In keeping with an exercise of weighing the equities and balancing the prejudices, another measure of what is "fair and reasonable" is the extent to which the proposed Plan treats creditors equally in their opportunities to recover, consistent with their security rights, and whether it does so in as non-intrusive and as non-prejudicial a manner as possible.

51 I am satisfied that the Final Plan treats creditors evenly and fairly. With the "drop out" clause entitling secured creditors to realize upon their security, should they deem it advisable at any time, all parties seem to be entitled to receive at least what they would receive out of a liquidation, i.e. as much as they would have received had there not been a reorganization: See *Re NsC Diesel Power Inc.* (1990), 97 N.S.R. (2d) 295 (T.D.). Potentially, they may receive more.

52 The Plan itself envisages other steps and certain additional proceedings that will be taken. Not the least inconsiderable of these, for example, is the proposed GW reorganization and contemplated arrangement under the OBCA. These further steps and proceedings, which lie in the future, may well themselves raise significant issues that have to be resolved between the parties or, failing their ability to resolve them, by the Court. I do not see this prospect as something which takes away from the fairness or reasonableness of the Plan but rather as part of grist for the implementation mill.

53 For all of the foregoing reasons, I find the Final Plan put forward to be "fair and reasonable".

54 Before sanction can be given to the Plan, however, there is one more hurdle which must be overcome. It has to do with the legal question of whether there must be unanimity amongst the classes of creditors in approving the Plan before the court is empowered to give its sanction to the Plan.

Lack of unanimity amongst the classes of creditors

55 As indicated at the outset, all of the classes of creditors did not vote in favour of the Final Plan. Of the 35 classes that voted, 27 voted in favour (overwhelmingly, it might be added, both in terms of numbers and percentage of value in each class). In 8 of the classes, however, the vote was either against acceptance of the Plan or the Plan did not command sufficient support in terms of numbers of creditors and/or percentage of value of claims to meet the 50%/75% test of section 6.

56 The classes of creditors who voted against acceptance of the Plan are in each case comprised of secured creditors who hold their security against a single project asset or, in the case of the Carena claims, against a single group of shares. Those who voted "no" are the following:

Class 2 — First Canadian Place Lenders

Class 8 — Fifth Avenue Place Bondholders

Class 10 — Amoco Centre Lenders

Class 13 — L'Esplanade Laurier Bondholders

Class 20 — Star Top Road Lenders

Class 21 — Yonge-Sheppard Centre Lenders

Class 29 — Carena Lenders

Class 33a — Bank of Nova Scotia Other Secured Creditors

57 While section 6 of the CCAA makes the mathematics of the approval process clear — the Plan must be approved by at least 50% of the creditors of a particular class representing at least 75% of the dollar value of the claims in that class — it is not entirely clear as to whether the Plan must be approved by every class of creditors before it can be sanctioned by the court. The language of the section, it will be recalled, is as follows:

> 6. *Where a majority* in number representing three-fourths in value *of the creditors, or class of creditors* ... agree to any compromise or arrangement ... the compromise or arrangement may be sanctioned by the court. (Emphasis added)

58 What does "a majority ... of the ... class of creditors" mean? Presumably it must refer to more than one group or class of creditors, otherwise there would be no need to differentiate between "creditors" and "class of creditors". But is the majority of the "class of creditors" confined to a majority within an individual class, or does it refer more broadly to a majority within each and every "class", as the sense and purpose of the Act might suggest?

59 This issue of "unanimity" of class approval has caused me some concern, because, of course, the Final Plan before me has not received that sort of blessing. Its sanctioning, however, is being sought by the Applicants, is supported by all of the classes of creditors approving, and is not opposed by any of the classes of creditors which did not approve.

60 At least one authority has stated that strict compliance with the provisions of the CCAA respecting the vote is a pre-requisite to the court having jurisdiction to sanction a plan: See *Re Keddy Motor Inns Ltd., supra*, at p. 20. Accepting that such is the case, I must therefore be satisfied that unanimity amongst the classes is not a requirement of the Act before the court's sanction can be given to the Final Plan.

61 In assessing this question, it is helpful to remember, I think, that the CCAA is remedial and that it "must be given a wide and liberal construction so as to enable it to effectively serve this ... purpose": *Elan Corp. v. Comiskey, supra*, per Do-

herty J.A., at p. 307. Speaking for the majority in that case as well, Finlayson J.A. (Krever J.A., concurring) put it this way, at p. 297:

> It is well established that the CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Such a resolution can have significant benefits for the company, its shareholders and employees. For this reason the debtor companies ... are entitled to a broad and liberal interpretation of the jurisdiction of the court under the CCAA.

62 Approaching the interpretation of the unclear language of section 6 of the Act from this perspective, then, one must have regard to the purpose and object of the legislation and to the wording of the section within the rubric of the Act as a whole. Section 6 is not to be construed in isolation.

63 Two earlier provisions of the CCAA set the context in which the creditors' meetings which are the subject of section 6 occur. Sections 4 and 5 state that where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors (s. 4) or its secured creditors (s. 5), the court may order a meeting of the creditors to be held. The format of each section is the same. I reproduce the pertinent portions of s. 5 here only, for the sake of brevity. It states:

> 5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or *any* class of them, the court may, on the application in a summary way of the company or of any such creditor ... order a meeting of the creditors or class of creditors ... (Emphasis added)

64 It seems that the compromise or arrangement contemplated is one with the secured creditors (as a whole) or *any* class — as opposed to *all classes* — of them. A logical extension of this analysis is that, other circumstances being appropriate, the plan which the court is asked to approve may be one involving some, but not all, of the classes of creditors.

65 Surprisingly, there seems to be a paucity of authority on the question of whether a plan must be approved by the requisite majorities in *all* classes before the court can grant its sanction. Only two cases of which I am aware touch on the issue at all, and neither of these is directly on point.

66 In *Re Wellington Building Corp.*, [1934] O.R. 653 (S.C.), Mr. Justice Kingstone dealt with a situation in which the creditors had been divided, for voting purposes, into secured and unsecured creditors, but there had been no further division amongst the secured creditors who were comprised of first mortgage bondholders, second, third and fourth mortgagees, and lienholders. Kingstone J. refused to sanction the plan because it would have been "unfair" to the bondholders to have done so (p. 661). At p. 660, he stated:

> I think, while one meeting may have been sufficient under the Act for the purpose of having all the classes of secured creditors summoned, it was necessary under the Act that they should vote in classes and that three-fourths of the value *of each class* should be obtained in support of the scheme before the Court could or should approve of it. (Emphasis added)

67 This statement suggests that unanimity amongst the classes of creditors in approving the plan is a requirement under the CCAA. Kingstone J. went on to explain his reasons as follows (p. 600):

> Particularly is this the case where the holders of the senior securities' (in this case the bondholders') rights are seriously affected by the proposal, as they are deprived of the arrears of interest on their bonds if the proposal is carried through. It was never the intention under the act, I am convinced, to deprive creditors in the position of these bondholders of their right to approve as a class by the necessary majority of a scheme propounded by the company; otherwise this would permit the holders of junior securities to put through a scheme inimical to this class and amounting to confiscation of the vested interest of the bondholders.

68 Thus, the plan in *Re Wellington Building Corp.* went unsanctioned, both because the bondholders had unfairly been

deprived of their right to vote on the plan as a class and because they would have been unfairly deprived of their rights by the imposition of what amounted to a confiscation of their vested interests as bondholders.

69 On the other hand, the Quebec Superior Court sanctioned a plan where there was a lack of unanimity in *Multidev Immobilia Inc. v. Société Anonyme Just Invest* (1988), 70 C.B.R. (N.S.) 91 (Que. S.C.). There, the arrangement had been accepted by all creditors except one secured creditor, Société Anonyme Just Invest. The company presented an amended arrangement which called for payment of the objecting creditor in full. The other creditors were aware that Just Invest was to receive this treatment. Just Invest, nonetheless, continued to object. Thus, three of eight classes of creditors were in favour of the plan; one, Bank of Montreal was unconcerned because it had struck a separated agreement; and three classes of which Just Invest was a member, opposed.

70 The Quebec Superior Court felt that it would be contrary to the objectives of the CCAA to permit a secured creditor who was to be paid in full to upset an arrangement which had been accepted by other creditors. Parent J. was of the view that the Act would not permit the Court to ratify an arrangement which had been refused by a class or classes of creditors (Just Invest), thereby binding the objecting creditor to something that it had not accepted. He concluded, however, that the arrangement could be approved *as regards the other creditors who voted in favour of the Plan*. The other creditors were cognizant of the arrangement whereby Just Invest was to be fully reimbursed for its claims, as I have indicated, and there was no objection to that amongst the classes that voted in favour of the Plan.

71 While it might be said that *Multidev, supra*, supports the proposition that a Plan will not be ratified if a class of creditors opposes, the decision is also consistent with the carving out of that portion of the Plan which concerns the objecting creditor and the sanctioning of the balance of the Plan, where there was no prejudice to the objecting creditor in doing so. To my mind, such an approach is analogous to that found in the Final Plan of the O & Y applicants which I am being asked to sanction.

72 I think it relatively clear that a court would not sanction a plan if the effect of doing so were to impose it upon a class, or classes, of creditors who rejected it and to bind them by it. Such a sanction would be tantamount to the kind of unfair confiscation which the authorities unanimously indicate is not the purpose of the legislation. That, however, is not what is proposed here.

73 By the terms of the Final Plan itself, the claims of creditors who reject the Plan are to be treated as "unaffected claims" not bound by its provisions. In addition, secured creditors are entitled to exercise their realization rights either immediately upon the "consummation date" (March 15, 1993) or thereafter, on notice. In short, even if they approve the Plan, secured creditors have the right to drop out at any time. Everyone participating in the negotiation of the Plan and voting on it, knew of this feature. There is little difference, and little different affect on those approving the Plan, it seems to me, if certain of the secured creditors drop out in advance by simply refusing to approve the Plan in the first place. Moreover, there is no prejudice to the eight classes of creditors which have not approved the Plan, because nothing is being imposed upon them which they have not accepted and none of their rights are being "confiscated".

74 From this perspective it could be said that the parties are merely being held to — or allowed to follow — their contractual arrangement. There is, indeed, authority to suggest that a Plan of compromise or arrangement is simply a contract between the debtor and its creditors, sanctioned by the court, and that the parties should be entitled to put anything into such a Plan that could be lawfully incorporated into any contract: See *Re Canadian Vinyl Industries Inc.* (1978), 29 C.B.R. (N.S.) 12 (Que. S.C.), at p. 18; L.W. Houlden & C.H. Morawetz, *Bankruptcy Law of Canada*, vol. 1 (Toronto: Carswell, 1984) pp. E-6 and E-7.

75 In the end, the question of determining whether a plan may be sanctioned when there has not been unanimity of approval amongst the classes of creditors becomes one of asking whether there is any unfairness to the creditors who have not approved it, in doing so. Where, as here, the creditors classes which have not voted to accept the Final Plan will not be bound by the Plan as sanctioned, and are free to exercise their full rights as secured creditors against the security they hold, there is

nothing unfair in sanctioning the Final Plan without unanimity, in my view.

76 I am prepared to do so.

77 A draft Order, revised as of late this morning, has been presented for approval. It is correct to assume, I have no hesitation in thinking, that each and every paragraph and subparagraph, and each and every word, comma, semi-colon, and capital letter has been vigilantly examined by the creditors and a battalion of advisors. I have been told by virtually every counsel who rose to make submissions, that the draft as is exists represents a very "fragile consensus", and I have no doubt that such is the case. It's wording, however, has not received the blessing of three of the classes of project lenders who voted against the Final Plan — The First Canadian Place, Fifth Avenue Place and L'Esplanade Laurier Bondholders.

78 Their counsel, Mr. Barrack, has put forward their serious concerns in the strong and skilful manner to which we have become accustomed in these proceedings. His submission, put too briefly to give it the justice it deserves, is that the Plan does not and cannot bind those classes of creditors who have voted "no", and that the language of the sanctioning Order should state this clearly and in a positive way. Paragraph 9 of his Factum states the argument succinctly. It says:

> 9. It is submitted that if the Court chooses to sanction the Plan currently before it, it is incumbent on the Court to make clear in its Order that the Plan and the other provisions of the proposed Sanction Order apply to and are binding upon only the company, its creditors in respect of claims in classes which have approved the Plan, and trustees for such creditors.

79 The basis for the concern of these "No" creditors is set out in the next paragraph of the Factum, which states:

> 10. This clarification in the proposed Sanction Order is required not only to ensure that the Order is only binding on the parties to the compromises but also to clarify that if a creditor has multiple claims against the company and only some fall within approved classes, then the Sanction Order only affects those claims and is not binding upon and has no effect upon the balance of that creditor's claims or rights.

80 The provision in the proposed draft Order which is the most contentious is paragraph 4 thereof, which states:

> 4. THIS COURT ORDERS that subject to paragraph 5 hereof the Plan be and is hereby sanctioned and approved and will be binding on and will enure to the benefit of the Applicants and the Creditors holding Claims in Classes referred to in paragraph 2 of this Order in their capacities as such Creditors.

81 Mr. Barrack seeks to have a single, but much debated word — "only" — inserted in the second line of that paragraph after the word "will", so that it would read "and will *only* be binding on .... the Applicants and the Creditors Holding Claims in Classes" [which have approved the Plan]. On this simple, single, word, apparently, the razor-thin nature of the fragile consensus amongst the remaining creditors will shatter.

82 In the alternative, Mr. Barrack asks that para. 4 of the draft be amended and an additional paragraph added as follows:

> 35. It is submitted that to reflect properly the Court's jurisdiction, paragraph 4 of the proposed Sanction Order should be amended to state:
>
> 4. This Court Orders that the Plan be and is hereby sanctioned and approved and is binding only upon the Applicants listed in Schedule A to this Order, creditors in respect of the claims in those classes listed in paragraph 2 hereof, and any trustee for any such class of creditors.
>
> 36. It is also submitted that an additional paragraph should be added if any provisions of the proposed Sanction Order are

granted beyond paragraph 4 thereof as follows:

This Court Orders that, except for claims falling within classes listed in paragraph 2 hereof, no claims or rights of any sort of any person shall be adversely affected in any way by the provisions of the Plan, this Order or any other Order previously made in these proceedings.

83 These suggestions are vigorously opposed by the Applicants and most of the other creditors. Acknowledging that the Final Plan does not bind those creditors who did not accept it, they submit that no change in the wording of the proposed Order is necessary in order to provided those creditors with the protection to which they say they are entitled. In any event, they argue, such disputes, should they arise, relate to the interpretation of the Plan, not to its sanctioning, and should only be dealt with in the context in which they subsequently arise — if arise they do.

84 The difficulty is that there may or may not be a difference between the order "binding" creditors and "affecting" creditors. The Final Plan is one that has specific features for specific classes of creditors, and as well some common or generic features which cut across classes. This is the inevitable result of a Plan which is negotiated in the crucible of such an immense corporate re-structuring. It may be, or it may not be, that the objecting Project Lenders who voted "no" find themselves "affected" or touched in some fashion, at some future time by some aspect of the Plan. With a re-organization and corporate re-structuring of this dimension it may simply not be realistic to expect that the world of the secured creditor, which became not-so-perfect with the onslaught of the Applicants' financial difficulties, and even less so with the commencement of the CCAA proceedings, will ever be perfect again.

85 I do, however, agree with the thrust of Mr. Barrack's submissions that the Sanction Order and the Plan can be binding only upon the Applicants and the creditors of the Applicants in respect of claims in classes which have approved the Plan, and trustees for such creditors. That is, in effect, what the Final Plan itself provides for when, in section 6.2(C), it stipulates that, where classes of creditors do not agree to the Plan,

(i) the Applicants shall treat such Class of Claims to be an Unaffected Class of Claims; and,

(ii) the Applicants *shall* apply to the Court "for a Sanction Order which sanctions the Plan *only insofar as it affects the Classes which have agreed to the Plan.*

86 The Final Plan before me is therefore sanctioned on that basis. I do not propose to make any additional changes to the draft Order as presently presented. In the end, I accept the position, so aptly put by Ms. Caron, that the price of an overabundance of caution in changing the wording may be to destroy the intricate balance amongst the creditors which is presently in place.

87 In terms of the court's jurisdiction, section 6 directs me to sanction the Order, if the circumstances are appropriate, and enacts that, once I have done so, the Order "is binding ... on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors ... and on the company". As I see it, that is exactly what the draft Order presented to me does.

88 Accordingly, an order will go in terms of the draft Order marked "revised Feb. 5, 1993", with the agreed amendments noted thereon, and on which I have placed my fiat.

89 These reasons were delivered orally at the conclusion of the sanctioning Hearing which took place on February 1 and February 5, 1993. They are released in written form today.

Application allowed.

Appendix "A" — Counsel for Sanctioning Hearing Order

David A. Brown, Q.C., Yoine Goldstein, Q.C., Stephen Sharpe and Mark E. Meland	-- For the Olympia & York Applicants
Ronald N. Robertson, Q.C.	-- For Hong Kong & Shanghai Banking Corporation
David E. Baird, Q.C., and Ms Patricia Jackson	-- For Bank of Nova Scotia
Michael Barrack and S. Richard Orzy	-- For the First Canadian Place Bondholders, the Fifth Avenue Place Bondholders and the L'Esplanade Lauriere Bondholders
William G. Horton	-- For Royal Bank of Canada
Peter Howard and Ms J. Superina	-- For Citibank Canada
Frank J. C. Newbould, Q.C.	-- For the Unsecured/Under-Secured Creditors Committee
John W. Brown, Q.C., and J.J. Lucki	-- For Canadian Imperial Bank of Commerce
Harry Fogul and Harold S. Springer	-- For the Exchange Tower Bondholders
Allan Sternberg and Lawrence Geringer	-- For the O & Y Eurocreditco Debenture Holders
Arthur O. Jacques and Paul M. Kennedy	-- For Bank of Nova Scotia, Agent for Scotia Plaza Lenders
Lyndon Barnes and J.E. Fordyce	-- For Credit Lyonnais, Credit Lyonnais Canada
J. Carfagnini	-- For National Bank of Canada
J.L. McDougall, Q.C.	-- For Bank of Montreal

Carol V.E. Hitchman	-- For Bank of Montreal (Phase I First Canadian Place)
James A. Grout	-- For Credit Suisse
Robert I. Thornton	-- For I.B.J. Market Security Lenders
Ms C. Carron	-- For European Investment Bank
W.J. Burden	-- For some debtholders of O & Y Commercial Paper II Inc.
G.D. Capern	-- For Robert Campeau
Robert S. Harrison and A.T. Little	-- For Royal Trust Co. as Trustee

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2009 CarswellOnt 2383, 2009 ONCA 377, 249 O.A.C. 58, 95 O.R. (3d) 767, 72 C.P.C. (6th) 1

Fantl v. Transamerica Life Canada

Joseph Fantl (Plaintiff / Respondent) and Transamerica Life Canada (Defendant / Respondent)

Ontario Court of Appeal

W.K. Winkler C.J.O., S.T. Goudge, J.M. Simmons JJ.A.

Heard: April 6, 2009
Judgment: May 7, 2009
Docket: CA C50166

Proceedings: affirming *Fantl v. Transamerica Life Canada* (2008), 2008 CarswellOnt 7270, 66 C.P.C. (6th) 203, 244 O.A.C. 183 (Ont. Div. Ct.); affirming *Fantl v. Transamerica Life Canada* (2008), 2008 CarswellOnt 2249, 60 C.P.C. (6th) 326 (Ont. S.C.J.)

Counsel: Alan J. Lenczner, Q.C., Naomi Loewith for Appellant, Kim Orr Barristers P.C.

Bonnie A. Tough, Jennifer M. Lynch for Respondent, Joseph Fantl

Mary Jane Stitt for Respondent, Transamerica Life Canada

Subject: Civil Practice and Procedure; Public; Torts

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Conduct of class proceeding — Stay of other proceedings

Representative plaintiff, F, retained law firm REKO to prosecute class action against insurance company under Class Proceedings Act, 1992 (original action) — REKO lawyers, including K, worked on original action — REKO dissolved in pre-trial phase of original action — Certain lawyers formerly engaged on original action joined new law firm of REO, while others followed former REKO partner, K, to new law firm of KO — F served notice of change of solicitors naming REO as counsel — KO unsuccessfully brought motion for relief, including order striking notice of change of solicitors and order requiring F to retain KO, or alternatively, order removing F as representative plaintiff and substituting new representative plaintiffs (motion) — KO then commenced action against insurance company with one of new representative plaintiffs proposed on motion (competing action) — Competing action overlapped significantly with original action — KO's appeal from motion decision was dismissed — KO appealed and F and insurance company sought stay of competing action — Appeal dismissed; competing action stayed — Competing action amounted to abuse of process — KO commenced competing action following dismissal of motion, not-

withstanding its admission before motions judge that such move would be disingenuous — Only possible purpose for bringing competing action was to provide platform for carriage motion to challenge original action — Competing action would inevitably be stayed in any event on ground that original action was more advanced — Further, as original action was on cusp of settlement, delay caused by carriage motion would only serve to postpone class members' access to justice — Class members were entitled to certainty.

Civil practice and procedure --- Parties — Representation by solicitor

Choice of new counsel by representative plaintiff — Representative plaintiff, F, retained law firm REKO to prosecute class action against insurance company under Class Proceedings Act, 1992 (CPA) — REKO lawyers worked on action, with K acting as lead counsel — REKO dissolved in pre-trial phase of action — Certain lawyers formerly engaged on action joined law firm of REO, while others followed former REKO partner, K, to law firm of KO — F served notice of change of solicitors naming REO as counsel — KO unsuccessfully brought motion for relief, including order striking notice of change of solicitors and order requiring F to retain KO — KO's appeal from decision of motions judge decision was dismissed — KO appealed — Appeal dismissed — There was no reason to interfere with F's choice of counsel — Competence of REO was not in issue — There was no evidence of improper purpose or considerations in F's choice of counsel — F's friendship with one of partners of REO did not constitute improper purpose — While this friendship was consideration, F was also attracted to REO because of undisputed competence of counsel and its reputation in class action work — There was no demonstrated prejudice to class from F's choice of counsel — F's choice of counsel was not prejudicial or unfair despite K's investment of time and effort as lead counsel — CPA does not provide lawyers with vested interest in subject matter of lawsuit entitling them to override choices of representative plaintiff.

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Amendment of order for certification

Motion to replace representative plaintiff — Representative plaintiff, F, retained law firm REKO to prosecute class action against insurance company under Class Proceedings Act, 1992 — REKO dissolved in pre-trial phase of original action — Certain lawyers formerly engaged on original action joined law firm of REO, while others followed former REKO partner, K, to law firm of KO — F served notice of change of solicitors naming REO as counsel — KO unsuccessfully brought motion for relief, including order removing F as representative plaintiff and substituting new representative plaintiffs — KO's appeal from decision of motions judge was dismissed — KO appealed — Appeal dismissed — There was no basis to interfere with decision of motions judge not to remove or replace F as representative plaintiff — F had prosecuted action to point of settlement and there was no suggestion that he had been less than diligent in this respect — Further, F agreed to represent class after being approached by solicitors from REKO — While not determinative, REKO's choice to approach F indicated that none of its counsel had any concerns about his ability to perform role of representative plaintiff — Moreover, when F assumed representation of class, it must have been implicitly understood by his solicitors that he would be providing litigation instructions.

Cases considered by *W.K. Winkler C.J.O.*:

Cassano v. Toronto Dominion Bank (2007), 47 C.P.C. (6th) 209, 87 O.R. (3d) 401, 2007 ONCA 781, 2007 CarswellOnt 7341, 230 O.A.C. 224, (sub nom. *Cassano v. Toronto-Dominion Bank*) 287 D.L.R. (4th) 703 (Ont. C.A.) — referred to

Ford v. F. Hoffmann-La Roche Ltd. (2005), 74 O.R. (3d) 758, 12 C.P.C. (6th) 252, 2005 CarswellOnt 1095 (Ont. S.C.J.) — referred to

Heron v. Guidant Corp. (2007), 2007 CarswellOnt 9010 (Ont. S.C.J.) — considered

Heron v. Guidant Corp. (2008), 232 O.A.C. 366, 2008 CarswellOnt 47 (Ont. Div. Ct.) — referred to

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — followed

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

Parsons v. Canadian Red Cross Society (1999), 1999 CarswellOnt 2932, 40 C.P.C. (4th) 151, 103 O.T.C. 161 (Ont. S.C.J.) — referred to

Ricardo v. Air Transat A.T. Inc. (2002), 2002 CarswellOnt 1394, 21 C.P.C. (5th) 297 (Ont. S.C.J.) — referred to

Setterington v. Merck Frosst Canada Ltd. (2006), 26 C.P.C. (6th) 173, 2006 CarswellOnt 506 (Ont. S.C.J.) — referred to

VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd. (2000), 4 C.P.C. (5th) 169, 2000 CarswellOnt 4681 (Ont. S.C.J.) — referred to

Ward-Price v. Mariners Haven Inc. (2004), 3 C.P.C. (6th) 116, 2004 CarswellOnt 2238, 71 O.R. (3d) 664 (Ont. S.C.J.) — referred to

Western Canadian Shopping Centres Inc. v. Dutton (2001), (sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere*) 201 D.L.R. (4th) 385, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, 272 N.R. 135, 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, [2001] 2 S.C.R. 534 (S.C.C.) — considered

Statutes considered:

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

Generally — referred to

s. 5(1) — referred to

s. 12 — referred to

s. 13 — referred to

s. 20 — referred to

s. 29(1) — referred to

s. 29(2) — referred to

s. 32(2) — referred to

s. 33(1) — considered

s. 33(4) — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 134(1) — referred to

APPEAL by law firm from judgment reported at *Fantl v. Transamerica Life Canada* (2008), 2008 CarswellOnt 7270, 66 C.P.C. (6th) 203, 244 O.A.C. 183 (Ont. Div. Ct.), dismissing its appeal from decision of motion judge refusing to grant orders requiring representative plaintiff to retain it as counsel or, alternatively, order replacing representative plaintiff.

W.K. Winkler C.J.O.:

Overview

1 This appeal relates to a representative plaintiff's right to choose new counsel in a class proceeding, following the dissolution of the law firm originally retained by the plaintiff to prosecute the action.

2 The appellant is a law firm, Kim Orr Barristers P.C. ("KO"). Joseph Fantl is the representative plaintiff in a class proceeding brought against the defendant Transamerica Life Canada ("Transamerica"). Both Mr. Fantl and Transamerica are respondents in this appeal.

3 In 2006, Mr. Fantl retained the law firm of Roy Elliott Kim O'Connor ("REKO") to act in the prosecution of the intended class action lawsuit against Transamerica. A team of REKO lawyers worked on the matter. Toward the end of 2007, REKO dissolved.

4 Certain of the team of lawyers formerly engaged on the file joined the newly formed law firm of Roy Elliott O'Connor ("REO"). Others followed one of REKO's former partners, Won Kim, to form the appellant law firm KO, while the remaining lawyer chose to go elsewhere. Because of the disbanding of REKO, Mr. Fantl was forced to decide what firm to retain to continue the matter. He chose REO because he knew and was a friend of Peter Roy, and because he had some experience with, and respected members of, the firm. As such, he trusted them to carry the case forward.

5 Mr. Fantl served a notice of change of solicitors naming REO as counsel. KO brought a motion pursuant to s. 12 of the *Class Proceedings Act 1992*, S.O. 1992, c.6 (the "CPA"), asking for various forms of relief, including an order striking the notice of change of solicitors and an order requiring Mr. Fantl to retain KO. In the alternative, KO sought to have Mr. Fantl removed as representative plaintiff and two new representative plaintiffs (Yi-Yea (Riya) Kang and Jeong-Ae Seok) substituted in his stead. The motion judge dismissed the motion in its entirety. KO appealed the decision of the motion judge to the Divisional Court, which dismissed the appeal. KO appeals to this court, with leave. An expedited hearing was granted given that a settlement has been reached and the settlement approval hearing relating to the case is imminent.

6 The motion judge, in refusing to grant the relief requested, held that a representative plaintiff has a right to retain counsel of his or her choice. He found that the test to be applied in determining whether the plaintiff's choice of counsel should stand is whether the counsel is adequate. Thus, he adopted the same test for counsel as is required by s. 5(1) of the CPA in determining whether a representative plaintiff may carry an action forward.

7 In this context, the motion judge noted that while the court has a broad supervisory jurisdiction in class proceedings, it should not intervene in a plaintiff's choice of counsel unless the choice would deny putative class members adequate legal representation. He rejected the appellant's theory that the proper test to be applied is whether the plaintiff's choice is in the best interests of the class. Hence, he refused to engage in a comparison of the two law firms to determine which group was superior. The Divisional Court upheld the reasons of the motion judge on these central issues.

8 Following the dismissal of the motion, KO brought a competing action against Transamerica, with Ms. Kang as the proposed representative plaintiff (the "Kang action"). The Kang action overlaps significantly with Mr. Fantl's action.

9 The appellant advances the same arguments on this appeal as were made to the courts below, contending that the motion judge erred by applying the wrong test. The competence of REO to act as class counsel is not in issue. This notwithstanding, on a comparison basis applying the test of best interests of the class, the appellant submits that the plaintiff ought to be directed to retain the KO firm. Consequently, the plaintiff's choice of counsel ought to be set aside and new representative plaintiffs appointed in place of Mr. Fantl.

10 The respondent submits that the motion judge applied the appropriate test and suggests that the key consideration in the analysis should be whether the plaintiff's decision caused any prejudice to the class members. Since there is no dispute as to the competence of REO counsel, and since the settlement discussions have advanced to the point of a settlement approval hearing, the motion judge's decision not to interfere with Mr. Fantl's choice of counsel should be upheld.

11 I cannot accede to the appellant's submissions. In my view, the representative plaintiff is entitled to select, and is indeed responsible for selecting, class counsel. In a circumstance like this, when a decision properly comes before the supervisory court for review, the criteria to be considered in determining whether the plaintiff's choice of counsel can stand are: competence of counsel; whether the choice was based on any improper considerations; and whether the choice resulted in any prejudice to the class. In the present case, competence of counsel is conceded. There is no evidence of any improper purpose in the selection of counsel or of any prejudice to the class as a result of that decision. Furthermore, the Kang action, commenced after the motion judge dismissed the appellant's motion, is an abuse of process.

12 I would dismiss the appeal, and exercise my discretion under s. 134(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "CJA") and s. 13 of the CPA, to stay the Kang action. My reasons, which differ from those of the motion judge, follow.

The Issues

13 There are three central issues on this appeal. First, is the representative plaintiff in an intended class proceeding, who is required to retain new counsel after the proceeding has been commenced, entitled to select counsel of his or her own choosing or is the court, in the exercise of its supervisory jurisdiction under the CPA, always required to approve class counsel?

14 Second, regardless of the answer to the first question, if the selection of counsel comes before the court for review, what is the proper test to be applied in determining whether the plaintiff's selection of class counsel should stand?

15 Third, the appellant has asked this court to review whether Mr. Fantl should be replaced as the representative plaintiff. This requested relief bears on the status of a competing action, launched by the appellant following the dismissal of its motion, in which Ms. Kang is the representative plaintiff.

Facts

16 This appeal arises from a proposed class action against Transamerica that has yet to be certified. Mr. Fantl is not the original representative plaintiff in this action. The action was initially started by Michael Millman, a chartered accountant in British Columbia who owned an insurance policy issued by the company that is now Transamerica, and which contained an investment option known as the Can-Am Fund. Mr. Millman sought to sue Transamerica on the basis that: (1) Transamerica had overcharged him for management expenses; and (2) that the Can-Am fund had not tracked or replicated the results of the S&P 500 total return index as had been promised.

17 The lawyer retained by Mr. Millman referred the claims to Sutts, Strosberg LLP in Ontario for the purpose of commencing a class action. On December 29, 2003, a statement of claim was issued by Mr. Millman's new counsel against Transamerica.

18 Although there is disputed evidence as to the timing and roles of the parties, the motion judge found that by autumn 2005, the case had been transferred to the law firm REKO. He further found that, upon the transfer of the file, Mr. Kim became the supervising lawyer on the case. Shortly thereafter, Mr. Millman indicated that he was no longer prepared to act as the representative plaintiff in the case.

19 Mr. Fantl was a long-standing friend of REKO partner Mr. Roy, and had been seeking legal advice from the firm on an unrelated matter at about the time that the original representative plaintiff removed himself from the file. During discussions, it emerged that Mr. Fantl was also an investor in the Can-Am Fund operated by Transamerica. REKO's lawyers invited him to act as the new representative plaintiff in the action and he accepted.

20 In May 2006, Mr. Fantl signed a retainer agreement with REKO. The retainer agreement was between Mr. Fantl and the law firm, and not between Mr. Fantl and any of REKO's individual lawyers.

21 Between September 2005 and April 2007, the case progressed. The statement of claim was amended, material for the certification was prepared and cross-examinations were conducted. The certification motion did not proceed in May 2007, as scheduled, because Mr. Kim and counsel for Transamerica began to explore the idea of consent certification and a settlement of the management expenses claim. The parties indicated in a case conference on September 12, 2007 that there was a prospect of settlement but that the scope of the funds implicated in the claim was growing significantly, beyond just the Can-Am fund.

22 The motion judge found that Mr. Kim had been the partner at REKO with the most involvement in Mr. Fantl's case, and that Mr. Kim had been assisted in this work to varying degrees by six associate lawyers. The motion judge also noted Mr. Fantl's evidence that he had had minimal contact with Mr. Kim throughout the course of the class action and that Mr. Kim had not provided him with any reports or advice on the case, apart from one brief conversation.

23 For reasons not disclosed to the motion judge, REKO dissolved on December 31, 2007. Mr. Kim established the firm now known as KO, and REKO's other former partners established the new firm called REO.

24 Mr. Roy wrote to Mr. Fantl to inform him of REKO's dissolution and to seek instructions with respect to carriage of the class action. On January 5, 2008, Mr. Fantl wrote to REO to say that he had chosen the firm to act as his lawyers for the class action. He cited his "personal knowledge of Mr. Roy, his abilities and integrity as a lawyer and my confidence in his judgment" as among the reasons for his choice. In this regard, the motion judge noted that Mr. Fantl had been the best man at Mr. Roy's wedding. In his affidavit evidence, Mr. Fantl also noted that his choice of counsel was influenced by the fact that "REO has extensive class action experience and the senior partners have a great deal of experience in complex litigation, including settlement of complicated cases." Mr. Fantl was not cross-

examined on his affidavit. REO served the notice of change of solicitors and came on the record on January 18, 2008.

25 KO subsequently brought a motion to set aside the notice of change of solicitors, and to disqualify Mr. Fantl from being the representative plaintiff in the class action. It argued before the motion judge that Mr. Fantl had breached his duty to the intended class members by choosing REO and that, based on the success and progress achieved by Mr. Kim in the action, it was in the best interests of the class that KO be appointed as solicitor of record. KO also argued that, in the alternative, the court should replace Mr. Fantl with two new proposed representative plaintiffs, Ms. Seok and Ms. Kang. Mr. Fantl argued that the court's jurisdiction to govern the solicitor-client relationship was limited to the post-certification phase and that, in any event, Mr. Fantl had fulfilled his duty to the intended class members by choosing adequate counsel.

26 KO's motion was dismissed. The dismissal was upheld by the Divisional Court. Following the dismissal of the motion, KO brought a competing action against Transamerica, with Ms. Kang as the proposed representative plaintiff. The Kang action covers 25 of the 26 investment funds that are the subject of the proposed settlement agreement in the instant case. The only distinction between the two is that the Kang action does not include the Can-Am fund.

Decision of the motion judge

27 In his reasons, the motion judge characterized the "overarching issue in the case" as being whether the court has the jurisdiction to supervise the relationships arising in a class proceeding, both pre- and post- certification: para. 56. He held that, on the basis of the court's inherent jurisdiction to control its own process and the powers derived from s. 12 of the CPA, the court's jurisdiction to supervise a class proceeding "exists from the outset of the litigation and the Court has the jurisdiction to make orders to protect putative class members as potential parties to the litigation": para. 58.

28 Having determined that the court has the jurisdiction to supervise all relationships arising out of a class proceeding from the outset of the litigation, the motion judge turned specifically to a consideration of the solicitor-client relationship. He recognized that in an ordinary action, well established principles dictate that a litigant has the autonomy to choose counsel without court interference. However, he noted that these principles cannot be transferred directly to the class action context due to the responsibilities owed by the representative plaintiff, class counsel and the court to absent class members.

29 The motion judge acknowledged previous case law suggesting that a solicitor-client relationship - with all its concomitant duties and obligations - may not exist between class counsel and proposed class members in the pre-certification stage. However, he held that a *sui generis* relationship exists between class counsel and proposed class members, and that at least some of the responsibilities inherent in the solicitor-client relationship are owed by counsel to the proposed class.

30 In considering the proper test for determining whether Mr. Fantl's choice of counsel should stand, the motion judge reviewed the case law that had developed in relation to the adequacy of the representative plaintiff, carriage motions and the removal or change of counsel. Ultimately, he likened the fact situation of the instant case as being akin to that of choosing a solicitor of record at the outset of litigation. He thus applied the standard applied by the court on a certification motion: whether the representative plaintiff has selected "competent counsel that will adequately represent the proposed class if the action is certified": para. 105.

31 In so deciding, the motion judge noted that this standard did not require the representative plaintiff to choose the best or more superior counsel. In this respect, while he stated that "Mr. Kim might or might not be a better choice", Mr. Fantl's choice of REO as solicitor of record met the standard of competency and adequacy: para. 110.

Accordingly, the motion was dismissed.

Decision of the Divisional Court

32 On appeal, the appellant submitted before the Divisional Court that the motion judge had applied the wrong legal test when determining whether Mr. Fantl had properly appointed REO as the new class counsel.

33 The Divisional Court reviewed the motion judge's conclusions and found that he had committed no error of law. In particular, the Divisional Court endorsed the motion judge's central conclusion that, "having selected competent counsel to represent the class, the fact there are other counsel who may be a better choice does not change the standard Mr. Fantl must meet": para. 37.

Positions of the Parties

34 The thrust of the appellant's argument is that, even though the litigation is being conducted by a representative or intended representative plaintiff, where a decision is required in the conduct of the proceeding, including one that occurs at the pre-certification stage, the decision of the plaintiff must receive the court's approval.

35 The appellant contends that this is necessitated by an overriding concern for the interests of the absent class members. Accordingly, in its submission, the test to be applied by the court is whether the decision made by the plaintiff is in the best interests of the class. This, says the appellant, is the test to be applied by a court throughout a class proceeding, regardless of the issue to be decided or the stage of the proceeding.

36 The respondents advance a more limited view of the supervisory role of the court in the exercise of its jurisdiction under the CPA. They caution that it is not appropriate for the court to "descend into the arena" and assume the responsibility of the plaintiff in conducting the litigation.

Analysis

37 In addressing the issues raised in this appeal, I am guided by the reasons of the Supreme Court of Canada in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.), which sets out the standards of review in appeals from a judge's order.

Issue 1: Supervisory jurisdiction of the court

38 It is now well settled that class proceedings are *sui generis* litigation. In part, this is because of the existence of the proposed class in addition to the putative representative plaintiff. As stated by Cullity J. in *Heron v. Guidant Corp.*, [2007] O.J. No. 3823 (Ont. S.C.J.), leave to appeal refused (2008), 232 O.A.C. 366 (Ont. Div. Ct.), at para. 10:

> From the commencement of a class proceeding the court, as well as the named plaintiff has responsibilities to members of the class....They are not parties to the proceeding but they are not strangers. Their rights are as much at stake as those of the plaintiffs. It is consistent with their *sui generis* status, and the objectives of the CPA, that their interests should not be vulnerable to the deficiencies in the ability of the named plaintiff to represent them.
>
> [Citations omitted.]

39 The existence of the absent class members, among other factors, is the reason that the court's supervisory

jurisdiction is engaged from the inception of an intended class proceeding. It continues throughout the "stages" of the proceeding until a final disposition, including the implementation of the administration of a settlement or, where applicable, a resolution of all individual issues.

40 The supervisory jurisdiction of the court over the class proceeding is not in issue on this appeal. The parties acknowledge that the court has supervisory jurisdiction throughout the proceeding. They do, however, posit markedly different theories as to the circumstances in which this jurisdiction must or ought to be exercised.

41 While I do not agree with the appellant's position that the court must be actively engaged at every turn in the proceeding, I am equally circumspect about the "hands off" approach advocated by the respondents. Neither view accurately captures the role of the court in respect of a class proceeding.

42 The CPA is specific as to certain matters arising out of litigation conducted under the aegis of the statute that require court approval. These include, *inter alia*, the abandonment or discontinuance of an action, approval of settlements, notice to class members and class counsel fees: see ss. 29(1), 29(2), 20, and 32(2) of the CPA respectively. In addition to such enumerated and specific matters requiring court approval, the legislature has also seen fit to provide the court, under s. 12 of the CPA, with a broad, discretionary jurisdiction to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination". Although the court's ongoing supervisory jurisdiction is manifest in the CPA, this is not to say that every decision made by the plaintiff or counsel in the prosecution of the class action lawsuit requires the sanction of the court.

43 The motion under appeal was brought pursuant to s. 12 of the CPA. The appellant argues that a notice of change of solicitors should not have been delivered without first obtaining an order of the court on motion brought by the representative plaintiff, so as to have the court approve the new class counsel. Further, the appellant contends that this determination should only be made on the basis of the "best interests of the class".

44 I disagree. The position advanced by the appellant appears to be an attempt to combine certain developed principles of class action jurisprudence so as to elevate the court's supervisory role over the proceeding to one of mandatory intervention. While it is true that the court has a responsibility to the absent class members, the prosecution of the action rests squarely with the representative plaintiff. The representative plaintiff in a class action lawsuit is a genuine plaintiff, who chooses, retains and instructs counsel and to whom counsel report.

45 This is clear from a reading of the CPA. In order to obtain certification, s. 5(1) of the CPA requires that the court be satisfied that the representative plaintiff "has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class". In other words, as stated by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.), at para. 41:

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

46 As is also stated in this passage, an important part of this representative plaintiff's plan is the retention of "competent" counsel.

47 I do not view it as necessary for the plaintiff to seek and obtain approval of the court for every decision in-

volving the selection or change of counsel. However, I am of the view that the case management judge charged with responsibility for the supervision of the proceeding should be immediately and directly notified of such a change. Further, if this decision is contested and properly comes before the court on motion, the court is well within its jurisdiction to review the plaintiff's decision.

Issue 2: Test for reviewing a plaintiff's choice of counsel

48 The parties vigorously disputed the test to be applied when the court reviews a representative plaintiff's choice of counsel. In his reasons, the motion judge correctly identified the issues and canvassed the relevant case law in deciding that question. In my view, he made no error in holding that the choice of counsel upon REKO's dissolution was a matter for Mr. Fantl to deal with and that his decision did not warrant interference by the court. Nonetheless, I would arrive at that result for different reasons and based on a different analysis than that of the motion judge.

49 The appellant has argued that this court should evaluate Mr. Fantl's choice of counsel by determining whether he was acting in the "best interests of the class" in so choosing. On the other hand, the respondent contends that the motion judge was correct in applying a test of adequacy to Mr. Fantl's choice of counsel. In my view, both approaches miss the mark. Once the court's jurisdiction is engaged, any review by the court of a decision as to choice of counsel must be directed to three factors:

(1) Has the plaintiff chosen competent counsel?

(2) Were there any improper considerations underlying the choice made by the plaintiff? and

(3) Is there prejudice to the class as a result of the choice?

50 Unless this inquiry reveals something unsatisfactory to the court, it ought not to interfere with the choice of counsel made by the plaintiff. The court is not a substitute decision maker for the plaintiff in the litigation. Accordingly, any intervention based on its supervisory jurisdiction must be limited to situations where there is cogent evidence that steps taken may have an adverse impact on the absent class members.

51 In formulating these criteria for review of the choice of counsel by the plaintiff, I am necessarily rejecting the argument of the appellant that the only test to be applied by the court is whether the choice is "in the best interests of the class". It must be remembered that the broad and guiding "best interests" principle developed in recognition of the distinction that must be made between the interests of individual class members and the interests of the class as a whole when the court is considering certain issues: see *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.), *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (Ont. S.C.J.), and *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (Ont. S.C.J.). Here, the context is very different.

52 Moreover, where the issue before the court is the plaintiff's choice of counsel, insofar as the "interests of the class" must be considered, they are sufficiently addressed under the prejudice criterion. Where there is no prejudice, the choice of "competent counsel" who has not been selected for any improper purpose will also be in the interests of the class.

53 By applying these criteria, the court avoids the "contest" approach proposed by the appellant, which pits two sets of competing lawyers against each other and undermines the role of the representative plaintiff in selecting counsel. Such an approach is neither necessary nor productive where, as here, competence is conceded and there is no evidence that the plaintiff has acted improperly or in a manner that prejudices the interests of the class.

54 The appellant contends that the "contest" approach is appropriate in the present circumstances because the choice of counsel is analogous to a carriage motion. I disagree. A carriage motion is a motion to determine which of two or more overlapping, competing intended class actions should be allowed to proceed and which should be stayed. A carriage motion involves a competition which, of necessity, requires a comparison of the competing proceedings. Unlike a carriage motion, there is no competition between proceedings here. It is for this reason that any analogy between a carriage motion and the present circumstances breaks down.

Application of the test to the instant case

55 The instant proceeding involves the choice of counsel upon dissolution of the class counsel law firm. The retainer agreement was entered into between Mr. Fantl and REKO, and not with Mr. Kim or any other individual lawyer. A team of lawyers at the predecessor firm dealt with the case.

56 On dissolution, some of the team formed the appellant, some formed REO and one lawyer joined another firm. Lawyers in each of these factions had participated in the work on the file to varying degrees. The lawyer who did the most work on the file was the associate who left and went to an unrelated firm.

57 The record indicates that, although Mr. Kim was the senior partner on the case, he did not take instructions from, or report to, Mr. Fantl, and that he only accompanied Mr. Fantl to cross-examinations. He attended one settlement meeting with the defendant at which defendant's counsel offered to settle the claim, expand the class definition and communicate this development to class members.

58 In the context of this file, and in the eyes of Mr. Fantl, there was more to the REKO firm than just Mr. Kim. Mr. Fantl was faced with three choices. He could go with the appellant, the REO firm or choose a different firm. He chose the REO firm.

59 The appellant argues that the failure to retain KO was akin to a dismissal of counsel. I do not accept this characterization of the facts before this court. The appellant was not terminated by the plaintiff. Indeed, KO had no relationship with the plaintiff capable of termination. Rather, its complaint is that the plaintiff did not choose to retain its lawyers after REKO's dissolution.

60 Turning to the first factor of the test, competence of counsel of choice was conceded in the present case. I note the appellant's submission that competence of counsel is not a useful benchmark since every lawyer in Ontario is competent and thus no motion challenging a plaintiff's choice of counsel is likely to ever be successful. I disagree. Where competence is a live issue, the court should consider under this head:

(1) The nature of the lawsuit;

(2) The complexity of the litigation;

(3) The fact that it was a class proceeding;

(4) The experience of counsel as to subject matter and class actions;

(5) The resources of counsel;

(6) The stage of the proceedings at which the review occurs; and

(7) Any other considerations the court might deem to be appropriate.

61 Moreover, when considering competence of counsel, the court must take into account the fact that, after certification, class counsel will be in a solicitor-client relationship with the class members, with all of the responsibilities that entails, extending until the implementation of a settlement or final disposition of any individual issues. In other words, given that the class may include a large number of people, this obligation may be significant and prolonged: see generally *Cassano v. Toronto Dominion Bank* (2007), 87 O.R. (3d) 401 (Ont. C.A.), and *Ward-Price v. Mariners Haven Inc.* (2004), 71 O.R. (3d) 664 (Ont. S.C.J.), at para. 7.

62 These criteria serve to advance an object of the CPA, namely to obtain first class representation for class members.

63 Turning to the second factor, there is no evidence of any improper purpose or motive on the part of the plaintiff in making his decision to retain REO. The appellant points to the plaintiff's friendship with Mr. Roy, one of the partners of REO, as the driving factor in choice of counsel. While that was a consideration, it was not the only factor for the plaintiff's choice of counsel. As noted by the motion judge and as indicated in the record, Mr. Fantl was attracted to REO because of the competence of counsel, which is not disputed, and its reputation in class action work.

64 In any event, I would not accept that the fact of an acknowledged friendship between the plaintiff and his counsel of choice would constitute an improper purpose in and of itself. An improper purpose would be one where the plaintiff was seeking to gain a personal advantage, the hope of an advantage not shared by the class members or was motivated in some way that was inconsistent with the interests of the class.

65 Turning to the third factor, to the extent that prejudice was argued by the appellant, this line of argument focused on the economic prejudice to the appellant rather than on any prejudice to the interests of the class. The appellant emphasized what was characterized as the policy arguments in support of entrepreneurial lawyers, which were said to advance one of the goals of the CPA - access to justice. Effectively, the appellant's argument is that it would be unfair for a plaintiff, upon dissolution of his or her counsel's law firm, to choose any lawyer other than the lawyer who had previously acted as the lead counsel. In other words, in a class action, the lawyer's time and effort on the file constitutes an equity investment by the lawyer in the case. It is argued that if representative plaintiffs are allowed to switch counsel at will, there will be less of an incentive for counsel to take on class actions and make an investment of time and effort that may be lost.

66 There is no question that class proceedings are entrepreneurial in nature. However, the proposition advanced by the appellant would only be supportable if the creation of an entrepreneurial class action bar was a policy goal underpinning the CPA. This argument fails because as far as the CPA is concerned, the entrepreneurial lawyer is a means to an end, not an end in and of itself. Were it otherwise, one of the criticisms of the CPA, that it promulgates plaintiff-less litigation benefiting only the lawyers involved, would be well founded. Such is not the case.

67 Sections 33(1) and (4) of the CPA, which provide for contingency fees and a multiplier effect on fees to reward risk and success, are intended to provide sufficient incentives for lawyers to take on class proceedings that would not otherwise be attractive. This is the entrepreneurial aspect of class proceedings legislation that enhances access to justice. The CPA does not, nor was it ever intended to, provide lawyers with a vested interest in the subject matter of the lawsuit entitling them to override the choices of the representative plaintiff in the litigation, including the choice of counsel.

68 In any event, Mr. Kim's investment of time and effort in the action while at REKO will be protected through the process of dissolving that firm.

69 In conclusion, in light of the three factors set out above, namely, that competence of counsel is not in issue, there is no evidence of any improper purpose or considerations in choice of counsel, and no demonstrated prejudice

to the class, there is no reason to interfere with the choice of counsel by Mr. Fantl.

Issue 3: Substitution of the representative plaintiff and the status of the Kang action

70 Before Perell J., the appellant sought an order adding Ms. Seok and Ms. Kang as potential representative plaintiffs to replace Mr. Fantl as the plaintiff. Perell J. denied its request.

71 On appeal, the appellant argued that Mr. Fantl's decision not to retain the appellant, in the face of Mr. Kim's success on the file, suggests that Mr. Fantl will not best represent the class members, and, thus, ought to be removed. On behalf of Ms. Kang and Ms. Seok, it argued that they should be substituted as representative plaintiffs. The respondents opposed, saying that, as with the commencement of the Kang action, this is simply an attempt to determine who will represent the interests of the class.

72 Mr. Fantl has prosecuted the action to the point of settlement. There is no suggestion that he has been less than diligent in this respect. Indeed, Mr. Fantl stepped in to represent the class when the original representative plaintiff chose to abandon that role. He did so after being approached by solicitors from REKO, some of whom now stand with opposing interests on this appeal.

73 While not necessarily determinative, the choice to approach Mr. Fantl to act in the representative capacity indicates that none of the counsel had any concerns about his ability to perform that role at that time. Moreover, when the plaintiff assumed the representation of the class, it must have been implicitly understood by his solicitors that he would be the one providing instructions for the litigation of the action.

74 In light of these factors and my conclusion above that Mr. Fantl chose competent counsel, did not act with an improper purpose or act to the prejudice of the class, there is no basis to interfere with the decision of the motion judge not to remove or replace Mr. Fantl as the representative plaintiff in this action.

Stay of Kang Action

75 The appellant commenced the Kang action following the dismissal of the motion to strike the notice of change of solicitors and replace the representative plaintiff, notwithstanding its admission before the motion judge that such a move would be "disingenuous": para. 99. Indeed, the Divisional Court commented on this development in the following terms at para. 11 of its reasons:

> Most remarkable of all, and independent of this motion under appeal, the lawyer has started a separate class proceeding against Transamerica in the name of Ms. Kang, the proposed representative plaintiff. This is the same Ms. Kang whom the lawyer seeks to have added as representative plaintiff with Mr. Fantl, or, in the alternative, to replace Mr. Fantl, his former client, with Ms. Kang and Ms. Seok.

76 I agree with the observation of the Divisional Court that the bringing of the Kang action after having lost the motion before the motion judge was "most remarkable". The only purpose for doing this can be to provide a platform for a carriage motion to challenge the instant proceeding as the proper proceeding to take the action forward to settlement on behalf of the class.

77 Apart from the fact that the appellant brought the second duplicative proceeding, which would in my view be determinative in and of itself, a carriage motion would also involve the appellant in bringing a proceeding against its former client.

78 The essence of the respondents' argument is that the Kang action amounts to an abuse of process. I agree.

Accordingly, pursuant to the jurisdiction conferred upon this court under s. 134(1) of the CJA and s. 13 of the CPA, I would stay the Kang action.

79 If allowed to proceed, the Kang action would inevitably be stayed in any event. Considering the factors outlined by Cumming J. in *VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2000), 4 C.P.C. (5th) 169 (Ont. S.C.J.), at para. 49, there is no question that Mr. Fantl's action would proceed over the Kang action given that it is so "significantly more advanced than the other": *Setterington v. Merck Frosst Canada Ltd.* (2006), 26 C.P.C. (6th) 173 (Ont. S.C.J.), at para. 22, and *Ricardo v. Air Transat A.T. Inc.* (2002), 21 C.P.C. (5th) 297 (Ont. S.C.J.), at para. 24.

80 Further, as this action is on the cusp of settlement, the delay caused by a carriage motion would only serve to postpone the class members' access to justice. Even the appellant recognized that time was of the essence in this case, given the imminent settlement approval hearing, when it sought and was granted an expedited hearing of this appeal. Therefore, regardless of whether the competing actions are analyzed through the lens of best interests of the class or through that of prejudice, I reach the same inevitable conclusion that the Kang action should be stayed. The class members are entitled to certainty.

Conclusion

81 In conclusion, I would dismiss the appeal. Further, I would grant a stay of the Kang action. Mr. Fantl shall receive costs of $10,000 for the appeal and $5,000 for the leave motion inclusive of disbursements and G.S.T. The appellant shall also pay to Transamerica its costs of $6,350 for the appeal and $2,000 for the leave motion, inclusive of disbursements and G.S.T.

S.T. Goudge J.A.:

I agree.

J.M. Simmons J.A.:

I agree.

Appeal dismissed.

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2009 CarswellOnt 3028, 53 C.B.R. (5th) 196, 75 C.C.P.B. 206

Nortel Networks Corp., Re

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Ontario Superior Court of Justice [Commercial List]

Morawetz J.

Heard: April 20, 2009
Judgment: May 27, 2009[FN*]
Docket: 09-CL-7950

Counsel: Janice Payne, Steven Levitt, Arthur O. Jacques for Steering Committee of Recently Severed Canadian Nortel Employees

Barry Wadsworth for CAW-Canada, George Borosh, Debra Connor

Lyndon Barnes, Adam Hirsh for Board of Directors of Nortel Networks Corporation, Nortel Networks Limited

Alan Mersky, Derrick Tay for Applicants

Henry Juroviesky, Eli Karp, Kevin Caspersz, Aaron Hershtal for Steering Committee for the Nortel Terminated Canadian Employees Owed Termination and Severance Pay

M. Starnino for Superintendent of Financial Services or Administrator of the Pension Benefits Gurantee Fund

Leanne Williams for Flextronics Telecom Systems Ltd.

Jay Carfagnini, Chris Armstrong for Monitor, Ernst & Young Inc.

Gail Misra for Communication, Energy and Paperworkers Union of Canada

J. Davis-Sydor for Brookfield Lepage Johnson Controls Facility Management Services

Mark Zigler, S. Philpott for Certain Former Employees of Nortel

G.H. Finlayson for Informal Nortel Noteholders Group

A. Kauffman for Export Development Canada

Alex MacFarlane for Unsecured Creditors' Committee (U.S.)

Subject: Insolvency

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

Appointment of representative counsel — Telecommunication company entered protection under Companies' Creditors Arrangement Act — Telecommunications company ceased paying former employees with unsecured claims — Several groups of employees claimed entitlement to assets of company, including current working employees, and pensioners — Several law firms maintained that different classes should be established representing employees with different interests, with different legal representatives for each — Five law firms brought motions regarding representation — Law firm KM appointed representative for all potential classes of employee — Court has broad power to appoint representative counsel — Employees and retirees were vulnerable creditors, and had little means to pursue claims beyond representative counsel — No party denied choice of counsel as employees entitled to obtain individual counsel — No current conflict of interest between pensioned and non-pensioned employees — Many classes of employee had similar interest in pension plan — Claims under pension, to extend it was funded, not affected by CCAA proceedings — Pension claims by terminated employees creating conflict with other claims was only hypothetical — All former employees had community of interest.

Cases considered by *Morawetz J.*:

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

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

Statutes considered:

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

Generally — referred to

s. 11 — considered

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

Generally — referred to

Pension Benefits Act, R.S.O. 1990, c. P.8

Generally — referred to

Rules considered:

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

R. 10 — referred to

R. 10.01 — considered

R. 12.07 — considered

MOTIONS regarding appointment of counsel in proceedings under *Companies' Creditors Arrangement Act.*

Morawetz J.:

1 On May 20, 2009, I released an endorsement appointing Koskie Minsky as representative counsel with reasons to follow. The reasons are as follows.

2 This endorsement addresses five motions in which various parties seek to be appointed as representative counsel for various factions of Nortel's current and former employees (Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation are collectively referred to as the "Applicants" or "Nortel").

3 The proposed representative counsel are:

(i) Koskie Minsky LLP ("KM") who is seeking to represent all former employees, including pensioners, of the Applicants or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in respect of a pension from the Applicants. Approximately 2,000 people have retained KM.

(ii) Nelligan O'Brien Payne LLP and Shibley Righton LLP (collectively "NS") who are seeking to be co-counsel to represent all former non-unionized employees, terminated either prior to or after the CCAA filing date, to whom the Applicants owe severance and/or pay in lieu of reasonable notice. In addition, in a separate motion, NS seeks to be appointed as co-counsel to the continuing employees of Nortel. Approximately 460 people have retained NS and a further 106 have retained Macleod Dixon LLP, who has agreed to work with NS.

(iii) Juroviesky and Ricci LLP ("J&R") who is seeking to represent terminated employees or any person claiming an interest under or on behalf of former employees. At the time that this motion was heard approximately 120 people had retained J&R. A subsequent affidavit was filed indicating that this number had increased to 186.

(iv) Mr. Lewis Gottheil, in-house legal counsel for the National Automobile, Aerospace, Transportation and General Workers Union of Canada ("CAW") who is seeking to represent all retirees of the Applicants who were formerly members of one of the CAW locals when they were employees. Approximately 600

people have retained Mr. Gottheil or the CAW.

4 At the outset, it is noted that all parties who seek representation orders have submitted ample evidence that establishes that the legal counsel that they seek to be appointed as representative counsel are well respected members of the profession.

5 Nortel filed for CCAA protection on January 14, 2009 (the "Filing Date"). At the Filing Date, Nortel employed approximately 6,000 employees and had approximately 11,700 retirees or their spouses receiving pension and/or benefits from retirement plans sponsored by the Applicants.

6 The Monitor reports that the Applicants have continued to honour substantially all of the obligations to active employees. However, the Applicants acknowledge that upon commencement of the CCAA proceedings, they ceased making almost all payments to former employees of amounts that would constitute unsecured claims. Included in those amounts were payments to a number of former employees for termination and severance, as well as amounts under various retirement and retirement transition programs.

7 The Monitor is of the view that it is appropriate that there be representative counsel in light of the large number of former employees of the Applicants. The Monitor is of the view that former employee claims may require a combination of legal, financial, actuarial and advisory resources in order to be advanced and that representative counsel can efficiently co-ordinate such assistance for this large number of individuals.

8 The Monitor has reported that the Applicants' financial position is under pressure. The Monitor is of the view that the financial burden of multiple representative counsel would further increase this pressure.

9 These motions give rise to the following issues:

(i) when is it appropriate for the court to make a representation and funding order?

(ii) given the completing claims for representation rights, who should be appointed as representative counsel?

Issue 1 - Representative Counsel and Funding Orders

10 The court has authority under Rule 10.01 of the *Rules of Civil Procedure* to appoint representative counsel where persons with an interest in an estate cannot be readily ascertained, found or served.

11 Alternatively, Rule 12.07 provides the court with the authority to appoint a representative defendant where numerous persons have the same interests.

12 In addition, the court has a wide discretion pursuant to s. 11 of the CCAA to appoint representatives on behalf of a group of employees in CCAA proceedings and to order legal and other professional expenses of such representatives to be paid from the estate of the debtor applicant.

13 In the KM factum, it is submitted that employees and retirees are a vulnerable group of creditors in an insolvency because they have little means to pursue a claim in complex CCAA proceedings or other related insolvency proceedings. It was further submitted that the former employees of Nortel have little means to pursue their claims in respect of pension, termination, severance, retirement payments and other benefit claims and that the former employees would benefit from an order appointing representative counsel. In addition, the granting of a representation order would provide a social benefit by assisting former employees and that representative counsel would provide a

reliable resource for former employees for information about the process. The appointment of representative counsel would also have the benefit of streamlining and introducing efficiency to the process for all parties involved in Nortel's insolvency.

14 I am in agreement with these general submissions.

15 The benefits of representative counsel have also been recognized by both Nortel and by the Monitor. Nortel consents to the appointment of KM as the single representative counsel for all former employees. Nortel opposes the appointment of any additional representatives. The Monitor supports the Applicants' recommendation that KM be appointed as representative counsel. No party is opposed to the appointment of representative counsel.

16 In the circumstances of this case, I am satisfied that it is appropriate to exercise discretion pursuant to s. 11 of the CCAA to make a Rule 10 representation order.

Issue 2 - Who Should be Appointed as Representative Counsel?

17 The second issue to consider is who to appoint as representative counsel. On this issue, there are divergent views. The differences primarily centre around whether there are inherent conflicts in the positions of various categories of former employees.

18 The motion to appoint KM was brought by Messrs. Sproule, Archibald and Campbell (the "Koskie Representatives"). The Koskie Representatives seek a representation order to appoint KM as representative counsel for all former employees in Nortel's insolvency proceedings, except:

> (a) any former chief executive officer or chairman of the board of directors, any non-employee members of the board of directors, or such former employees or officers that are subject to investigation and charges by the Ontario Securities Commission or the United States Securities and Exchange Commission:
>
> (b) any former unionized employees who are represented by their former union pursuant to a Court approved representation order; and
>
> (c) any former employee who chooses to represent himself or herself as an independent individual party to these proceedings.

19 Ms. Paula Klein and Ms. Joanne Reid, on behalf of the Recently Severed Canadian Nortel Employees ("RSCNE"), seek a representation order to appoint NS as counsel in respect of all former Nortel Canadian non-unionized employees to whom Nortel owes termination and severance pay (the "RSCNE Group").

20 Mr. Kent Felske and Mr. Dany Sylvain, on behalf of the Nortel Continuing Canadian Employees ("NCCE") seek a representative order to appoint NS as counsel in respect of all current Canadian non-unionized Nortel employees (the "NCCE Group").

21 J&R, on behalf of the Steering Committee (Mr. Michael McCorkle, Mr. Harvey Stein and Ms. Marie Lunney) for Nortel Terminated Canadian Employees ("NTCEC") owed termination and severance pay seek a representation order to appoint J&R in respect of any claim of any terminated employee arising out of the insolvency of Nortel for:

> (a) unpaid termination pay;

(b) unpaid severance pay;

(c) unpaid expense reimbursements; and

(d) amounts and benefits payable pursuant to employment contracts between the Employees and Nortel

22 Mr. George Borosh and/or Ms. Debra Connor seek a representation order to represent all retirees of the Applicants who were formerly represented by the CAW (the "Retirees") or, alternatively, an order authorizing the CAW to represent the Retirees.

23 The former employees of Nortel have an interest in Nortel's CCAA proceedings in respect of their pension and employee benefit plans and in respect of severance, termination pay, retirement allowances and other amounts that the former employees consider are owed in respect of applicable contractual obligations and employment standards legislation.

24 Most former employees and survivors of former employees have basic entitlement to receive payment from the Nortel Networks Limited Managerial and Non-negotiated Pension Plan (the "Pension Plan") or from the corresponding pension plan for unionized employees.

25 Certain former employees may also be entitled to receive payment from Nortel Networks Excess Plan (the "Excess Plan") in addition to their entitlement to the Pension Plan. The Excess Plan is a non-registered retirement plan which provides benefits to plan members in excess of those permitted under the registered Pension Plan in accordance with the *Income Tax Act*.

26 Certain former employees who held executive positions may also be entitled to receive payment from the Supplementary Executive Retirement Plan ("SERP") in addition to their entitlement to the Pension Plan. The SERP is a non-registered plan.

27 As of Nortel's last formal valuation dated December 31, 2006, the Pension Plan was funded at a level of 86% on a wind-up basis. As a result of declining equity markets, it is anticipated that the Pension Plan funding levels have declined since the date of the formal valuation and that Nortel anticipates that its Pension Plan funding requirements in 2009 will increase in a very substantial and material matter.

28 At this time, Nortel continues to fund the deficit in the Pension Plan and makes payment of all current service costs associated with the benefits; however, as KM points out in its factum, there is no requirement in the Initial Order compelling Nortel to continue making those payments.

29 Many retirees and former employees of Nortel are entitled to receive health and medical benefits and other benefits such as group life insurance (the "Health Care Plan"), some of which are funded through the Nortel Networks' Health and Welfare Trust (the "HWT").

30 Many former employees are entitled to a payment in respect of the Transitional Retirement Allowance ("TRA"), a payment which provides supplemental retirement benefits for those who at the time of their retirement elect to receive such payment. Some 442 non-union retirees have ceased to receive this benefit as a result of the CCAA proceedings.

31 Former employees who have been recently terminated from Nortel are owed termination pay and severance pay. There were 277 non-union former employees owed termination pay and severance pay at the Filing Date.

32 Certain former unionized employees also have certain entitlements including:

(a) Voluntary Retirement Option ("VRO");

(b) Retirement Allowance Payment ("RAP"); and

(c) Layoff and Severance Payments

33 The Initial Order permitted Nortel to cease making payments to its former employees in respect of certain amounts owing to them and effective January 14, 2009, Nortel has ceased payment of the following:

(a) all supplementary pensions which were paid from sources other than the Registered Pension Plan, including payments in respect of the Excess Plan and the SERP;

(b) all TRA agreements where amounts were still owing to the affected former employees as at January 14, 2009;

(c) all RAP agreements where amounts were still owing to the affected former employees as at January 14, 2009;

(d) all severance and termination agreements where amounts were still owing to the affected former employees as at January 14, 2009; and

(e) all retention bonuses where amounts were still owing to affected former employees as at January 14, 2009.

34 The representatives seeking the appointment of KM are members of the Nortel Retiree and Former Employee Protection Committee ("NRPC"), a national-based group of over 2,000 former employees. Its stated mandate is to defend and protect pensions, severance, termination and retirement payments and other benefits. In the KM factum, it is stated that since its inception, the NRPC has taken steps to organize across the country and it has assembled subcommittees in major centres. The NRPC consists of 20 individuals who it claims represent all different regions and interests and that they participate in weekly teleconference meetings with legal counsel to ensure that all former employees' concerns are appropriately addressed.

35 At paragraph 49 of the KM factum, counsel submits that NRPC members are a cross-section of all former employees and include a variety of interests, including those who have an interest in and/or are entitled to:

(a) the basic Pension Plan as a deferred member or a member entitled to transfer value;

(b) the Health Care Plan;

(c) the Pension Plan and Health Care Plan as a survivor of a former employee;

(d) Supplementary Retirement Benefits from the Excess Plan and the SERP plans;

(e) severance and termination pay ; and

(f) TRA payments.

36 The representatives submit that they are well suited to represent all former employees in Nortel's CCAA proceedings in respect of all of their interests. The record (Affidavit of Mr. D. Sproule) references the considerable experience of KM in representing employee groups in large-scale restructurings.

37 With respect to the allegations of a conflict of interest as between the various employee groups (as described below), the position of the representatives seeking the appointment of KM is that all former employees have unsecured claims against Nortel in its CCAA proceedings and that there is no priority among claims in respect of Nortel's assets. Further, they submit that a number of former employees seeking severance and termination pay also have other interests, including the Pension Plan, TRA payments and the supplementary pension payments and that it would unjust and inefficient to force these individuals to hire individual counsel or to have separate counsel for separate claims.

38 Finally, they submit that there is no guarantee as to whether Nortel will emerge from the CCAA, whether it will file for bankruptcy or whether a receiver will be appointed or indeed whether even a plan of compromise will be filed. They submit that there is no actual conflict of interest at this time and that the court need not be concerned with hypothetical scenarios which may never materialize. Finally, they submit that in the unlikely event of a serious conflict in the group, such matters can be brought to the attention of the court by the representatives and their counsel on a *ex parte* basis for resolution.

39 The terminated employee groups seeking a representation order for both NS and J&R submit that separate representative counsel appointments are necessary to address the conflict between the pension group and the employee group as the two groups have separate legal, procedural, and equitable interests that will inevitably conflict during the CCAA process.

40 They submit that the pensioners under the Pension Plan are continuing to receive the full amount of the pension from the Pension Plan and as such they are not creditors of Nortel. Counsel submits that the interest of pensioners is in continuing to receive to receive their full pension and survivor benefits from the Pension Plan for the remainder of their lives and the lives of surviving spouses.

41 In the NS factum at paragraphs 44 - 58, the argument is put forward as to why the former employees to whom Nortel owes severance and termination pay should be represented separately from the pensioners. The thrust of the argument is that future events may dictate the response of the affected parties. At paragraph 51 of the factum, it is submitted that generally, the recently severed employees' primary interest is to obtain the fastest possible payout of the greatest amount of severance and/or pay in lieu of notice in order to alleviate the financial hardships they are currently experiencing. The interests of pensioners, on the other hand, is to maintain the status quo, in which they continue to receive full pension benefits as long as possible. The submission emphasizes that issues facing the pensioner group and the non-pensioner group are profoundly divergent as full monthly benefit payments for the pensioner group have continued to date while non-pensioners are receiving 86% of their lump sums on termination of employment, in accordance with the most recently filed valuation report.

42 The motion submitted by the NTCEC takes the distinction one step further. The NTCEC is opposed to the motion of NS. NS wishes to represent both the RSCNE and the NCCE. The NTCEC believes that the terminated employees who are owed unpaid wages, termination pay and/or severance should comprise their own distinct and individual class.

43 The NTCEC seek payment and fulfillment of Nortel's obligations to pay one or several of the following:

(a) TRA;

(b) 2008 bonuses; and

(c) amendments to the Nortel Pension Plan

44 Counsel to NTCEC submits that the most glaring and obvious difference between the NCCE and the NTCEC, is that NCCE are still employed and have a continuing relationship with Nortel and have a source of employment income and may only have a contingent claim. The submission goes on to suggest that, if the NCCE is granted a representation order in these proceedings, they will seek to recover the full value of their TRA claim from Nortel during the negotiation process notwithstanding that one's claim for TRA does not crystallize until retirement or termination. On the other hand, the terminated employees, represented by the NTCEC and RSCNE are also claiming lost TRA benefits and that claim has crystallized because their employment with Nortel has ceased. Counsel further submits that the contingent claim of the NCCE for TRA is distinct and separate with the crystallized claim of the NTCEC and RSCNE for TRA.

45 Counsel to NTCEC further submits that there are difficulties with the claim of NCCE which is seeking financial redress in the CCAA proceedings for damages stemming from certain changes to the Nortel Networks Limited Managerial and Non-negotiated Pension Plan effective June 1, 2008 and Nortel's decision to decrease retirees benefits. Counsel submits that, even if the NCCE claims relating to the Pension Plan amendment are quantifiable, they are so dissimilar to the claims of the RSCNE and NTCEC, that the current and former Nortel employees cannot be viewed as a single group of creditors with common interests in these proceedings, thus necessitating distinct legal representation for each group of creditors.

46 Counsel further argues that NTCEC's sole mandate is to maximize recovery of unpaid wages, termination and severance pay which, those terminated employees as a result of Nortel's CCAA filing, have lost their employment income, termination pay and/or severance pay which would otherwise be protected by statute or common law.

47 KM, on behalf of the Koskie Representatives, responded to the concerns raised by NS and by J&R in its reply factum.

48 KM submits that the conflict of interest is artificial. KM submits that all members of the Pension Plan who are owed pensions face reductions on the potential wind-up of the Pension Plan due to serious under-funding and that temporarily maintaining of status quo monthly payments at 100%, although required by statute, does not avoid future reductions due to under-funding which offset any alleged overpayments. They submit that all pension members, whether they can withdraw 86% of their funds now and transfer them a locked-in vehicle or receive them later in the form of potentially reduced pensions, face a loss and are thus creditors of Nortel for the pension shortfalls.

49 KM also states that the submission of the RSCNE that non-pensioners may put pressure on Nortel to reduce monthly payments on pensioners ignores the *Ontario Pension Benefits Act* and its applicability in conjunction with the CCAA. It further submits that issues regarding the reduction of pensions and the transfers of commuted values are not dealt with through the CCAA proceedings, but through the Superintendent of Financial Services and the Plan Administrator in their administration and application of the PBA. KM concludes that the Nortel Pension Plans are not applicants in this matter nor is there a conflict given the application of the provisions of the PBA as detailed in the factum at paragraphs 11 - 21.

50 KM further submits that over 1,500 former employees have claims in respect of other employment and retirement related benefits such as the Excess Plan, the SERP, the TRA and other benefit allowances which are claims that have "crystallized" and are payable now. Additionally, they submit that 11,000 members of the Pension Plan are entitled to benefits from the Pensioner Health Care Plan which is not pre-funded, resulting in significant claims in Nortel's CCAA proceedings for lost health care benefits.

51 Finally, in addition to the lack of any genuine conflict of interest between former employees who are pensioners and those who are non-pensioners, there is significant overlap in interest between such individuals and a number of the former employees seeking severance and termination pay have the same or similar interests in other benefit payments, including the Pension Plan, Health Care Plan, TRA, SERP and Excess Plan payments. As well, former employees who have an interest in the Pension Plan also may be entitled to severance and termination pay.

52 With respect to the motions of NS and J&R, I have not been persuaded that there is a real and direct conflict of interest. Claims under the Pension Plan, to the extent that it is funded, are not affected by the CCAA proceedings. To the extent that there is a deficiency in funding, such claims are unsecured claims against Nortel. In a sense, deficiency claims are not dissimilar from other employee benefit claims.

53 To the extent that there may be potentially a divergence of interest as between pension-based claims and terminated-employee claims, these distinctions are, at this time, hypothetical. At this stage of the proceeding, there has been no attempt by Nortel to propose a creditor classification, let alone a plan of arrangement to its creditors. It seems to me that the primary emphasis should be placed on ensuring that the arguments of employees are placed before the court in the most time efficient and cost effective way possible. In my view, this can be accomplished by the appointment of a single representative counsel, knowledgeable and experienced in all facets of employee claims.

54 It is conceivable that there will be differences of opinion between employees at some point in the future, but if such differences of opinion or conflict arise, I am satisfied that this issue will be recognized by representative counsel and further directions can be provided.

55 A submission was also made to the effect that certain individuals or groups of individuals should not be deprived of their counsel of choice. In my view, the effect of appointing one representative counsel does not, in any way, deprive a party of their ability to be represented by the counsel of their choice. The Notice of Motion of KM provides that any former employee who does not wish to be bound by the representative order may take steps to notify KM of their decision and may thereafter appear as an independent party.

56 In the responding factum at paragraphs 28 - 30, KM submits that each former employee, whether or not entitled to an interest in the Pension Plan, has a common interest in that each one is an unsecured creditor who is owed some form of deferred compensation, being it severance pay, TRA or RAP payments, supplementary pensions, health benefits or benefits under a registered Pension Plan and that classifying former employees as one group of creditors will improve the efficiency and effectiveness of Nortel's CCAA proceedings and will facilitate the reorganization of the company. Further, in the event of a liquidation of Nortel, each former employee will seek to recover deferred compensation claims as an unsecured creditor. Thus, fragmentation of the group is undesirable. Further, all former employees also have a common legal position as unsecured creditors of Nortel in that their claims all arise out of the terms and conditions of their employment and regardless of the form of payment, unpaid severance pay and termination pay, unpaid health benefits, unpaid supplementary pension benefits and other unpaid retirement benefits are all remuneration of some form arising from former employment with Nortel.

57 The submission on behalf of KM concludes that funds in a pension plan can also be described as deferred wages. An employer who creates a pension plan agrees to provide benefits to retiring employees as a form of compensation to that employee. An underfunded pension plan reflects the employer's failure to pay the deferred wages owing to former employees.

58 In its factum, the CAW submits that the two proposed representative individuals are members of the Nortel Pension Plan applicable to unionized employees. Both individuals are former unionized employees of Nortel and were members of the CAW. Counsel submits that naming them as representatives on behalf of all retirees of Nortel who were members of the CAW will not result in a conflict with any other member of the group.

59 Counsel to the CAW also stated that in the event that the requested representation order is not granted, those 600 individuals who have retained Mr. Lewis Gottheil will still be represented by him, and the other similarly situated individuals might possibly be represented by other counsel. The retainer specifically provides that no individual who retains Mr. Gottheil shall be charged any fees nor be responsible for costs or penalties. It further provides that the retainer may be discontinued by the individual or by counsel in accordance with applicable rules.

60 Counsel further submits that the 600 members of the group for which the representation order is being sought have already retained counsel of their choice, that being Mr. Lewis Gottheil of the CAW. However, if the requested representative order is not granted, there will still be a group of 600 individual members of the Pension Plan who are represented by Mr. Gottheil. As a result, counsel acknowledges there is little to no difference that will result from granting the requested representation order in this case, except that all retirees formerly represented by the union will have one counsel, as opposed to two or several counsel if the order is not granted.

61 In view of this acknowledgement, it seems to me that there is no advantage to be gained by granting the CAW representative status. There will be no increased efficiencies, no simplification of the process, nor any real practical benefit to be gained by such an order.

62 Notwithstanding that creditor classification has yet to be proposed in this CCAA proceeding, it is useful, in my view, to make reference to some of the principles of classification. In *Stelco Inc., Re*, the Ontario Court of Appeal noted that the classification of creditors in the CCAA proceeding is to be determined based on the "commonality of interest" test. In *Stelco Inc., Re*, the Court of Appeal upheld the reasoning of Paperny J. (as she then was) in *Canadian Airlines Corp., Re* and articulated the following factors to be considered in the assessment of the "commonality of interest".

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

Stelco Inc., Re (2005), 15 C.B.R. (5th) 307 (Ont. C.A.), paras 21-23; *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), para 31.

63 I have concluded that, at this point in the proceedings, the former employees have a "commonality of interest" and that this process can be best served by the appointment of one representative counsel.

64 As to which counsel should be appointed, all firms have established their credentials. However, KM is, in my view, the logical choice. They have indicated a willingness to act on behalf of all former employees. The choice of KM is based on the broad mandate they have received from the employees, their experience in representing groups of retirees and employees in large scale restructurings and speciality practice in the areas of pension, benefits, labour and employment, restructuring and insolvency law, as well as my decision that the process can be best served by having one firm put forth the arguments on behalf of all employees as opposed to subdividing the employee group.

65 The motion of Messrs. Sproule, Archibald and Campbell is granted and Koskie Minsky LLP is appointed as Representative Counsel. This representation order is also to cover the fees and disbursements of Koskie Minsky.

66 The motions to appoint Nelligan O'Brien Payne and Shibley Righton, Juroviesky and Ricci, and the CAW as representative counsel are dismissed.

67 I would ask that counsel prepare a form of order for my consideration.

Order accordingly.

FN* Additional reasons at *Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 3530 (Ont. S.C.J. [Commercial List]).

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2009 CarswellOnt 6169,

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2009 CarswellOnt 6169

Fraser Papers Inc., Re

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

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

Ontario Superior Court of Justice [Commercial List]

Pepall J.

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

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

R. Chadwick, C. Costa for Monitor

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

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

C. Sinclair for United Steelworkers

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

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

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

Chriss Burr for CIT Business Credit Canada Inc.

D. Chernos for Brookfield Asset Management Inc.

2009 CarswellOnt 6169,

Subject: Insolvency; Civil Practice and Procedure

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

Cases considered by *Pepall J.*:

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

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

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

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Generally — referred to

Chapter 15 — referred to

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

Generally — referred to

s. 11 — referred to

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

Generally — referred to

Rules considered:

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

Generally — referred to

***Pepall J.*:**

Relief Requested

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

2 The motions are brought by the following moving parties:

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

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

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

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

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

Discussion

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

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

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

7 Representative counsel should be appointed in this case and I have jurisdiction to do so. Section 11 of the *CCAA* and the Rules of Civil Procedure provide the Court with broad jurisdiction in this regard. No one challenges either of these propositions. The employees and retirees not otherwise represented are a vulnerable group who require assistance in the restructuring process and it is beneficial that representative counsel be appointed. The balance of convenience favours the granting of such an order and it is in the interests of justice to do so. The real issues are who should be appointed and whether Fraser Papers should fund the proposed representation.

(A) USW and CEP Motions

8 Dealing firstly with the motions brought by the unions, the USW is the exclusive bargaining agent for the unionized employees of the Applicants working in Madawaska, Maine and Berlin- Gorham, New Hampshire. Personnel at these facilities participate in a defined benefit pension plan and a defined contribution pension plan. The U.S. law applicable to pension plans is the *Employee Retirement Income Security Act of 1974* ("ERISA")[FN2]. The evi-

dence filed by the USW suggests that a labour organization that negotiated a pension plan has a role in legal proceedings involving termination of that plan. If voluntary, consent of the union is required and if involuntary, an order of the bankruptcy court under the appropriate provisions of U.S. bankruptcy law is necessary. The USW has extensive experience representing the rights of employees and retirees in these sorts of proceedings. It is also noteworthy that, although the collective agreements between the USW and the Applicants do not provide for retiree health and life insurance benefits, the U.S. Bankruptcy Code provides that a labour organization is deemed to be the authorized representative of retirees, surviving spouses, and dependents receiving benefits pursuant to its collective bargaining agreements, unless the union opts not to serve as the authorized representative or the bankruptcy court determines that different representation is appropriate.

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

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

(b) Nelligan/Shibley and Davies

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

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

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

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

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

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

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

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

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

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

Summary

2009 CarswellOnt 6169,

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

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

FN2 29 U.S.C.

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

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

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

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C

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

Canwest Publishing Inc./Publications Canwest Inc., Re

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

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

Ontario Superior Court of Justice [Commercial List]

Pepall J.

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

Counsel: Lyndon Barnes, Alex Cobb for Canwest LP Entities

Maria Konyukhova for Monitor, FTI Consulting Canada Inc.

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

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

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

Anthony F. Dale for CAW-Canada

Deborah McPhail for Financial Services Commission of Ontario

Subject: Insolvency; Civil Practice and Procedure

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

In January 2010 LP Entities obtained order pursuant to Companies' Creditors Arrangement Act staying all proceedings and claims against them — Order permitted, but did not require, payments to employees and pension plans — There were approximately 45 non-unionized employees who were still owed termination and severance payments,

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

Statutes considered:

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

Generally — referred to

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

Generally — referred to

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

***Pepall J.*:**

Reasons for Decision

Relief Requested

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

2 On February 22, 2010, I granted an order on consent of the LP Entities authorizing the Communications, Energy and Paperworker's Union of Canada ("CEP") to continue to represent its current members and to represent former members of bargaining units represented by the union including pensioners, retirees, deferred vested partici-

pants and surviving spouses and dependants employed or formerly employed by the LP Entities. That order only extended to unionized members or former members. The within motion focused on non-unionized former employees and retirees although Ms. Payne for the moving parties indicated that the moving parties would be content to include other non-unionized employees as well. There is no overlap between the order granted to CEP and the order requested by the Salaried Employees and Retirees.

Facts

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

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

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

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

> (a) salaries, commissions, bonuses and outstanding employee expenses;
>
> (b) current services and special payments in respect of the active registered pension plan; and
>
> (c) post-employment and post-retirement benefits to former employees who were represented by a union when they were employed by the LP Entities.

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

8 All four proposed Representatives have claims against the LP Entities that are representative of the claims that would be advanced by former employees, namely pension benefits and compensation for involuntary terminations.

In addition to the claims against the LP Entities, the proposed Representatives may have claims against the directors of the LP Entities that are currently impacted by the CCAA proceedings.

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

10 Funding by the LP Entities in respect of the representation requested would violate the Support Agreement dated January 8, 2010 between the LP Entities and the LP Administrative Agent. Specifically, section 5.1(j) of the Support Agreement states:

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

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

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

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

Issues

14 The issues on this motion are as follows:

(1) Should the Representatives be appointed?

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

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

Positions of Parties

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

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

17 Furthermore, the LP Entities oppose the funding request. The fees will deplete the resources of the Estate without any possible corresponding benefit and the Support Agreement with the LP Secured Lenders does not au-

thorize any such payment.

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

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

Discussion

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

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

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

22 The evidence before me consists of affidavits from three of the four proposed Representatives and a partner with the Nelligan O'Brien Payne LLP law firm, the Monitor's Third Report, and a compendium containing an affidavit of an investment manager for noteholders filed on an earlier occasion in these CCAA proceedings. This evidence addresses most of the aforementioned factors.

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

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

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

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

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

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

Motion granted.

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2009 CarswellOnt 9398

Canwest Global Communications Corp., Re

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

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

Ontario Superior Court of Justice [Commercial List]

Pepall J.

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

Counsel: Lyndon Barnes, Shawn Irving, for Applicants

Alan Merskey, for Special Committee of the Board of Directors

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

Benjamin Zarnett, for Ad Hoc Committee of Noteholders

Hilary Clarke, for Bank of Nova Scotia

Steve Weisz, for CIT Business Credit Canada Inc.

Hugh O'Reilly, Amanda Darrach, for CHCH Retirees

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

Deborah McPhail, for FSCO

Subject: Civil Practice and Procedure; Insolvency

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

Statutes considered:

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

s. 11 — referred to

Rules considered:

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

R. 10 — referred to

***Pepall J.*:**

Relief Requested

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

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

Brief Outline of Facts

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

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

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

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

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

their entitlement under that plan.

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

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

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

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

9 CEP represents 1000 bargaining unit employees employed by the Applicants. It intends to facilitate and advance the claims of both its current members and its former members (but not including the CH Employees). CEP states that as a result of the current economic crisis, it has had to incur significant costs in representing its current and former members in CCAA proceedings. This is particularly so given the union's strong presence in the forestry and media industries and the degree to which they have been impacted by the state of the economy. CEP states mat the costs have been substantial and have adversely affected its financial position. CEP states that its ability to provide effective representation in these proceedings is dependent on receipt of funding. In the past 6 months, CEP has spent about $250,000 on legal costs in connection with different CCAA proceedings. Furthermore, former members do not pay union dues and their representation, although part of the union's internal mandate, creates costs that are outside CEP's cost structure. In addition, over the past 12 months, CEP has lost approximately 12,000 members due to economic conditions. This obviously has a negative impact on union revenues. Faced with these conditions, CEP seeks funding.

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

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

Issues

12 The issues to consider are:

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

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

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

Discussion

(a) Cavalluzzo LLP

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

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

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

(b) CEP and CaleyWray

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

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

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

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

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

(c) Claims Bar Extension

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

Conclusion

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

***Pepall J.*:**

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

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

END OF DOCUMENT

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

Sierra Club of Canada v. Canada (Minister of Finance)

Atomic Energy of Canada Limited, Appellant v. Sierra Club of Canada, Respondent and The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, Respondents

Supreme Court of Canada

McLachlin C.J.C., Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant

Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada

Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental

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

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

Practice --- Discovery — Discovery of documents — Privileged document — Miscellaneous privileges

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Examination for discovery — Range of examination — Privilege — Miscellaneous privileges

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Preuve --- Preuve documentaire — Confidentialité en ce qui concerne les documents — Documents divers

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Communication des documents — Documents confidentiels — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Interrogatoire préalable — Étendue de l'interrogatoire — Confidentialité — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environne-

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

mentale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

The federal government provided a Crown corporation with a $1.5 billion loan for the construction and sale of two CANDU nuclear reactors to China. An environmental organization sought judicial review of that decision, maintaining that the authorization of financial assistance triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*. The Crown corporation was an intervenor with the rights of a party in the application for judicial review. The Crown corporation filed an affidavit by a senior manager referring to and summarizing confidential documents. Before cross-examining the senior manager, the environmental organization applied for production of the documents. After receiving authorization from the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the Crown corporation sought to introduce the documents under R. 312 of the *Federal Court Rules, 1998* and requested a confidentiality order. The confidentiality order would make the documents available only to the parties and the court but would not restrict public access to the proceedings.

The trial judge refused to grant the order and ordered the Crown corporation to file the documents in their current form, or in an edited version if it chose to do so. The Crown corporation appealed under R. 151 of the *Federal Court Rules, 1998* and the environmental organization cross-appealed under R. 312. The majority of the Federal Court of Appeal dismissed the appeal and the cross-appeal. The confidentiality order would have been granted by the dissenting judge. The Crown corporation appealed.

Held: The appeal was allowed.

Publication bans and confidentiality orders, in the context of judicial proceedings, are similar. The analytical approach to the exercise of discretion under R. 151 should echo the underlying principles set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). A confidentiality order under R. 151 should be granted in only two circumstances, when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk, and when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

The alternatives to the confidentiality order suggested by the Trial Division and Court of Appeal were problematic. Expunging the documents would be a virtually unworkable and ineffective solution. Providing summaries was not a reasonable alternative measure to having the underlying documents available to the parties. The confidentiality order was necessary in that disclosure of the documents would impose a serious risk on an important commercial interest of the Crown corporation, and there were no reasonable alternative measures to granting the order.

The confidentiality order would have substantial salutary effects on the Crown corporation's right to a fair trial and on freedom of expression. The deleterious effects of the confidentiality order on the open court principle and freedom of expression would be minimal. If the order was not granted and in the course of the judicial review application the Crown corporation was not required to mount a defence under the *Canadian Environmental Assessment Act*, it was possible that the Crown corporation would suffer the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. The salutary effects of the order outweighed the deleterious effects.

Le gouvernement fédéral a fait un prêt de l'ordre de 1,5 milliards de dollar en rapport avec la construction et la vente par une société d'État de deux réacteurs nucléaires CANDU à la Chine. Un organisme environnemental a sollicité le contrôle judiciaire de cette décision, soutenant que cette autorisation d'aide financière avait déclenché l'application de l'art. 5(1)b) de la *Loi canadienne sur l'évaluation environnementale*. La société d'État était intervenante au débat et elle avait reçu les droits de partie dans la demande de contrôle judiciaire. Elle a déposé l'affidavit d'un cadre supérieur dans lequel ce dernier faisait référence à certains documents confidentiels et en faisait le résumé. L'organ-

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

isme environnemental a demandé la production des documents avant de procéder au contre-interrogatoire du cadre supérieur. Après avoir obtenu l'autorisation des autorités chinoises de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, la société d'État a cherché à les introduire en invoquant la r. 312 des *Règles de la Cour fédérale, 1998*, et elle a aussi demandé une ordonnance de confidentialité. Selon les termes de l'ordonnance de confidentialité, les documents seraient uniquement mis à la disposition des parties et du tribunal, mais l'accès du public aux débats ne serait pas interdit.

Le juge de première instance a refusé l'ordonnance de confidentialité et a ordonné à la société d'État de déposer les documents sous leur forme actuelle ou sous une forme révisée, à son gré. La société d'État a interjeté appel en vertu de la r. 151 des *Règles de la Cour fédérale, 1998*, et l'organisme environnemental a formé un appel incident en vertu de la r. 312. Les juges majoritaires de la Cour d'appel ont rejeté le pourvoi et le pourvoi incident. Le juge dissident aurait accordé l'ordonnance de confidentialité. La société d'État a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Il y a de grandes ressemblances entre l'ordonnance de non-publication et l'ordonnance de confidentialité dans le contexte des procédures judiciaires. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la r. 151 devrait refléter les principes sous-jacents énoncés dans l'arrêt *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Une ordonnance de confidentialité rendue en vertu de la r. 151 ne devrait l'être que lorsque: 1) une telle ordonnance est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le cadre d'un litige, en l'absence d'autres solutions raisonnables pour écarter ce risque; et 2) les effets bénéfiques de l'ordonnance de confidentialité, y compris les effets sur les droits des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris les effets sur le droit à la liberté d'expression, lequel droit comprend l'intérêt du public à l'accès aux débats judiciaires.

Les solutions proposées par la Division de première instance et par la Cour d'appel comportaient toutes deux des problèmes. Épurer les documents serait virtuellement impraticable et inefficace. Fournir des résumés des documents ne constituait pas une « autre option raisonnable » à la communication aux parties des documents de base. L'ordonnance de confidentialité était nécessaire parce que la communication des documents menacerait gravement un intérêt commercial important de la société d'État et parce qu'il n'existait aucune autre option raisonnable que celle d'accorder l'ordonnance.

L'ordonnance de confidentialité aurait d'importants effets bénéfiques sur le droit de la société d'État à un procès équitable et à la liberté d'expression. Elle n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression. Advenant que l'ordonnance ne soit pas accordée et que, dans le cadre de la demande de contrôle judiciaire, la société d'État n'ait pas l'obligation de présenter une défense en vertu de la *Loi canadienne sur l'évaluation environnementale*, il se pouvait que la société d'État subisse un préjudice du fait d'avoir communiqué cette information confidentielle en violation de ses obligations, sans avoir pu profiter d'un avantage similaire à celui du droit du public à la liberté d'expression. Les effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables.

Cases considered by *Iacobucci J.*:

AB Hassle v. Canada (Minister of National Health & Welfare), 1998 CarswellNat 2520, 83 C.P.R. (3d) 428, 161 F.T.R. 15 (Fed. T.D.) — considered

AB Hassle v. Canada (Minister of National Health & Welfare), 2000 CarswellNat 356, 5 C.P.R. (4th) 149, 253 N.R. 284, [2000] 3 F.C. 360, 2000 CarswellNat 3254 (Fed. C.A.) — considered

Canadian Broadcasting Corp. v. New Brunswick (Attorney General), 2 C.R. (5th) 1, 110 C.C.C. (3d) 193, [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385, 182 N.B.R. (2d) 81, 463 A.P.R. 81, 39 C.R.R. (2d) 189, 203 N.R.

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

169, 1996 CarswellNB 462, 1996 CarswellNB 463, 2 B.H.R.C. 210 (S.C.C.) — followed

Dagenais v. Canadian Broadcasting Corp., 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112, 1994 CarswellOnt 1168 (S.C.C.) — followed

Edmonton Journal v. Alberta (Attorney General) (1989), [1990] 1 W.W.R. 577, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577, 102 N.R. 321, 71 Alta. L.R. (2d) 273, 103 A.R. 321, 41 C.P.C. (2d) 109, 45 C.R.R. 1, 1989 CarswellAlta 198, 1989 CarswellAlta 623 (S.C.C.) — followed

Eli Lilly & Co. v. Novopharm Ltd., 56 C.P.R. (3d) 437, 82 F.T.R. 147, 1994 CarswellNat 537 (Fed. T.D.) — referred to

Ethyl Canada Inc. v. Canada (Attorney General), 1998 CarswellOnt 380, 17 C.P.C. (4th) 278 (Ont. Gen. Div.) — considered

Irwin Toy Ltd. c. Québec (Procureur général), 94 N.R. 167, (sub nom. *Irwin Toy Ltd. v. Quebec (Attorney General)*) [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 1989 CarswellQue 115F, 1989 CarswellQue 115 (S.C.C.) — followed

M. (A.) v. Ryan, 143 D.L.R. (4th) 1, 207 N.R. 81, 4 C.R. (5th) 220, 29 B.C.L.R. (3d) 133, [1997] 4 W.W.R. 1, 85 B.C.A.C. 81, 138 W.A.C. 81, 34 C.C.L.T. (2d) 1, [1997] 1 S.C.R. 157, 42 C.R.R. (2d) 37, 8 C.P.C. (4th) 1, 1997 CarswellBC 99, 1997 CarswellBC 100 (S.C.C.) — considered

N. (F.), Re, 2000 SCC 35, 2000 CarswellNfld 213, 2000 CarswellNfld 214, 146 C.C.C. (3d) 1, 188 D.L.R. (4th) 1, 35 C.R. (5th) 1, [2000] 1 S.C.R. 880, 191 Nfld. & P.E.I.R. 181, 577 A.P.R. 181 (S.C.C.) — considered

R. v. E. (O.N.), 2001 SCC 77, 2001 CarswellBC 2479, 2001 CarswellBC 2480, 158 C.C.C. (3d) 478, 205 D.L.R. (4th) 542, 47 C.R. (5th) 89, 279 N.R. 187, 97 B.C.L.R. (3d) 1, [2002] 3 W.W.R. 205, 160 B.C.A.C. 161, 261 W.A.C. 161 (S.C.C.) — referred to

R. v. Keegstra, 1 C.R. (4th) 129, [1990] 3 S.C.R. 697, 77 Alta. L.R. (2d) 193, 117 N.R. 1, [1991] 2 W.W.R. 1, 114 A.R. 81, 61 C.C.C. (3d) 1, 3 C.R.R. (2d) 193, 1990 CarswellAlta 192, 1990 CarswellAlta 661 (S.C.C.) — followed

R. v. Mentuck, 2001 SCC 76, 2001 CarswellMan 535, 2001 CarswellMan 536, 158 C.C.C. (3d) 449, 205 D.L.R. (4th) 512, 47 C.R. (5th) 63, 277 N.R. 160, [2002] 2 W.W.R. 409 (S.C.C.) — followed

R. v. Oakes, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 53 O.R. (2d) 719, 1986 CarswellOnt 95, 1986 CarswellOnt 1001 (S.C.C.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — referred to

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

s. 2(b) — referred to

s. 11(d) — referred to

Canadian Environmental Assessment Act, S.C. 1992, c. 37

Generally — considered

s. 5(1)(b) — referred to

s. 8 — referred to

s. 54 — referred to

s. 54(2)(b) — referred to

Criminal Code, R.S.C. 1985, c. C-46

s. 486(1) — referred to

Rules considered:

Federal Court Rules, 1998, SOR/98-106

R. 151 — considered

R. 312 — referred to

APPEAL from judgment reported at 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (Fed. C.A.), dismissing appeal from judgment reported at 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (Fed. T.D.), granting application in part.

POURVOI à l'encontre de l'arrêt publié à 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (C.A. Féd.), qui a rejeté le pourvoi à l'encontre du jugement publié à 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (C.F. (1re inst.)), qui avait accueilli en partie la demande.

The judgment of the court was delivered by *Iacobucci J.*:

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolu-

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

tion. However, some material can be made the subject of a confidentiality order. This appeal raises the important issues of when, and under what circumstances, a confidentiality order should be granted.

2 For the following reasons, I would issue the confidentiality order sought and, accordingly, would allow the appeal.

II. Facts

3 The appellant, Atomic Energy of Canada Ltd. ("AECL"), is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervener with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada ("Sierra Club"). Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance in the form of a $1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

4 The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

5 The appellant and the respondent Ministers argue that the CEAA does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(b) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the CEAA.

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit prepared by Dr. Feng, one of AECL's experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang's evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under R. 312 of the *Federal Court Rules, 1998*, SOR/98-106, and requested a confidentiality order in respect of the documents.

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the "EIRs"), a Preliminary Safety Analysis Report (the "PSAR"), and the supplementary affidavit of Dr. Pang, which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

9 As noted, the appellant argues that it cannot introduce the Confidential Documents into evidence without a

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

confidentiality order; otherwise, it would be in breach of its obligations to the Chinese authorities. The respondent's position is that its right to cross-examine Dr. Pang and Dr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

10 The Federal Court of Canada, Trial Division, refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

III. Relevant Statutory Provisions

11 *Federal Court Rules, 1998*, SOR/98-106

> 151.(1) On motion, the Court may order that material to be filed shall be treated as confidential.
>
> (2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

IV. Judgments below

A. Federal Court of Canada, Trial Division, [2000] 2 F.C. 400

12 Pelletier J. first considered whether leave should be granted pursuant to R. 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondents would be prejudiced by delay, but since both parties had brought interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

13 On the issue of confidentiality, Pelletier J. concluded that he must be satisfied that the need for confidentiality was greater than the public interest in open court proceedings, and observed that the argument for open proceedings in this case was significant given the public interest in Canada's role as a vendor of nuclear technology. As well, he noted that a confidentiality order was an exception to the rule of open access to the courts, and that such an order should be granted only where absolutely necessary.

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the information is confidential and that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

15 Concluding that both the subjective part and both elements of the objective part of the test had been satisfied, he nevertheless stated: "However, I am also of the view that in public law cases, the objective test has, or should have, a third component which is whether the public interest in disclosure exceeds the risk of harm to a party arising from disclosure" (para. 23).

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

17 In weighing the public interest in disclosure against the risk of harm to AECL arising from disclosure, Pelletier J. noted that the documents the appellant wished to put before the court were prepared by others for other purposes, and recognized that the appellant was bound to protect the confidentiality of the information. At this stage, he again considered the issue of materiality. If the documents were shown to be very material to a critical issue, "the requirements of justice militate in favour of a confidentiality order. If the documents are marginally relevant, then the voluntary nature of the production argues against a confidentiality order" (para. 29). He then decided that the documents were material to a question of the appropriate remedy, a significant issue in the event that the appellant failed on the main issue.

18 Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

19 Pelletier J. observed that his order was being made without having perused the Confidential Documents because they had not been put before him. Although he noted the line of cases which holds that a judge ought not to deal with the issue of a confidentiality order without reviewing the documents themselves, in his view, given their voluminous nature and technical content as well as his lack of information as to what information was already in the public domain, he found that an examination of these documents would not have been useful.

20 Pelletier J. ordered that the appellant could file the documents in current form, or in an edited version if it chose to do so. He also granted leave to file material dealing with the Chinese regulatory process in general and as applied to this project, provided it did so within 60 days.

B. Federal Court of Appeal, [2000] 4 F.C. 426

(1) Evans J.A. (Sharlow J.A. concurring)

21 At the Federal Court of Appeal, AECL appealed the ruling under R. 151 of the *Federal Court Rules, 1998*, and Sierra Club cross-appealed the ruling under R. 312.

22 With respect to R. 312, Evans J.A. held that the documents were clearly relevant to a defence under s. 54(2)(b), which the appellant proposed to raise if s. 5(1)(b) of the CEAA was held to apply, and were also potentially relevant to the exercise of the court's discretion to refuse a remedy even if the Ministers were in breach of the CEAA. Evans J.A. agreed with Pelletier J. that the benefit to the appellant and the court of being granted leave to file the documents outweighed any prejudice to the respondent owing to delay and thus concluded that the motions judge was correct in granting leave under R. 312.

23 On the issue of the confidentiality order, Evans J.A. considered R. 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of

openness of judicial process carries greater weight as a factor in the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

24 In support of his conclusion that the weight assigned to the principle of openness may vary with context, Evans J.A. relied upon the decisions in *AB Hassle v. Canada (Minister of National Health & Welfare)*, [2000] 3 F.C. 360 (Fed. C.A.), where the court took into consideration the relatively small public interest at stake, and *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Gen. Div.), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the CEAA, and concluded that the motions judge could not be said to have given the principle of openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

25 Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

26 Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus, the appeal and cross-appeal were both dismissed.

(2) Robertson J.A. (dissenting)

27 Robertson J.A. disagreed with the majority for three reasons. First, in his view, the level of public interest in the case, the degree of media coverage, and the identities of the parties should not be taken into consideration in assessing an application for a confidentiality order. Instead, he held that it was the nature of the evidence for which the order is sought that must be examined.

28 In addition, he found that without a confidentiality order, the appellant had to choose between two unacceptable options: either suffering irreparable financial harm if the confidential information was introduced into evidence or being denied the right to a fair trial because it could not mount a full defence if the evidence was not introduced.

29 Finally, he stated that the analytical framework employed by the majority in reaching its decision was fundamentally flawed as it was based largely on the subjective views of the motions judge. He rejected the contextual approach to the question of whether a confidentiality order should issue, emphasizing the need for an objective framework to combat the perception that justice is a relative concept, and to promote consistency and certainty in the law.

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

31 Robertson J.A. stated that, although the principle of open justice is a reflection of the basic democratic value of accountability in the exercise of judicial power, in his view, the principle that justice itself must be secured is paramount. He concluded that justice as an overarching principle means that exceptions occasionally must be made to rules or principles.

32 He observed that, in the area of commercial law, when the information sought to be protected concerns "trade secrets," this information will not be disclosed during a trial if to do so would destroy the owner's proprietary rights and expose him or her to irreparable harm in the form of financial loss. Although the case before him did not involve a trade secret, he nevertheless held that the same treatment could be extended to commercial or scientific information which was acquired on a confidential basis and attached the following criteria as conditions precedent to the issuance of a confidentiality order (at para. 13):

> (1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of probabilities the party seeking the confidentiality order would suffer irreparable harm if the information were made public; (4) the information is relevant to the legal issues raised in the case; (5) correlatively, the information is "necessary" to the resolution of those issues; (6) the granting of a confidentiality order does not unduly prejudice the opposing party; and (7) the public interest in open court proceedings does not override the private interests of the party seeking the confidentiality order. The onus in establishing that criteria one to six are met is on the party seeking the confidentiality order. Under the seventh criterion, it is for the opposing party to show that a *prima facie* right to a protective order has been overtaken by the need to preserve the openness of the court proceedings. In addressing these criteria one must bear in mind two of the threads woven into the fabric of the principle of open justice: the search for truth and the preservation of the rule of law. As stated at the outset, I do not believe that the perceived degree of public importance of a case is a relevant consideration.

33 In applying these criteria to the circumstances of the case, Robertson J.A. concluded that the confidentiality order should be granted. In his view, the public interest in open court proceedings did not override the interests of AECL in maintaining the confidentiality of these highly technical documents.

34 Robertson J.A. also considered the public interest in the need to ensure that site-plans for nuclear installations were not, for example, posted on a web-site. He concluded that a confidentiality order would not undermine the two primary objectives underlying the principle of open justice: truth and the rule of law. As such, he would have allowed the appeal and dismissed the cross-appeal.

V. Issues

35

> A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under R. 151 of the *Federal Court Rules, 1998*?
>
> B. Should the confidentiality order be granted in this case?

VI. Analysis

A. The Analytical Approach to the Granting of a Confidentiality Order

(1) The General Framework: Herein the Dagenais Principles

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.) [hereinafter *New Brunswick*], at para. 23, La Forest J. expressed the relationship as follows:

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

37 A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out by this Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

38 Although in each case freedom of expression will be engaged in a different context, the *Dagenais* framework utilizes overarching *Canadian Charter of Rights and Freedoms* principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the exercise of discretion under R. 151 should echo the underlying principles laid out in *Dagenais*, *supra*, although it must be tailored to the specific rights and interests engaged in this case.

39 *Dagenais*, *supra*, dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-*Charter* common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). At p. 878 of *Dagenais*, Lamer C.J. set out his reformulated test:

> A publication ban should only be ordered when:
>
> (a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

41 In *New Brunswick*, *supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code* to exclude the public from a trial should be exercised.

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick, supra*, at para. 33; however, he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

> (a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
>
> (b) the judge must consider whether the order is limited as much as possible; and
>
> (c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

43 This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, 2001 SCC 76 (S.C.C.), and its companion case *R. v. E. (O.N.)*, 2001 SCC 77 (S.C.C.). In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(d) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

44 The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

45 In spite of this distinction, the Court noted that underlying the approach taken in both *Dagenais* and *New Brunswick* was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the *Charter* and the *Oakes* test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in *Dagenais*, but broadened the *Dagenais* test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve *any* important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

> A publication ban should only be ordered when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well-grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

47 At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve *Charter* rights, and that the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted:

> The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflect . . . the substance of the *Oakes* test", *we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right.* [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

48 *Mentuck* is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles. However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

49 The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

51 Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

52 In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the *Charter*: *New Brunswick*, *supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is *seen* to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice," guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick*, *supra*, at para. 22.

(3) Adapting the Dagenais Test to the Rights and Interests of the Parties

53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

> A confidentiality order under R. 151 should only be granted when:
>
> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

54 As in *Mentuck*, *supra*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well-grounded in the evidence and poses a serious threat to the commercial interest in question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest," the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35 (S.C.C.), at para. 10, the open court rule only yields" where the *public* interest in confidentiality outweighs the public interest in

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

openness" (emphasis added).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest." It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. Application of the Test to this Appeal

(1) Necessity

58 At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself or to its terms.

59 The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the confidential documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been" accumulated with a reasonable expectation of it being kept confidential" (para. 14) as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant's commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL's competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the CEAA and this finding was not appealed at this Court. Further, I agree with the Court of Appeal's assertion (para. 99) that, given the importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant's case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

64 There are two possible options with respect to expungement, and, in my view, there are problems with both of these. The first option would be for AECL to expunge the confidential information without disclosing the expunged material to the parties and the court. However, in this situation the filed material would still differ from the material used by the affiants. It must not be forgotten that this motion arose as a result of Sierra Club's position that the summaries contained in the affidavits should be accorded little or no weight without the presence of the underlying documents. Even if the relevant information and the confidential information were mutually exclusive, which would allow for the disclosure of all the information relied on in the affidavits, this relevancy determination could not be tested on cross-examination because the expunged material would not be available. Thus, even in the best case scenario, where only irrelevant information needed to be expunged, the parties would be put in essentially the same position as that which initially generated this appeal in the sense that at least some of the material relied on to prepare the affidavits in question would not be available to Sierra Club.

65 Further, I agree with Robertson J.A. that this best case scenario, where the relevant and the confidential information do not overlap, is an untested assumption (para. 28). Although the documents themselves were not put before the courts on this motion, given that they comprise thousands of pages of detailed information, this assumption is at best optimistic. The expungement alternative would be further complicated by the fact that the Chinese authorities require prior approval for any request by AECL to disclose information.

66 The second option is that the expunged material be made available to the Court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are *reasonably* alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits" may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

68 With the above considerations in mind, I find the confidentiality order necessary in that disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and that there are no reasonably alternative measures to granting the order.

(2) The Proportionality Stage

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

the effects on the right to free expression, which, in turn, is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

(a) Salutary Effects of the Confidentiality Order

70 As discussed above, the primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case or, more generally, the fair trial right. Because the fair trial right is being invoked in this case in order to protect commercial, not liberty, interests of the appellant, the right to a fair trial in this context is not a *Charter* right; however, a fair trial for all litigants has been recognized as a fundamental principle of justice: *Ryan*, *supra*, at para. 84. It bears repeating that there are circumstances where, in the absence of an affected *Charter* right, the proper administration of justice calls for a confidentiality order: *Mentuck*, *supra*, at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

71 The Confidential Documents have been found to be relevant to defences that will be available to the appellant in the event that the CEAA is found to apply to the impugned transaction and, as discussed above, the appellant cannot disclose the documents without putting its commercial interests at serious risk of harm. As such, there is a very real risk that, without the confidentiality order, the ability of the appellant to mount a successful defence will be seriously curtailed. I conclude, therefore, that the confidentiality order would have significant salutary effects on the appellant's right to a fair trial.

72 Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

73 Second, I agree with the observation of Robertson J.A. that, as the Confidential Documents contain detailed technical information pertaining to the construction and design of a nuclear installation, it may be in keeping with the public interest to prevent this information from entering the public domain (para. 44). Although the exact contents of the documents remain a mystery, it is apparent that they contain technical details of a nuclear installation, and there may well be a substantial public security interest in maintaining the confidentiality of such information.

(b) Deleterious Effects of the Confidentiality Order

74 Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(b) *Charter* right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: *New Brunswick, supra*, at paras. 22-23. Although as a *general* principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the *particular* deleterious effects on freedom of expression that the confidentiality order would have.

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 976, *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), *per* Dickson C.J., at pp. 762-764. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the *Charter*: *Keegstra*, *supra*, at pp. 760-761. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assess-

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ment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

76 Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal, supra, per* Wilson J., at pp. 1357-1358. Clearly, the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

77 However, as mentioned above, to some extent the search for truth may actually be *promoted* by the confidentiality order. This motion arises as a result of Sierra Club's argument that it must have access to the Confidential Documents in order to test the accuracy of Dr. Pang's evidence. If the order is denied, then the most likely scenario is that the appellant will not submit the documents, with the unfortunate result that evidence which may be relevant to the proceedings will not be available to Sierra Club or the court. As a result, Sierra Club will not be able to fully test the accuracy of Dr. Pang's evidence on cross-examination. In addition, the court will not have the benefit of this cross-examination or documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

78 As well, it is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case. However, in the hands of the parties and their respective experts, the documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would, in turn, assist the court in reaching accurate factual conclusions. Given the nature of the documents, in my view, the important value of the search for truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the Confidential Documents under the order sought than it would by denying the order, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.

79 In addition, under the terms of the order sought, the only restrictions on these documents relate to their public distribution. The Confidential Documents would be available to the court and the parties, and public access to the proceedings would not be impeded. As such, the order represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle.

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focuses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

81 The third core value, open participation in the political process, figures prominently in this appeal, as open justice is a fundamental aspect of a democratic society. This connection was pointed out by Cory J. in *Edmonton Journal, supra*, at p. 1339:

> It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

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Although there is no doubt as to the importance of open judicial proceedings to a democratic society, there was disagreement in the courts below as to whether the weight to be assigned to the open court principle should vary depending on the nature of the proceeding.

82 On this issue, Robertson J.A. was of the view that the nature of the case and the level of media interest were irrelevant considerations. On the other hand, Evans J.A. held that the motions judge was correct in taking into account that this judicial review application was one of significant public and media interest. In my view, although the public nature of the case may be a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration.

83 Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a confidentiality order. It is important to note that this core value will *always* be engaged where the open court principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the *substance* of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below, where he stated, at para. 87:

> While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

84 This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the CEAA. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish *public* interest from *media* interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public *nature* of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case. I reiterate the caution given by Dickson C.J. in Keegstra, *supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values," we must guard carefully against judging expression according to its popularity."

86 Although the public interest in open access to the judicial review application *as a whole* is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the public interest in disclosure, and consequently attached excessive weight to this factor. In this connection, I respectfully disagree with the following conclusion of Evans J.A., at para. 97:

> Thus, having considered the nature of this litigation, and having assessed the extent of public interest in the openness of the proceedings in the case before him, the Motions Judge cannot be said in all the circumstances to have given this factor undue weight, even though confidentiality is claimed for only three documents among the small mountain of paper filed in this case, and their content is likely to be beyond the comprehension of all but those equipped with the necessary technical expertise.

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Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal*, *supra*, at pp. 1353-1354:

> One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.

87 In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the CEAA, in which case the Confidential Documents would be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations or withholding the documents in the hopes that either it will not have to present a defence under the CEAA or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the CEAA are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

89 In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the CEAA, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on *either* the public interest in freedom of expression *or* the appellant's commercial interests or fair trial right. This neutral result is in contrast with the scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

90 In summary, the core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. As such, the order would not have significant deleterious effects on freedom of expression.

VII. Conclusion

91 In balancing the various rights and interests engaged, I note that the confidentiality order would have substantial salutary effects on the appellant's right to a fair trial, and freedom of expression. On the other hand, the deleterious effects of the confidentiality order on the principle of open courts and freedom of expression would be minimal. In addition, if the order is not granted and in the course of the judicial review application the appellant is not required to mount a defence under the CEAA, there is a possibility that the appellant will have suffered the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of

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the public to freedom of expression. As a result, I find that the salutary effects of the order outweigh its deleterious effects, and the order should be granted.

92 Consequently, I would allow the appeal with costs throughout, set aside the judgment of the Federal Court of Appeal, and grant the confidentiality order on the terms requested by the appellant under R. 151 of the *Federal Court Rules, 1998*.

Appeal allowed.

Pourvoi accueilli.

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2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [2004] 2 S.C.R. 332, 33 B.C.L.R. (4th) 261, 120 C.R.R. (2d) 203, [2005] 2 W.W.R. 671, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

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Vancouver Sun, Re

The Vancouver Sun, Appellant v. Attorney General of Canada, Attorney General of British Columbia, "The Named Person", Ajaib Singh Bagri and Ripudaman Singh Malik, Respondents and Attorney General of Ontario, Intervener

Supreme Court of Canada

McLachlin C.J.C., Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps, Fish JJ.

Heard: December 10, 2003
Judgment: June 23, 2004
Docket: 29878

Proceedings: reversing in part *Vancouver Sun, Re* (2003), 2003 BCSC 1330, 2003 CarswellBC 2083 (B.C. S.C.)

Counsel: Robert S. Anderson, Ludmila B. Herbst for Appellant

George Dolhai, Bernard Laprade for Respondent, Attorney General of Canada

Dianne Wiedemann, Mary T. Ainslie for Respondent, Attorney General of British Columbia

Kenneth Westlake, Howard Rubin, Brian A. Crane, Q.C. for Respondent "Named Person"

William B. Smart, Q.C., Brock Martland for Respondent, Ripudaman Singh Malik

Michael A. Code, Jonathan Dawe for Respondent, Ajaib Singh Bagri

Michael Bernstein, Sandy Tse for Intervener

Subject: Criminal; Public; Family

Criminal law --- Offences — Terrorism — General

Section 83.28 of Criminal Code must be interpreted consistently with preamble to Anti-terrorism Act and fundamental characteristics of judicial process, including open court principle — Dagenais/Mentuck test should be applied to

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [2004] 2 S.C.R. 332, 33 B.C.L.R. (4th) 261, 120 C.R.R. (2d) 203, [2005] 2 W.W.R. 671, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

all discretionary judicial decisions that limit freedom of expression by press — While s. 83.28(2) application in this case was properly heard ex parte and in camera, there was no reason to keep existence of order or its subject-matter secret.

Criminal law --- Victims' rights and third party remedies — Exclusion of the public

Section 83.28 of Criminal Code must be interpreted consistently with preamble to Anti-terrorism Act and fundamental characteristics of judicial process, including open court principle — Dagenais/Mentuck test should be applied to all discretionary judicial decisions that limit freedom of expression by press — While s. 83.28(2) application in this case was properly heard ex parte and in camera, there was no reason to keep existence of order or its subject-matter secret.

Criminal law --- Pre-trial procedure — Public or publication ban order — General

Section 83.28 of Criminal Code must be interpreted consistently with preamble to Anti-terrorism Act and fundamental characteristics of judicial process, including open court principle — Dagenais/Mentuck test should be applied to all discretionary judicial decisions that limit freedom of expression by press — While s. 83.28(2) application in this case was properly heard ex parte and in camera, there was no reason to keep existence of order or its subject-matter secret.

Droit criminel --- Infractions — Terrorisme — En général

Article 83.28 du Code criminel doit être interprété de manière compatible avec le préambule de la Loi antiterroriste et avec les caractéristiques fondamentales du processus judiciaire, incluant le principe de la publicité des débats judiciaires — Critère des arrêts Dagenais et Mentuck doit être appliqué à toutes les décisions judiciaires discrétionnaires qui limitent la liberté d'expression de la presse — Même si la demande présentée en vertu de l'art. 83.28(2) a été entendue à bon droit ex parte et à huis clos, rien ne justifiait de taire l'existence de l'ordonnance ou du sujet visé.

Droit criminel --- Droits des victimes et réparations pour les tiers — Exclusion du public

Article 83.28 du Code criminel doit être interprété de manière compatible avec le préambule de la Loi antiterroriste et avec les caractéristiques fondamentales du processus judiciaire, incluant le principe de la publicité des débats judiciaires — Critère des arrêts Dagenais et Mentuck doit être appliqué à toutes les décisions judiciaires discrétionnaires qui limitent la liberté d'expression de la presse — Même si la demande présentée en vertu de l'art. 83.28(2) a été entendue à bon droit ex parte et à huis clos, rien ne justifiait de taire l'existence de l'ordonnance ou son contenue.

Droit criminel --- Procédure avant procès — Ordonnance interdisant la publicité ou publication — En général

Article 83.28 du Code criminel doit être interprété de manière compatible avec le préambule de la Loi antiterroriste et avec les caractéristiques fondamentales du processus judiciaire, incluant le principe de la publicité des débats judiciaires — Critère des arrêts Dagenais et Mentuck doit être appliqué à toutes les décisions judiciaires discrétionnaires qui limitent la liberté d'expression de la presse — Même si la demande présentée en vertu de l'art. 83.28(2) a été entendue à bon droit ex parte et à huis clos, rien ne justifiait de taire l'existence de l'ordonnance ou du sujet visé.

Two accused were jointly charged with several offences in relation to the explosion of Air India Flight 182 and the intended explosion of Air India Flight 301 in 1985. Shortly after the start of the trial, the Crown brought an ex parte application for an order that a Named Person, a potential Crown witness, attend a judicial investigative hearing for examination pursuant to s. 83.28 of the Criminal Code , which provides for investigative hearings in relation to terrorism offences as defined in s. 2. The applications judge granted the order, directing that the hearing be held in camera and that notice of the hearing not be given to the accused, the press or the public. Counsel for the accused

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became aware of the order and sought to make submissions, while counsel for the Named Person sought to challenge the constitutional validity of s. 83.28. The applications judge directed that submissions should be made to the judge presiding over the investigative hearing.

Shortly after the investigative hearing began, a reporter for the appellant newspaper, who recognized lawyers from the Air India trial entering a closed courtroom, was denied access to the proceedings. The hearing judge refused to entertain a motion at that time for the proceedings to be opened to the public. The newspaper filed a notice of motion, seeking an order that the proceedings be opened to the public and that its counsel and a member of its editorial board, upon filing an undertaking of confidentiality, be provided with access to the pleadings and all materials to date. Prior to hearing the motion, the hearing judge, in camera, concluded that the s. 83.28 order had been validly issued and that s. 83.28 was constitutionally sound. However, she varied the initial order to allow counsel for the accused to attend the investigative hearing with the right to cross-examine the Named Person, subject to certain restrictions. She ordered her judgment to be sealed until the conclusion of the investigative hearing or the making of any contrary court order.

When the courtroom was finally opened to the public, the hearing judge delivered, in open court, a synopsis of her reasons for judgment. She then stated that the s. 83.28 proceeding had been adjourned so that the Named Person could seek leave to appeal. The newspaper's motion was dismissed and the newspaper appealed.

Held: The appeal was allowed in part and the order of the hearing judge was varied.

Per Iacobucci and Arbour JJ. (McLachlin C.J.C., Major, Binnie, Fish JJ. concurring): The unique judicial procedure provided for in s. 83.28 of the Criminal Code must be interpreted consistently with the preamble to the Anti-terrorism Act, which stresses the imperatives of an effective response to terrorism as well as a continued commitment to the values and constraints of the Canadian Charter of Rights and Freedoms, and with the fundamental characteristics of a judicial process insofar as it contemplates the judicial proceeding.

The open court principle is a hallmark of democracy and a fundamental characteristic of all judicial proceedings, and it should not be presumptively displaced in favour of an in camera process. Public access to the courts guarantees the integrity of the judicial process and is integral to public confidence in the justice system and the public's understanding of the administration of justice. The open court principle is inextricably linked to the freedom of expression protected by s. 2(b) of the Charter and advances the core values therein, including the freedom of the press to report on judicial proceedings and the right of the public to receive information. The principle of openness of judicial proceedings extends to the pre-trial stage because the policy considerations upon which openness is predicated are the same as at the trial stage.

The Dagenais/Mentuck test should be applied to all discretionary judicial decisions that limit freedom of expression by the press. The test was developed to balance freedom of expression and other important rights and interests, which are broader than simply the administration of justice and may include privacy and security interests. While the test was developed in the context of publication bans, it is equally applicable to all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings. Discretion must be exercised in accordance with the Charter, whether it arises under the common law or is authorized by statute or rules of court. The burden of displacing the general rule of openness lies on the party making the application.

Section 83.28(2) does not expressly provide for any part of the judicial investigative hearing to be in camera. One must distinguish between an application for a s. 83.28 judicial investigative hearing and the holding of that hearing. Section 83.28(2) provides that the application for an order that a investigative hearing be held, made by a peace officer with prior consent of the Attorney General, is ex parte. By its very nature, this application must be presented to a judge in camera. However, it does not necessarily follow that due to its investigative nature, the hearing itself must be presumptively held in secret. The proper balance between the investigative imperatives and the judicial assump-

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tion of openness is best achieved by a proper exercise of the discretion granted to judges to impose terms and conditions on the conduct of the investigative hearing under s. 83.28(5)(e). In exercising that discretion, judicial officers should reject the notion of presumptively secret hearings. Parliament chose to have investigative hearings of a judicial nature, and they must contain as many of the guarantees and indicia that come from judicial involvement as is compatible with the task at hand. One such guarantee is a presumption of openness, which should be displaced only upon proper consideration of the competing interests at every stage of the process. The existence of an order made under s. 83.28, and as much of its subject-matter as possible, should be made public unless, under the balancing exercise of the Dagenais/Mentuck test, secrecy is necessary.

In this case, the level of secrecy imposed was unnecessary. While the application for the order for the investigative hearing under s. 83.28(2) was properly heard ex parte and in camera, there was no reason for keeping the existence of the order or its subject-matter secret. In light of the position taken by the Named Person at that stage, the identity of that person was properly kept confidential, but that direction should have been subject to revision by the hearing judge. In the circumstances of this case, where a potential Crown witness in an ongoing trial became the subject of the investigative order, it was obvious that third party interests should have been considered. On a proper application of the principles in the Dagenais/Mentuck test, notice of the hearing should have been given to counsel for the accused at the outset.

When the Named Person indicated an intention to challenge the constitutionality of the order, the imperatives of the open court principle became even more compelling. The constitutional challenge should not have been held in camera. Rather, the challenge and as much of the information about the case as could be revealed without jeopardizing the investigation should have been made public, subject, if need be, to a total or partial publication ban. Much of the constitutional challenge could have been properly argued without the details of the information submitted to the applications judge being revealed. It was clear under s. 83.28(5)(e) that the terms and conditions attached to the investigative hearing must be varied and adjusted to achieve the proper balance between confidentiality and publicity as the matter progressed. Accordingly, the name of the Named Person should be made public and the order of the hearing judge should be varied so that the investigative hearing was held in public, subject to any order of the hearing judge that the public be excluded and/or a publication ban regarding aspects of the anticipated evidence to be given by the Named Person. The hearing judge should also review the continuing need for any secrecy at the end of the judicial investigative hearing, and release publicly any gathered information that could be made public without unduly jeopardizing the interests of the Named Person, third parties, or the investigation.

Per LeBel J.: Subject to the comments in the companion appeal, Application Under s. 83.28 of the Criminal Code, Re, the reasons of the majority and their proposed disposition were agreed with.

Per Bastarache and Deschamps JJ. (dissenting in part): While openness of judicial proceedings, both as a principle of common law and as an aspect of s. 2(b) of the Canadian Charter of Rights and Freedoms guaranteeing freedom of the press, is the rule and covertness the exception, public access to judicial proceedings can be curtailed where there is a need to protect social values of superordinate importance. Where the rights of third parties would be unduly harmed and the administration of justice rendered unworkable by the presence of the public, the court may sit in camera. Such is normally the case for investigative proceedings under s. 83.28.

The Dagenais/Mentuck test is not an appropriate framework to guide a judge's discretion under s. 83.28 to order an in camera investigative hearing. A convincing evidentiary basis for denial of access to any judicial proceeding is generally necessary under this test to rebut the presumption of open courts. However, it is only after the information and evidence has been gathered by the Crown that the presiding judge will be able to exercise his or her discretion judicially. To act otherwise would present great risks to the proper administration of justice and to the safety, interests and rights of third parties.

The open court principle must yield to circumstances that would render the proper administration of justice unworkable. Public access to investigative hearings would normally defeat the purpose of the proceedings by rendering

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them ineffective as an investigative tool. Police cannot gather information and act upon it at the same time it is disseminated to the public and the media. Moreover, the information obtained at a s. 83.28 hearing could be used in connection with subsequent applications for search warrants, wiretaps and further s. 83.28 orders against other witnesses. The efficacy of these investigative tools would be seriously compromised if the details of the s. 83.28 proceedings were open to the public. There is a legitimate law enforcement interest in maintaining the confidentiality of a witness's identity and testimony, since the premature disclosure of information about a terrorism offence would compromise and impede the very investigation of this gathered information. This would frustrate effective law enforcement, which is meant to benefit society as a whole.

The predominant purpose of the investigative hearing, like the execution of a search warrant, is to gather information. While the purposes of these investigative tools are similar, the judge's role in investigative proceedings under s. 83.28 is limited to ensuring that information is gathered in a proper manner and protecting the integrity of the investigation and interests of the witness. Without knowing what information will be revealed, it is not possible to evaluate the seriousness of the risk to third parties' rights and to the proper administration of justice. Thus, in the case of investigative hearings, the presumption of openness must yield to other serious considerations so as to preserve the rights of third parties and ensure the proper administration of justice. The fact that an investigative hearing takes place during an ongoing investigation further supports the confidentiality of the proceedings.

The challenge to the validity of s. 83.28 did not make the open court principle more compelling, since the constitutional challenge could not realistically be separated from the actual investigative hearing. The protection of the judicial system's integrity does not depend on the public's knowledge of potentially harmful information, nor would advance notice to the media of the s. 83.28 hearing serve any useful purpose. Until the witness testifies, it is inherently uncertain whether or not public access to the hearing will jeopardize the countervailing interests at stake.

Different considerations apply after the completion of investigative procedures, when the evidentiary uncertainty surrounding investigative proceedings under s. 83.28 is dispelled. The information gathered by the Crown will provide a basis upon which the presiding judge can balance the competing interests at stake and more accurately assess the risk presented by the disclosure of information to third parties and to the proper administration of justice.

In this case, there was no way of knowing prior to the investigative hearing whether the level of secrecy imposed was unnecessary because until the witness has testified, judges cannot assess with any degree of accuracy the extent to which the proper administration of justice and third parties' rights could be jeopardized. Accordingly, the hearing judge properly exercised her discretion and did not err by ordering that the s. 83.28 hearing be held in camera.

Les deux accusés ont été inculpés de plusieurs infractions relativement à l'explosion du vol 182 d'Air India et à l'explosion prévue du vol 301 d'Air India en 1985. Peu de temps après le début du procès, le ministère public a présenté une demande ex parte afin d'obtenir une ordonnance obligeant la personne désignée, un témoin éventuel du ministère public, à se présenter à une investigation judiciaire pour être interrogé conformément à l'art. 83.28 du Code criminel, qui prévoit la tenue d'une audition d'enquête relativement à des infractions de terrorisme telles que définies par l'art. 2. Le juge saisi de la demande a accordé l'ordonnance, a ordonné la tenue de l'audition à huis clos et qu'aucun avis de l'audition ne soit donné aux accusés, à la presse ou au public. Les avocats des accusés ont eu vent de l'ordonnance et ont demandé la permission de faire des soumissions, tandis que l'avocat de la personne désignée a demandé d'attaquer la validité constitutionnelle de l'art. 83.28. Le juge saisi des demandes a décidé que les soumissions devaient être faites devant le juge présidant l'investigation.

Peu de temps après le début de l'investigation, une journaliste travaillant pour le journal appelant s'est vu refuser l'accès à une salle d'audience fermée après avoir reconnu les avocats du procès Air India qui y entraient. La juge présidant l'audition a refusé d'entendre, à ce moment-là, une requête visant à autoriser que les débats se déroulent en public. Le journal a déposé un avis de requête dans laquelle il indiquait son intention de solliciter la publicité des débats en plus de demander que son avocat et un membre de son équipe éditoriale, après avoir signé une promesse de confidentialité, aient accès aux procédures écrites et aux documents déposés jusque-là. Avant d'entendre la re-

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quête, la juge présidant l'audition a conclu, à huis clos, que l'ordonnance en vertu de l'art. 83.28 avait été validement rendue et que l'art. 83.28 était constitutionnel. Elle a cependant modifié l'ordonnance originale pour permettre aux avocats des accusés d'assister à l'investigation et de contre-interroger la personne désignée, avec quelques restrictions. Elle a ordonné que son jugement soit scellé en attendant la conclusion de l'investigation ou une ordonnance contraire.

Lorsque la salle d'audience a finalement été ouverte au public, la juge présidant l'audition a donné un résumé de ses motifs. Elle a ensuite indiqué que la procédure en vertu de l'art. 83.28 avait été ajournée afin que la personne désignée puisse interjeter appel. La requête du journal a été rejetée; le journal a interjeté appel.

Arrêt: Le pourvoi a été accueilli en partie et l'ordonnance de la juge présidant l'audition a été modifiée.

Iacobucci et Arbour, JJ. (McLachlin, J.C.C., Major, Binnie et Fish, JJ., souscrivant à l'opinion de Iacobucci et Arbour, JJ.): L'unique procédure judiciaire prévue par l'art. 83.28 du Code criminel doit être interprétée de manière compatible avec le préambule de la Loi antiterroriste, laquelle énonce les impératifs d'une réponse efficace au terrorisme, un engagement continu à l'égard des valeurs et des limites à la Charte canadienne des droits et libertés ainsi que les caractéristiques fondamentales du processus judiciaire, dans la mesure où l'on envisage des procédures judiciaires.

Le principe de la publicité des débats est un fondement de la démocratie ainsi qu'une caractéristique fondamentale de toutes les procédures judiciaires; il ne devrait pas être mis de côté, par présomption, en faveur d'un huis clos. L'accès du public aux tribunaux assure l'intégrité du processus judiciaire et fait partie intégrante de la confiance du public envers le système judiciaire et de la compréhension qu'à ce dernier de l'administration de la justice. Le principe de la publicité des débats est inextricablement lié à la liberté d'expression protégée par l'art. 2b) de la Charte et sert à promouvoir les valeurs fondamentales qu'elle véhicule, y compris la liberté de la presse de rapporter les procédures judiciaires et le droit du public de recevoir de l'information. Ce principe englobe le stade précédant le procès étant donné que les raisons sur lesquelles se fonde la publicité des débats sont les mêmes que pour le stade du procès.

Le critère des arrêts Dagenais et Mentuck devrait être appliqué à toutes les décisions judiciaires discrétionnaires qui limitent la liberté d'expression de la presse. Le critère a été élaboré afin de concilier la liberté d'expression et d'autres droits importants qui sont plus larges que l'administration de la justice et qui peuvent inclure les droits à la vie privée et à la sécurité. Même si le critère a été élaboré dans le contexte des interdictions de publication, il s'applique tout autant aux décisions discrétionnaires d'un juge du procès qui *limitent* la liberté d'expression de la presse dans le cadre de procédures judiciaires. Ce pouvoir discrétionnaire doit être exercé de façon conforme à la Charte, peu importe s'il découle de la common law ou s'il est autorisé par la loi ou par les règles de la cour. C'est la partie qui fait la demande qui a le fardeau de prouver la nécessité d'une exception à la publicité des débats.

L'article 83.28(2) ne prévoit pas expressément le huis clos pour quelque portion de l'investigation judiciaire. Il faut faire une distinction entre une demande visant à obtenir une investigation judiciaire de l'art. 83.28 et la tenue même de cette audition. L'article 83.28 prévoit que la demande d'un officier de la paix, qui a préalablement obtenu le consentement du procureur général, visant à obtenir la tenue d'une investigation, doit être entendue ex parte. De par sa nature véritable, cette demande doit être présentée à huis clos devant un juge. Cependant, cela ne veut pas dire que, en raison de sa nature d'enquête, l'audition doit elle-même être tenue, par présomption, en secret. La meilleure façon de concilier les impératifs d'enquête et la présomption judiciaire de la publicité des débats se fait grâce à l'exercice approprié de la discrétion accordée au juge d'imposer les modalités du déroulement de l'investigation en vertu de l'art. 83.28(5)e). Lorsqu'ils exercent ce pouvoir discrétionnaire, les officiers de justice devraient rejeter la présomption d'auditions secrètes. Le Parlement a choisi la tenue d'investigations de nature judiciaire et ces dernières doivent inclure le plus possible des garanties et protections du processus judiciaire qui soient compatibles avec la démarche. Une de ces garanties est justement la présomption de la publicité des débats, laquelle ne devrait être mise de côté qu'après avoir examiné de façon approfondie les intérêts opposés à chaque stade du processus. L'existence d'une

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ordonnance en vertu de l'art. 83.28, ainsi que le plus possible son contenu, doit être révélée au public à moins que le secret ne soit nécessaire en vertu du critère de conciliation Dagenais/Mentuck.

En l'espèce, le niveau de secret imposé n'était pas nécessaire. Même si la demande sollicitant une ordonnance pour obtenir une audition d'enquête en vertu de l'art. 83.28(2) a été à bon droit entendue ex parte et à huis clos, rien ne justifiait de continuer de taire l'existence de l'ordonnance ou le contenu de celle-ci. À la lumière de la position prise par la personne désignée à ce stade-là, l'identité de cette personne a été gardée confidentielle à bon droit, mais cet ordre aurait dû être assujetti à une révision par la juge présidant l'audition. Dans les circonstances de l'espèce, alors qu'un témoin éventuel du ministère public dans un procès en cours était devenu assujetti à une ordonnance d'investigation, il était clair que les intérêts des tiers auraient dû être pris en compte. Les principes du critère Dagenais/Mentuck auraient dû être appliqués et les avocats des accusés auraient dû recevoir dès le départ un avis d'audition.

Les impératifs du principe de la publicité des débats sont devenus encore plus importants à partir du moment où la personne désignée a indiqué son intention d'attaquer la constitutionnalité de l'ordonnance. La contestation constitutionnelle n'aurait pas dû être entendue à huis clos. En fait, on aurait dû rendre publiques la contestation ainsi que toutes les informations qui pouvaient être révélées sans mettre en danger l'enquête, assujetties par ailleurs à une interdiction totale ou partielle de publication, s'il y avait lieu. La plupart des soumissions pour la contestation constitutionnelle auraient pu être faites sans que soient révélées les détails de la dénonciation présentée au juge saisi de la demande. Il était clair, en vertu de l'art. 83.28, que les modalités de l'investigation doivent être modifiés et ajustés au fur et à mesure afin de concilier la confidentialité et la publicité. Par conséquent, le nom de la personne désignée doit être rendu public et l'ordonnance devrait être modifiée afin que l'investigation soit tenue en public, assujettie par ailleurs à toute ordonnance du juge excluant le public ou à une interdiction de publication relativement à la preuve anticipée fournie par la personne désignée. À la fin de l'investigation judiciaire, la juge présidant l'audition devrait réévaluer la nécessité du secret et dévoiler publiquement toute l'information recueillie qui peut être rendue publique sans mettre en danger les intérêts de la personne désignée, des tiers ou de l'enquête.

LeBel, J.: Sous réserve des commentaires faits dans l'arrêt connexe, Application Under s. 83.28 of the Criminal Code, Re, les motifs des juges majoritaires et le dispositif qu'ils proposent étaient partagés.

Bastarache et Deschamps, JJ. (dissidents en partie): Même si la règle est la publicité des débats, en tant que principe de common law et aspect de l'art. 2b) de la Charte canadienne des droits et libertés garantissant la liberté de la presse, et que le secret est l'exception, l'accès du public aux procédures judiciaires peut être mis de côté lorsque cela est nécessaire pour protéger des valeurs sociales d'importance supérieure. Lorsqu'un préjudice serait causé aux droits des tiers et que l'administration de la justice serait rendue impossible par la présence du public, la cour peut alors siéger à huis clos. Cela est généralement le cas pour les procédures d'enquête en vertu de l'art. 83.28.

Le critère Dagenais/Mentuck ne constitue pas un cadre approprié pour guider le juge dans l'exercice de son pouvoir discrétionnaire en vertu de l'art. 83.28 d'ordonner que l'investigation soit tenue à huis clos. Selon ce test, il est généralement nécessaire, pour repousser la présomption de la publicité des débats, d'avoir suffisamment de preuve pour justifier de refuser l'accès aux procédures judiciaires. Cependant, le juge présidant l'audition ne sera capable d'exercer sa discrétion judiciaire qu'après avoir reçu les informations et la preuve recueillie par le ministère public. Agir autrement ne ferait que faire courir de graves risques à l'administration de la justice et à la sécurité, les intérêts et les droits des tiers.

Le principe de la publicité des débats doit céder le pas aux circonstances qui rendraient impossible la bonne administration de la justice. L'accès du public aux auditions d'enquête irait généralement à l'encontre de l'objet des procédures en les rendant inefficaces en tant qu'outil d'enquête. La police ne peut recueillir des renseignements et agir sur la base de ceux-ci en même temps s'ils sont dévoilés au public et aux médias. De plus, les renseignements obtenus lors d'une audition de l'art. 83.28 peuvent être utilisés dans le cadre de demandes subséquentes de mandats, d'écoute électronique et d'autres ordonnances de l'art. 83.28 à l'égard d'autres témoins. L'efficacité de ces outils d'en-

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quête serait sérieusement compromise si les détails des procédures en vertu de l'art. 83.28 étaient révélés au public. L'application des lois a un intérêt légitime dans le maintien du caractère confidentiel de l'identité du témoin et des informations données, étant donné que la divulgation prématurée de renseignements sur une infraction de terrorisme pourrait compromettre et entraver l'enquête même sur les renseignements recueillis. Cela empêcherait une application efficace de la loi, laquelle est censée bénéficier à la société dans son ensemble.

Tout comme l'exécution d'un mandat de perquisition, le but premier de l'investigation est de recueillir des renseignements. Même si le but visé par ces outils d'enquête est semblable, le rôle du juge dans les procédures d'enquête en vertu de l'art. 83.28 se limite à s'assurer que l'information est recueillie de manière appropriée et à protéger l'intégrité de l'enquête et les intérêts du témoin. Si l'on ignore quelle information sera révélée, il est impossible d'évaluer la gravité du danger pour les droits des tiers et la bonne administration de la justice. Par conséquent, dans le cas d'investigations, la présomption de la publicité des débats doit céder le pas à d'autres considérations, de façon à préserver les droits des tiers et à assurer la bonne administration de la justice. Le fait qu'une audition d'enquête est tenue dans le cadre d'une enquête en cours appuie d'autant plus la nécessité que les procédures soient confidentielles.

La contestation de la validité de l'art. 83.28 ne rendait plus nécessaire la publicité des débats, puisque la contestation constitutionnelle ne pouvait pas, de façon réaliste, être séparée de l'audition d'enquête. La protection de l'intégrité du système judiciaire ne dépend pas de la connaissance par le public de renseignements possiblement préjudiciables; un avis aux médias de la tenue d'une audition en vertu de l'art. 83.28 ne servirait à rien non plus. Tant que le témoin n'a pas témoigné, il demeure difficile de savoir si permettre ou non l'accès au public peut compromettre les intérêts opposés en jeu.

Différentes considérations s'appliquent après la fin des procédures d'enquête, lorsque s'est dissipée l'incertitude quant à la preuve qui entourait les procédures d'enquête. Les renseignements recueillis par le ministère public fourniront un fondement qui peut être utilisé par le juge présidant l'audition pour concilier les intérêts opposés en jeu et pour mieux apprécier le danger que pose la divulgation des renseignements aux tiers et à la bonne administration de la justice.

Dans ce cas-ci, rien ne permettait de savoir avant l'audition d'enquête si le niveau de secret imposé n'était pas nécessaire, parce que, tant que le témoin n'a pas témoigné, les juges ne peuvent évaluer précisément dans quelle mesure la bonne administration de la justice et les droits des tiers pourraient être mis en danger. Par conséquent, la juge présidant l'investigation a bien exercé son pouvoir discrétionnaire et n'a commis aucune erreur en ordonnant que l'audition de l'art. 83.28 soit tenue à huis clos.

Annotation

The majority ruling on the openness of investigative hearings is a welcome relief from the majority positions in the companion case, which upheld the constitutionality of investigative hearings and held that they did not offend the independence of the judiciary. The application of the open court principle to investigative hearings is important because it prevents an already suspect process from becoming too Star Chamber-like. Time will tell, however, whether judges exercise their discretion in favour of *in camera* proceedings more in this context than in the usual criminal context. In making annual reports under section 83.31 of the *Criminal Code*, the Attorneys General should be obliged to outline the extent to which *in camera* hearings and publication bans are ordered in connection with investigative hearings. As well, when Parliament has an opportunity to re-visit investigative hearings in early 2007, this information should be considered by members of Parliament in deciding whether or not the provisions should continue in force.

Tim Quigley[FN*]

Cases considered by *Iacobucci, Arbour JJ.*:

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [2004] 2 S.C.R. 332, 33 B.C.L.R. (4th) 261, 120 C.R.R. (2d) 203, [2005] 2 W.W.R. 671, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

Ambard v. Attorney General for Trinidad & Tobago (1936), [1936] A.C. 322, [1936] 1 All E.R. 704 (Trinidad & Tobago P.C.) — considered

Application Under s. 83.28 of the Criminal Code, Re (2003), 2003 BCSC 1172, 2003 CarswellBC 1823 (B.C. S.C.) — considered

Application Under s. 83.28 of the Criminal Code, Re (2004), [2004] 2 S.C.R. 248, 33 B.C.L.R. (4th) 195, [2005] 2 W.W.R. 605, 121 C.R.R. (2d) 1, 21 C.R. (6th) 82, 322 N.R. 205, (sub nom. *R. v. Bagri*) 184 C.C.C. (3d) 449, (sub nom. *R. v. Bagri*) 240 D.L.R. (4th) 81, 199 B.C.A.C. 45, 2004 SCC 42, 2004 CarswellBC 1378, 2004 CarswellBC 1379 (S.C.C.) — referred to

Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (1996), 2 C.R. (5th) 1, 110 C.C.C. (3d) 193, [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385, 182 N.B.R. (2d) 81, 463 A.P.R. 81, 39 C.R.R. (2d) 189, 203 N.R. 169, 1996 CarswellNB 462, 1996 CarswellNB 463, 2 B.H.R.C. 210 (S.C.C.) — considered

Dagenais v. Canadian Broadcasting Corp. (1994), 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112, 1994 CarswellOnt 1168 (S.C.C.) — followed

Edmonton Journal v. Alberta (Attorney General) (1989), [1990] 1 W.W.R. 577, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577, 102 N.R. 321, 71 Alta. L.R. (2d) 273, 103 A.R. 321, 41 C.P.C. (2d) 109, 45 C.R.R. 1, 1989 CarswellAlta 198, 1989 CarswellAlta 623 (S.C.C.) — considered

Ford c. Québec (Procureur général) (1988), 90 N.R. 84, 54 D.L.R. (4th) 577, 19 Q.A.C. 69, 36 C.R.R. 1, 10 C.H.R.R. D/5559, 1988 CarswellQue 155, 1988 CarswellQue 155F, (sub nom. *Ford v. Quebec (Attorney General)*) [1988] 2 S.C.R. 712 (S.C.C.) — considered

MacIntyre v. Nova Scotia (Attorney General) (1982), [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 40 N.R. 181, 26 C.R. (3d) 193, 96 A.P.R. 609, 132 D.L.R. (3d) 385, (sub nom. *Nova Scotia (Attorney General) v. MacIntyre*) 65 C.C.C. (2d) 129, 1982 CarswellNS 21, 1982 CarswellNS 110 (S.C.C.) — considered

R. v. B. (S.A.) (2003), 2003 SCC 60, 2003 CarswellAlta 1525, 2003 CarswellAlta 1526, 14 C.R. (6th) 205, 178 C.C.C. (3d) 193, 231 D.L.R. (4th) 602, 311 N.R. 1, [2003] 2 S.C.R. 678, [2004] 2 W.W.R. 199, 21 Alta. L.R. (4th) 207, 339 A.R. 1, 312 W.A.C. 1 (S.C.C.) — considered

R. v. Mentuck (2001), 2001 SCC 76, 2001 CarswellMan 535, 2001 CarswellMan 536, 158 C.C.C. (3d) 449, 205 D.L.R. (4th) 512, 47 C.R. (5th) 63, 277 N.R. 160, [2002] 2 W.W.R. 409, 163 Man. R. (2d) 1, 269 W.A.C. 1, [2001] 3 S.C.R. 442 (S.C.C.) — followed

R. v. Oakes (1986), [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 53 O.R. (2d) 719, 1986 CarswellOnt 95, 1986 CarswellOnt 1001 (S.C.C.) — considered

R. v. Reyat (1991), 1991 CarswellBC 1245 (B.C. S.C.) — referred to

Ruby v. Canada (Solicitor General) (2002), [2002] 4 S.C.R. 3, 2002 SCC 75, 2002 CarswellNat 3225, 2002 CarswellNat 3226, 219 D.L.R. (4th) 385, 295 N.R. 353, 7 C.R. (6th) 88, 22 C.P.R. (4th) 289, 99 C.R.R. (2d) 324, 49 Admin. L.R. (3d) 1 (S.C.C.) — referred to

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [2004] 2 S.C.R. 332, 33 B.C.L.R. (4th) 261, 120 C.R.R. (2d) 203, [2005] 2 W.W.R. 671, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

Scott v. Scott (1913), [1913] A.C. 417, [1911-13] All E.R. Rep. 1, 82 L.J.P. 74, 109 L.T. 1, 29 L.T.R. 520, Sol. Jo. 498 (U.K. H.L.) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 287 N.R. 203, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522 (S.C.C.) — referred to

Vancouver Sun, Re (2003), [2003] 2 S.C.R. xi (note) (S.C.C.) — referred to

Cases considered by *Bastarache J.*:

Application Under s. 83.28 of the Criminal Code, Re (2004), [2004] 2 S.C.R. 248, 33 B.C.L.R. (4th) 195, [2005] 2 W.W.R. 605, 121 C.R.R. (2d) 1, 21 C.R. (6th) 82, 322 N.R. 205, (sub nom. *R. v. Bagri)* 184 C.C.C. (3d) 449, (sub nom. *R. v. Bagri)* 240 D.L.R. (4th) 81, 199 B.C.A.C. 45, 2004 SCC 42, 2004 CarswellBC 1378, 2004 CarswellBC 1379 (S.C.C.) — referred to

Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (1996), 2 C.R. (5th) 1, 110 C.C.C. (3d) 193, [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385, 182 N.B.R. (2d) 81, 463 A.P.R. 81, 39 C.R.R. (2d) 189, 203 N.R. 169, 1996 CarswellNB 462, 1996 CarswellNB 463, 2 B.H.R.C. 210 (S.C.C.) — considered

Dagenais v. Canadian Broadcasting Corp. (1994), 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112, 1994 CarswellOnt 1168 (S.C.C.) — considered

MacIntyre v. Nova Scotia (Attorney General) (1982), [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 40 N.R. 181, 26 C.R. (3d) 193, 96 A.P.R. 609, 132 D.L.R. (3d) 385, (sub nom. *Nova Scotia (Attorney General) v. MacIntyre)* 65 C.C.C. (2d) 129, 1982 CarswellNS 21, 1982 CarswellNS 110 (S.C.C.) — considered

Michaud c. Québec (Procureur général) (1996), (sub nom. *Michaud v. Quebec (Attorney General))* 201 N.R. 241, (sub nom. *Michaud v. Quebec (Attorney General))* 109 C.C.C. (3d) 289, [1996] 3 S.C.R. 3, (sub nom. *Michaud v. Quebec (Attorney General))* 38 C.R.R. (2d) 230, 1 C.R. (5th) 1, (sub nom. *Michaud v. Quebec (Attorney General))* 138 D.L.R. (4th) 423, 1996 CarswellQue 908, 1996 CarswellQue 909 (S.C.C.) — considered

R. v. A (1990), 55 C.C.C. (3d) 570, [1990] 1 S.C.R. 992, 108 N.R. 214, 77 C.R. (3d) 232, 1990 CarswellQue 18, 1990 CarswellQue 113 (S.C.C.) — referred to

R. v. B. (S.A.) (2003), 2003 SCC 60, 2003 CarswellAlta 1525, 2003 CarswellAlta 1526, 14 C.R. (6th) 205, 178 C.C.C. (3d) 193, 231 D.L.R. (4th) 602, 311 N.R. 1, [2003] 2 S.C.R. 678, [2004] 2 W.W.R. 199, 21 Alta. L.R. (4th) 207, 339 A.R. 1, 312 W.A.C. 1 (S.C.C.) — considered

R. v. Mentuck (2001), 2001 SCC 76, 2001 CarswellMan 535, 2001 CarswellMan 536, 158 C.C.C. (3d) 449, 205 D.L.R. (4th) 512, 47 C.R. (5th) 63, 277 N.R. 160, [2002] 2 W.W.R. 409, 163 Man. R. (2d) 1, 269 W.A.C. 1, [2001] 3 S.C.R. 442 (S.C.C.) — considered

Southam Inc. v. Ontario (1990), (sub nom. *Southam Inc. v. Coulter)* 75 O.R. (2d) 1, (sub nom. *Southam Inc. v. Coulter)* 40 O.A.C. 341, (sub nom. *Southam Inc. v. Coulter)* 60 C.C.C. (3d) 267, 1990 CarswellOnt 952 (Ont. C.A.) — considered

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [2004] 2 S.C.R. 332, 33 B.C.L.R. (4th) 261, 120 C.R.R. (2d) 203, [2005] 2 W.W.R. 671, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

Cases considered by *LeBel J.*:

Application Under s. 83.28 of the Criminal Code, Re (2004), [2004] 2 S.C.R. 248, 33 B.C.L.R. (4th) 195, [2005] 2 W.W.R. 605, 121 C.R.R. (2d) 1, 21 C.R. (6th) 82, 322 N.R. 205, (sub nom. *R. v. Bagri*) 184 C.C.C. (3d) 449, (sub nom. *R. v. Bagri*) 240 D.L.R. (4th) 81, 199 B.C.A.C. 45, 2004 SCC 42, 2004 CarswellBC 1378, 2004 CarswellBC 1379 (S.C.C.) — referred to

Statutes considered by *Iacobucci, Arbour JJ.*:

Anti-terrorism Act, S.C. 2001, c. 41

Preamble — considered

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 2(b) — considered

s. 7 — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

s. 2 "terrorism offence" — referred to

s. 83.28 [en. 2001, c. 41, s. 4] — considered

s. 83.28(2) [en. 2001, c. 41, s. 4] — considered

s. 83.28(3) [en. 2001, c. 41, s. 4] — referred to

s. 83.28(4)(a) [en. 2001, c. 41, s. 4] — considered

s. 83.28(4)(b) [en. 2001, c. 41, s. 4] — considered

s. 83.28(5)(e) [en. 2001, c. 41, s. 4] — considered

s. 83.31 [en. 2001, c. 41, s. 4] — referred to

s. 83.32(1) [en. 2001, c. 41, s. 4] — referred to

s. 486(1) — considered

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [2004] 2 S.C.R. 332, 33 B.C.L.R. (4th) 261, 120 C.R.R. (2d) 203, [2005] 2 W.W.R. 671, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

Statutes considered by *Bastarache J.*:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 2(b) — considered

Criminal Code, R.S.C. 1985, c. C-46

s. 83.28 [en. 2001, c. 41, s. 4] — considered

s. 83.28(3) [en. 2001, c. 41, s. 4] — referred to

s. 83.28(4) [en. 2001, c. 41, s. 4] — referred to

Words and phrases considered

judicial investigative hearing

[Per Iacobucci, Arbour JJ. (McLachlin C.J.C., Major, Binnie, Fish JJ. concurring):] The judicial investigative hearing provided for in s. 83.28 of the [*Criminal Code*, R.S.C. 1985, c. C-46] is a procedure with no comparable history in Canadian law. It provides essentially that a peace officer, with the prior approval of the Attorney General, may apply *ex parte* to a judge for an order for "the gathering of information". The gathering of information is in relation to a terrorism offence, which is described in s. 2 of the *Code*.

Termes et locutions cités

investigation judiciaire

[Iacobucci et Arbour, JJ. (McLachlin, J.C.C., Major, Binnie et Fish, JJ., souscrivant à l'opinion de Iacobucci et Arbour, JJ.):] L'investigation judiciaire prévue à l'art. 83.28 du [*Code criminel*, L.R.C. 1985, c. C-46] est une procédure sans précédent dans l'histoire du droit canadien. Elle prévoit essentiellement qu'un agent de la paix, avec le consentement préalable du procureur général, peut demander à un juge, en l'absence de toute autre partie, de rendre une ordonnance autorisant « la recherche de renseignements ». La recherche de renseignements se rapporte à une infraction de terrorisme, définie à l'art. 2 du *Code*.

APPEAL by newspaper from judgment reported at *Vancouver Sun, Re* (2003), 2003 BCSC 1330, 2003 CarswellBC 2083 (B.C. S.C.), dismissing its motion for order that judicial investigative hearing under s. 83.28 of *Criminal Code* be open to public.

POURVOI du journal à l'encontre de l'arrêt publié à *Vancouver Sun, Re* (2003), 2003 BCSC 1330, 2003 CarswellBC 2083 (B.C. S.C.), qui a rejeté sa requête afin qu'il soit ordonné que l'investigation judiciaire en vertu de l'art. 83.23 soit ouverte au public.

***Iacobucci, Arbour JJ.*:**

I. Introduction

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [2004] 2 S.C.R. 332, 33 B.C.L.R. (4th) 261, 120 C.R.R. (2d) 203, [2005] 2 W.W.R. 671, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

1 This appeal is a companion to *Application Under s. 83.28 of the Criminal Code, Re*, 2004 SCC 42 (S.C.C.) (the "constitutional appeal"), released concurrently. For a comprehensive review of all of the issues on the constitutionality and application of s. 83.28 of the *Criminal Code*, R.S.C. 1985, c. C-46 (as amended by the *Anti-terrorism Act*, S.C. 2001, c. 41), the constitutional appeal should be read first.

2 The judicial investigative hearing provided for in s. 83.28 of the *Code* is a procedure with no comparable history in Canadian law. It provides essentially that a peace officer, with the prior approval of the Attorney General, may apply *ex parte* to a judge for an order for "the gathering of information". The gathering of information is in relation to a terrorism offence, which is described in s. 2 of the *Code*. The information to be gathered relates both to the circumstances of the offence and the whereabouts of possible suspects. If satisfied that proper grounds have been established, the court may order the attendance of a person for examination under oath before a judge, and the person must remain in attendance and answer questions put to him or her by the Attorney General or his agent. Although the person who is the subject of the order cannot refuse to answer a question on the ground that it may incriminate him or her or subject him or her to any proceeding or penalty, his or her answers receive full direct and derivative use immunity. The person has the right to retain and instruct counsel, and the judge has a wide discretion to impose terms and conditions to protect the person named in the order, third parties, as well as the integrity of ongoing investigations.

3 In our view, this unique judicial procedure must be interpreted and applied in light of the two following principles:

> 1. The interpretation of s. 83.28 must be guided by the Preamble to the *Anti-terrorism Act*, which amended the *Criminal Code* to include s. 83.28. The Preamble stresses the imperatives of an effective response to terrorism as well as a continued commitment to the values and constraints of the *Canadian Charter of Rights and Freedoms*;
>
> 2. Section 83.28 should be interpreted in a manner consistent with the fundamental characteristics of a judicial process insofar as the section contemplates a judicial proceeding.

4 The issue in this appeal deals with the level of secrecy with which the judicial investigative hearing was conducted. We have concluded that the open court principle is a fundamental characteristic of judicial proceedings, and that it should not be presumptively displaced in favour of an *in camera* process. The need to close the courtroom doors, for the whole or parts of the judicial investigative hearing is governed by the principles expressed in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.), and *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76 (S.C.C.).

II. The Facts

5 The judicial investigative hearing relates to two alleged acts of terrorism that occurred on June 23, 1985. An explosion caused the deaths of two baggage handlers and injured four others at the Narita Airport in Japan. A second explosion caused Air India Flight 182 to crash off the west coast of Ireland, causing the death of all 329 passengers and crew.

6 On February 4, 1988, the first accused, Inderjit Singh Reyat was arrested in England where he was living with his family. Mr. Reyat was extradited to Canada on December 13, 1989, to face a number of charges relating to the explosion at Narita Airport. On May 10, 1991, he was convicted on seven counts: *R. v. Reyat*, [1991] B.C.J. No. 2006 (B.C. S.C.).

7 On October 27, 2000, Ripudaman Singh Malik and Ajaib Singh Bagri were jointly charged with respect to both explosions and the intended explosion of Air India Flight 301. A few months later, on March 8, 2001, a direct

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [2004] 2 S.C.R. 332, 33 B.C.L.R. (4th) 261, 120 C.R.R. (2d) 203, [2005] 2 W.W.R. 671, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

indictment was filed against the accused, Mr. Malik and Mr. Bagri, and on June 5, 2001, a new indictment was filed, adding a third accused, Mr. Reyat. Mr. Reyat plead guilty on February 10, 2003, to a new indictment that charged him with aiding or abetting the construction of the explosive device that was placed on Air India Flight 182. He was sentenced to 5 years imprisonment in addition to the time already spent in custody.

8 Following Mr. Reyat's guilty plea to a charge of manslaughter in February 2003, Mr. Malik and Mr. Bagri re-elected, before Josephson J. of the Supreme Court of British Columbia, to be tried by a judge alone. The trial of Mr. Malik and Mr. Bagri (the "Air India Trial") commenced on April 28, 2003 and continues to this date.

9 On May 6, 2003, the Crown applied to a judge *ex parte* for a s. 83.28 order to gather information regarding the Air India offences from the Named Person. Dohm A.C.J. of the British Columbia Supreme Court issued the s. 83.28 order for a judicial investigative hearing on the strength of an affidavit by a member of the RCMP's Air India Task Force. He directed the hearing to be held *in camera* and no notice was given to the accused in the Air India Trial, to the press, or to the public. He also prohibited The Named Person from disclosing any information or evidence obtained at the hearing.

10 Sometime prior to May 20, 2003, when the hearing was to be held, counsel for Mr. Malik and Mr. Bagri fortuitously became aware of the order and advised Dohm A.C.J. that they wished to make submissions. The Named Person retained counsel, and on June 16, 2003, Dohm A.C.J. was advised that the Named Person wished to challenge the constitutional validity of s. 83.28. Dohm A.C.J. directed that, seven days later, all submissions be heard by Holmes J. The constitutional challenge to s. 83.28 and the application to have the hearing order of Dohm A.C.J. set aside commenced on June 23, 2003. Neither the public nor the press was informed.

11 On June 27, 2003, the Air India Trial adjourned for the summer. That same day, Ms. Bolan from the Vancouver Sun recognized lawyers from the Air India trial and attempted to follow them into a closed courtroom where *in camera* proceedings were taking place. The trial list disclosed that "*R v. I.*(conference)" was taking place before Holmes J. in Courtroom 33. Ms. Bolan contacted counsel for the Vancouver Sun who knocked on the door of Courtroom 33. Counsel was informed by a sheriff that the judge would not entertain a motion at that time for the proceedings to be opened to the public.

12 The Vancouver Sun then filed a Notice of Motion and a letter setting out the background with the Supreme Court of British Columbia and asked for an early date for its motion to be heard. The motion sought an order that counsel for the appellant and a member of the Vancouver Sun's editorial board, upon filing an undertaking of confidentiality, be provided with access to the pleadings and all materials from the proceedings to date and for an order that the court proceedings be open to the public. The Vancouver Sun was informed, on July 3, 2003 that Holmes J. would hear its application on July 23, 2003.

13 The hearing before Holmes J. continued *in camera*, and on July 21, 2003, she issued her reasons dismissing the application to set aside the s. 83.28 judicial investigative hearing. She did, however, vary the order of Dohm A.C.J. to allow counsel for Malik and Bagri to attend the investigative hearing with the right to cross-examine the Named Person, subject to the restriction that any information received was to be kept confidential by counsel and was not to be shared with the two accused. The Named Person immediately applied to Holmes J., who, on July 22, 2003, stayed the investigative hearing to September 2, 2003, so that the Named Person could seek leave to appeal to this Court. None of this was known to the public or press.

14 On July 22, 2003, the Vancouver Sun received a call from the registry of the British Columbia Supreme Court indicating that the hearing of its application had been delayed to 10 a.m. the following day, apparently to allow the s. 83.28 proceedings to continue *in camera* earlier in the morning. When the courtroom was finally opened to the public, the Vancouver Sun made its application to be allowed further access to pleadings and proceedings on the filing of an undertaking of confidentiality and for a declaration s. 83.28 proceedings should not be *in camera*.

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [2004] 2 S.C.R. 332, 33 B.C.L.R. (4th) 261, 120 C.R.R. (2d) 203, [2005] 2 W.W.R. 671, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

The application was dismissed by Holmes J. on July 24, 2003: [2003] B.C.J. No. 1992, 2003 BCSC 1330 (B.C. S.C.).

15 Immediately prior to Vancouver Sun's application, Holmes J. delivered, in open court, a synopsis of her reasons for judgment dated July 21, 2003 in which she set out that the hearing before her had involved the constitutional validity of s. 83.28 and the validity of a s. 83.28 order for a judicial investigative hearing. Holmes J. gave a synopsis because the reasons for judgment were sealed. She also revealed that the questioning of the Named Person had not yet commenced. It was at this point that the appellant learned that the British Columbia Supreme Court had been involved in the first-ever application by the Crown under s. 83.28 of the *Criminal Code* for an order requiring a witness to attend a judicial investigative hearing. The appellant contends that but for serendipity and their persistence, no "synopsis" would have been released and the existence of proceedings under s. 83.28 would not have been made public.

16 The synopsis of reasons for judgment dated July 21, 2003, 2003 BCSC 1172 (B.C. S.C.), set out that "[t]he proceedings concerned the interpretation, application, and constitutionality of the new s. 83.28 of the *Criminal Code*, which provides for investigative hearings in relation to terrorism offences, as now defined in s. 2 of the *Code*" (para.1). Holmes J. then explained that an order had been issued under s. 83.28 for a judicial investigative hearing as part of the ongoing Air India Investigation but that the Named Person who was required to attend was neither a suspect nor an accused. She summarized her findings that the order was validly issued and constitutionally sound; that counsel for Mr. Malik and Mr. Bagri would participate in the investigative hearing because of the unusual circumstance that the Air India Trial was underway; the hearing might have an incidental effect on the Air India Trial but the predominant purpose of the hearing is to further the ongoing investigation; the hearing is subject to restrictions protecting the privacy and other rights and interests of the Named Person and the integrity of the investigation.

17 After delivering her synopsis, Holmes J. stated that the s. 83.28 proceeding had been adjourned so that the Named Person could seek leave to appeal to this Court. On July 25, 2003, LeBel J. ordered that the Supreme Court of Canada file be sealed and that the application for leave be expedited. Leave was granted on August 11, 2003, to appeal the order of Holmes J. of July 21, 2003.

18 On October 6, 2003, the Vancouver Sun was granted leave to appeal the July 24, 2003 order of Holmes J. dismissing its application for access to the materials in the courts below: [2003] 2 S.C.R. xi (note) (S.C.C.). The Vancouver Sun, the National Post, and Global Television Network Inc. were also given intervener standing in the constitutional appeal, limited to issues of media access. Submissions were also made at the October 6 hearing on whether all or part of the constitutional appeal could be opened to the public and the media.

19 At the October 6, 2003 leave hearing, the Named Person indicated the constitutional appeal could be conducted in public. The Attorney General of British Columbia took the position that parts of the appeal, constituting stand-alone issues, could be held in public: the constitutionality of s. 83.28 of the *Criminal Code*, the role of the judge, and retrospective application of the provision. Mr. Bagri submitted that grounds of appeal relating to self-incrimination and privacy under section 7 of the *Charter*, judicial independence, and retrospectivity could be heard in public.

20 This Court heard the constitutional appeal on December 10 and 11, 2003 in its entirety in open court subject to a number of restrictions specified at the start of the oral hearing by the Chief Justice. During the oral arguments, counsel refrained from mentioning the name and gender of the Named Person, any facts that could identify this person, and any material supporting the order for an investigative hearing. In addition, the hearing was not broadcast, contrary to the usual practice of the Court.

III. Analysis

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21 The issue on appeal is the level of secrecy that should apply to the application for and conduct of a judicial investigative hearing under s. 83.28 of the *Criminal Code*.

A. The Parameters of the Open Court Principle

22 Section 83.28 of the *Criminal Code*, which provides for the judicial investigative hearing, will cease to apply at the end of the fifteenth sitting day of Parliament after December 31, 2006 unless its application is extended by resolution passed by both Houses of Parliament: *Criminal Code*, s. 83.32(1). Until that time, the Attorney General must make accessible to the public an annual report on its use: *Criminal Code*, s. 83.31. The sunset clause and annual reporting requirements underscore the unusual and serious nature of the judicial investigative hearing. It is therefore important to allow the public to scrutinize and discuss the reasoning and deliberations of a Court when it deals with a challenge to the constitutionality of that proceeding. It is also important to allow the legal profession and the public at large to observe how such a procedure is actually used, as long as this can be done, in full or in part, without undue injury to the administration of justice or without frustrating the purpose of s. 83.28.

23 This Court has emphasized on many occasions that the "open court principle" is a hallmark of a democratic society and applies to all judicial proceedings: *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175 (S.C.C.), at p. 187; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.), at paras. 21-22; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). "Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized": *Edmonton Journal*, *supra*, at p. 1336.

24 The open court principle has long been recognized as a cornerstone of the common law: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 21. The right of public access to the courts is "one of principle ... turning, not on convenience, but on necessity": *Scott v. Scott*, [1913] A.C. 417 (U.K. H.L.), *per* Viscount Haldane L.C., at p. 438. Justice is not a cloistered value": *Ambard v. Attorney General for Trinidad & Tobago*, [1936] A.C. 322 (Trinidad & Tobago P.C.), *per* Lord Atkin, at p. 335. "[P]ublicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity": J.H. Burton, ed., *Bethamiana or, Select Extracts from the Works of Jeremy Bentham* (1843), p. 115.

25 Public access to the courts guarantees the integrity of judicial processes by demonstrating "that justice is administered in a non-arbitrary manner, according to the rule of law": *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 22. Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.

26 The open court principle is inextricably linked to the freedom of expression protected by s. 2(*b*) of the *Charter* and advances the core values therein: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 17. The freedom of the press to report on judicial proceedings is a core value. Equally, the right of the public to receive information is also protected by the constitutional guarantee of freedom of expression: *Ford c. Québec (Procureur général)*, [1988] 2 S.C.R. 712 (S.C.C.); *Edmonton Journal*, *supra*, at pp. 1339-40. The press plays a vital role in being the conduit through which the public receives that information regarding the operation of public institutions: *Edmonton Journal*, *supra*, at pp. 1339-40. Consequently, the open court principle, to put it mildly, is not to be lightly interfered with.

27 Furthermore, the principle of openness of judicial proceedings extends to the pretrial stage of judicial proceedings because the policy considerations upon which openness is predicated are the same as in the trial stage: *MacIntyre*, *supra*, at p. 183. Dickson J. found "it difficult to accept the view that a judicial act performed during a

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trial is open to public scrutiny but a judicial act performed at the pretrial stage remains shrouded in secrecy": *MacIntyre*, at p. 186.

28 This Court has developed the adaptable *Dagenais/Mentuck* test to balance freedom of expression and other important rights and interests, thereby incorporating the essence of the balancing of the *Oakes* test: *Dagenais*, *supra*; *Mentuck*, *supra*; *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). The rights and interests considered are broader than simply the administration of justice and include a right to a fair trial: *Mentuck*, *supra*, at para. 33, and may include privacy and security interests.

29 From *Dagenais*, *supra*, and *Mentuck*, *supra*, this Court has stated that a publication ban should be ordered only when:

> a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

(*Mentuck*, *supra*, at para. 32)

30 The first part of the *Dagenais/Mentuck* test reflects the minimal impairment requirement of the *Oakes* test, and the second part of the *Dagenais/Mentuck* test reflects the proportionality requirement. The judge is required to consider not only "whether reasonable alternatives are available, but also to restrict the order as far as possible without sacrificing the prevention of the risk": *Mentuck*, *supra*, at para. 36.

31 While the test was developed in the context of publication bans, it is equally applicable to all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings. Discretion must be exercised in accordance with the *Charter*, whether it arises under the common law, as is the case with a publication ban (*Dagenais*, *supra*; *Mentuck*, *supra*); is authorized by statute, for example under s. 486(1) of the *Criminal Code* which allows the exclusion of the public from judicial proceedings in certain circumstances (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 69); or under rules of court, for example, a confidentiality order (*Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, 2002 SCC 41 (S.C.C.)). The burden of displacing the general rule of openness lies on the party making the application: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 71.

B. The Nature of the Judicial Investigative Hearing Under Section 83.28

32 We have reproduced the relevant statutory provisions of the *Criminal Code* as an Appendix to these reasons. From the perspective of the open court principle, the proceedings under s. 83.28 can be usefully broken down into three steps:

> (a) the *ex parte* application under s. 83.28(2) for an order for the gathering of information;
>
> (b) the hearing itself, under the terms and conditions contemplated in s. 83.28(5)(*e*); and
>
> (c) the post-hearing stage, at which non-public information may be released publicly, again subject to the terms and conditions in s. 83.28(5)(*e*).

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Section 83.28 does not expressly provide for any part of the judicial investigative hearing to be held *in camera*.

33 Competing views about the proper interpretation of the provision as a whole are as follows: on the one hand, the appellant argues that the open court principle applies to the entire process and should only be displaced in accordance with the *Dagenais/Mentuck* test. The respondents, on the other hand, submits that when Parliament enacted the section, it was entitled to rely on this Court's jurisprudence to the effect that investigative processes, even if they involve a judicial officer, are presumptively held *in camera* (referring, for example to an application for a search warrant: *MacIntyre*, *supra*).

34 The validity of the respondents' submission rests on the assumption that the s. 83.28 hearing is an investigative measure akin to the issuance of a search warrant. This assumption is only partly accurate because one must distinguish between an *application* for a s. 83.28 judicial investigative hearing and the *holding* of the judicial investigative hearing. The application for an order that a judicial investigative hearing be held is procedurally similar to the application for a search warrant or for a wiretap authorization. Section 83.28(2) provides that the application, made by a peace officer with prior consent of the Attorney General, 83.28(3), is *ex parte*. By its very nature, this application must be presented to a judge *in camera*.

35 In that *in camera* procedure, the judge is directed to determine, for a past offence under s. 83.28(4)(*a*), whether (1) there are reasonable grounds to believe that a terrorism offence has been committed; and (2) information about the offence, or about a suspect, is likely to be obtained by the holding of a judicial investigative hearing. The judge may also determine, for a future offence under s. 83.28(4)(*b*), whether (1) there are reasonable grounds to believe that a terrorism offence will be committed; (2) that the person has information about the offence or a third party who may commit that offence; and (3) reasonable attempts have already been made to obtain that information from the person.

36 This first step of the process is akin to the application for the issuance of a search warrant. Although that application is heard by a judge, the imperatives of the investigation require that it not be made public: *MacIntyre*, *supra*, at pp. 177-78. The same is true of a wiretap application, and, in most cases, of an application for a DNA warrant (although, in *R. v. B. (S.A.)*, [2003] 2 S.C.R. 678, 2003 SCC 60 (S.C.C.), we left open the discretion of a judge to hold a contested hearing on the appropriateness of issuing a DNA warrant). In any event, since that process must be held *ex parte*, it follows that in that context it could not be held in open court: see *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75 (S.C.C.).

37 The real issue is whether, because of the investigative nature of the judicial hearing, it too must, by necessity, be presumptively held in secret. In that respect, the analogy to the execution of search warrants, as opposed to their issuance, is not particularly helpful. It is true that search warrants are not only issued, but executed in secret. On the other hand, they are not executed by judges. The judicial role consists of ensuring that there are reasonable grounds to authorize a particular police action. In contrast, the judicial investigative hearing requires full judicial participation in the conduct of the hearing itself.

38 The proper balance between the investigative imperatives and the judicial assumption of openness is best achieved by a proper exercise of the discretion granted to judges to impose terms and conditions on the conduct of the hearing under s. 83.28(5)(*e*). In exercising that discretion, judicial officers should reject the notion of presumptively secret hearings. This conclusion is supported by the choice of Parliament to have investigative hearings of a judicial nature; these hearings must contain as many of the guarantees and indicia that come from judicial involvement as is compatible with the task at hand.

39 One such guarantee is a presumption of openness, which should only be displaced upon proper consideration of the competing interests at *every* stage of the process. In that spirit, the *existence* of an order made under s. 83.28, and as much of its subject-matter as possible should be made public unless, under the balancing exercise of the

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Dagenais/Mentuck test, secrecy becomes necessary. Similarly, once a search warrant has been executed and something has been found, the necessity for secrecy has abated and continued limits on public accessibility should only be "undertaken with the greatest reluctance": *MacIntyre*, *supra*, at p. 189.

40 If the existence of the order is made public, the issuing judge, acting under s. 83.28(5)(*e*), would determine, still under the guidance of the *Dagenais/Mentuck* test, whether any information ought to be withheld from the public. For example, even though there may be no reason to hide an order for a judicial investigative hearing in relation to an identified alleged terrorist act, it may not be appropriate to reveal the reasonable grounds upon which the police relied to obtain the order. Whether the name of the person who will be heard at the hearing needs to be kept confidential may largely dictate whether the time and place of the hearing will also be the subject of a non-disclosure order. Of course should the hearing proceed in a public forum, the Crown would be expected to request that parts of the hearing proceed *in camera* in light of the sensitive nature of the information sought.

41 It may very well be that by necessity large parts of judicial investigative hearings will be held in secret. It may also very well be that the very existence of these hearings will at times have to be kept secret. It is too early to determine, in reality, how many hearings will be resorted to and what form they will take. This is an entirely novel procedure, and this is the first case — to our knowledge — in which it has been used.

42 The parties on the present appeal seem to agree that this is a "unique" case, in the sense that this is not a "typical" set of circumstances in which such a hearing will be sought. This may be so. We cannot speculate as to what will be more "typical". Resort to "reasonable hypotheticals" is fraught with difficulties in an environment as unprecedented as this one. Applying this novel legislation to the fact situation before us, it becomes apparent that at least in this case, the level of secrecy imposed from the outset was unnecessary. It is therefore prudent to proceed with as little departure as possible from the basic tenets of judicial proceedings, all the while developing a discretionary framework that will reflect the unique investigative role of the judge acting under s. 83.28.

43 In applying the *Dagenais/Mentuck* approach to the decision to hold the investigative judicial hearing *in camera*, judges should expect to be presented with evidence credible on its face of the anticipated risks that an open inquiry would present, including evidence of the information expected to be revealed by the witness. Even though the evidence may reveal little more than reasonable expectations, this is often all that can be expected at that stage of the process and the presiding judge, applying the *Dagenais/Mentuck* test in a contextual manner, would be entitled to proceed on the basis of evidence that satisfies him or her that publicity would unduly impair the proper administration of justice.

C. Application to This Case

44 At the outset, we must state that this judicial investigative hearing is the first to our knowledge, and our comments are not to be taken as critical of the judges below who dealt with these novel matters under great pressure and time constraints. Properly adapted to the circumstances of this case, the *Dagenais/Mentuck* test in our view leads to the following conclusions.

45 The application for the order for the judicial investigative hearing under s. 83.28(2) before Dohm A.C.J. on May 6, 2003, was properly heard *ex parte* and *in camera*.

46 On the other hand, there was no reason for keeping the existence of the order secret, nor the fact that the investigative hearing ordered by Dohm A.C.J. was in relation to the explosion that caused the crash of Air India Flight 182 in June 1985.

47 In light of the position taken by the Named Person at that stage, the identity of the person was properly kept confidential. That direction should have been made subject to revision by the judge presiding at the judicial investi-

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gative hearing.

48 It is apparent on the facts that notice of the hearing should have been given to counsel for Mr. Malik and Mr. Bagri promptly. In the circumstances of this case where a potential Crown witness in an ongoing trial becomes the subject of the investigative order, it is obvious that third party interests have to be considered. Section 83.28(5)(*e*) specifically contemplates the imposition of terms and conditions that are "desirable ... for the protection of the interests of ... third parties". The subsequent participation of counsel for Mr. Malik and Mr. Bagri in the hearings before Holmes J., merely emphasizes that they should have received notice in the first instance. Instead, in light of the secrecy surrounding the very existence of the judicial investigative hearing ordered by Dohm A.C.J., counsel found out only accidentally of its existence. They then persuaded Holmes J. that the interests of their clients required their participation in the hearing. A proper application of the principles in *Dagenais/Mentuck* test reveals that there was no justification for the order that counsel for Mr. Malik and Mr. Bagri not be given notice of the hearing at the outset. It is particularly incumbent on the presiding judge to turn his or her mind to the *Dagenais/Mentuck* test in *ex parte* applications because the media is not present to represent its own rights and interests: *Mentuck*, *supra*.

49 It is not necessary in this appeal, given our conclusion that the hearing should have been held in open court, to decide whether an appropriate condition under s. 83.28(5)(*e*) could include an order that counsel be present but be prohibited from disclosing to their clients the content of the information revealed in the hearing. It is difficult to anticipate all the difficulties that such an order may pose. In the same way, we would not endorse the suggestion made by the Vancouver Sun that some members of its Editorial Board be allowed to attend the hearings and have access to the materials but be subject to an undertaking of confidentiality. It is difficult again to understand how the public good is better served by the qualified participation of professionals who cannot discharge fully their publicly entrusted mandate. In any event, these issues can be left for another day, and should be debated amongst the professional bodies involved so that court imposed conditions can properly consider ethical standards and best practices in the professions involved.

50 Keeping in mind our statements about the novelty of this case, the present facts clearly illustrate the mischief that flows from a presumption of secrecy. Secrecy then becomes the norm, is applied across the board, and sealing orders follow as a matter of course.

51 When the Named Person indicated an intention to challenge the constitutionality of the order, the imperatives of the open court principle became even more compelling. The constitutional challenge, and as much of the information about the case as could be revealed without jeopardizing the investigation, should have been made public, subject, if need be, to a total or partial publication ban. When that matter resumed before Holmes J., it became apparent that the existence of a judicial investigative hearing related to the Air India case was already known to counsel for Mr. Malik and Mr. Bagri and later to the Vancouver Sun.

52 The unfolding of events in this case also illustrates how antithetical to judicial process secret court hearings are. Courthouses are public places. In the course of a public hearing a judge may order that part of the proceedings be held *in camera*, thus excluding the public for from that part of the hearing. But, of course, in such a case, the fact that an *in camera* hearing is taking place, as well as the overall context in which it was ordered, are in the public domain, subject to challenge, *inter alia* by the Press and to comments by interested parties and by the public. Whether better notice should be given to the Press, or to other possibly interested parties, of proceedings that are held *in camera* or that are subject to a publication ban is beyond the scope of the issues raised on this appeal but we again suggest serious consideration should be given to this matter by the legal profession, the media, and the courts.

53 In retrospect, the hearing of the constitutional challenge that was held in open court before us could and should have been held in the same manner before Holmes J. Although she may have felt bound by the secrecy order issued by Dohm A.C.J., it is clear under s. 83.28(5)(*e*) that the terms and conditions attached to the judicial investigative hearing must be varied and adjusted to achieve the proper balance between confidentiality and publicity as the matter progresses.

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54 Here, for instance, the Named Person now takes the position that the proceedings should be held in public and no longer wishes that his or her identity be protected. Although this is only one factor to consider and certainly not dispositive of the issue, it removes in part the concerns that the investigative judge may have had regarding the privacy interests of the named person. The only factors militating in favour of a degree of secrecy in this case are the factors related to the protection of an ongoing investigation or for other vital but unstated reasons. In a case in which so much of the information relating to the offence is already in the public domain, and in which recourse to a judicial investigative hearing is sought in the midst of an ongoing non jury trial, the case for extensive secrecy is a difficult one to make and was not made out here.

55 We again emphasize that in the difficult circumstances of this unusual application of a novel criminal procedure, Holmes J. did excellent work in fleshing out the issues and addressing them as best she could. Any shortcomings in her decision become much easier to identify with hindsight, particularly since much of the ordered secrecy in this case has been lifted causing no apparent damage to the investigation. Furthermore, shortcomings in the original decision also become apparent when a hearing is truly adversarial, with all affected interests represented.

56 It is therefore clear that the constitutional challenge here should not have been conducted *in camera*. We would add that there would have been no need to give the Vancouver Sun (through some members of its editorial board or otherwise) preferential and confidential access to secret information in this case if much of the constitutional challenge had been conducted in open court, along the lines of the process followed in this court, with the helpful cooperation of all parties. Much of the constitutional case can be properly argued without the details of the information submitted to the application judge being revealed.

IV. Disposition

57 We would therefore order that:

> The appeal be allowed in part and that the order made by Holmes J. be varied.
>
> That the name of the Named Person be made public.
>
> That the proposed judicial investigative hearing be held in public, subject to any order of the presiding judge that the public be excluded and/or that a publication ban be put in place regarding aspects of the anticipated evidence to be given by the Named Person.

58 In any event, we would also order that the investigative judge review the continuing need for any secrecy at the end of the investigative hearing and release publicly any part of the information gathered at the hearing that can be made public without unduly jeopardizing the interests of the Named Person, of third parties, or of the investigation: *Criminal Code*, s. 83.28(5)(*e*). Even in cases where the very existence of an investigative hearing would have been the subject of a sealing order, the investigative judge should put in place, at the end of the hearing, a mechanism whereby its existence, and as much as possible of its content, should be publicly released.

***Bastarache J.* (dissenting in part):**

I. Introduction

59 I agree with Iacobucci and Arbour JJ.'s discussion on the importance of openness of judicial proceedings, both as a principle of common law and as an aspect of s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* guaranteeing freedom of the press (paras. 23-36). However, I respectfully cannot agree with their analysis or dispo-

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sition in this appeal.

60 While I do recognize that openness of judicial proceedings is the rule and covertness the exception, this Court has held that public access to judicial proceedings can be curtailed "where there is present the need to protect social values of superordinate importance": *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175 (S.C.C.), at 186-87. In my view, several considerations of superordinate importance, such as the proper administration of justice as well as the protection of the interests, rights and safety of third parties, warrant the curtailment of public access to investigative proceedings under s. 83.28 of the *Criminal Code*, R.S.C. 1985, c. C-46, in most instances. As discussed below, I believe that public access to investigative hearings would normally defeat the purpose of the proceedings by rendering them ineffective as an investigative tool.

II. Inapplicability of the *Dagenais/Mentuck* Framework

61 This Court developed, in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.), and *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76 (S.C.C.), a framework to guide the exercise of judicial discretion in restricting access to judicial proceedings. Nevertheless, with respect, I do not believe that the *Dagenais/Mentuck* test can guide a judge's discretion in ordering that the investigative proceedings under s. 83.28 should be held *in camera*.

62 The first requirement of the *Dagenais/Mentuck* test is that a public ban should only be ordered when "such an order is necessary in order to prevent a serious risk to the proper administration of justice" (*Mentuck*, *supra*, at para. 32). This requirement was explained by our Court in *Mentuck*, at para. 34:

> One required element is that the risk in question be a serious one, or, as Lamer C.J. put it at p. 878 in *Dagenais*, a "real and substantial" risk. That is, it must be a risk reality of which is well-grounded in the evidence. It must also be a risk that poses a serious threat to the proper administration of justice. In other words, it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained. [Emphasis added.]

63 Thus, in order to deny access to judicial proceedings, this test requires, at the outset, the existence of a serious risk that is well grounded in the evidence. But where the purpose of the investigative proceeding under review is to gather information and possibly evidence, it would be quite difficult if not impossible to present an application for denial of access that is well grounded in the evidence. The presumption of openness cannot operate in circumstances where it cannot in fact be rebutted. This is the case because there is no evidence before the hearing actually takes place. The very object of the hearing is to gather information and evidence.

64 In my opinion, the only evidence on which a judge presiding over an investigative hearing could assess the risk under the *Dagenais/Mentuck* test would be the information, if any, supporting the reasonable grounds presented by the peace officer to satisfy the judge hearing the application (s. 83.28(3) and (4)). However, I do not think that reasonable grounds to believe that a person has direct and material information that relates to a past or future terrorist offence, or that relates to the whereabouts of an individual suspected of having committed a terrorism offence, is sufficient evidence upon which a judge can assess the application and upon which he or she may exercise his or her judicial discretion. It is imperative to bear in mind that the information sought has not yet been obtained, and that neither the investigators, the Crown nor the presiding judge is able to predict what the witness will say during the hearing. Consequently, if the presumption of openness applies to investigative hearings, an applicant seeking a denial of public access for the s. 83.28 proceedings could never satisfy the *Dagenais/Mentuck* test. It is not possible for the presiding judge to assess, in an evidentiary vacuum, the degree of risk that would be created if the hearing were open to the public. In light of this inherent uncertainty with which presiding judges are confronted, public access to all investigative hearings under s. 83.28 must be very limited.

65 In sum, a convincing evidentiary basis for denial of access to any judicial proceeding is generally necessary

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under the *Dagenais/Mentuck* test to rebut the presumption of open courts, a highly valued democratic principle of our society. However, because of the lack of information and evidence prior to an investigative hearing, this framework is not appropriate to determine denial of access. This situation is not unique.

66 In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.), La Forest J. found that in situations where judges are confronted with an uncertain evidentiary record, the evidence should be received by way of a *voir dire*, from which the public is excluded (at para. 72):

> There must be a sufficient evidentiary basis from which the trial judge may assess the application and upon which he or she may exercise his or her discretion judicially. In some cases in which the facts are not in dispute the statement of counsel will suffice. If there is insufficient evidence placed before the trial judge, or there is a dispute as to the relevant facts, the applicant should seek to have the evidence heard *in camera*. This may be done by way of a *voir dire*, from which the public is excluded.... The decision to hold a *voir dire* will be a function of what is necessary in a given case to ensure that the trial judge has a sufficient evidentiary basis upon which to act judicially. [Emphasis added.]

67 Thus, it is only after the information and evidence has been gathered by the Crown that the presiding judge will be able to exercise his or her discretion judicially. To act otherwise would present great risks to the proper administration of justice and to the safety, interests and rights of third parties.

III. Risk to the Safety, Interests and Rights of Witnesses and Third Parties

68 The importance of protecting the innocent was considered by Dickson J. in *MacIntyre*, *supra*, at p. 187:

> Many search warrants are issued and executed, and nothing is found. In these circumstances, does the interest served by giving access to the public outweigh that served in protecting those persons whose premises have been searched and nothing has been found? Must they endure the stigmatization to name and reputation which would follow publication of the search? Protection of the innocent from unnecessary harm is a valid and important policy consideration. In my view that consideration overrides the public access interest in those cases where a search is made and nothing is found. The public right to know must yield to the protection of the innocent. If the warrant is executed and something is seized, other considerations come to bear. [Emphasis added.]

69 In s. 83.28 proceedings, which deal with acts of terrorism, the possibility that information may be disclosed which unfairly prejudices or tarnishes the reputation of innocent people clearly exists. Such proceedings run the risk that "unfounded, even outrageous, allegations of misconduct may be made against the absent target of the information": *Southam Inc. v. Ontario* (1990), 60 C.C.C. (3d) 267 (Ont. C.A.), at p. 275. This unreliable and possibly untruthful testimony could severely damage the reputation of innocent people, who may themselves lack adequate means to counter the effect of information they know to be erroneous or false. This consideration therefore warrants confidentiality in investigative proceedings.

70 With regards to safety, the disclosure of a witness's identity may place that person at serious risk of harm from suspects or their allies. The same can be said for third parties identified by the witness as having information to provide during the investigative hearing. This Court has acknowledged the potential jeopardy to the safety of the witness should it become known that he or she is about to be questioned: *R. v. A.*, [1990] 1 S.C.R. 992 (S.C.C.).

71 As noted by the respondent Attorney General of Canada, for some witnesses, the likelihood that the persons against whom they can provide information will discover their identity or the content of their testimony may cause them to commit perjury or refuse to comply with the order. This would go against society's interest in encouraging the reporting of offences and the participation of witnesses in the investigative process. Given the nature of the threat posed by terrorism and terrorist organizations, confidentiality will likely encourage witnesses to come forward

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [2004] 2 S.C.R. 332, 33 B.C.L.R. (4th) 261, 120 C.R.R. (2d) 203, [2005] 2 W.W.R. 671, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

and be honest in their recollection of facts, because they would not fear for their safety.

IV. Risk to the Proper Administration of Justice

72 This Court has held that "the open court principle itself must yield to circumstances that would render the proper administration of justice unworkable": *Canadian Broadcasting Corp.*, *supra*, at para. 29. This confirmed the findings of our Court in *MacIntyre*, *supra*, at pp. 187-88:

> The point taken here is that the effective administration of justice would be frustrated if individuals were permitted to be present when the warrants were issued. Therefore, the proceeding must be conducted *in camera*, as an exception to the open court principle. I agree. The effective administration of justice does justify the exclusion of the public from the proceedings attending the actual issuance of the warrant. The Attorneys General have established, at least to my satisfaction, that if the application for the warrant were made in open court the search for the instrumentalities of crime would, at best, be severely hampered and, at worst, rendered entirely fruitless. In a process in which surprise and secrecy may play a decisive role the occupier of the premises to be searched would be alerted, before the execution of the warrant, with the probable consequence of destruction or removal of evidence. I agree with counsel for the Attorney General of Ontario that the presence in an open courtroom of members of the public, media personnel, and, potentially, contacts of suspected accused in respect of whom the search is to be made, would render the mechanism of a search warrant utterly useless. [Emphasis added.]

73 Although the investigative hearings under s. 83.28 are a new form of proceeding, the question of public access raises essentially the same issues that this Court has considered in the context of other investigative tools. The necessity of clandestine proceedings in relation to the application for and execution of investigative tools has been accepted by this Court in situations concerning search warrant applications and wiretap authorization proceedings.

74 For example, this Court recognized at para. 51 of *Michaud c. Québec (Procureur général)*, [1996] 3 S.C.R. 3 (S.C.C.), that "[t]he reality of modern law enforcement is that police authorities must frequently act under the cloak of secrecy to effectively counteract the activities of sophisticated criminal enterprises." Speaking about electronic surveillance, Lamer C.J. went on to state at para. 52:

> The effectiveness of such surveillance would be dramatically undermined if the state was routinely required to disclose the application and affidavits filed in support of a surveillance authorization to every non-accused surveillance target. The wiretap application will often provide a crucial insight in the *modus operandi* of electronic surveillance, and regular disclosure would permit criminal organizations to adjust their activities accordingly.

75 Secrecy has therefore been recognized as paramount in the context of wiretaps, and public access has been limited to ensure the effectiveness of electronic surveillance as an investigative device. The same could be said of terrorist groups or organizations: if the police cannot investigate and collect information in a confidential environment, their investigation or attempt to prevent the terrorist offence would be undermined because suspects could be "tipped off".

76 The confidentiality of investigative tools was recently confirmed by this Court in *R. v. B. (S.A.)*, [2003] 2 S.C.R. 678, 2003 SCC 60 (S.C.C.). In her discussion of the constitutionality of DNA warrants, Arbour J. stated that "as with most investigative techniques, the *ex parte* nature of the proceedings is constitutionally acceptable as a norm because of the risk that the suspect would take steps to frustrate the proper execution of the warrant" (para. 56).

77 I agree with the respondent Attorney General of British Columbia that police cannot gather information and act upon it at the same time it is disseminated to the public and the media. Information gathered may lead to other

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [2004] 2 S.C.R. 332, 33 B.C.L.R. (4th) 261, 120 C.R.R. (2d) 203, [2005] 2 W.W.R. 671, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

avenues of investigation and other potential witnesses. Moreover, the information obtained at a s. 83.28 hearing could be used in connection with subsequent applications for search warrants, wiretaps and further s. 83.28 orders against other witnesses. The efficacy of these investigative tools would be seriously compromised if the details of the s. 83.28 proceedings were open to the public. Corruption of witnesses' recollections, the potential fleeing of suspects and the risk of pressure being put on future witnesses to give false testimony are but a few examples.

78 Unlike other investigative proceedings, such as search warrants, where the evidence found and things seized are material, a witness's version of events may vary substantially, especially in response to threats or intimidation. This person could also flee. Thus, there is a legitimate law enforcement interest in maintaining the confidentiality of a witness's identity and testimony, because the premature disclosure of information about a terrorism offence would compromise and impede the very investigation of this gathered information. This would frustrate effective law enforcement, which is meant to benefit society as a whole: *B. (S.A.), supra*, at para. 51.

79 The predominant purpose of the investigative hearing, like the execution of a search warrant, is to gather information. While the purposes of these investigative tools are similar, this should not be taken as saying that the role of the judge in investigatory proceedings is like that of an agent of the State charged with executing a search warrant. Rather, the companion reasons clearly state that the judge's role in investigative proceedings under s. 83.28 is limited to ensuring that information is gathered in a proper manner and protecting the integrity of the investigation and interests of the witness (2004 SCC 42 (S.C.C.), at paras. 86-87). However, the evidentiary uncertainty preceding both procedures is the same. Without knowing what information will be revealed, it is not possible, in my view, to evaluate the seriousness of the risk to third parties' rights and to the proper administration of justice. Judges simply do not have sufficient evidence on which to make an informed assessment. Thus, in the case of investigative hearings, the presumption of openness must yield to other serious considerations so as to preserve the rights of third parties and ensure the proper administration of justice.

80 In my opinion, the fact that an investigative hearing takes place during an ongoing investigation further supports the confidentiality of the proceedings. For example, the respondent Bagri argues that the premature disclosure of investigative information from a s. 83.28 hearing could compromise the integrity of the ongoing investigations, which could in turn hamper his ability to make full answer and defence in the Air India trial.

81 Likewise, the fact that the hearing was in part about the constitutional validity of s. 83.28 did not make the imperatives of the open court principle more compelling in this case. To the contrary, the public disclosure of this challenge to the provision would ignore the fact that the Named Person's identity and any information that person may disclose should be kept confidential until the completion of the proceeding. An examination of the Record shows that the constitutional challenge could not realistically be separated from the actual investigative hearing — in fact, public disclosure of such a challenge would normally have the effect of publicizing the fact that an application has been made under s. 83.28 and that an investigative hearing may be taking place, though I would not rule out the possibility of isolating these proceedings and holding them in open court under the appropriate circumstances. In my view, the protection of the judicial system's integrity does not depend on the public's knowledge of potentially harmful information, especially in light of the fact that any information which is found to be non-prejudicial will be publicly disclosed after the end of the proceeding.

82 For the same reasons, like Holmes J. (*Vancouver Sun, Re*, [2003] B.C.J. No. 1992, 2003 BCSC 1330 (B.C. S.C.)), I see no merit in alerting the media to the fact that an *in camera* hearing is to take place. Advance notice of the s. 83.28 hearing would serve no useful purpose. The media's pursuit of a newsworthy event at that point would only undermine the proper administration of justice and could potentially damage third parties' rights and interests. The trouble is that until the witness testifies, is it inherently uncertain whether or not public access to the hearing will jeopardize the countervailing interests at stake.

V. Completion of the Investigative Hearing

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [2004] 2 S.C.R. 332, 33 B.C.L.R. (4th) 261, 120 C.R.R. (2d) 203, [2005] 2 W.W.R. 671, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

83 I agree with Holmes J. that different considerations apply after the completion of investigative procedures (para. 27). Much like the execution of a search warrant, the evidentiary uncertainty surrounding investigative proceedings under s. 83.28 is dispelled upon completion of the hearing and "the purposes of the policy of secrecy are largely, if not entirely, accomplished": *MacIntyre*, *supra*, at p. 188. The information gathered by the Crown at the s. 83.28 proceeding will provide a basis upon which the presiding judge can balance the competing interests at stake and more accurately assess the risk presented by the disclosure of information to third parties and to the proper administration of justice. Consequently, all information which is deemed non-prejudicial can be released shortly after the hearing. Because openness is the presumption, the person who wishes to deny the right of public access has the burden of proof and must satisfy the *Dagenais/Mentuck* test.

VI. Conclusion

84 Although the rule is that of openness, where the rights of third parties would be unduly harmed and the administration of justice rendered unworkable by the presence of the public, the court may sit *in camera*. Such is normally the case for investigative proceedings under s. 83.28.

85 Courts reviewing a trial judge's decision to deny public access must remember that a trial judge is usually in the best position to assess the demands of a given situation: *Canadian Broadcasting Corp.*, *supra*, at para. 77. A reviewing court may look at the facts of this case in hindsight and conclude that the level of secrecy imposed from the outset was unnecessary. Nonetheless, there is no way of knowing this prior to the investigative hearing, because until the witness has testified, judges cannot assess with any degree of accuracy the extent to which the proper administration of justice and third parties' rights could be jeopardized. Accordingly, I find that Holmes J. properly exercised her discretion and did not err by ordering that the s. 83.28 hearing be held *in camera*. For these reasons, I would dismiss the appeal.

***LeBel J.*:**

86 Subject to my comments in the companion case of *Application Under s. 83.28 of the Criminal Code, Re*, 2004 SCC 42 (S.C.C.), I agree with the reasons of Justices Iacobucci and Arbour and with their proposed disposition in this appeal.

Appeal allowed in part.

Pourvoi accueilli en partie.

APPENDIX

APPENDIX

Statutory Provisions

Criminal Code, R.S.C. 1985, c. C-46, as amended by S.C. 2001, c. 41

Investigative Hearing

83.28 (1) In this section and section 83.29, "judge" means a provincial court judge or a judge of a superior court of criminal jurisdiction.

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [2004] 2 S.C.R. 332, 33 B.C.L.R. (4th) 261, 120 C.R.R. (2d) 203, [2005] 2 W.W.R. 671, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

(2) Subject to subsection (3), a peace officer may, for the purposes of an investigation of a terrorism offence, apply *ex parte* to a judge for an order for the gathering of information.

(3) A peace officer may make an application under subsection (2) only if the prior consent of the Attorney General was obtained.

(4) A judge to whom an application is made under subsection (2) may make an order for the gathering of information if the judge is satisfied that the consent of the Attorney General was obtained as required by subsection (3) and

(a) that there are reasonable grounds to believe that

(i) a terrorism offence has been committed, and

(ii) information concerning the offence, or information that may reveal the whereabouts of a person suspected by the peace officer of having committed the offence, is likely to be obtained as a result of the order; or

(b) that

(i) there are reasonable grounds to believe that a terrorism offence will be committed,

(ii) there are reasonable grounds to believe that a person has direct and material information that relates to a terrorism offence referred to in subparagraph (i), or that may reveal the whereabouts of an individual who the peace officer suspects may commit a terrorism offence referred to in that subparagraph, and

(iii) reasonable attempts have been made to obtain the information referred to in subparagraph (ii) from the person referred to in that subparagraph.

(5) An order made under subsection (4) may

(a) order the examination, on oath or not, of a person named in the order;

(b) order the person to attend at the place fixed by the judge, or by the judge designated under paragraph (*d*), as the case may be, for the examination and to remain in attendance until excused by the presiding judge;

(c) order the person to bring to the examination any thing in their possession or control, and produce it to the presiding judge;

(d) designate another judge as the judge before whom the examination is to take place; and

(e) include any other terms or conditions that the judge considers desirable, including terms or conditions for the protection of the interests of the person named in the order and of third parties or for the protection of any ongoing investigation.

(6) An order made under subsection (4) may be executed anywhere in Canada.

2004 CarswellBC 1376, 2004 SCC 43, 184 C.C.C. (3d) 515, 240 D.L.R. (4th) 147, 322 N.R. 161, 21 C.R. (6th) 142, 199 B.C.A.C. 1, [2004] 2 S.C.R. 332, 33 B.C.L.R. (4th) 261, 120 C.R.R. (2d) 203, [2005] 2 W.W.R. 671, REJB 2004-66287, J.E. 2004-1332, [2004] B.C.W.L.D. 804

(7) The judge who made the order under subsection (4), or another judge of the same court, may vary its terms and conditions.

(8) A person named in an order made under subsection (4) shall answer questions put to the person by the Attorney General or the Attorney General's agent, and shall produce to the presiding judge things that the person was ordered to bring, but may refuse if answering a question or producing a thing would disclose information that is protected by any law relating to non-disclosure of information or to privilege.

(9) The presiding judge shall rule on any objection or other issue relating to a refusal to answer a question or to produce a thing.

(10) No person shall be excused from answering a question or producing a thing under subsection (8) on the ground that the answer or thing may tend to incriminate the person or subject the person to any proceeding or penalty, but

(a) no answer given or thing produced under subsection (8) shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 132 or 136; and

(b) no evidence derived from the evidence obtained from the person shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 132 or 136.

(11) A person has the right to retain and instruct counsel at any stage of the proceedings.

(12) The presiding judge, if satisfied that any thing produced during the course of the examination will likely be relevant to the investigation of any terrorism offence, shall order that the thing be given into the custody of the peace officer or someone acting on the peace officer's behalf.

FN* College of Law, University of Saskatchewan.

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1982 CarswellNS 21, 26 C.R. (3d) 193, [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 96 A.P.R. 609, 40 N.R. 181, (sub nom. Nova Scotia (Attorney General) v. MacIntyre) 132 D.L.R. (3d) 385, 65 C.C.C. (2d) 129, J.E. 82-132, 7 W.C.B. 154

1982 CarswellNS 21, 26 C.R. (3d) 193, [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 96 A.P.R. 609, 40 N.R. 181, (sub nom. Nova Scotia (Attorney General) v. MacIntyre) 132 D.L.R. (3d) 385, 65 C.C.C. (2d) 129, J.E. 82-132, 7 W.C.B. 154

MacIntyre v. Nova Scotia (Attorney General)

A.G.N.S. and GRAINGER v. MacINTYRE et al.

Supreme Court of Canada

Laskin C.J.C., Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

Heard: February 3, 1981
Judgment: January 26, 1982

Counsel: *R.M. Endres* and *M. Gallagher*, for appellant.

R.C.D. Murrant and *G. Proudfoot*, for respondent.

J.A. Scollin, Q.C. and *S.R. Fainstein*, for A.G. Can.

S.C. Hill, for A.G. Ont.

R. Schacter, for A.G. Que.

E.D. Westhaver, for A.G. N.B.

E.R. Edwards, for A.G. B.C.

K.W. MacKay, for A.G. Sask.

Y. Roslak, Q.C., and *L.R. Nelson*, for A.G. Alta.

A.D. Gold, for Can. Civil Liberties Assn.

Subject: Criminal

Special procedure and powers — Power of search — Issue of search warrants — Information — Public access to sworn information to obtain search warrant — Information considered judicial record available for public inspection — Public record once warrant to search executed and things seized returned to justice — Public access prohibited to

1982 CarswellNS 21, 26 C.R. (3d) 193, [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 96 A.P.R. 609, 40 N.R. 181, (sub nom. Nova Scotia (Attorney General) v. MacIntyre) 132 D.L.R. (3d) 385, 65 C.C.C. (2d) 129, J.E. 82-132, 7 W.C.B. 154

information supporting issue of warrant under which no seizure effected.

Special procedure and powers — Power of search — Issue of search warrants — Presentation of sworn information to justice — Hearing for issue to be conducted ex parte and in camera.

A journalist researching a story on political patronage and fund-raising in the province of Nova Scotia was refused access to a number of sworn informations to obtain search warrants filed at the Provincial Court offices in Halifax on the basis that the material was not available for inspection by the general public. Thereafter, the journalist obtained a declaration from the courts and upheld on appeal that the public could examine any information to obtain a search warrant once it had been sworn before a justice, whether or not the warrant issued pursuant thereto had as yet been executed, and the Court of Appeal held further that the application pursuant to s. 443 of the Criminal Code for the issuance of a search warrant was a proceeding to be held in open court with the right of public attendance. The Crown appealed the order granting access to the relevant sworn informations to obtain search warrants.

Held:

Appeal dismissed.

Per Dickson J. (Laskin C.J.C., McIntyre, Chouinard and Lamer JJ., concurring)

Sworn informations to obtain search warrants are documents to which a presumption of public access applies. No information to obtain a search warrant is to be made available by the custodian thereof to any member of the public until the warrant to search has been executed and a return of things seized made to a justice pursuant to s. 446(1) of the Criminal Code. Where the execution of the search warrant does not result in a seizure of the items sought by police, the sworn information in support of such a warrant is not to be publicly accessible.

In those instances where the information to obtain the search warrant is publicly accessible, the document is to be available to all members of the public, not merely to persons touched or interested in the search itself. The right in the member of the public is to inspect the warrant to search and the sworn information to obtain the search warrant.

The application pursuant to s. 443(1) of the Criminal Code, wherein a sworn information to obtain a search warrant is presented to a justice, is to be conducted ex parte and in camera without the right of public attendance in order to ensure the surprise and secrecy necessary to the effective execution of a warrant to search.

Every court has a supervisory and protecting power over its own records. Access can be denied thereto only when the ends of justice would be subverted by disclosure or the judicial documents, such as sworn informations to obtain search warrants, might be used for improper purposes. The presumption remains in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right of access.

Per Martland J. (dissenting) (Ritchie, Beetz and Estey JJ. concurring)

The individual citizen cannot assert a right to examine search warrants and related informations on the basis that the issuance of a search warrant constitutes a judicial act in open court with a right of public attendance. Applications by law enforcement officials for the issuance of search warrants are to be conducted by an ex parte, in camera proceeding.

A sworn information to obtain a search warrant ought to be available only to a person touched by the search or to a person who is able to demonstrate that the document sought in some way affects his interest. In this case the journalist had no direct and tangible interest in the documents sought. The sworn informations were sought for an ulterior

1982 CarswellNS 21, 26 C.R. (3d) 193, [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 96 A.P.R. 609, 40 N.R. 181, (sub nom. Nova Scotia (Attorney General) v. MacIntyre) 132 D.L.R. (3d) 385, 65 C.C.C. (2d) 129, J.E. 82-132, 7 W.C.B. 154

object, for the purpose of preparing a news story, and accordingly, the common law rule of interest entitled the justice to refuse the request for access to the relevant informations.

An interested party is not entitled to access to the relevant information to obtain a search warrant prior to the execution thereof. Disclosure of the contents of a sworn information to obtain a search warrant before trial could seriously affect the administration of justice through publication of facts prejudicial to the fair trial of a person suspected of having committed a crime, through the disclosure of the identity of a police informant, and, through the disclosure of facts related to the pattern of police activities in connection with searches to those engaged in criminal activities.

Cases considered:

Considered by majority:

Gazette Printing Co. v. Shallow (1909), 41 S.C.R. 339, 6 E.L.R. 348 — *considered*

McPherson v. McPherson, [1936] A.C. 177, [1936] 1 W.W.R. 33, [1936] 1 D.L.R. 321 — *considered*

Nixon v. Warner Communications Inc. (1978), 435 U.S. 589, 98 S.Ct. 1306 — *considered*

Realty Renovations Ltd. v. A.G. Alta., [1979] 1 W.W.R. 74, 44 C.C.C. (2d) 249, 16 A.R. 1 — *not followed*

R. v. I.R.C.; Ex parte Rossminster, [1980] 2 W.L.R. 1, [1980] Crim. L.R. 111, 70 Cr. App. R. 157, (sub nom. *I.R.C. v. Rossminster Ltd.)* [1980] 1 All E.R. 80 — *referred to*

R. v. Solloway Mills & Co., [1930] 3 D.L.R. 293 (Alta. S.C.) — *referred to*

R. v. Wright (1799), 8 Term Rep. 293, 101 E.R. 1396 (K.B.) — *considered*

Scott v. Scott, [1913] A.C. 417 — *considered*

Southam Publishing Co. v. Mack (1959), 2 Crim. L.Q. 119 (Alta. S.C.) — *referred to*

Considered in dissent:

A.G. v. Scully (1902), 4 O.L.R. 394, 6 C.C.C. 167, leave to appeal refused 33 S.C.R. 16, 6 C.C.C. 381 — *considered*

Caddy v. Barlow (1827), 1 Man. & Ry. 275 (K.B.) — *considered*

McPherson v. McPherson, [1936] A.C. 177, [1936] 1 W.W.R. 33, [1936] 1 D.L.R. 321 — *considered*

R. v. Fisher (1811), 2 Camp. 563, 170 E.R. 1253 (N.P.) — *considered*

R. v. I.R.C.; Ex parte Rossminster, [1980] 2 W.L.R. 1, [1980] Crim. L.R. 111, 70 Cr. App. R. 157, (sub nom. *I.R.C. v. Rossminster Ltd.)* [1980] 1 All E.R. 80 — *applied*

Scott v. Scott, [1913] A.C. 417 — *considered*

Statutes considered:

1982 CarswellNS 21, 26 C.R. (3d) 193, [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 96 A.P.R. 609, 40 N.R. 181, (sub nom. Nova Scotia (Attorney General) v. MacIntyre) 132 D.L.R. (3d) 385, 65 C.C.C. (2d) 129, J.E. 82-132, 7 W.C.B. 154

Criminal Code, R.S.C. 1970, c. C-34, ss. 443, 446.

46 Edw. III.

Rules considered:

English Rules of Court, R. 4, 0.63.

Forms considered:

Criminal Code, R.S.C. 1970, c. C-34, Form 1.

Authorities considered:

1 Hals. (4th) 116, para. 97.10 Hals. (4th) 316, para. 705.Taylor on Evidence, 11th ed. (1920), paras. 1492, 1493.

Appeal by the Crown against declaration, 38 N.S.R. (2d) 633, 52 C.C.C. (2d) 161, 110 D.L.R. (3d) 289, 69 A.P.R. 633, that sworn informations to obtain search warrants available for public inspection.

Martland J. **(dissenting) (*Ritchie, Beetz* and *Estey JJ.* concurring):**

1 This appeal is from a judgment of the Appeal Division of the Supreme Court of Nova Scotia [38 N.S.R. (2d) 633, 52 C.C.C. (2d) 161, 110 D.L.R. (3d) 289, 69 A.P.R. 633]. The facts which gave rise to the case are not in dispute.

2 The appellant, Ernest Harold Grainger, is chief clerk of the Provincial Magistrate's Court at Halifax and is also a justice of the peace. The respondent is a television journalist employed by the Canadian Broadcasting Corporation who, at the material time, was researching a story on political patronage and fund raising. He asked the appellant, Grainger, to show him certain search warrants and supporting material and was refused on the ground that such material was not available for inspection by the general public.

3 The respondent gave notice to the appellants of an intended application in the Supreme Court of Nova Scotia, Trial Division, for "an Order in the nature of mandamus and/or a declaratory judgment to the effect that the search warrants and Informations relating thereto issued pursuant to section 443 of the *Criminal Code* of Canada or other related or similar statutes are a matter of public record and may be inspected by a member of the public upon reasonable request".

4 The application was heard by Richard J. [reported 37 N.S.R. (2d) 199 at 207, 67 A.P.R. 199] who ordered that the respondent "is entitled to a declaration to the effect that search warrants which have been executed upon and which are in the custody and control of a Justice of the Peace or a court official are court records and are available for examination by members of the general public". It will be noted that this order was limited to search warrants which had been executed.

5 The appellants appealed unsuccessfully to the Appeal Division. The judgment dismissing the appeal contained the following declaration:

> IT IS DECLARED that a member of the public is entitled to inspect informations upon which search warrants have been issued pursuant to section 443 of the *Criminal Code* of Canada.

1982 CarswellNS 21, 26 C.R. (3d) 193, [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 96 A.P.R. 609, 40 N.R. 181, (sub nom. Nova Scotia (Attorney General) v. MacIntyre) 132 D.L.R. (3d) 385, 65 C.C.C. (2d) 129, J.E. 82-132, 7 W.C.B. 154

6 This declaration was broader in its scope than that made by Richard J. in that it was not limited to search warrants which had been executed. The basis for the court's decision is set forth in the following paragraph of the reasons for judgment [at p. 655]:

> In my opinion any member of the public does have a right to inspect informations upon which search warrants are based, pursuant to s. 443 of the *Criminal Code*, since the issue of the search warrant is a judicial act performed in open court by a justice of the peace. The public would be entitled to be present on that occasion and to hear the contents of the information presented to the justice when he is requested to exercise his discretion in the granting of the warrant. The information has become part of the record of the court as revealed at a public hearing and must be available for inspection by members of the public.

7 Subsection (1) of s. 443 of the Criminal Code, R.S.C. 1970, c. C-34 provides:

> 443.(1) A justice who is satisfied by information upon oath in Form 1, that there is reasonable ground to believe that there is in a building, receptacle or place
>
> (*a*) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed,
>
> (*b*) anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against this Act, or
>
> (*c*) anything that there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant,
>
> may at any time issue a warrant under his hand authorizing a person named therein or a peace officer to search the building, receptacle or place for any such thing, and to seize and carry it before the justice who issued the warrant or some other justice for the same territorial division to be dealt with by him according to law.

8 Section 446 of the Criminal Code provides that anything seized under a search warrant issued pursuant to s. 443 and brought before a justice shall be detained by him or he may order that it be detained until the conclusion of any investigation or until required to be produced for the purpose of a preliminary inquiry or trial.

9 Subsection (5) of s. 446 provides:

> (5) Where anything is detained under subsection (1), a judge of a superior court of criminal jurisdiction or of a court of criminal jurisdiction may, on summary application on behalf of a person who has an interest in what is detained, after three clear days notice to the Attorney General, order that the person by or on whose behalf the application is made be permitted to examine anything so detained.

10 The appellants, by leave of this court, have appealed from the judgments of the Appeal Division. The two issues stated by the appellants are as follows:

> (i) Are search warrants issued pursuant to Section 443 of the *Criminal Code* issued in open court and are they and the informations pertaining thereto consequently documents open for public inspection,
>
> (ii) Whether there is otherwise a general right to inspect search warrants and the informations pertaining thereto.

11 With respect to the first issue, I am in agreement with my brother Dickson, for the reasons which he has

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given, that the broad declaration made by the Appeal Division cannot be sustained. That being so, the respondent cannot assert a right to examine the search warrants and the related informations on the basis that the issuance of the search warrants was a judicial act in open court with a right for the public to be present.

12 That brings us to the second issue defined by the appellants as to whether there is a general right to inspect search warrants and the informations pertaining thereto. This was the real basis of the submission of the respondent who did not seek to sustain the position taken by the Appeal Division. His position is that search warrants issued under s. 443 and the informations pertaining thereto are court documents which are open to general public inspection.

13 The respondent relies upon an ancient English statute enacted in 1372, 46 Edw. III. An English translation of this Act, which was enacted in law French, appears in a note at the end of the judgment of the Court of King's Bench in *Caddy v. Barlow* (1827), 1 Man. & Ry. 275 at 279. I will quote that part of the note which includes the statutory provision:

> It appears that originally all judicial records of the King's Courts were open to the public without restraint, and were preserved for that purpose. Lord Coke, in his preface to 3 Co. Rep. 3, speaking on this subject says, 'these records, for that they contain great and hidden treasure, are faithfully and safely kept, (as they well deserve), in the king's treasury. Any yet not so kept but that any subject may for his necessary use and benefit have access thereunto; which was the ancient law of England, and so is declared by an Act of Parliament in 46 Edw. 3, in these words: — Also the Commons pray, that, whereas records, and whatsoever is in the King's Court, ought of reason to remain there, for perpetual evidence and aid of all parties thereto, and of all those whom in any manner they reach, when they have need; and yet of late they refuse, in the Court of our said Lord, to make search or exemplification of any thing which can fall in evidence against the King, or in his disadvantage. May it please (you) to ordain by statute, that search and exemplification be made for all persons (*fait as touts gentz*) of whatever record touches them in any manner, as well as that which falls against the King as other persons. *Le Roy le voet.*

14 The respondent cites this legislation in support of the proposition that a member of the public has access to all judicial records. However, the provisions of the statute did not go that far. It referred to "whatever record *touches* them in any manner". I take this as meaning that to obtain the benefit of the statute the person had to show that the document sought to be searched in some way affected his interests.

15 This view is supported by the portion of the footnote which precedes the quotation of the statute. Lord Coke states that any subject may have access to the records "for his necessary use and benefit".

16 The case of *Caddy v. Barlow* itself related to the admissibility, in an action for malicious prosecution, of a copy of an indictment against the plaintiff which had been granted to her brother, the co-accused.

17 The respondent refers to the judgment of the Court of Appeal for Ontario in *A.G. v. Scully* (1902), 4 O.L.R. 394, 6 C.C.C. 167, leave to appeal refused 33 S.C.R. 16, 6 C.C.C. 381 in which reference is made to *Caddy v. Barlow* and to the English statute. That case dealt with an application made to the clerk of the peace for a copy of the indictment in a criminal charge of theft against the applicant who had been acquitted. He obviously had an interest in obtaining the document.

18 The Appeal Division in the present case which, as previously noted, based its decision to permit the examination of the search warrants and informations upon its conclusion that these documents were produced at a judicial hearing in open court, did deal with the assertion of a general right to examine court documents in the following passage in its reasons [at p. 655]:

1982 CarswellNS 21, 26 C.R. (3d) 193, [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 96 A.P.R. 609, 40 N.R. 181, (sub nom. Nova Scotia (Attorney General) v. MacIntyre) 132 D.L.R. (3d) 385, 65 C.C.C. (2d) 129, J.E. 82-132, 7 W.C.B. 154

> In my opinion at common law courts have always exercised control over their process in open court and access to the records. Although the public have a right to any information they may glean from attendance at a public hearing of a process in open court, and to those parts of the record that are part of the public presentation of the judicial proceeding in open court, there have always been some parts of the court file that are available only to 'persons interested' and this 'interest' must be established to the satisfaction of the court. Parties to civil actions and the accused in criminal proceedings have always been held by the courts to be persons so interested. Other persons must establish their right to see particular documents before being entitled to do so.

19 The Appeal Division cited in its reasons paras. 1492 and 1493 of Taylor on Evidence, 11th ed. (1920) (the same paragraphs appear with the same numbers in the 12th edition):

> 1492. It is highly questionable whether the *records of inferior tribunals* are open to the inspection of all persons without distinction, but it is clear that everyone has a right to inspect and take copies of the parts of the proceedings in which he is individually interested. The party, therefore, who wishes to examine any particular record of one of those Courts should first apply to that Court, showing that he has some interest in the document in question, and that he requires it for a proper purpose. If his application be refused, the Chancery, or the King's Bench Division of the High Court, upon affidavit of the fact, may send either for the record itself or an exemplification, or the latter Court will, by mandamus, obtain for the applicant the inspection or copy required. Thus, where a person, after having been convicted by a magistrate under the game laws, had an action brought against him for the same offence, the Court of Queen's Bench held that he was entitled to a copy of the conviction and, the magistrate having refused to give him one, they granted a writ of certiorari, to procure a copy, and thus to enable the defendant to defeat the action. Where a party, who had been sued in a Court of conscience and had been taken in execution, brought an action of trespass and false imprisonment, the Judges granted him a rule to inspect so much of the book of the proceedings as related to the suit against himself.
>
> 1493. Indeed, it may be laid down as a general rule that the King's Bench Division will *enforce by mandamus the production of every document of a public nature*, in which any one of his Majesty's subjects can prove himself to be *interested*. Every officer, therefore, appointed by law to keep records ought to deem himself a trustee for all interested parties, and allow them to inspect such documents as concern themselves, without putting them to the expense and trouble of making a formal application for a mandamus. But the applicant must show that he has some direct and tangible interest in the documents sought to be inspected, and that the inspection is *bona fide* required on some special and public ground, or the court will not interfere in his favour, and therefore, if his object be merely to gratify a rational curiosity, or to obtain information on some general subject, or to ascertain facts which may be indirectly useful to him in some ulterior proceedings, he cannot claim inspection as a right capable of being enforced.

20 The first edition of this work was published in 1848, and so these propositions may be taken as representing the author's views of the law of England on this subject.

21 In 1 Hals. (4th) 116, para. 97, a similar statement of the law appears:

> The applicant's interest in the documents must be direct and tangible. Neither curiosity, even though rational, nor the ascertainment of facts which may be useful for furthering some ulterior object, constitutes a sufficient interest to bring an applicant within the rule on which the court acts in granting a mandamus for the inspection of public documents.
>
> Although reasonable grounds must be shown for requiring inspection, it is not necessary to show as a ground for the application for a mandamus to inspect documents that a suit has been actually instituted. It will suffice to show that there is some particular matter in dispute and that the applicant is interested therein.

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22 It is quite clear that the respondent has no direct and tangible interest in the documents which he sought to examine. He wished to examine them to further an ulterior object, i.e. for the purpose of preparing a news story. Applying the rule applicable under English law, the appellant, Grainger, was entitled to refuse his request.

23 It is suggested that a broader right might be recognized consonant with the openness of judicial proceedings. This suggestion requires a consideration of the nature of the proceedings provided for in s. 443. That section provides a means whereby persons engaged in the enforcement of criminal law may obtain leave, inter alia, to search buildings, receptacles or places and seize documents or other things which may afford evidence with respect to the commission of a criminal offence. A justice is empowered by the section to authorize this to be done. Before giving such authority, he must be satisfied by information on oath that there is reasonable ground for believing that there is in the building, receptacle or place anything in respect of which an offence has been committed or is suspected to have been committed, anything that there is reasonable ground to believe will afford evidence of the commission of a criminal offence or anything that there is reasonable ground to believe is intended to be used for the commission of an offence against the person for which a person may be arrested without warrant.

24 The function of the justice may be considered to be a judicial function, but might more properly be described as a function performed by a judicial officer, since no notice is required to anyone, there is no opposite party before him and, in fact, in the case of a search before proceedings are instituted, no opposite party exists. There is no requirement that the justice should perform his function in court. The justice does not adjudicate, nor does he make any order. His power is to give authority to do certain things which are a part of pre-trial preparation by the Crown. No provision is made in either s. 443 or s. 446 for an examination by anyone of the documents on the basis of which the justice issued a search warrant.

25 As the function of the justice is not adjudicative and is not performed in open court, cases dealing with the requirement of court proceedings being carried on in public, such as *Scott v. Scott*, [1913] A.C. 417 and *McPherson v. McPherson*, [1936] A.C. 177, [1936] 1 W.W.R. 33, [1936] 1 D.L.R. 321 are not, in my opinion, relevant to the issue before the court. The documents which the respondent seeks to examine are not documents filed in court proceedings. They are the necessary requirements which enable the justice to grant permission for the Crown to pursue its investigation of possible crimes and to prepare for criminal proceedings.

26 If the documents in question in this appeal are not subject to public examination prior to the execution of the search warrants, I see no logical reason why they should become subject to such examination thereafter, at least until the case in respect of which the search has been made has come to trial. It is true that a search of those documents before the search warrant has been executed might frustrate the very purpose for which the warrant was issued by forewarning the person whose premises were to be searched. The element of surprise is essential to the proper enforcement of the criminal law. There are, however, additional and important reasons why such documents should not be made public which continue even after the warrant has been executed.

27 The information upon oath on the basis of which a search warrant may be issued is in Form 1 contained in Pt. XXV of the Criminal Code. It requires a description of the offence in respect of which the search is to be made. The informant must state that he has reasonable grounds for believing that the things for which the search is to be made are in a particular place and must state the grounds for such belief. This document, which may be submitted to the justice before any charges have been laid, discloses the informant's statement that an offence has been committed or is intended to be committed.

28 The disclosure of such information before trial could be prejudicial to the fair trial of the person suspected of having committed such crime. Publication of such information prior to trial is even more serious.

29 In *R. v. Fisher* (1811), 2 Camp. 563, 170 E.R. 1253 (N.P.), a prosecution was instituted for criminal libel in consequence of the publication by the defendants of the preliminary examinations taken ex parte before a magistrate

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prior to the committal for trial of the plaintiff on a charge of assault with intent to rape. In his judgment, Lord Ellenborough said at p. 570:

> If anything is more important than another in the administration of justice, it is that jurymen should come to the trial of those persons on whose guilt or innocence they are to decide, with minds pure and unprejudiced. Is it possible they should do so, after having read for weeks and months before *ex parte* statements of the evidence against the accused, which the latter had no opportunity to disprove or to controvert? ... The publication of proceedings in courts of justice, where both sides are heard, and matters are finally determined, is salutary, and therefore it is permitted. The publication of these preliminary examinations has a tendency to pervert the public mind, and to disturb the course of justice; and it is therefore illegal.

30 Inspection of the information and the search warrant would enable the person inspecting the documents to discover the identity of the informant. In certain types of cases this might well place the informant in jeopardy. It was this kind of risk which led to the recognition in law of the right of the police to protect from disclosure the identity of police informants. That right exists even where a police officer is testifying at a trial. The same kind of risk arises in relation to persons who give information leading to the issuance of a search warrant. For the same reasons which justify the police in refusing to disclose the identity of an informant, public disclosure of documents from which the identity of the informant may be ascertained should not be compelled.

31 In his reasons, my brother Dickson has referred to the fact that in recent years the search warrant has become an increasingly important investigatory aid as crime and criminals become increasingly sophisticated and has pointed out that the effectiveness of a search pursuant to a search warrant depends, inter alia, on the degree of confidentiality which attends the issuance of the warrant. To insure such confidentiality, it is essential that criminal organizations, such as those involved in the drug traffic, should be prevented, as far as possible, from obtaining the means to discover the identity of persons assisting the police.

32 Apart from the protection of the identity of the person furnishing the information upon which the issuance of a search warrant is founded, it is undesirable, in the public interest, that those engaged in criminal activities should have available to them information which discloses the pattern of police activities in connection with searches. In *R. v. I.R.C.; Ex parte Rossminster*, [1980] 2 W.L.R. 1, [1980] Crim. L.R. 111, 70 Cr. App. R. 157, (sub nom. *I.R.C. v. Rossminster Ltd.)* [1980] 1 All E.R. 80 at 83, the House of Lords considered the validity of a search warrant procured pursuant to an English statute, the Taxes Management Act, 1970 (Eng.), c. 12. The warrant was obtained because of suspected tax frauds. When executed, the occupants of the premises were not told the offences alleged or the "reasonable ground" on which the judge issuing the warrant had acted. In his reasons for judgment, Lord Wilberforce said:

> But, on the plain words of the enactment, the officers are entitled if they can persuade the board and the judge, to enter and search *premises* regardless of whom they belong to: a warrant which confers this power is strictly and exactly within the parliamentary authority, and the occupier has no answer to it. I accept that some information as regards the person(s) who are alleged to have committed an offence and possibly as to the approximate dates of the offences must almost certainly have been laid before the board and the judge. But the occupier has no right to be told of this stage, nor has he the right to be informed of the 'reasonable grounds' of which the judge was satisfied. Both courts agree as to this: all this information is clearly protected by the public interest immunity which covers investigations into possible criminal offences. With reference to the police, Lord Reid stated this in *Conway v. Rimmer*, [1968] A.C. 910 at 953-54, [1968] 1 All E.R. 874 at 889, in these words:
>
> > The police are carrying on an unending war with criminals many of whom are today highly intelligent. So it is essential that there should be no disclosure of anything which might give any useful information to those who organise criminal activities; and it would generally be wrong to require disclosure in a civil case of anything which might be material in a pending prosecution, but after a verdict has been given, or it has been decided to take no proceedings, there is not the same need for secrecy.

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33 The release to the public of the contents of informations and search warrants may also be harmful to a person whose premises are permitted to be searched and who may have no personal connection with the commission of the offence. The fact that his premises are the subject of a search warrant generates suspicion that he was in some way involved in the offence. Publication of the fact that such a warrant had been issued in respect of his premises would be highly prejudicial to him.

34 For these reasons, I am not satisfied that there is any valid reason for departing from the rule as stated in Halsbury so as to afford to the general public the right to inspect documents forming part of the search warrant procedure under s. 443.

35 In summary, my conclusion is that proceedings before a justice under s. 443 being part and parcel of criminal investigative procedure are not analogous to trial proceedings, which are generally required to be conducted in open court. The opening to public inspection of the documents before the justice is not equivalent to the right of the public to attend and witness proceedings in court. Access to these documents should be restricted, in accordance with the practice established in England, to persons who can show an interest in the documents which is direct and tangible. Clearly the respondent had no such interest.

36 I would allow the appeal and set aside the judgment of the Court of Appeal and of Richard J. In accordance with the submission of the appellants, there should be no order as to costs.

***Dickson J. (Laskin C.J.C., McIntyre, Chouinard* and *Lamer J.J.* concurring):**

37 The appellant, Ernest Harold Grainger, is chief clerk of the Provincial Magistrate's Court at Halifax and also a justice of the peace. In the latter capacity he had occasion to issue certain search warrants. The respondent, Linden MacIntyre, is a television journalist employed by the Canadian Broadcasting Corporation. At the material time Mr. MacIntyre was researching a story on political patronage and fund raising. Mr. MacIntyre asked Mr. Grainger to show him the search warrants and supporting material. Mr. Grainger refused, on the ground that such material was not available for inspection by the general public. Mr. MacIntyre commenced proceedings in the Supreme Court of Nova Scotia, Trial Division, for an order that search warrants and informations relating thereto, issued pursuant to s. 443 of the Criminal Code, R.S.C. 1970, c. C-34, or other related or similar statutes, are a matter of public record and may be inspected by a member of the public upon reasonable request.

I

38 Richard J. of the Trial Division of the Supreme Court of Nova Scotia delivered reasons approving Mr. MacIntyre's application [reported 37 N.S.R. (2d) 199, 67 A.P.R. 199]. He held that Mr. MacIntyre was entitled to a declaration to the effect that search warrants "which have been executed", and informations relating thereto, which are in the control of the justice of the peace or a court official are court records available for examination by members of the general public.

39 An appeal brought by the Attorney General of Nova Scotia and by Mr. Grainger to the Appeal Division of the Supreme Court of Nova Scotia was dismissed [38 N.S.R. (2d) 633, 52 C.C.C. (2d) 161, 110 D.L.R. (3d) 289, 69 A.P.R. 633]. The Appeal Division proceeded on much broader grounds than Richard J. The order dismissing the appeal contained a declaration "that a member of the public is entitled to inspect informations upon which search warrants have been issued pursuant to s. 443 of the *Criminal Code* of Canada". The court also declared that Mr. MacIntyre was entitled to be present in open court when the search warrants were issued. This right, the Appeal Division said, extended to any member of the public, including individuals who would be the subjects of the search warrants.

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40 This court granted leave to appeal the judgment and order of the Appeal Division. The Attorney General of Canada and the Attorneys General of the provinces of Ontario, Quebec, New Brunswick, British Columbia, Saskatchewan and Alberta intervened to support the appellant Attorney General of Nova Scotia. The Canadian Civil Liberties Association intervened in support of Mr. MacIntyre.

41 Although Mr. MacIntyre happens to be a journalist employed by the C.B.C. he has throughout taken the position that his standing is no higher than that of any member of the general public. He claims no special status as a journalist.

II

42 A search warrant may be broadly defined as an order issued by a justice under statutory powers, authorizing a named person to enter a specified place to search for and seize specified property which will afford evidence of the actual or intended commission of a crime. A warrant may issue upon a sworn information and proof of reasonable grounds for its issuance. The property seized must be carried before the justice who issued the warrant to be dealt with by him according to law.

43 Search warrants are part of the investigative pre-trial process of the criminal law, often employed early in the investigation and before the identity of all of the suspects is known. Parliament, in furtherance of the public interest in effective investigation and prosecution of crime, and through the enactment of s. 443 of the Code, has legalized what would otherwise be an illegal entry of premises and illegal seizure of property. The issuance of a search warrant is a judicial act on the part of the justice, usually performed ex parte and in camera, by the very nature of the proceedings.

44 The search warrant in recent years has become an increasingly important investigatory aid, as crime and criminals become increasingly sophisticated and the incidence of corporate white collar crime multiplies. The effectiveness of any search made pursuant to the issuance of a search warrant will depend much upon timing, upon the degree of confidentiality which attends the issuance of the warrant and upon the element of surprise which attends the search.

45 As is often the case in a free society, there are at work two conflicting public interests. The one has to do with civil liberties and the protection of the individual from interference with the enjoyment of his property. There is a clear and important social value in avoidance of arbitrary searches and unlawful seizures. The other, competing, interest lies in the effective detection and proof of crime and the prompt apprehension and conviction of offenders. Public protection, afforded by efficient and effective law enforcement, is enhanced through the proper use of search warrants.

46 In this balancing of interests, Parliament has made a clear policy choice. The public interest in the detection, investigation and prosecution of crimes has been permitted to dominate the individual interest. To the extent of its reach, s. 443 has been introduced as an aid in the administration of justice and enforcement of the provisions of the Criminal Code.

III

47 The Criminal Code gives little guidance on the question of accessibility to the general public of search warrants and the underlying informations. And there is little authority on the point. The appellant Attorney General of Nova Scotia relied upon Taylor's Treatise on the Law of Evidence, 11th ed. (1920), upon a footnote to O. 63, R. 4 of the English Rules of Court, and upon *R. v. I.R.C.; Ex parte Rossminster*, [1980] 2 W.L.R. 1, [1980] Crim. L.R. 111, 70 Cr. App. R. 157, (sub nom. *I.R.C. v. Rossminster Ltd.)* [1980] 1 All E.R. 80. These authorities indicate that under English practice there is no general right to inspect and copy judicial records and documents. The right is only exer-

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ciseable when some direct and tangible interest or proprietary right in the documents can be demonstrated.

48 It does seem clear that an individual who is "directly interested" in the warrant can inspect the information and the warrant after the warrant has been executed. The reasoning here is that an interested party has a right to apply to set aside or quash a search warrant based on a defective information (*R. v. Solloway Mills & Co.*, [1930] 3 D.L.R. 293 (Alta. S.C.)). This right can only be exercised if the applicant is entitled to inspect the warrant and the information immediately after it has been executed. The point is discussed by MacDonald J. of the Alberta Supreme Court in *Realty Renovations Ltd. v. A.G. Alta.*, [1979] 1 W.W.R. 74, 44 C.C.C. (2d) 249 at 253-54, 16 A.R. 1:

> Since the issue of a search warrant is a judicial act and not an administrative act, it appears to me to be fundamental that in order to exercise the right to question the validity of a search warrant, the interested party or his counsel must be able to inspect the search warrant and the information on which it is based. Although there is no appeal from the issue of a search warrant, a superior Court has the right by prerogative writ to review the act of the Justice of the Peace in issuing the warrant. In order to launch a proper application, the applicant should know the reasons or grounds for his application, which reasons or grounds are most likely to be found in the form of the information or warrant. I am unable to conceive anything but a denial of Justice if the contents of the information and warrant, after the warrant is executed, are hidden until the police have completed the investigation or until the Crown prosecutor decides that access to the file containing the warrant is to be allowed. Such a restriction could effectively delay, if not prevent review of the judicial act of the Justice in the issue of the warrant. If a warrant is void then it should be set aside as soon as possible and the earlier the application to set it aside can be heard, the more the right of the individual is protected.

49 The appellant, the Attorney General of Nova Scotia, does not contest the right of an "interested party" to inspect search warrants and informations after execution. His contention is that Mr. MacIntyre, a member of the general public, not directly affected by issuance of the warrant, has no right of inspection. The question, therefore, is whether, in law, any distinction can be drawn, in respect of accessibility, between those persons who might be termed "interested parties" and those members of the public who are unable to show any special interest in the proceedings.

50 There would seem to be only two Canadian cases which have addressed the point. In (1959-60) 2 Crim. L. Q. 119 reference is made to an unreported decision of Greschuk J. in *Southam Publishing Co. v. Mack* in Supreme Court Chambers in Calgary, Alberta. Mandamus was granted required a magistrate to permit a reporter of the Calgary Herald to inspect the information and complaints which were in his possession relating to cases the magistrate had dealt with on a particular date.

51 In *Realty Renovations Ltd. v. A.G. Alta.*, supra, MacDonald J. concluded his judgment with these words [at p. 255]:

> I further declare that upon execution of the search warrant, the information in support and the warrant are matters of Court Record and are available for inspection on demand.

It is only fair to observe, however, that in that case the person seeking access was an "interested party" and therefore the broad declaration, quoted above, strictly speaking went beyond what was required for the decision.

52 American courts have recognized a general right to inspect and copy public records and documents, including judicial records and documents. Such common law right has been recognized, for example, in courts of the District of Columbia (*Nixon v. Warner Communications Inc.* (1978), 435 U.S. 589, 55 L. Ed. (2d) 570, 98 S. Ct. 1306). In that case Powell J., delivering the opinion of the Supreme Court of the United States, observed at p. 1311:

> Both petitioner and respondents acknowledge the existence of a common-law right of access to judicial records,

1982 CarswellNS 21, 26 C.R. (3d) 193, [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 96 A.P.R. 609, 40 N.R. 181, (sub nom. Nova Scotia (Attorney General) v. MacIntyre) 132 D.L.R. (3d) 385, 65 C.C.C. (2d) 129, J.E. 82-132, 7 W.C.B. 154

> but they differ sharply over its scope and the circumstances warranting restrictions of it. An infrequent subject of litigation, its contours have not been delineated with any precision.

Later, at p. 1312, Powell J. said:

> The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies, see, e.g. *State ex rel. Colscott v. King* (1900), 154 Ind. 621 at 621-27, 57 N.E. 535 at 536-;38; *State ex rel. Ferry v. Williams* (1879), 41 N.J.L. 322 at 336-39, and in a newspaper publisher's intention to publish information concerning the operation of government, see, e.g. *State ex rel. Youmans v. Owens* (1965), 28 Wis. (2d) 672 at 677, 137 N.W. (2d) 470 at 472, modified on other grounds, 28 Wis. (2d) 685a, 139 N.W. (2d) 241. But see *Burton v. Reynolds* (1896), 110 Mich. 354, 68 N.W. 217.

53 By reason of the relatively few judicial decisions it is difficult, and probably unwise, to attempt any comprehensive definition of the right of access to judicial records or delineation of the factors to be taken into account in determining whether access is to be permitted. The question before us is limited to search warrants and informations. The response to that question, it seems to me, should be guided by several broad policy considerations, namely, respect for the privacy of the individual, protection of the administration of justice, implementation of the will of Parliament that a search warrant be an effective aid in the investigation of crime, and finally, a strong public policy in favour of "openness" in respect of judicial acts. The rationale of this last-mentioned consideration has been eloquently expressed by Bentham in these terms:

> In the darkness of secrecy, sinister interest, and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice oper ate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and surest of all guards against improbity. It keeps the judge himself while trying under trial.

54 The concern for accountability is not diminished by the fact that the search warrants might be issued by a justice in camera. On the contrary, this fact increases the policy argument in favour of accessibility. Initial secrecy surrounding the issuance of warrants may lead to abuse, and publicity is a strong deterrent to potential malversation.

55 In short, what should be sought is maximum accountability and accessibility but not to the extent of harming the innocent or of impairing the efficiency of the search warrant as a weapon in society's never-ending fight against crime.

IV

56 The appellant, the Attorney General of Nova Scotia, says in effect that the search warrants are none of Mr. MacIntyre's business. MacIntyre is not directly interested in the sense that his premises have been the object of a search. Why then should he be entitled to see them?

57 There are two principal arguments advanced in support of the position of the appellant. The first might be termed the "privacy" argument. It is submitted that the privacy rights of the individuals who have been the object of searches would be violated if persons like Mr. MacIntyre were permitted to inspect the warrants. It is argued that the warrants are issued merely on proof of "reasonable grounds" to believe that there is evidence with respect of the commission of a criminal offence in a "building, receptacle or place". At this stage of the proceedings no criminal charge has been laid and there is no assurance that a charge ever will be laid. Moreover, search warrants are often issued to search the premises of a third party who is in no way privy to any wrongdoing, but is in possession of material necessary to the inquiry. Why, it is asked, submit these individuals to embarrassment and public suspicion through release of search warrants?

1982 CarswellNS 21, 26 C.R. (3d) 193, [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 96 A.P.R. 609, 40 N.R. 181, (sub nom. Nova Scotia (Attorney General) v. MacIntyre) 132 D.L.R. (3d) 385, 65 C.C.C. (2d) 129, J.E. 82-132, 7 W.C.B. 154

58 The second, independent, submission of the appellant might be termed the "administration of justice" argument. It is suggested that the effectiveness of the search warrant procedure depends to a large extent on the element of surprise. If the occupier of the premises were informed in advance of the warrant, he would dispose of the goods. Therefore, the public must be denied access to the warrants, otherwise the legislative purpose and intention of Parliament, embodied in s. 443 of the Criminal Code would be frustrated.

V

59 Let me deal first with the "privacy" argument. This is not the first occasion on which such an argument has been tested in the courts. Many times it has been urged that the "privacy" of litigants requires that the public be excluded from court proceedings. It is now well-established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings. The following comments of Lawrence J. in *R. v. Wright* (1799), 8 Term Rep. 293 at 298, 101 E.R. 1396 at 1399 (K.B.) are apposite and were cited with approval by Duff J. in *Gazette Printing Co. v. Shallow* (1909), 41 S.C.R. 339 at 359, 6 E.L.R. 348:

> Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Courts of Justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.

60 The leading case is the decision of the House of Lords in *Scott v. Scott*, [1913] A.C. 417. In the later case of *McPherson v. McPherson*, [1936] A.C. 177 at 200, [1936] 1 W.W.R. 33, [1936] 1 D.L.R. 321, Lord Blanesburgh, delivering the judgment of the Privy Council, referred to "publicity" as the "authentic hall-mark of judicial as distinct from administrative procedure".

61 It is, of course, true that *Scott v. Scott* and *McPherson v. McPherson* were cases in which proceedings had reached the stage of trial whereas the issuance of a search warrant takes place at the pre-trial investigative stage. The cases mentioned, however, and many others which could be cited, establish the broad principle of "openness" in judicial proceedings, whatever their nature, and in the exercise of judicial powers. The same policy considerations upon which is predicated our reluctance to inhibit accessibility at the trial stage are still present and should be addressed at the pre-trial stage. Parliament has seen fit, and properly so, consider ing the importance of the derogation from fundamental common law rights, to involve the judiciary in the issuance of search warrants and the disposition of the property seized, if any. I find it difficult to accept the view that a judicial act performed during a trial is open to public scrutiny but a judicial act performed at the pre-trial stage remains shrouded in secrecy.

62 The reported cases have not generally distinguished between judicial proceedings which are part of a trial and those which are not. Ex parte applications for injunctions, interlocutory proceedings, or preliminary inquiries are not trial proceedings, and yet the "open court" rule applies in these cases. The authorities have held that subject to a few well-recognized exceptions, as in the case of infants, mentally disordered persons or secret processes, all judicial proceedings must be held in public. The editor of 10 Hals. (4th) states [at p. 316, para. 705] the rule in these terms:

> In general, all cases, both civil and criminal, must be heard in open court, but in certain exceptional cases, where the administration of justice would be rendered impracticable by the presence of the public, the court may sit in camera.

At every stage the rule should be one of public accessibility and concomitant judicial accountability, all with a view

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to ensuring there is no abuse in the issue of search warrants, that once issued they are executed according to law, and finally that any evidence seized is dealt with according to law. A decision by the Crown not to prosecute, notwithstanding the finding of evidence appearing to establish the commission of a crime, may, in some circumstances, raise issues of public importance.

63 In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent.

64 Many search warrants are issued and executed, and nothing is found. In these circumstances, does the interest served by giving access to the public outweigh that served in protecting those persons whose premises have been searched and nothing has been found? Must they endure the stigmatization to name and reputation which would follow publication of the search? Protection of the innocent from unnecessary harm is a valid and important policy consideration. In my view that consideration overrides the public access interest in those cases where a search is made and nothing is found. The public right to know must yield to the protection of the innocent. If the warrant is executed and something is seized, other considerations come to bear.

VI

65 That brings me to the second argument raised by the appellant. The point taken here is that the effective administration of justice would be frustrated if individuals were permitted to be present when the warrants were issued. Therefore, the proceeding must be conducted in camera, as an exception to the open court principle. I agree. The effective administration of justice does justify the exclusion of the public from the proceedings attending the actual issuance of the warrant. The Attorneys General have established, at least to my satisfaction, that if the application for the warrant were made in open court the search for the instrumentalities of crime would, at best, be severely hampered and, at worst, rendered entirely fruitless. In a process in which surprise and secrecy may play a decisive role the occupier of the premises to be searched would be alerted before the execution of the warrant, with the probable consequence of destruction or removal of evidence. I agree with counsel for the Attorney General of Ontario that the presence in an open courtroom of members of the public, media personnel, and, potentially, contacts of suspected accused in respect of whom the search is to be made, would render the mechanism of a search warrant utterly useless.

66 None of the counsel before us sought to sustain the position of the Appeal Division of the Supreme Court of Nova Scotia that the issue of the search warrant is a judicial act which should be performed in open court by a justice of the peace with the public present. The respondent Mr. MacIntyre stated in para. 5 of his factum:

> One must note that the Respondent never sought documentation relating to unexecuted search warrants nor did he ever request to be present during the decision-making process ...

It appeared clear during argument that the act of issuing the search warrant is, in practice, rarely, if ever, performed in open court. Search warrants are issued in private at all hours of the day or night, in the chambers of the justice by day or in his home by night. Section 443(1) of the Code seems to recognize the possibility of exigent situations in stating that a justice may "at any time" issue a warrant.

67 Although the rule is that of "open court" the rule admits of the exception referred to in Halsbury, namely, that in exceptional cases, where the administration of justice would be rendered impracticable by the presence of the public, the court may sit in camera. The issuance of a search warrant is such a case.

68 In my opinion, however, the force of the "administration of justice" argument abates once the warrant has been executed, i.e. after entry and search. There is thereafter a "diminished interest in confidentiality" as the purposes of the policy of secrecy are largely, if not entirely, accomplished. The need for continued concealment virtu-

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ally disappears. The appellant concedes that at this point individuals who are directly "interested" in the warrant have a right to inspect it. To that extent at least it enters the public domain. The appellant must, however, in some manner, justify granting access to the individuals directly concerned, while denying access to the public in general. I can find no compelling reason for distinguishing between the occupier of the premises searched and the public. The curtailment of the traditionally uninhibited accessibility of the public to the working of the courts should be undertaken with the greatest reluctance.

69 The "administration of justice" argument is based on the fear that certain persons will destroy evidence and thus deprive the police of the fruits of their search. Yet the appellant agrees these very individuals (i.e. those "directly interested") have a right to see the warrant, and the material upon which it is based, once it has been executed. The appellants do not argue for blanket confidentiality with respect to warrants. Logically, if those directly interested can see the warrant, a third party who has no interest in the case at all is not a threat to the administration of justice. By definition, he has no evidence that he can destroy. Concern for preserving evidence and for the effective administration of justice cannot justify excluding him.

70 Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.

71 I am not unaware that the foregoing may seem a departure from English practice, as I understand it, but it is in my view more consonant with the openness of judicial proceedings which English case law would seem to espouse.

VII

72 I conclude that the administration of justice argument does justify an in camera proceeding at the time of issuance of the warrant but, once the warrant has been executed, exclusion thereafter of members of the public cannot normally be countenanced. The general rule of public access must prevail, save in respect of those whom I have referred to as innocent persons.

73 I would dismiss the appeal and vary the declaration of the Appeal Division of the Supreme Court of Nova Scotia to read as follows:

> IT IS DECLARED that after a search warrant has been executed, and objects found as a result of the search are brought before a justice pursuant to s. 446 of the *Criminal Code*, a member of the public is entitled to inspect the warrant and the information upon which the warrant has been issued pursuant to s. 443 of the *Code*.

74 There will be no costs in this court.

Appeal dismissed.

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2009 CarswellQue 9963, 58 C.B.R. (5th) 49, EYB 2009-164655

Mecachrome Canada Inc., Re

In the Matter of the Plan of Compromise or Arrangement of

Mecachrome Canada Inc. and Mecachrome Montréal-Nord Inc. and Mecachrome Technologies Inc. and Mirabel-Mecachrome Inc. (Petitioners) and Ernst & Young Inc. and Samson Bélair Deloitte & Touche Inc. (Co-Monitors)

Quebec Superior Court

Clément Gascon, J.C.S.

Heard: July 14, 16, 2009
Judgment: July 16, 2009
Docket: C.S. Montréal 500-11-035041-082

Counsel: Me Sylvain Rigaud for Petitioners

Me Jean Fontaine for Co-Monitors

Me Sylvain Vauclair for "Fonds de Solidarité des travailleurs du Québec (F.T.Q.), FCRP Aerofund et FCRP Aerofund II, représentés par Société de gestion ACE Management), prêteurs temporaires"

Me Fred Myers, Me Brendan O'Neill, Me Jonathan Warin for "Comité ad hoc des détenteurs de billets"

Me Gordon Levine for Bank of New York Mellon (formerly "Bank of New York") and BNY Trust Company of Canada

Me Francis Meagher, Me Guillaume Hébert for General Electric Canada Equipment Finance G.P.

Me Kurt A. Johnson for Makino, Inc. et SST-Canada, ULC

Subject: Insolvency; Corporate and Commercial

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Discretion of court

Debtor MII was worldwide manufacturer of high precision components for car and aeronautical industry and, especially, was sole supplier for several commercial customers — In December 2008, MII and its subsidiaries applied to Court for initial order under Companies' Creditors Arrangement Act for purpose of negotiating plan of arrangement with their creditors — Plan funding agreement was entered into between MII and DIP lenders, which lead to conclu-

sion of proposed plan — Under proposed plan, DIP lenders would acquire all shares of MII and, in consideration, DIP lenders would undertake to pay MII approximately 55,000,000 euros — As result, unsecured creditors would recover about 12 per cent of their claims — Group of unsecured creditors contested plan because they were not involved in its negotiation and did not support it — MII and its subsidiaries brought motion asking Court to issue order approving plan funding agreement — Motion dismissed — Act is aimed at enabling debtor company, with support of its creditors, to weather its financial difficulties and continue to operate through conclusion of plan of arrangement on best possible conditions for creditors — Here, probabilities of achieving this fundamental goal appeared to be better served by refusing to approve plan funding agreement presented rather than by tying hands of debtors with respect to consideration of potentially available alternate solutions that could benefit affected creditors — Court considered that debtors and monitor failed to proceed in manner where transparency, integrity, credibility and fairness were beyond reproach — Given absence of open, transparent and flexible process, Court found that unsecured creditors' arguments should prevail — Therefore, while process may be going to dead end without plan, this was not reason for Court to give its blessings to plan resulting from such flawed process.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Approbation du tribunal — Discrétion du tribunal

Débitrice MII était un fabricant mondial de composants de haute précision destinés à l'industrie de l'automobile et de l'aéronautique et, en particulier, était l'unique fournisseur de plusieurs clients commerciaux — En décembre 2008, MII et ses filiales ont demandé au tribunal d'émettre une ordonnance initiale en vertu de la Loi sur les arrangements avec les créanciers des compagnies dont l'objectif était de négocier un plan d'arrangement avec leurs créanciers — Entente sur le plan de financement a été conclue entre MII et des prêteurs de type débiteur en possession (« prêteurs DEP »), ce qui a mené à la conclusion du plan proposé — En vertu du plan proposé, les prêteurs DEP feraient l'acquisition de toutes les actions de MII et, en contrepartie, les prêteurs DEP s'engageraient à payer à MII environ 55 000 000 d'euros — Comme résultat, les créanciers chirographaires récupéreraient environ 12 pour cent de leurs réclamations — Groupe de créanciers chirographaires a contesté le plan parce qu'il n'avait pas été impliqué dans sa négociation et ne l'appuyait pas — MII et ses filiales ont déposé une requête demandant au tribunal d'émettre une ordonnance approuvant l'entente sur le plan de financement — Requête rejetée — Loi a pour objectif de permettre à la compagnie débitrice, avec l'appui de ses créanciers, de passer à travers des difficultés et de continuer ses opérations au moyen d'un plan d'arrangement conclu dans les meilleures conditions pour les créanciers — En l'espèce, il semblait préférable, pour que cet objectif fondamental soit atteint, de refuser d'approuver l'entente sur le plan de financement présenté plutôt que de lier les mains des débitrices en regard des solutions alternatives qu'il était possible de trouver au bénéfice des créanciers visés — Tribunal considérait que les débitrices et le contrôleur n'avaient pas procédé d'une manière qui soit sans reproche en ce qui concerne la transparence, l'intégrité, la crédibilité et l'équité — Considérant l'absence d'un processus ouvert, transparent et flexible, le tribunal a conclu que les arguments des créanciers chirographaires devraient l'emporter — Par conséquent, bien que le processus risquait de se retrouver au point mort sans le plan, ce n'était pas une raison pour que le tribunal donne sa bénédiction à un plan résultant d'un processus aussi défaillant.

Cases considered by *Clément Gascon, J.C.S.*:

Boutique Euphoria (Arrangement) (July 19, 2007), Doc. Montreal 500-11-030746-073 (Que. S.C.) — followed

Calpine Canada Energy Ltd., Re (2007), 2007 ABQB 49, 2007 CarswellAlta 156, 28 C.B.R. (5th) 185 (Alta. Q.B.) — followed

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Stelco Inc., Re (2005), 2005 CarswellOnt 5023, 15 C.B.R. (5th) 279 (Ont. S.C.J. [Commercial List]) — referred

to

Stelco Inc., Re (2005), 204 O.A.C. 216, 78 O.R. (3d) 254, 2005 CarswellOnt 6283, 15 C.B.R. (5th) 288 (Ont. C.A.) — referred to

Tiger Brand Knitting Co., Re (2005), 2005 CarswellOnt 1240, 9 C.B.R. (5th) 315 (Ont. S.C.J.) — followed

Tiger Brand Knitting Co., Re (2005), 19 C.B.R. (5th) 53, 2005 CarswellOnt 8387 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — referred to

s. 4 — referred to

s. 5 — referred to

s. 11 — referred to

Motion by debtors asking Court to issue order approving plan funding agreement.

Clément Gascon, J.C.S.:

The Motion at Issue

1 The Court renders judgment on a Motion to Approve a Plan Funding Agreement. The reasons are delivered in the English language as the Motion, the Exhibits, the Monitor's Report and the Contestation involved are all drafted in that language.

2 While the Court was ready to render judgment on July 15th, at the request of the parties' Counsel, the delivery of these reasons was postponed for 24 hours in view of their ongoing discussions.

3 By their Motion dated July 7, 2009, Mecachrome International Inc. (MII), Mecachrome Canada Inc., Mecachrome Montréal-Nord Inc., Mecachrome Technologies Inc. and Mirabel Mecachrome Inc. (collectively, the Canadian Debtors), ask the Court to issue an order approving a Plan Funding Agreement (the PFA) entered into between MII and FCPR Aerofund, FCPR Aerofund II, the Fonds de solidarité des travailleurs du Québec FTQ (together, the DIP Lenders) and Mecadev SAS, a newly formed entity to remain under the control of the DIP Lenders.

4 The original PFA at issue, dated July 4, 2009[FN1] , was amended during the second phase of oral arguments, namely on July 14, 2009, and replaced by another one, this time dated July 13, 2009[FN2] .

5 The Motion is filed pursuant to a restructuring process initiated on December 12, 2008, whereby the Canadian Debtors applied to the Court for the issuance of an initial order under Sections 4, 5 and 11 of the *CCAA*[FN3] .

6 The goal was to enable the restructuring of their affairs by preparing, negotiating and implementing a plan of arrangement with their creditors. The Canadian Debtors were then - and are still - operating at a deficit and facing

serious liquidity problems.

7 On that same day, the subsidiaries of MII incorporated in France, that is, Mecachrome France SAS and Mecachrome SAS (the French Debtors), also applied for the commencement of a parallel safeguard procedure in France.

The PFA

8 The PFA referred to in the Motion sets out the terms and conditions on which the DIP Lenders propose to fund a plan of compromise or arrangement (the Proposed Plan), to be implemented pursuant to the *CCAA* in respect of the Canadian Debtors and their creditors.

9 In short, the PFA as amended provides for:

a) the execution and implementation of the restructuring transactions agreed upon in the Proposed Plan attached as Schedule A to the PFA;

b) the DIP Lenders to act as sponsors for the funding;

c) MII agreeing to undertake, upon request by the DIP Lenders, a corporate reorganization of the business, operations and assets of the company and its subsidiaries, but only after the vote of the creditors on the Proposed Plan and the sanction order of the Court;

d) the possibility for MII to consider, negotiate and ultimately accept a proposal which is a Superior Proposal, from a financial point of view, to the one provided in the PFA. In such a case, the DIP Lenders have the right to offer to amend the terms of the PFA to match the Superior Proposal within a five-day period. If they elect not to match such Superior Proposal, MII has the right to terminate the PFA, but will be required to pay a break fee;

e) other events giving rise to the right to receive a break fee, including breach of specified covenants and failure of the Board of Directors of MII to recommend approval of the Proposed Plan;

f) MII's obligation to pay to the DIP Lenders all fees and expenses incurred in connection with the DIP loan agreement and the transaction contemplated by the PFA and all transactions related thereto if the Proposed Plan is not approved by the creditors;

g) a number of conditions precedent to closing, including obtaining the required creditors' support and Canadian Court approval, all required appropriate regulatory approvals, consents from certain third parties under the company's contracts, renegotiation of certain agreements, and absence of material adverse change.

10 Under the PFA and the Proposed Plan, the DIP Lenders will acquire all the shares of MII. In consideration, they undertake to pay to MII, through Mecadev, approximately Euros 55,000,000, of which some Euros 30,000,000 will serve for distribution purposes to the unsecured creditors of the Canadian Debtors. The other Euros 25,000,000 will essentially be used to repay the DIP loan advances, the Bank Syndicate's secured loan, the claims of a specific creditor and the fees and disbursements of the transaction.

11 For the DIP Lenders, the PFA is equivalent to an acquisition proposal of the business of MII, as the Monitor points out at paragraph 30 of his Fifth Report.

12 For the unsecured creditors of the Canadian Debtors, the Proposed Plan arising there from would entail a recovery of about 12% of their claims.

The Contestation

13 The record shows that MII issued Euros 200,000,000 of senior subordinated notes (the Notes) in May 2006, guaranteed by the Canadian Debtors and the French Debtors.

14 An Ad Hoc Committee of Holders of the Notes is actively involved in the restructuring process. It represents by far the largest group of unsecured creditors in the *CCAA* proceedings. The members of the Ad Hoc Committee hold approximately 70% of the Notes. The Noteholders are the unsecured creditors who will most significantly have to bear the losses arising from this *CCAA* restructuring.

15 The Ad Hoc Committee contests the Motion at issue. In a nutshell, they consider that the DIP Lenders:

a) have unilaterally put forward a pre-emptive PFA under which they propose to take ownership of 100% of MII;

b) have sought to do so in the absence of a Court-approved marketing process being conducted to confirm the fairness of the consideration they are offering;

c) rather than inviting negotiations and a fair process, seek to prevent MII from truly negotiating further any other reasonable arrangement;

d) seek a break fee and expense reimbursement despite the absence of a fair process and knowing that their Proposed Plan, as currently drafted, does not have the support of key stakeholders, that is, the Noteholders they represent.

16 While, so they say, open to achieve a consensual restructuring solution for the Canadian Debtors, the Ad Hoc Committee argues that the DIP Lenders have chosen to unilaterally put forward a PFA and Proposed Plan which do not have their support as key stakeholders and which are premised upon an untested offer.

17 Their clear and unambiguous intention, reiterated during oral argument, is to veto the Proposed Plan arising from the PFA.

18 The Canadian Debtors reply that under the special circumstances of this case:

a) time is of the essence and they need to proceed forthwith to a vote by the unsecured creditors on the Proposed Plan;

b) to that end, the PFA remains the best and, indeed, the only available funding arrangement received so far for the presentation of any kind of plan of arrangement to the unsecured creditors;

c) the matter should be put to a vote of the unsecured creditors, in the interest of all stakeholders involved;

d) the Monitor supports the PFA, even more so in its amended format.

19 Of course, the Monitor and the DIP Lenders support the argument of the Canadian Debtors.

Analysis and Discussion

20 For a restructuring process that has started barely six months ago, it is quite unfortunate to see that key stakeholders, such as the DIP Lenders and the Ad Hoc Committee of Noteholders, have chosen to crystallize their respective position and not to pursue more constructive dialogue together.

21 They both appear to have lost sight of the fact that neither one will be able to achieve any reasonable and acceptable solution to this restructuring without the cooperation of the other.

22 In his wisdom, the Monitor had warned both of these parties along these lines at paragraph 41 of his Fourth Report of June 26, 2009, apparently to no avail, or at the very least, with not much success. Neither the DIP Lenders nor the Ad Hoc Committee appear to have paid attention to his remarks.

23 On the one hand, the DIP Lenders' approach of presenting the initial PFA and the Proposed Plan as a "take it or leave it" proposal, not open to discussion or negotiation, certainly appears questionable. Even more so when one now realizes that, faced with the articulated contestation of the Ad Hoc Committee and their line of questions to the Monitor, the DIP Lenders have finally decided to amend their PFA during the second phase of oral arguments, so as to tone down what was said to be irrevocable.

24 No doubt such change of heart would have been far more beneficial to the whole process if done earlier rather than at the very last minute. Very precious days, if not weeks, have been lost as a result. This does not enhance the credibility of the process adopted towards the conclusion of the PFA.

25 On the other hand, the Ad Hoc Committee's Contestation seems to forget the high risks involved with their position. They consider that the PFA, even as amended, remains unacceptable. Yet, their Contestation may end up in an absence of any reasonable arrangement and thus, in a liquidation of the Canadian Debtors and an even smaller recovery for the Noteholders compared to the one contemplated in the PFA and the Proposed Plan.

26 The Ad Hoc Committee does raise legitimate objections, but they do not appear to bring much to the table in terms of concrete or reasonable solution at this stage.

27 Be that as it may, the parties and their learned Counsel and financial advisors have elected to rely on this Court's judgment to sort out what, in all due respect, they should have solved together through reasonable concessions and compromises.

28 In so doing, through their respective Motion and Contestation, they ask the Court to decide which of the two (2) conflicting positions should prevail. There is no in-between. Either the Motion is well founded or the Contestation is. The Court cannot change the terms of the PFA at the centre of this debate. This negotiation belongs to the parties, not to the Court.

29 To rule upon this issue, the Court must exercise the powers given in this respect by the relevant provisions of the *CCAA*. This includes notably the exercise of its judicial discretion and inherent jurisdiction, the whole in furtherance of the objectives of the Act.

30 As this Court already stated before, the fundamental goal of the *CCAA* is found in its very title, that is an Act to facilitate compromises and arrangements between companies and their creditors. It is aimed at enabling a debtor company, with the support of its creditors, to weather its financial difficulties and continue to operate in the interest

of all interveners and society in general.

31 The manner in which the *CCAA* favours this objective is through the conclusion of a plan of arrangement approved by minimum levels of majority of creditors, in number and in value. Of course, this objective must be reached at the best cost and on the best possible conditions for the creditors who inevitably suffer the consequences.

32 In the Court's assessment of the situation as it stands today, the probabilities of achieving this fundamental goal of the *CCAA* appears to be better served by refusing to approve the PFA presented rather than by tying the hands of the Canadian Debtors in the manner entailed by such PFA.

33 In a situation like this one, where the Court is asked to approve and give its blessing to a PFA leading to a Proposed Plan pursuant to which the DIP Lenders will end up acquiring MII, a *CCAA* restructuring requires the Canadian Debtors and the Monitor to satisfy the Court that they have proceeded in a manner where the transparency, integrity, credibility and fairness of the process is beyond reproach.

34 Notwithstanding the clear efforts of the Canadian Debtors and the Monitor, the Court considers that this not the case here. Too many factors militate against granting the Motion as sought and approving the PFA as it stands, even in its amended format.

35 In the Court's opinion, the cumulative effect of a) the absence of any legitimate and open process in order to obtain funding proposals beyond those of the DIP Lenders or the Ad Hoc Committee after May 15, 2009, b) the narrow definition of what constitutes a Superior Proposal under the PFA and the lack of flexibility, if any, given to the Board of Directors of MII in qualifying a proposal as a Superior Proposal or in considering or recommending such, and, c) the chilling effect of the rather high break fee contemplated in the PFA, forces the conclusion that the arguments of the Ad Hoc Committee's Contestation must prevail.

36 To rule otherwise would pay scant respect to the need for a sufficient, transparent and open process before a Court sanctions the potential acquisition of the whole business in the context of a *CCAA* restructuring.

37 As well, to allow the process contemplated by the PFA to move forward with no additional amendments will somehow usurp the key exercise of the right to vote belonging to the creditors under the *CCAA*. The Court is of the view that, as it stands now, the PFA unnecessarily ties up the hands of the Canadian Debtors with respect to the consideration of potentially available alternate solutions that, in the end, could benefit the affected creditors.

38 This is wrong and should not be condoned lightly. Some explanations are called for.

39 First, the Court agrees that the evidence does not establish that a proper maximizing value process has been undertaken so as to justify approving the PFA as it stands now.

40 In fact, short of the DIP Lenders and the Ad Hoc Committee, neither the Canadian Debtors, nor the Monitor or anyone else have apparently interested any other entity in funding an arrangement.

41 The lack of any steps taken towards that end appears to be linked to the short time frame allegedly available and the exclusivity clause of the DIP financing agreement that was extended to May 15, 2009. In the context of what is equivalent to an acquisition proposal of the business, this is hardly acceptable.

42 The evidence indicates that as recently as last December 2008, prior to agreeing to a DIP financing arrangement under very difficult circumstances, the Canadian Debtors still canvassed no less 23 potential parties before making a final choice.

43 While the interest shown then remained very sketchy, as only two (2) proposals were received, the following key changes however took place since that time:

a) a well-organized data room pertaining to the business and its financial information has been set up, after what appears to have been a lot of work by many;

b) there is a new CEO and a new CFO now in charge of the business;

c) significant downsizing of the business has taken place since the beginning of the *CCAA* process;

d) a new business plan has been prepared by MII in May 2009.

44 In view of this, it is hard to understand why no steps were taken in order to interest any other parties in funding a potential arrangement. The impression given by the evidence offered is that the focus was limited solely to the DIP Lenders and the Ad Hoc Committee, and nothing else. The Monitor's Fifth Report seems to confirm that, apparently, it would have been unworkable to proceed otherwise.

45 As stated, albeit in a different but still similar context, by the Ontario Court of Appeal in *Soundair*[FN4], by the Ontario Superior Court of Justice in *Tiger Brand Knitting*[FN5], by the Alberta Court of Queen's Bench in *Calpine Canada Energy Ltd., Re*[FN6], and by this Court in [FN7], in a process such as this one, there has to be some demonstration by the Canadian Debtors that reasonable attempts have been made to properly canvass the market before approving a PFA that is, in essence, presented to the affected creditors as the best available deal under the circumstances.

46 To that end, the PFA, which is aimed at acquiring all the shares of MII with a right to match any competing offer and a break fee should a Superior Proposal be accepted, closely resembles a stalking horse bid process with no real canvassing of the market at any point in time, be it prior to its finalization or after its approval.

47 The inclusion of an exclusivity clause of limited duration in the DIP financing agreement may have given a head start to the DIP Lenders in any acquisition proposal scenario. However, in the Court's opinion, it did not, and could not, have the impact of relieving the Canadian Debtors and the Monitor of their duty and obligations towards all the other stakeholders.

48 A *CCAA* process does insulate a debtor company from the attacks of its creditors. However, at the same time, the Act places the process under the Court's supervision. This has meaning and consequences. The benefits that the Act gives to a debtor company do not exist without corresponding obligations, particularly in terms of fairness, transparency and openness towards all stakeholders.

49 The mere fact that, here, these obligations must be met and the results achieved, and rightly so, within a very tight time frame does not entail that these duties could or should be ignored.

50 From that standpoint, even though the DIP Lenders have finally decided, at the last hour, to withdraw their exclusivity clause requirements, it remains that the narrow definition of what constitutes a Superior Proposal seriously limits the possibility of even seeing other bidders involved once the PFA is approved. In other words, because of the content of the PFA as it stands now, once it is approved as sought, it appears unlikely that any kind of transparent and open process will follow.

51 The situation would no doubt have been worse with the exclusivity clause initially included in the PFA. The

clause has now been removed. Yet, under the PFA, the conditions precedent to a Superior Proposal being qualified as such and the lack of flexibility of the Board of Directors of MII towards any proposal other than the PFA render quite unlikely the remote possibility of the Canadian Debtors seeing any other proposal once the PFA at issue is approved.

52 From that perspective, if the PFA is truly the best available funding arrangement under the circumstances, it is difficult to understand why the definition of Superior Proposal had to be so narrowly construed and why the MII Board of Directors' powers of recommendation so precisely limited, mostly when one sees that the DIP Lenders have the opportunity to match any Superior Proposal within five days.

53 At present, the terms of the PFA discourage rather than invite the coming forward of other potential bidders.

54 Contrary to what the Canadian Debtors argued, the issue is not whether the MII Board of Directors will likely consider or not a Superior Proposal received, even though their flexibility is very limited in that regard. The issue is rather whether or not the PFA as drafted does indeed favour any Superior Proposal coming forward because of its narrow and convoluted definition.

55 Second, while no doubt serious, the alleged urgency and need to proceed quickly to a vote of the unsecured creditors on the Proposed Plan on the basis of the PFA appears to be somewhat qualified. While no less than a few days ago, the PFA was being presented to the Court as a "take it or leave it" proposal, no terms of which could be modified, time has rather shown that even that initial PFA was not yet a fully matured and final proposal.

56 Faced with strong opposition by the Ad Hoc Committee of the Noteholders, the DIP Lenders first renounced to the rather unrealistic tight time frame they were insisting upon in their initial PFA. Then, they finally withdrew the gist of the exclusivity requirements that the Monitor himself had considered inappropriate for some time, to the knowledge of the DIP Lenders.

57 Furthermore, faced with the criticism regarding its level, they slightly reduced the amount of their break fee. Finally, they clarified the ambiguities concerning the pre-acquisition proposal clauses and the application of the break fee and fee and expenses clauses.

58 Considering the position voiced initially by the DIP Lenders, it appears obvious that none of this would have taken place without the benefit of the Contestation of the Ad Hoc Committee. That Contestation was triggered by the Canadian Debtors' Motion and the corresponding need to satisfy the Court as to the reasonability of the PFA conditions, including the integrity and transparency of the process leading to it.

59 In this respect, the additional delays caused so far by the Contestation have enhanced rather than hurt the process by allowing at the very least some problematic clauses of the PFA to be withdrawn or qualified.

60 Third, turning to the break fee, the Court agrees with the Ad Hoc Committee's submission that the amount proposed appears disproportionate to the amount that the DIP Lenders are putting on the table for the Canadian Debtors' plan of arrangement.

61 Under the PFA, the DIP Lenders undertake to pay through Mecadev Euros 55,000,000 to MII. The proposed break fee, as reduced, is Euros 2,500,000, which is about 4.5% of the Euros 55,000,000 offered.

62 Based on the evidence presented to the Court, this appears excessive. In the chart of break fees attached to the Motion[FN8] , the average break fee, in a merger and acquisition scenario, is about 2.9%. Also, no precedent involving similar break fees in the context of a restructuring process has been offered to the Court.

63 Finally, according to the evidence, the amount of the break fee is at least twice the amount of real expenses incurred so far by the DIP Lenders under the PFA process. Accordingly, it does include some sort of a risk premium or effort premium of some magnitude.

64 The burden of showing that the break fee is reasonable rests upon the Canadian Debtors. The evidence in support thereof is sketchy at best. This is not an issue that one should consider lightly in the context of a *CCAA* restructuring supervised by a Court, whereby the unsecured creditors, who are already suffering the consequences of the restructuring as here, end up in reality paying the cost of such break fee.

65 Fourth, the Court considers that the other arguments that the Canadian Debtors insisted upon are not convincing under the circumstances.

66 On the one hand, while the approval and support of the Monitor remains an important factor, it is not decisive in and of itself.

67 Here, the Monitor is faced with nothing else and reasonably fears that the process may be going to a dead end without the PFA. Admittedly, this is not an easy situation. Yet, in the Court's view, it is no reason to close one's eyes towards a process that appears to be submitted as a "*fait accompli*" under the PFA.

68 On the other hand, the argument voiced often by the Canadian Debtors and the Monitor, to the effect of letting the matter go to a vote on the Proposed Plan by the unsecured creditors, does not answer the problem truly at issue here.

69 The Court is asked to approve and give its blessing to the PFA. Once the PFA is approved, there is no going back. The creditors will not be in a position to change its terms, if alone, with respect notably to the narrow definition of a Superior Proposal, the lack of flexibility given to the Board of Directors of MII in terms of recommendations, and the applicability of the break fee. Letting the matter go to a vote on the Proposed Plan will not deal with these issues at any point in time.

70 In this regard, the *Stelco* decision[FN9] relied upon by the Canadian Debtors and the DIP Lenders is of no assistance. In that case, the decision to send the matter to a vote notwithstanding the opposition voiced was reached in a different context.

71 The process involved had been going on for twenty some months. Prior plans had been presented and had failed. No one had any formal or decisive veto like here. The Court was of the view that the plan was not doomed to fail and that the break fee was reasonable. The process was neither at issue.

72 In this case, this is not so.

73 The position voiced by the Ad Hoc Committee suffers no ambiguity. It should not be discarded lightly. No one has suggested that they have any other ulterior motive than to try to obtain the best possible value for their claims within the best available process and through the best efforts.

74 It is not with happiness that the Court concludes that it cannot approve the PFA as it stands today. No one knows if time or a more open process will lead to a better result. However, this uncertainty is insufficient to approve the process leading to the PFA and the PFA as it stands.

75 To paraphrase the Ad Hoc Committee's submission, approval of the PFA on the terms proposed would limit

the flexibility and optionality of the process at a time when, given that the DIP Lenders' PFA has not been tested and is not supported by key stakeholders, the process does require flexibility, optionality and credibility.

76 All in all, the Court's assessment of the situation is that there is likely still margin to do better. The behaviour of the DIP Lenders and the amended PFA are silent testimony in support of that assertion.

FOR THESE REASONS GIVEN VERBALLY AND REGISTERED, THE COURT:

77 **DISMISSES** the Motion;

78 **COSTS TO FOLLOW.**

Motion dismissed.

FN1 Exhibit R-1.

FN2 Exhibit R-1A.

FN3 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

FN4 *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.), at ¶16.

FN5 *Tiger Brand Knitting Co., Re* (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.), leave to appeal refused (2005), 19 C.B.R. (5th) 53 (Ont. C.A.).

FN6 2007 ABQB 49 (Alta. Q.B.)

FN7 *Boutique Euphoria (Arrangement)* (July 19, 2007), Doc. Montreal 500-11-030746-073 (Que. S.C.)

FN8 Exhibit R-2.

FN9 *Stelco Inc., Re* [2005 CarswellOnt 5023 (Ont. S.C.J. [Commercial List])], 2005 CanLII 36272; (2005), 15 C.B.R. (5th) 288 (Ont. C.A.), 2005 CanLII 40140.

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2007 CarswellAlta 156, 2007 ABQB 49, [2007] A.W.L.D. 1172, 28 C.B.R. (5th) 185

2007 CarswellAlta 156, 2007 ABQB 49, [2007] A.W.L.D. 1172, 28 C.B.R. (5th) 185

Calpine Canada Energy Ltd., Re

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

And in the Matter of Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company (Applicants)

Alberta Court of Queen's Bench

B.E. Romaine J.

Heard: January 22, 2007
Judgment: February 8, 2007
Docket: Calgary 0501-17864

Counsel: Larry B. Robinson, Q.C., Sean I. Collins, Fred Myers, Jay A. Carfagnini, Brian Empey for CCAA Debtors

Patrick McCarthy, Q.C., Josef A. Krueger for Monitor

A. Robert Anderson, Q.C., Kevin P. McElcheran (present by telephone) for Independent Trustees of Calpine Commercial Trust

John Finnigan, Robert Thornton for ULC2 Ad Hoc Committee of Bondholders

Sean Dunphy, Elizabeth Pillon for ULC2 Trustee

Frank Dearlove for HSBC Bank

Howard Gorman, Randal Van de Mosselaer for ULC1 Noteholders

Peter H. Griffin for Calpine Corporation and other U.S. Debtors

Peter T. Linder, Q.C., Emi R. Bossio for HCP Acquisition Inc.

Richard Billington for Catalyst Capital Group Inc.

Glenn Solomon for certain creditors

Subject: Insolvency; Corporate and Commercial

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues

Corporation went into receivership — Corporation had closely intertwined relationship with commercial trust and income fund — Group representing corporation sought to sell various assets relating to such relationship between entities, including certain trust units — Group reached settlement agreement with fund and applied for order approving of such agreement — Receiver received offer from third party for trust units — Court directed monitor to prepare report comparing third party offer and settlement agreement — Monitor initially advised that settlement agreement be accepted — Following complaints by certain stakeholders and creditors, court directed monitor to create new report considering new offer put forth by third party — Monitor advised that third party's new offer be accepted — Group brought application for approval of third party's offer — Application granted — Best interests of all parties would not be served by continuation of process in search of better offers — Potential for increased consideration was outweighed by risks and potential delay that would follow — Final recommendation of monitor was sound and reasonable — Rejection of recommendations in any but most exceptional circumstances materially diminished and weakened role and functions of receiver — Such casual rejection would lead to conclusion that decision of receiver was of little weight and that real decision was always made by court upon application for approval — Third party's final offer was only route which assured avoidance of prolonged litigation.

Cases considered by *B.E. Romaine J.*:

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 1986 CarswellOnt 235, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note) (Ont. H.C.) — followed

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 21 D.L.R. (4th) 473, 65 A.R. 372, 59 C.B.R. (N.S.) 242, 1985 CarswellAlta 332 (Alta. C.A.) — considered

Statutes considered:

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

Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

Generally — referred to

APPLICATION by group for approval of third party's offer to purchase trust units.

***B.E. Romaine J.*:**

Introduction

1 These reasons describe the complicated and controversial course of an application to sell certain assets. The application was made by the above-noted applicants (collectively, the "Calpine Applicants"), who, pursuant to an initial order dated December 20, 2005, are under the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

Facts

2 This saga began when the Calpine Applicants decided to attempt to sell certain assets that form part of the complex, intertwined relationship of Calpine Canada Power Ltd. ("CCPL") with the Calpine Commercial Trust (the "Trust") and the Calpine Power Income Fund (the "Fund").

3 On December 21, 2006, the Calpine Applicants filed a Notice of Motion, returnable on December 28, 2006, seeking authorization to market and sell the following assets (the "Fund-related Assets"):

> a) certain contracts, being a management agreement, an administration agreement and some operating agreements (collectively, the "MA&O Agreements") relating to the Fund, the Trust and Calpine Power L.P. ("CLP") and to the operation of two power plants owned by CLP; and
>
> b) the Class B Units in CLP.

4 An affidavit sworn on December 21, 2006 by Toby Austin, President and CEO of CCPL, includes at para. 10 a simplified diagram of the structure of CCPL's relationship with the Fund, the Trust and CLP.

5 Briefly, CLP is a limited partnership with Calpine Power L.P. Ltd. ("CLPGP") as its general partner and the Trust and CCPL as limited partners. CLPGP has assigned its rights and obligations as a general partner to CCPL. The Trust is an open-ended trust, the sole beneficiary of which is the trustee of the Fund. The Fund is a publicly held income fund listed on the TSX. Since CCPL and the other Canadian Calpine entities sought the protection of the CCAA, the Trust and the Fund have been governed by the independent trustees of the Trust and the independent directors of CLPGP (who are also trustees).

6 The Trust's principal asset is its interest in CLP. CLP indirectly owns two power plants, the Island Cogen Facility in British Columbia and the Calgary Energy Centre. CLP granted a participating unsecured loan to Calpine Canada Whitby Holdings Company, an entity that owns 50% of a joint venture that is developing a cogeneration facility in Ontario.

7 The Trust owns A Units in the CLP limited partnership. CCPL owns B Units. The B Units, which represent 30% of the equity of CLP, are subordinate to the A Units. Further complicating this already intertwined relationship, the Trust purchased from CCPL in May 2004 a promissory note with a face value of approximately $53.5 million pursuant to a loan known as the Manager's Loan. As security for the Manager's Loan, CCPL granted to the Trust a pledge of the B Units.

8 CCPL administers the Fund and the related entities pursuant to the MA&O Agreements. The MA&O Agreements all provide that they may be assigned by CCPL only with the consent of either the Trust or CLP, which consent shall not be unreasonably withheld. In support of their motion for authorization to sell the Fund-related Assets, the Calpine Applicants advised that on December 19, 2006, Harbinger Capital Partners ("Harbinger") had announced its intention to launch a take-over bid for the publicly-traded trust units of the Fund and that the Calpine Applicants believed that this presented them with an opportunity to negotiate the sale of the Fund-related Assets with bidders who might be interested in acquiring the Fund.

9 In response to the Calpine Applicants' motion, the Fund advised that it intended to bring a cross-application to terminate the MA&O Agreements. The Christmas break intervened and the application and proposed cross-application were adjourned to a date in January 2007. The Fund was to circulate materials with respect to its cross-application by Friday, January 12, 2007.

10 During the days leading up to and including Saturday, January 13, 2007, the Fund and the Calpine Applicants negotiated and entered into a settlement agreement (the "Settlement Agreement"). A notice of motion and supporting affidavit with respect to this Settlement Agreement was circulated to the service list on January 13 and 14, 2007. The Calpine Applicants applied for an order:

a) authorizing CCPL to enter into the Settlement Agreement;

b) approving the Settlement Agreement and the various transaction agreements that accompanied it;

c) terminating the MA&O Agreements upon the closing of the Settlement Agreement and lifting the stay of proceedings under the CCAA proceedings for that limited purpose;

d) directing that a confidential supplemental report on the Settlement Agreement that was to be prepared by Ernst & Young Inc. (the "Monitor") be sealed until closing of the Settlement Agreement; and

e) miscellaneous other relief.

11 The Fund prepared a Notice of Motion bearing the same date in which the independent trustees of the Trust and the directors of CLPGP applied to lift the stay imposed under the CCAA for the purpose of terminating the MA&O Agreements if the Settlement Agreement was not approved by the Court. The motion to approve the Settlement Agreement was to be heard on Wednesday, January 17, 2007.

12 On Monday, January 15, 2007, I heard from various stakeholders in this CCAA proceeding who were aggrieved about both the timing of the application and the stringent requirements of confidentiality that had been imposed by the Fund on information relating to the Settlement Agreement. That day was a holiday in the United States where a number of stakeholders are resident and several counsel had been unable to receive instructions from their clients on these issues. I directed that the application to approve the Settlement Agreement be set over to Monday, January 22, 2007 and that the issue of the terms of confidentiality be adjourned to Wednesday, January 17, 2007 so that counsel could obtain adequate instructions from their clients.

13 Late on January 16, 2007, the Monitor received an offer (the "Harbinger Offer") for the Fund-related Assets from HCP Acquisition Inc. ("HCP"), the subsidiary of Harbinger that is the vehicle for Harbinger's take-over bid for the public Trust units. The Monitor provided the Court with a copy of the offer, together with an application for advice and directions, shortly before Court opened to hear submissions on the confidentiality issue. The Harbinger Offer for the Fund-related Assets was publicly disclosed by press release, but most parties had only recently become aware of its terms. The Monitor, of course, was not in a position at that time to provide advice on the offer and how it compared to the terms of the Settlement Agreement. It became apparent during the course of the hearing that the stakeholders wanted the Monitor to prepare a comparison of the Settlement Agreement and the Harbinger Offer. Submissions from that point focussed on how much, if any, of the Monitor's report with respect to that comparison should be subject to confidentiality, and whether the confidentiality provisions imposed by the Fund on the Settlement Agreement and on the Monitor's Supplemental Report (as defined below) should be lifted. Some stakeholders argued vigorously for a different process more akin to an open auction or tender for the assets.

14 At this point, the Monitor had prepared two reports, a Sixteenth Report that discussed the Settlement Agree-

ment in general terms, without disclosing its specific financial terms, which was disclosed without restriction to the service list, and a Supplemental Report to the Sixteenth Report (the "Supplemental Report") that disclosed those financial terms, together with the Monitor's comments on the value of the MA&O Agreements and the B Units. These latter comments included a review of CCPL's discounted cash flow financial model of the B Units. The Supplemental Report was made available only to stakeholders who entered into confidentiality agreements as required by the Settlement Agreement.

15 The Calpine Applicants and the Fund submitted that the Settlement Agreement and the Supplemental Report were confidential and commercially sensitive to both parties. The Calpine Applicants were concerned that pricing and valuation information contained in the Supplemental Report would have a negative impact on any subsequent marketing process if the Settlement Agreement was not approved. The Fund had concerns relating to its response to the Harbinger take-over bid of the publicly-traded trust units and submitted that disclosure of the pricing and financial terms could be used by Harbinger to the disadvantage of the Fund. The Fund also asserted strenuously that it did not want to be placed in the position of a stalking horse for the Fund-related Assets and that, if it was put in that position, it would withdraw its offer.

16 The parties who sought access to the terms of the Settlement Agreement and the Supplemental Report were offered certain choices of confidentiality agreements, but it is clear that the Fund sought to ensure that such parties would be precluded from using the information for any purpose other than evaluating the Settlement Agreement, and particularly from making any kind of competing bid for the Fund's public trust units. One version of confidentiality agreement proffered by the Fund allowed stakeholders to establish an internal confidential screen that would remain in effect for two years in order to evaluate the information without requiring confidentiality to be imposed on the stakeholder's entire organization. Another allowed legal advisors to review the material without allowing them to disclose confidential terms to their clients. Although an attempt to impose this degree of restriction on access to information is exceptional in litigation generally, it is not without precedent in cases involving CCAA proceedings and receivers where assets of a business are sought to be sold: See In the matter of a Plan of Compromise and Arrangement of Air Canada, *et al.*, under the CCAA, R.S.C. 1985, c. C-36, as amended; see also In the matter of the CCAA, R.S.C. 1985, c. C-36, as amended, and In the Matter of the Courts of Justice Act, R.S.O. 1990 c. C-43, as amended and In the Matter of a Plan of Compromise or Arrangement of Royal Oak Mines, *et al.* (all unreported).

17 I concluded that, although the Settlement Agreement was negotiated under stringent terms of confidentiality and the Supplemental Report was prepared pursuant to an assumption of confidentiality and on the assumption that the likelihood of CCPL receiving any offers whose benefits to CCPL exceeded those of the Settlement Agreement was remote, the situation had changed with the introduction of the Harbinger Offer. I was concerned, however, that it could be prejudicial to the primary goal of maximizing value to stakeholders if I ordered unrestricted disclosure of the Settlement Agreement or of the Supplemental Report during the short period of time between January 17 and January 22, 2007, when the Monitor's new report comparing the offers became available, particularly if I determined after hearing full submissions on January 22, 2007 that a different process should be followed.

18 I therefore declined either to endorse the confidentiality provisions imposed by the Fund to that date or to order greater disclosure, on the basis that the fairness of the process that led to the Settlement Agreement and the confidentiality requirements that had been imposed by it were live issues for submissions on January 22, 2007 and would be factors in any decision on whether or not to approve the Settlement Agreement. I directed the Monitor to prepare its comparison report with the analysis of the Settlement Agreement remaining subject to restricted disclosure, but with the Monitor's conclusions and recommendations being available on an unrestricted basis to stakeholders. I asked the Monitor to address the issue of whether a broader auction or marketing process should be undertaken.

19 The Monitor's Seventeenth Report was prepared and circulated on Friday, January 19, 2007. The Monitor concluded that, taking into account the material variables affecting the comparison between the Harbinger Offer and the Settlement Agreement, the completion of the Settlement Agreement proposal was the prudent approach. The

Monitor stipulated, however, that the Calpine stakeholders should have the benefit of the Seventeenth Report and that the Monitor and the Court "should consider the stakeholders' tolerance for increased risk and potentially incremental realizations for the Fund-related Assets when considering the motion to approve the [Settlement Agreement] on January 22, 2007."

20 The Monitor considered two broad options, the completion of the Settlement Agreement and an auction marketing process. The Monitor noted that the Fund had advised the Court that it would not participate in an auction process and had indicated that, if the Settlement Agreement was not approved on January 22, 2007, it would proceed on January 26, 2007 with its motion to terminate the MA&O Agreements. If the Fund removed itself from the auction process, there would be no competitive tension with the Harbinger Offer unless other parties came forward. The Monitor believed that a limited number of new parties would be available to participate in an auction process because parties who might otherwise be interested might have become restricted in submitting an offer because of participation in the Fund's efforts to find a "white knight" with respect to the Harbinger take-over bid for the Fund public trust units. The Monitor pointed out that the B Units are an illiquid, subordinated minority position in a private entity, attractive primarily to parties who may be interested acquiring the Fund. He also noted that the Harbinger Offer could be terminated at any point prior to acceptance. Given all of these factors, the Monitor believed there was substantial risk in pursuing an auction process.

21 On the morning of January 22, 2007, shortly before the motion to approve the Settlement Agreement was heard, Harbinger submitted a revised offer for the Fund-related Assets (the "Harbinger Revised Offer") that increased the price offered from the greater of $100 million or the value of the Settlement Agreement transaction price plus $2 million, as set out in the Harbinger Offer, to the greater of $110 million and 110% of the value of the Settlement Agreement transaction price. The Harbinger Revised Offer also removed Harbinger's ability to withdraw the offer without the Monitor's permission before the earlier of:

a) February 16, 2007;

b) Court approval of an alternate proposal; and

c) Harbinger making a replacement offer that the Monitor concludes is superior to the Harbinger Revised Offer.

22 At the hearing, the Ad Hoc Committee of ULC II Bondholders, which includes Harbinger as a member, and the ULC II Indenture Trustee were in vehement opposition to the motion to approve the Settlement Agreement, suggesting that the process that led to the Settlement Agreement and the restrictions on access to financial information imposed by the Fund had resulted in a "fatally flawed secret marketing process" that placed the stakeholders and the Court in an untenable position. In answer to the Monitor's suggestion that the Court hear from the stakeholders regarding their tolerance for increased risk and potentially incremental realizations for the Fund-related Assets, the Ad Hoc Committee advised that its members, absent Harbinger, had conferred and that "they are prepared to forego the secret benefits of the Settlement Agreement and either take their chances with a properly supervised process, or if need be, revert to the status quo where the marketing of this asset had not yet been commenced." Counsel for the ULC II Bondholders and Trustee submitted that an expedited sales process should be conducted, and that there was still time, given the status of the Harbinger take-over bid, for there to be an auction between the two existing bidders.

23 The Ad Hoc Committee of the ULC II Bondholders and the ULC II Indenture Trustee were the only major creditor group who had not entered into a form of confidentiality agreement with CCPL and the Trust so as to obtain access to the financial terms of the Settlement Agreement and the restricted portions of the Monitor's reports. As noted by counsel, the ULC II Bondholders are in the business of trading in distressed bonds, and the possession of non-public information relating to the B Units would preclude them from trading in any Calpine securities until the

information became public. While the alternatives offered by CCPL and the Trust would allow counsel to the Bondholders to evaluate the Settlement Agreement with a view to the interests of their clients, it would not allow them direct access to information without the unpalatable result to their business of restricting their freedom to trade in Calpine securities. Thus, for this group of stakeholders, anything less than full public disclosure of information about the B Units would be problematic. This placed these creditors in direct conflict with the Trust and the Fund in their efforts to maintain confidentiality of commercially-sensitive information and to avoid becoming a "stalking-horse" for higher offers. While neither of these private commercial interests is of primary significance to this Court in the context of CCAA proceedings, which have as a primary goal the maximization of value of the debtors' assets for the benefit of stakeholders as a whole, they are factors to be weighed in a determination of the fairness and integrity of the sale process.

24 Counsel for the Ad Hoc ULC I Noteholders Committee, who had access to all information relating to the Settlement Agreement through a "counsel's eyes only" confidentiality agreement, noted that his clients were in favour of a short auction between the Fund and Harbinger, with the Fund publicly releasing the details of the Settlement Agreement.

25 Harbinger submitted that the Harbinger Revised Offer addressed a number of the Monitor's concerns, including the elimination of the right to withdraw the offer at any time prior to acceptance, and called for an open auction/marketing process for the assets.

26 The Fund pointed out that eighteen creditors or creditor groups had signed a form of confidentiality agreement, leaving only the ULC II Bondholders and the ULC II Indenture Trustee among the major creditors who had not had access to the financial terms of the Settlement Agreement and the restricted portions of the Monitor's Reports. It "strongly objected" to the marketing of the MA&O Agreements and set out the requirements it indicated it would insist that an assignee of those agreements and a purchaser of the B Units must fulfill if the Settlement Agreement was not approved.

27 When it became apparent that the Settlement Agreement likely would not be approved on the day of hearing, counsel for the Fund noted that the Settlement Agreement expired at midnight on January 23, 2007 and he could not indicate if the independent trustees and directors would extend the deadline or would let the Settlement Agreement lapse. He stated that the Fund would not participate if the process became an auction. Counsel for the Fund suggested that the terms of the Settlement Agreement be disclosed to all parties other than Harbinger for a very brief period of two hours that day, after which the Monitor would prepare a supplemental report on any additional offers that this disclosure would generate overnight, with the hearing continuing the next day. The Calpine Applicants pointed out that they were bound to support the Settlement Agreement and that they, too, were reluctant to prolong the process beyond the time the Settlement Agreement would expire, as they feared losing the benefits of that agreement.

28 This one-day proposal, which excluded Harbinger, was characterized by the ULC II Bondholders group and the ULC I Noteholders group as being unworkable and wholly ineffective in maximizing value. Harbinger, through its counsel, suggested that the process required at least 10 days, the creation of a data room and a general invitation to bidders.

29 The duties a court must perform when deciding whether a receiver has acted appropriately in selling an asset are summarized succinctly in *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1, 4 O.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321 (Ont. C.A.) at para. 16 as follows:

> 1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

While the *Soundair* case involved a receivership and this is a situation of a debtor-in-possession under the CCAA overseen by a Monitor, these duties remain relevant to the issues before me, with some adaptation for the differences in the form of proceedings. It is noteworthy that *Soundair* did not suggest that a formal auction process was necessary or advisable in every case, and the Court in fact referred to *Salima Investments Ltd. v. Bank of Montreal* (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372, 21 D.L.R. (4th) 473 (Alta. C.A.), where the Alberta Court of Appeal suggests that a court on an application to approve a sale is not necessarily bound to conduct a judicial auction.

30 I have no doubt that in negotiating the Settlement Agreement with the Fund, the Calpine Applicants made efforts to get the best price possible, and that they did not act improvidently. While there were submissions to the contrary, it is telling that the Monitor was prepared to recommend the Settlement Agreement despite the lack of negotiation with parties other than the Fund, due primarily to the unique and difficult character of the Fund-related Assets and the backdrop of the Harbinger take-over bid for the Fund's public trust units, which created a time-limited window of opportunity. I also am not persuaded that the Settlement Agreement was not responsive to the interests of all parties, particularly to the primary interest of the creditors in maximizing value, given the circumstances facing the Calpine Applicants at the time the Settlement Agreement was negotiated.

31 There was, however, a lack of sufficient transparency and open disclosure, which resulted in a process lacking the degree of integrity and fairness necessary when the court is involved in a public sale of assets under the CCAA. The CCAA insulates a debtor from its creditors for a period of time to allow it to attempt to resolve its financial problems through an acceptable plan of arrangement. It allows the debtor to carry on business during that period of time and to exercise a degree of normal business judgment under the supervision of the court and a Monitor. What may be commercially reasonable and even advantageous when undertaken by parties outside the litigation process, however, may be restricted by the requirement that fairness be done, and be seen to be done, when the process is supervised by the court. While a more open process may not lead to greater value, and may, as in this case, give rise to the possibility that an existing bidder may exit the process, the nature of a court-supervised process demands a process that meets at least minimal requirements of fairness and openness. The process undertaken to the point of the hearing on January 22, 2007, particularly with its emphasis on control of information and confidentiality for the primary benefit of the Fund, did not pass the test.

32 In addition, the fact of the Harbinger Offer necessitated closer consideration of the Monitor's assumption, reasonable as it may have been at the time it was made, that the likelihood that the Calpine Applicants would receive any offers that would exceed the benefits to CCPL of the Settlement Agreement was remote.

33 I concluded that circumstances had conspired to produce a situation that was neither fish nor fowl, a kind of lop-sided auction where different bidders were privy to different information and bound by different constraints. What had already occurred could not be changed, but a different process was required from that point forward. While there were differences of opinion as to how much time was available to conduct a sales process with an acceptable degree of integrity, it was necessary that such process be conducted quickly, given the circumstances affecting the two interested bidders. It appeared clear that it would be to the benefit of all stakeholders if the process were accelerated. I decided that an abbreviated sales process was necessary in order to balance the competing requirements of fairness, speed imposed by external circumstances and protection of *bona fide* proprietary or commercially-sensitive information.

34 While not dismissing the application to approve the Settlement Agreement, I directed that:

a) the Monitor issue its Eighteenth Report which would disclose the financial terms of the Settlement Agreement to all stakeholders, including HCP, by noon on January 23, 2007;

b) offers for the Fund-related Assets were to be submitted to the Monitor by noon on Thursday, January 25, 2007;

c) the Monitor would issue its Nineteenth Report comparing offers received by 2:00 p.m. on Friday, January 26, 2007; and

d) the hearing would resume on Tuesday, January 30, 2007.

35 These time limits were later changed by agreement of affected parties so that final offers were to be received by noon on Friday, January 26, 2007 and the Monitor would issue its Nineteenth Report by noon on Saturday, January 27, 2007.

36 I directed that HCP would be able to meet and discuss issues relating to its offer with the Monitor and/or, if the Fund decided not to extend the Settlement Agreement, the Calpine Applicants.

37 I did not release the Supplemental Report generally, on the basis that it had been prepared in the scenario of a single offer and on the assumption of confidentiality. Nor did I release the confidential portion of the Monitor's Seventeenth Report, which had been superceded by events.

38 The Monitor issued its Nineteenth Report providing a summary and analysis of offers received for the Fund-related Assets by noon on January 26, 2007. However, immediately prior to releasing the report, the Monitor was contacted by HCP and the Fund, acting jointly, requesting a delay of two hours to allow time for the submission of a revised offer. The Monitor advised me of the receipt of such revised offer when it delivered the Nineteenth Report to me on January 26, 2007 and provided a copy of the newly-revised offer (the "Harbinger Final Offer"). The Monitor indicated that it would be canvassing major stakeholders to receive their input on the offers and would issue a supplemental report to the Nineteenth Report prior to the court hearing on January 30, 2007. On Monday, January 29, 2007, I asked the Monitor to include in such report an analysis of the Harbinger Final Offer and any other offers it might receive prior to the release of this supplemental report.

39 The Monitor issued its Twentieth Report late in the day on January 29, 2007. In addition to the Harbinger Final Offer, the Monitor had received a letter from Catalyst Capital Group Inc. ("Catalyst") varying certain of the terms of an offer it had submitted by Friday's deadline in view of the press release issued by HCP relating to the Harbinger Final Offer. These revised terms were incorporated into the Monitor's analysis of the Catalyst offer.

40 Four offers were presented to the Court on Tuesday, January 30, 2007. One was a revised offer from the Fund. One was a revised offer from HCP received by the Monitor on January 26, 2007 (the "Second Revised HCP Offer"). One was an offer from Catalyst as revised on January 29, 2007 (the "Revised Catalyst Offer"). One was the Harbinger Final Offer. The Monitor recommended the Harbinger Final Offer.

41 The Harbinger Final Offer provides certainty of price and certainty of closing. It eliminates risks associated with the splitting and realization of certain claims CLP has made against the Calpine Applicants, and it facilitates the capture of value for creditors with respect to the Whitby cogeneration project by allowing the prepayment of a loan related to the project and the sale by CCPL of its interest in the project. It has no material conditions, and eliminates the uncertainty of future litigation with the Fund as the Fund has undertaken to support the offer and to provide the necessary consents.

42 This certainty, of course, comes with a price, which is that between approximately $10 million and $34 million of additional potential consideration would be forgone compared to the Second Revised HCP Offer, the Revised Catalyst Offer or a new Catalyst offer briefly described by counsel during the hearing (the "New Catalyst Offer").

43 As the Monitor points out, there is substantial closing risk associated with the Second Revised HCP Offer and the Revised Catalyst Offer, risks that likely would erode the potential financial upside of those offers. The Second Revised HCP Offer, which carries the least risk, could not guarantee the consent of the Fund to either the transfer of the MA&O Agreements and the B Units or the outcome of an application to hold in abeyance the Fund's application to terminate the MA&O Agreements for a reasonable time following closing. Nor could it guarantee the outcome of an application for a permanent stay of any claim by the Trust or the Fund to terminate the MA&O Agreements for default due to the CCAA proceedings. These are risks not only of outcome but of time, as litigation would be required not only in this Court, but also might be prolonged by appeal.

44 The Revised Catalyst Offer and the New Catalyst Offer carry the same risks and more. Although the Fund may be constrained in rationalizing a refusal of consent with respect to the Second Revised HCP Offer by reason of its support of the Harbinger Final Offer, it would not be so constrained in refusing consent with respect to Catalyst. The Revised Catalyst Offer (and presumably the New Catalyst Offer, although this was not made clear) were subject to due diligence, regulatory approval, and, with respect to its higher range of value, the ability of Catalyst to come to an agreement with CCPL and perhaps the Fund to achieve value from the Whitby project. Originally, the Revised Catalyst Offer could be terminated at any time before acceptance. While Catalyst, in its submissions during the hearing, stated that it was prepared to abandon this condition, it was not clear how long it was prepared to leave its offers open.

45 The Ad Hoc ULC I Noteholders Committee expressed the wish to continue the process to see if greater value could be achieved. While the temptation to continue the process is understandable, given the carrot of higher offers and the suggestion of late-breaking developments in the take-over bid for the Fund's public trust units, prolonging the process would not allow Catalyst or any other new bidder the opportunity to overcome the serious contract transfer and contract termination risks that shadow their offers, given that the Fund is now bound to support the Harbinger Final Offer. Only the Harbinger Final Offer can provide the assurance that prolonged litigation with the Fund will be avoided, at least in the time frame imposed on this process by the take-over bid.

46 In addition, given my decision on January 22, 2007 to allow an abbreviated process, and not the more leisurely time-frame requested by some of the bidders, it would be unfair to extend the process on the basis of Catalyst's last-minute, in-Court efforts to improve its bid.

47 I also considered the objection raised by the Ad Hoc ULC I Noteholders Committee to the transfer of value to the public unitholders arising from the Harbinger Final Offer. It is true that value that potentially existed under the Second Revised HCP Offer has been transferred from the Calpine creditors to the public unitholders of the Fund under the Harbinger Final Offer through the sweetening of the HCP take-over bid, but this did not occur without the significant advantage of greater certainty. It is noteworthy that the Monitor in his Seventeenth Report was prepared to recommend the Settlement Agreement with its lower consideration over the Harbinger Offer on the basis of that uncertainty.

48 The process was certainly not pretty. It started with a privately-negotiated Settlement Agreement that could not be disclosed in a way that would create a level playing field for all interested parties. There were good-faith reasons for the negotiation of such an agreement, set out in the affidavits and cross-examinations of the Calpine Applicants and the Fund, reasons rooted in attempting to achieve a balance between the Calpine Applicants' goal of value maximization and the Fund's need for confidentiality arising from both commercial proprietary interest and the threat of the take-over bid. Nevertheless, as I indicated earlier, the restrictions on disclosure arising from these cir-

cumstances could not be sanctioned in the context of a public CCAA proceeding with many stakeholders.

49 The Fund-related Assets are, as many parties noted, unique and unusual assets. They are part of a web of intertwined relationships in a complex corporate structure. As the Calpine Applicants recognized, the value of these assets could be optimized because of the take-over bid and the strategic challenges facing Harbinger and the Fund relating to that take-over bid. While advantageous to the Calpine creditors in that respect, the situation foreclosed a more traditional court-supervised auction that may have been appropriate for a different kind of asset and created a brief window of time for maximizing value. Perfection of process was highly unrealistic in these circumstances.

50 Has value been maximized under the abbreviated sales process? As some of the case law on process notes, a good test of whether a process has produced improvident bids is whether a substantially higher bid surfaces at the approval stage. In this case, while the last-minute bid by Catalyst was higher, it was not substantially so, and the improvements offered at the last minute by Catalyst to eliminate conditions in its bid were not so attractive as to lead to the concern that unrealized value lurked in the market if only the process had been extended.

51 There was criticism of the Harbinger Final Offer on the basis that it came in after the deadline for final offers had expired. However, Catalyst was afforded the same opportunity to revise its previous offer. In fact, it did so, and its revised offer was considered by the Monitor. This was not a formal tender process with an elaborate set of terms and conditions. Given the short time line forced by external circumstances, a certain amount of flexibility was necessary and was afforded to both HCP and Catalyst, but the integrity of the process required that that flexibility end at the time of hearing on January 30, 2007. The ability afforded to both HCP and Catalyst to revise their bids prior to the completion of the Monitor's Twentieth Report was not unfair, nor did it materially compromise the process.

52 It must be emphasized that the Monitor recommended that the HCP Final Offer be accepted and set out thorough and thoughtful reasons for that recommendation in its Twentieth Report. That recommendation was unshaken by Catalyst's last-minute attempts to improve its bid. While this application involves a Monitor under the CCAA, rather than a court-appointed receiver, I endorse the view of the Anderson, J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320 (note), 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (Ont. H.C.) set out at page 112:

> If the court were to reject the recommendations of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

53 The Monitor in this case has been intimately involved in the proposed sale of the Fund-related Assets from the beginning and for more than a year has accumulated valuable knowledge and insight into the complications and intricacies of the very complex corporate structure of the Calpine Applicants. The opinion of the Monitor deserves respect and deference. If, as the Court in *Soundair* commented at para. 14, "(t)he best method of selling an airline at the best price is something far removed from the expertise of a court", so is navigating the difficult shoals of selling unique, illiquid assets forming part of a complex corporate network with bidders preoccupied with broader external challenges. The recommendation of the Monitor, who was faced with a number of difficult variables and a rapidly-changing set of circumstances, was sound and reasonable.

54 I therefore found that the Harbinger Final Offer should be approved, as it provided for a reasonable balance of price and closing certainty, was endorsed by many of the stakeholders and was recommended by the Monitor.

55 Given the unique nature of the assets being sold, the nature of the closing risks, and in particular the nature

of the material conditions affecting the value of the Revised Catalyst Offer, I agree with the Monitor, the Calpine Applicants, the independent trustees, the ULC II Bondholder groups and the U.S. Calpine entities that the potential for increased consideration through a continuation of the process or acceptance of the more conditional offers is outweighed by the risks and potential delay that would follow.

Application granted.

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2009 CarswellOnt 6161, 59 C.B.R. (5th) 165, [2011] W.D.F.L. 2985, [2011] W.D.F.L. 2930, [2011] W.D.F.L. 2929, [2011] W.D.F.L. 2924, [2011] W.D.F.L. 2907, [2011] W.D.F.L. 2899, [2011] W.D.F.L. 2898

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Arclin Canada Ltd./Arclin Canada Ltée, Re

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF a Plan of Compromise or Arrangement of ARCLIN CANADA LTD./ARCLIN CANADA LTÉE., ARCLIN MANAGEMENT HOLDINGS INC., ARCLIN HOLDINGS GP I INC., ARCLIN HOLDINGS GP II INC., ARCLIN HOLDINGS III INC. and ARCLIN HOLDINGS IV INC. (Applicants)

Ontario Superior Court of Justice

A. Hoy J.

Heard: October 13, 2009
Judgment: October 14, 2009
Docket: CV-09-8290-00CL

Counsel: Steven J. Weisz, Jackie Moher for Applicants

David Bish for Monitor, Ernst & Young Inc.

Marc Wasserman for UBS, agent for First Lien Lenders & DIP Lenders

Kevin P. McElcheran for Official Committee of Unsecured Creditors

Subject: Insolvency; Civil Practice and Procedure

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

Companies obtained protection from creditors under Companies' Creditors Arrangement Act ("CCAA") — Board of directors approved key employee retention program agreements with chief executive officer ("CEO") and chief financial officer ("CFO") — Companies brought application for approval of agreements and sealing order with respect to agreements — Application granted in part — Agreements approved; agreements sealed for seven days to permit companies and monitor to clarify significant prejudice that could result if sealing did not continue — Substantial weight placed on strong recommendation of monitor that agreements be approved — First lien lenders and DIP lender supported agreements — Unsecured creditors would be satisfied as to reasonableness of agreements — CEO and CFO were approached about other opportunities for employment and indicated they would take advantage

2009 CarswellOnt 6161, 59 C.B.R. (5th) 165, [2011] W.D.F.L. 2985, [2011] W.D.F.L. 2930, [2011] W.D.F.L. 2929, [2011] W.D.F.L. 2924, [2011] W.D.F.L. 2907, [2011] W.D.F.L. 2899, [2011] W.D.F.L. 2898

of them if agreements were not approved — CEO and CFO were essential to successful restructuring and could not easily be replaced — Amounts payable under agreements were insignificant in relation to total debt outstanding — Agreements were reasonable in relation to current compensation of CEO and CFO — US affiliates would derive benefit from agreements — Key employee retention programs were controversial and CCAA process had to be open and transparent to greatest extent possible.

Judges and courts --- Jurisdiction — Jurisdiction of court over own process — Sealing files

Companies obtained protection from creditors under Companies' Creditors Arrangement Act ("CCAA") — Board of directors approved key employee retention program agreements with chief executive officer ("CEO") and chief financial officer ("CFO") — Companies brought application for approval of agreements and sealing order with respect to agreements — Application granted in part — Agreements approved — Agreements sealed for seven days to permit companies and monitor to clarify significant prejudice that could result if sealing did not continue — Key employee retention programs were controversial — CCAA process had to be open and transparent to greatest extent possible.

Cases considered by *A. Hoy J.*:

Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd. (2007), 2007 CarswellOnt 5799, 36 C.B.R. (5th) 296 (Ont. S.C.J.) — referred to

Statutes considered:

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

Generally — considered

United States Code, Title 11, c. 11

Generally — referred to

APPLICATION under *Companies' Creditors Arrangement Act* for approval of key employee retention program agreements and sealing order with respect to agreements.

***A. Hoy J.*:**

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

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

2009 CarswellOnt 6161, 59 C.B.R. (5th) 165, [2011] W.D.F.L. 2985, [2011] W.D.F.L. 2930, [2011] W.D.F.L. 2929, [2011] W.D.F.L. 2924, [2011] W.D.F.L. 2907, [2011] W.D.F.L. 2899, [2011] W.D.F.L. 2898

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Application granted in part.

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2005 CarswellOnt 2613, 2005 SCC 41, 197 C.C.C. (3d) 1, 253 D.L.R. (4th) 577, 29 C.R. (6th) 251, EYB 2005-92055, J.E. 2005-1234, 200 O.A.C. 348, 335 N.R. 201, 76 O.R. (3d) 320 (note), 132 C.R.R. (2d) 178, [2005] 2 S.C.R. 188

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Toronto Star Newspapers Ltd. v. Ontario

Her Majesty The Queen (Appellant) v. Toronto Star Newspapers Ltd., Canadian Broadcasting Corporation and Sun Media Corporation (Respondents) and Canadian Association of Journalists (Intervener)

Supreme Court of Canada

McLachlin C.J.C., Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron JJ.

Heard: February 9, 2005
Judgment: June 29, 2005
Docket: 30113

Proceedings: affirming *Toronto Star Newspapers Ltd. v. Ontario* (2003), 2003 CarswellOnt 3986, 178 C.C.C. (3d) 349, 232 D.L.R. (4th) 217, (sub nom. *R. v. Toronto Star Newspapers Ltd.*) 178 O.A.C. 60, (sub nom. *R. v. Toronto Star Newspapers Ltd.*) 110 C.R.R. (2d) 288, 17 C.R. (6th) 392, (sub nom. *R. v. Toronto Star Newspapers Ltd.*) 67 O.R. (3d) 577 (Ont. C.A.); reversing in part (2003), 2003 CarswellOnt 4020 (Ont. S.C.J.)

Counsel: Scott C. Hutchison, Melissa Ragsdale for Appellant

Paul B. Schabas, Ryder Gilliland for Respondents

Written submissions only by John Norris for Intervener

Subject: Criminal; Constitutional

Criminal law --- Pre-trial procedure — Public or publication ban order — General

Order sealing information to obtain search warrant prima facie unconstitutional — Police investigation was founded on information obtained from confidential informant — Police brought application for warrant, and Crown brought application for order sealing Information to Obtain warrant to protect informant — Application was granted — Media brought application for judicial review of sealing order — Application was granted save for information which identified informant, Crown's appeal was allowed in part and further identifying information was sealed and Crown appealed — Appeal dismissed — Open-courts rule may only be overridden when open information could in fact endanger administration of justice — Public access to Information to Obtain was covered by Dagenais/Mentuck test — In present case, Information to Obtain did not have to be wholly sealed in order to protect informant and Informa-

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tion was accordingly properly opened to public scrutiny.

Criminal law --- Charter of Rights and Freedoms — Freedom of expression

Order sealing information to obtain search warrant prima facie unconstitutional — Police investigation was founded on information obtained from confidential informant — Police brought application for warrant, and Crown brought application for order sealing Information to Obtain warrant to protect informant — Application was granted — Media brought application for judicial review of sealing order — Application was granted save for information which identified informant, Crown's appeal was allowed in part and further identifying information was sealed and Crown appealed — Appeal dismissed — Open-courts rule may only be overridden when open information could in fact endanger administration of justice — Public access to Information to Obtain was covered by Dagenais/Mentuck test — In present case, Information to Obtain did not have to be wholly sealed in order to protect informant and Information was accordingly properly opened to public scrutiny.

Police commenced an investigation into possible violations of provincial health and related regulatory legislation by a meat packing plant in Ontario. The investigation was preceded by the receipt of "whistle-blowing" information from a confidential informant. Police brought an application for a search warrant, and the Crown brought an ex parte application for an order sealing the Information to Obtain the warrant and the terms of the warrant itself in order to protect the identity of the confidential informant. Members of the media brought various applications for judicial review of the sealing order. Applications for relief in the nature of *certiorari* and *mandamus* were granted and the Information to Obtain was ordered unsealed, subject to redaction of information which could identify the informant. The Crown's appeal to the Court of Appeal was allowed in part and further redaction was ordered to better protect the informant's identity. The Crown appealed to the Supreme Court of Canada.

Held: The appeal was dismissed.

Per Fish J. for the Court: The constitutional guarantee of freedom of expression as contained in *Canadian Charter of Rights and Freedoms* subsection 2(b) leads to a presumptive rule that court proceedings, including documents in support of those proceedings, be open and subject to public scrutiny. The purpose of the guarantee is to safeguard the essence of our free society, and as such interference with the rule should not be lightly undertaken. However, there are times in which access to sensitive information in court proceedings will actually "endanger and not protect the integrity of our system of justice". Courts have a residual discretion to restrict access in order to prevent such danger, and that discretion is properly exercised in accordance with the so-called *Dagenais/Mentuck* test. The *Dagenais/Mentuck* test applies to attempts to seal search warrants in the same manner as it does to other court proceedings. The test should be applied in accordance with the context of the material sought to be sealed or secured against disclosure, and accordingly must be flexible, particularly where the rights or safety of specific individuals may be put at risk by public access to court information.

In the present case, the applications judge and Court of Appeal properly held that by application of the *Dagenais/Mentuck* test, the sealing order was properly set aside save and except for personal information which could identify the confidential informant. The Crown's position was founded on investigative convenience, which is not in itself reasonable grounds to seal an Information to Obtain a search warrant. Where the Crown alleges that prima facie public court information be sealed in order to secure an investigative advantage, it must at least show that failing to seal the materials in question would result in real and serious harm to the investigation. The Crown did not meet that burden in the present case, and the sealing order was accordingly properly set aside.

Cases considered by *Fish J.*:

Dagenais v. Canadian Broadcasting Corp. (1994), 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112, 1994 CarswellOnt 1168, 1994 SCC 102 (S.C.C.) — followed

2005 CarswellOnt 2613, 2005 SCC 41, 197 C.C.C. (3d) 1, 253 D.L.R. (4th) 577, 29 C.R. (6th) 251, EYB 2005-92055, J.E. 2005-1234, 200 O.A.C. 348, 335 N.R. 201, 76 O.R. (3d) 320 (note), 132 C.R.R. (2d) 178, [2005] 2 S.C.R. 188

MacDonell c. Flahiff (1998), (sub nom. *R. v. Flahiff*) 157 D.L.R. (4th) 485, (sub nom. *R. v. Flahiff*) 123 C.C.C. (3d) 79, 1998 CarswellQue 19, (sub nom. *Flahiff c. MacDonell*) [1998] R.J.Q. 327, 17 C.R. (5th) 94 (Que. C.A.) — referred to

MacIntyre v. Nova Scotia (Attorney General) (1982), [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 40 N.R. 181, 26 C.R. (3d) 193, 96 A.P.R. 609, 132 D.L.R. (3d) 385, (sub nom. *Nova Scotia (Attorney General) v. MacIntyre*) 65 C.C.C. (2d) 129, 1982 CarswellNS 21, 1982 CarswellNS 110 (S.C.C.) — considered

National Post Co. v. Ontario (2003), 176 C.C.C. (3d) 432, 107 C.R.R. (2d) 89, 2003 CarswellOnt 2134 (Ont. S.C.J.) — referred to

R. v. Eurocopter Canada Ltd. (2001), 2001 CarswellOnt 1406, [2001] O.T.C. 310 (Ont. S.C.J.) — referred to

R. v. Mentuck (2001), 2001 SCC 76, 2001 CarswellMan 535, 2001 CarswellMan 536, 158 C.C.C. (3d) 449, 205 D.L.R. (4th) 512, 47 C.R. (5th) 63, 277 N.R. 160, [2002] 2 W.W.R. 409, 163 Man. R. (2d) 1, 269 W.A.C. 1, [2001] 3 S.C.R. 442 (S.C.C.) — followed

Toronto Star Newspapers Ltd. v. Ontario (2000), 2000 CarswellOnt 2199 (Ont. S.C.J.) — referred to

Vancouver Sun, Re (2004), [2004] 2 S.C.R. 332, 33 B.C.L.R. (4th) 261, 120 C.R.R. (2d) 203, [2005] 2 W.W.R. 671, (sub nom. *Application Under Section 83.28 of the Criminal Code, Re*) 322 N.R. 161, 21 C.R. (6th) 142, (sub nom. *R. v. Bagri*) 184 C.C.C. (3d) 515, (sub nom. *R. v. Bagri*) 240 D.L.R. (4th) 147, (sub nom. *Application Under Section 83.28 of the Criminal Code, Re*) 199 B.C.A.C. 1, 2004 SCC 43, 2004 CarswellBC 1376, 2004 CarswellBC 1377 (S.C.C.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 2(b) — considered

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

s. 487.3 [en. 1997, c. 23, s. 14] — considered

s. 487.3(2) [en. 1997, c. 23, s. 14] — considered

Provincial Offences Act, R.S.O. 1990, c. P.33

Generally — referred to

APPEAL by Crown from judgment reported at *Toronto Star Newspapers Ltd. v. Ontario* (2003), 2003 CarswellOnt

2005 CarswellOnt 2613, 2005 SCC 41, 197 C.C.C. (3d) 1, 253 D.L.R. (4th) 577, 29 C.R. (6th) 251, EYB 2005-92055, J.E. 2005-1234, 200 O.A.C. 348, 335 N.R. 201, 76 O.R. (3d) 320 (note), 132 C.R.R. (2d) 178, [2005] 2 S.C.R. 188

3986, 178 C.C.C. (3d) 349, 232 D.L.R. (4th) 217, (sub nom. *R. v. Toronto Star Newspapers Ltd.*) 178 O.A.C. 60, (sub nom. *R. v. Toronto Star Newspapers Ltd.*) 110 C.R.R. (2d) 288, 17 C.R. (6th) 392, (sub nom. *R. v. Toronto Star Newspapers Ltd.*) 67 O.R. (3d) 577 (Ont. C.A.), allowing in part Crown's appeal from judgment granting media application to quash order sealing contents of information to obtain search warrant.

Fish J.:

I

1 In any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy.

2 That lesson of history is enshrined in the *Canadian Charter of Rights and Freedoms*. Section 2(*b*) of the *Charter* guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.

3 The freedoms I have mentioned, though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted.

4 Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice or unduly impair its proper administration.*

5 This criterion has come to be known as the *Dagenais/Mentuck* test, after the decisions of this Court in which the governing principles were established and refined. The issue in this case is whether that test, developed in the context of publication bans at the time of trial, applies as well at the pre-charge or "investigative stage" of criminal proceedings. More particularly, whether it applies to "sealing orders" concerning search warrants and the informations upon which their issuance was judicially authorized.

6 The Court of Appeal for Ontario held that it does and the Crown now appeals against that decision.

7 I would dismiss the appeal. In my view, the *Dagenais/Mentuck* test applies to *all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings. Any other conclusion appears to me inconsistent with an unbroken line of authority in this Court over the past two decades. And it would tend to undermine the open court principle inextricably incorporated into the core values of s. 2(*b*) of the *Charter*.

8 The *Dagenais/Mentuck* test, though applicable at every stage of the judicial process, was from the outset meant to be applied in a flexible and contextual manner. A serious risk to the administration of justice at the investigative stage, for example, will often involve considerations that have become irrelevant by the time of trial. On the other hand, the perceived risk may be more difficult to demonstrate in a concrete manner at that early stage. Where a sealing order is at that stage solicited for a brief period only, this factor alone may well invite caution in opting for full and immediate disclosure.

9 Even then, however, a party seeking to limit public access to legal proceedings must rely on more than a generalized assertion that publicity could compromise investigative efficacy. If such a generalized assertion were sufficient to support a sealing order, the presumption would favour secrecy rather than openness, a plainly unacceptable

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result.

10 In this case, the evidence brought by the Crown in support of its application to delay access amounted to a generalized assertion of possible disadvantage to an ongoing investigation. The Court of Appeal accordingly held that the Crown had not discharged its burden. As mentioned earlier, I would not interfere with that finding and I propose, accordingly, that we dismiss the present appeal.

II

11 The relevant facts were fully and accurately set out in these terms by Doherty J.A. in the Court of Appeal for Ontario ((2003), 67 O.R. (3d) 577 (Ont. C.A.)):

> On August 20, 2003, a justice of the peace issued six search warrants for various locations linked to the business of Aylmer Meat Packers Inc. ("Aylmer"). The informations sworn to obtain the warrants were identical. The warrants were obtained under the provisions of the *Provincial Offences Act*, R.S.O. 1990, c. P.33 and related to alleged violations of provincial legislation regulating the slaughter of cattle. The informations were sworn by Roger Weber, an agricultural investigator with the Ministry of Natural Resources. The warrants were executed on August 21 and 22, 2003.
>
> On about August 26, 2003, the investigation by the Ministry of Natural Resources into the operation of Aylmer became the subject of widespread media reports. The suitability for human consumption of meat slaughtered and processed by Aylmer became a matter of public concern.
>
> On about August 27, 2003, the Ontario Provincial Police commenced a fraud investigation into the business affairs of Aylmer. The officers involved in that investigation were advised that Inspector Weber had applied for and obtained the search warrants described above.
>
> On September 2, 2003, the Crown brought an *ex parte* application in open court in the Ontario Court of Justice for an order sealing the search warrants, the informations used to obtain the warrants and related documents. The Crown claimed that public disclosure of the material could identify a confidential informant and could interfere with the ongoing criminal investigation.
>
> Justice Livingstone made an order directing that the warrants and informations were to be sealed along with the affidavit of Detective Sergeant Andre Clelland, dated August 30, 2003 filed in support of the application for a sealing order and a letter, dated September 2, 2003, from Roger Weber indicating that the Ministry of Natural Resources took no objection to the application. The sealing order was to expire December 2, 2003. The Clelland affidavit and Inspector Weber's letter were subsequently made part of the public record on the consent of the Crown.
>
> The Toronto Star Newspapers Limited and other media outlets (respondents) brought a motion for *certiorari* and *mandamus* in the Superior Court. That application proceeded before McGarry J. on September 15 and 16, 2003. On September 24, 2003, McGarry J. released reasons quashing the sealing order and directing that the documents should be made public except to the extent that the contents of the informations could disclose the identity of a confidential informant. McGarry J. edited one of the informations to delete references to material that could identify the confidential informant and told counsel that the edited version would be made available to the respondents unless the Crown appealed within two days.... [paras. 1-6]

12 The Crown did, indeed, appeal — but with marginal success.

13 The Court of Appeal for Ontario held that Livingstone J. had exceeded her jurisdiction by refusing to grant a

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brief adjournment to allow counsel for the media to attend and make submissions on the application for a sealing order. Speaking for the court, Doherty J.A. found that the media can legitimately be expected to play an important role on applications to prohibit their access, and that of the public they serve, to court records and court proceedings. "There was no good reason", he stated, "to deny *The London Free Press* an opportunity to make submissions" (para. 15). This amounted, in his view, to a denial of natural justice and resulted in a loss of jurisdiction. I find it unnecessary to express a decided view on this branch of the matter, since it is not in issue before us, and find it sufficient for present purposes to refer to the guidelines on notice to the media and media standing set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.), particularly at pp. 868-69 and 890-91.

14 Doherty J.A. next addressed the merits of the request for a sealing order. Applying this Court's decision in *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76 (S.C.C.), he concluded that the Crown had not displaced the presumption that judicial proceedings are open and public. Like McGarry J., Doherty J.A. recognized that the materials had to be edited to exclude information that could reveal the identity of the confidential informant and the editing he found appropriate was "somewhat more extensive than that done by McGarry J." (para. 28).

15 The order of the Court of Appeal has now become final and the factual basis for a sealing order has evaporated with the passage of time. In the absence of a stay, the edited material was released on October 29, 2003, and the proceedings have to that extent become moot.

16 The Crown nonetheless pursues its appeal to this Court with respect to the underlying question of law: What is the governing test on an application to delay public access to search warrant materials that would otherwise become accessible upon execution of the search warrant?

17 Essentially, the Crown contends that the Court of Appeal erred in law in applying the "stringent" *Dagenais/Mentuck* test without taking into account the particular characteristics and circumstances of the pre-charge, investigative phase of the proceedings.

III

18 Once a search warrant is executed, the warrant and the information upon which it is issued must be made available to the public unless an applicant seeking a sealing order can demonstrate that public access would subvert the ends of justice: *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175 (S.C.C.). "[W]hat should be sought", it was held in *MacIntyre*, "is maximum accountability and accessibility but not to the extent of harming the innocent or of impairing the efficiency of the search warrant as a weapon in society's never-ending fight against crime" (Dickson J., as he then was, speaking for the majority, at p. 184).

19 *MacIntyre* was not decided under the *Charter*. The Court was nonetheless alert in that case to the principles of openness and accountability in judicial proceedings that are now subsumed under the *Charter*'s guarantee of freedom of expression and of the press.

20 Search warrants are obtained *ex parte* and in *camera*, and generally executed before any charges have been laid. The Crown had contended in *MacIntyre* that they ought therefore to be presumptively shrouded in secrecy in order to preserve the integrity of the ongoing investigation. The Court found instead that the presumption of openness was effectively rebutted *until* the search warrant was executed — but not thereafter. In the words of Dickson J.:

> ...the force of the 'administration of justice' argument abates once the warrant has been executed, *i.e.* after entry and search. There is thereafter a "diminished interest in confidentiality" as the purposes of the policy of secrecy are largely, if not entirely, accomplished. The need for continued concealment virtually disappears.... The curtailment of the traditionally uninhibited accessibility of the public to the working of the courts should be undertaken with the greatest reluctance. [pp. 188-89]

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21 After a search warrant has been executed, openness was to be presumptively favoured. The party seeking to deny public access thereafter was bound to prove that disclosure would subvert the ends of justice.

22 These principles, as they apply in the criminal investigative context, were subsequently adopted by Parliament and codified in s. 487.3 of the *Criminal Code*. That provision does not govern this case, since our concern here is with warrants issued under the *Provincial Offences Act*, R.S.O. 1990, c. P.33 of Ontario. It nonetheless provides a useful reference point since it encapsulates in statutory form the common law that governs, in the absence of valid legislation to the contrary, throughout Canada.

23 Section 487.3(2) is of particular relevance to this case. It contemplates a sealing order on the ground that the ends of justice would be subverted, in that disclosure of the information would compromise the nature and extent of an ongoing investigation. That is what the Crown argued here. It is doubtless a proper ground for a sealing order with respect to an information used to obtain a provincial warrant and not only to informations under the *Criminal Code*. In either case, however, the ground must not just be asserted in the abstract; it must be supported by particularized grounds related to the investigation that is said to be imperilled. And that, as we shall see, is what Doherty J.A. found to be lacking here.

24 Since the advent of the *Charter*, the Court has had occasion to consider discretionary actions which limit the openness of judicial proceedings in other contexts. The governing principles were first set out in *Dagenais*.

25 In that case, four accused sought a ban on publication of a television mini-series, *The Boys of St. Vincent*, which was fictional in appearance — but strikingly similar in fact — to the subject matter of their trial. Writing for a majority of the Court, Lamer C.J. held that a ban should only be imposed where alternative measures cannot prevent the serious risk to the interests at stake and, even then, only to the extent found by the Court to be necessary to prevent a real and substantial risk to the fairness of the trial. In addition, a ban should only be ordered where its salutary effects outweigh its negative impact on the freedom of expression of those affected by the ban. Here, too, the presumption was said to favour openness, and the party seeking a restriction on disclosure was therefore required to justify the solicited limitation on freedom of expression.

26 The *Dagenais* test was reaffirmed but somewhat reformulated in *Mentuck*, where the Crown sought a ban on publication of the names and identities of undercover officers and on the investigative techniques they had used. The Court held in that case that discretionary action to limit freedom of expression in relation to judicial proceedings encompasses a broad variety of interests and that a publication ban should only be ordered when:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice. [para. 32]

27 Iacobucci J., writing for the Court, noted that the "risk" in the first prong of the analysis must be *real, substantial*, and *well grounded in the evidence*: "it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained" (para. 34).

28 The *Dagenais/Mentuck* test, as it has since come to be known, has been applied to the exercise of discretion to limit freedom of expression and of the press in a variety of legal settings. And this Court has recently held that the test applies to *all* discretionary actions which have that limiting effect:

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> While the test was developed in the context of publication bans, it is equally applicable to all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings. Discretion must be exercised in accordance with the *Charter*, whether it arises under the common law, as is the case with a publication ban...; is authorized by statute, for example under s. 486(1) of the *Criminal Code* which allows the exclusion of the public from judicial proceedings in certain circumstances (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [[1996] 3 S.C.R. 480], at para. 69); or under rules of court, for example, a confidentiality order (, [2002] 2 S.C.R. 522, 2002 SCC 41). (*Vancouver Sun, Re* (2004), [2004] 2 S.C.R. 332, 2004 SCC 43 (S.C.C.), at para. 31)

29 Finally, in *Vancouver Sun, Re*, the Court expressly endorsed the reasons of Dickson J. in *MacIntyre* and emphasized that the presumption of openness *extends to the pre-trial stage of judicial proceedings*. "The open court principle," it was held, "is inextricably linked to the freedom of expression protected by s. 2(*b*) of the *Charter* and advances the core values therein." It therefore applies at every stage of proceedings (paras. 23-27).

30 The Crown now argues that the open court principle embodied in the *Dagenais/Mentuck* test ought not to be applied when the Crown seeks to seal search warrant application materials. This argument is doomed to failure by more than two decades of unwavering decisions in this Court: the *Dagenais/Mentuck* test has repeatedly and consistently been applied to all discretionary judicial orders limiting the openness of judicial proceedings.

31 It hardly follows, however, that the *Dagenais/Mentuck* test should be applied mechanistically. Regard must always be had to the circumstances in which a sealing order is sought by the Crown, or by others with a real and demonstrated interest in delaying public disclosure. The test, though applicable at *all* stages, is a flexible and contextual one. Courts have thus tailored it to fit a variety of discretionary actions, such as confidentiality orders, judicial investigative hearings, and Crown-initiated applications for publication bans.

32 In *Vancouver Sun, Re*, the Court recognized that the evidentiary burden on an application to hold an investigative hearing *in camera* cannot be subject to the same stringent standard as applications for a publication ban at trial:

> Even though the evidence may reveal little more than reasonable expectations, this is often all that can be expected at that stage of the process and the presiding judge, applying the *Dagenais/Mentuck* test in a contextual manner, would be entitled to proceed on the basis of evidence that satisfies him or her that publicity would unduly impair the proper administration of justice. [para. 43]

33 Similar considerations apply to other applications to limit openness at the investigative stage of the judicial process.

IV

34 The Crown has not demonstrated, on this appeal, that the flexible *Dagenais/Mentuck* test as applied to search warrant materials is unworkable in practice. The respondents, on the other hand, have drawn our attention to several cases in which the test was effectively and reasonably applied. Sealing orders or partial sealing orders were in fact granted, for example, in *National Post Co. v. Ontario*, (2003), 176 C.C.C. (3d) 432 (Ont. S.C.J.); *R. v. Eurocopter Canada Ltd.*, [2001] O.J. No. 1591 (Ont. S.C.J.); *MacDonell c. Flahiff* (1998), 157 D.L.R. (4th) 485 (Que. C.A.); and *Toronto Star Newspapers Ltd. v. Ontario*, [2000] O.J. No. 2398 (Ont. S.C.J.).

35 Nor has the Crown satisfied us that Doherty J.A. failed to adopt a "contextual" approach to the order sought in this case.

36 In support of its application, the Crown relied exclusively on the affidavit of a police officer who asserted his

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belief, "based on [his] involvement in this investigation that the release of the Warrants, Informations to Obtain and other documents would interfere with the integrity of the ongoing police investigation" (Appellant's Record, p. 70). The officer stated that, should the contents of the information become public, witnesses could be fixed with information from sources other than their personal knowledge and expressed his opinion "that the release of the details contained in the Informations to Obtain [the search warrants] has the potential to make it more difficult for the Ontario Provincial Police to gather the best evidence in respect of its investigation" (Appellant's Record, p. 72).

37 Doherty J.A. rejected these broad assertions for two reasons.

38 First, he found that they amounted to a "general proposition that pre-trial publication of the details of a police investigation risks the tainting of statements taken from potential witnesses" (para. 26). In Doherty J.A.'s view, if that general proposition were sufficient to obtain a sealing order,

> ...the presumptive rule would favour secrecy and not openness prior to trial. A general assertion that public disclosure may distract from the ability of the police to get at the truth by tainting a potential witness's statement is no more valid than the equally general and contrary assertion that public disclosure enhances the ability of the police to get at the truth by causing concerned citizens to come forward with valuable information. [para. 26]

39 Second, Doherty J.A. found that the affiant's concern, for which he offered no specific basis, amounted to a mere assertion that "the police might have an advantage in questioning some individuals if those individuals [are] unaware of the details of the police investigation" (para. 27). In oral argument before this Court, counsel for the Crown referred to this as the "advantage of surprise". In this regard, Doherty J.A. noted Iacobucci J.'s conclusion in *Mentuck*, at para. 34, that access to court documents cannot be denied solely for the purpose of giving law enforcement officers an investigative *advantage*; rather, the party seeking confidentiality must at the very least allege a *serious and specific risk to the integrity of the criminal investigation.*

40 Finally, the Crown submits that Doherty J.A. applied a "stringent" standard — presumably, an *excessively* stringent standard — in assessing the merits of the sealing application. This complaint is unfounded.

41 Quite properly, Doherty J.A. emphasized the importance of freedom of expression and of the press, and noted that applications to intrude on that freedom must be "subject to close scrutiny and meet rigorous standards" (para. 19). Ultimately, however, he rejected the Crown's claim in this instance because it rested entirely on a general assertion that publicity can compromise investigative integrity.

42 At no point in his reasons did Doherty J.A. demand or require a high degree of predictive certainty in the Crown's evidence of necessity.

V

43 For all of these reasons, I propose that we dismiss the appeal, with costs to the respondents, on a party-and-party basis.

Appeal dismissed.

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2011 CarswellOnt 1328, 2011 ONCA 186, 280 O.A.C. 141, 12 C.P.C. (7th) 116

2011 CarswellOnt 1328, 2011 ONCA 186, 280 O.A.C. 141, 12 C.P.C. (7th) 116

GasTOPS Ltd. v. Forsyth

GasTOPS Ltd., Plaintiff (Respondent) and Bradley Forsyth, Douglas Brouse Jeffrey Cass, Robert Vandenberg and MXI Technologies Ltd. a.k.a. 1197543 Ontario Ltd., Defendants (Appellants)

Ontario Court of Appeal [In Chambers]

R.G. Juriansz J.A.

Heard: January 27, 2011
Judgment: March 8, 2011
Docket: CA M39614, C51170

Counsel: David Elliot, for Appellants

James Shields, for Respondent

Subject: Civil Practice and Procedure; Labour and Employment; Public

Civil practice and procedure --- Trials — Conduct of trial — Restrictions or bans on publication — General principles

Plaintiff software company claimed that defendant former employees used its proprietary trade secrets and confidential business information to misappropriate corporate opportunities — Plaintiff was successful at trial — Some 150 exhibits were designated confidential pursuant to broad confidentiality and nondisclosure order made by trial judge — Motion was brought concerning confidentiality of court record in appeal proceedings — Order issued that four trial exhibits were to be kept confidential and that court registry was not to make them available to public — Trial judge's confidentiality and non-disclosure order was not intended to interfere with Court of Appeal's authority to deal with its own processes — Trial judge did not intend that parties should seek variation of his order to identify Court of Appeal judges as designated persons to whom information could be revealed or to permit filing of appeal record — Trial judge's order only applied to trial record and proceedings at trial — Isolated references to appeals simply indicated that certain steps could be taken in regard to trial record — Starting point on appeal was that any party seeking to have material kept confidential had to obtain order to that effect — Disclosure of four documents in question would pose serious, real and substantial risk to plaintiff's commercial interests — There was public interest in not disclosing documents that outweighed public interest in openness of courts — Documents contained intellectual property, information connected to national defence, and subject matter over which third parties had required secrecy in their commercial dealings with plaintiff — Also, documents would scarcely have been of any interest to anyone other than potential competitors in same business — Redaction was not reasonable alternative.

Cases considered by *R.G. Juriansz J.A.*:

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

MOTION concerning confidentiality of part of court record in appeal proceedings.

***R.G. Juriansz J.A.*:**

1 This motion relates to the confidentiality of part of the court record in this appeal. After the hearing of the motion on January 27, 2011, I ordered that Trial Exhibits 17C, 33C, 42C and 764C are to be kept confidential and that the court registry is not to make them available to the public. I indicated that I would provide written reasons later.

2 I am case managing this appeal. In the action the respondent, a software company, claimed the individual defendants, who are former employees of the respondent, used its proprietary trade secrets and confidential business information to misappropriate corporate opportunities. The respondent was successful at trial. The trial judge awarded it damages in the amount of $11,401,571. At the trial, which lasted 290 days, 2893 exhibits totalling some 70,000 pages were filed. Some 150 exhibits were designated confidential pursuant to a broad sweeping Confidentiality and Nondisclosure Order made by the trial judge. I highlight a few of the features of that order.

3 The order provides that Designated Information may be revealed only to Designated Persons. Designated Persons are listed in the order. They include the trial judge, counsel for the parties, court staff and the parties themselves. Other Designated Persons, such as expert witnesses, have to execute Confidentiality Undertakings in a prescribed form before being granted access to the Designated Information. The Confidentiality Undertakings, themselves, are ordered to be kept confidential. The order provides that the court may name other Designated Persons "from time to time on motion by either party".

4 The question of whether, and to what extent, the order applied to the Court of Appeal proceeding arose early in the case management process. The order that Designated Information be kept confidential is not time-limited. The order contains several references to the appeal process. For example, para. 6 of the order provides "that upon final disposition of all court proceedings, including appeals, all Designated Information will be destroyed." On the other hand, the order can be read as reserving to the trial judge a continuing role to supervise access to the information during and after the appeal proceedings. If taken literally, the order would require that the Court of Appeal registry and even the Court of Appeal judges be named as Designated Persons by the trial judge so that the Designated Information may be revealed to them. The first notice of motion filed by the respondent regarding the confidentiality issue sought an order of this court supplementing the confidentiality orders to include judges of the Court of Appeal and appeal court staff as Designated Persons. As well, if the appeal is considered a "related hearing", para. 5 of the order would control who may be present in the courtroom at the hearing of the appeal when Designated Information is discussed.

5 A final concern was that there is no indication that the requirements of the Supreme Court's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.), were satisfied prior to the making of the order. In fact, the order seems on its face to delegate to the parties the responsibility for determining what material would be kept confidential. Paragraph 1 of the order provides:

> THIS COURT ORDERS that at any time during the within trial, or any related hearing, either party may designate any particular exhibit (hereinafter "Designated Information") as being subject to the confidentiality provisions of this order.

6 In light of all of these concerns, I instructed counsel that a motion be scheduled in open court on notice to the media to address whether the trial judge's Confidentiality and Nondisclosure Order applied to the appeal proceeding and to deal with any requests that the record on appeal, or parts of it, be kept confidential.

7 Ultimately, the respondent sought to have only four exhibits kept confidential. The appellants made no request that any material be kept confidential. The motion proceeded on January 27, 2011, after notice was given to the media through the court's website. No representative of the media attended.

Discussion

8 In my view, the trial judge's Confidentiality and Nondisclosure Order was not intended to interfere with this court's authority to deal with its own process. A careful reading of the order leads me to conclude that the trial judge did not intend that the parties should seek a variation of his order to identify Court of Appeal judges as Designated Persons or to permit the filing of the appeal record. As I read it, the order applies only to the trial record and the proceedings at trial. The order's isolated references to "appeals" simply indicate when certain steps may be taken in regard to the trial record. For example, para. 2(e)(v) provides that copies of the Confidentiality Undertakings filed with the trial court may be obtained on application to the trial court upon the completion of "the trial, and any appeals". Paragraph 6 provides that the Designated Information will be destroyed "upon the final disposition of all court proceedings, including appeals". I understand para. 6 to refer to destruction of the Designated Information in the registry of the trial court, and not in the registry of this court.

9 I conclude that the order does not apply to this court or the record filed with this court. No variation of the trial judge's order is necessary to have any portion of the appeal record available to the public. Rather, the starting point in this court is that all material filed with this court's registry is available to the public, and any party seeking to have material kept confidential must obtain an order to that effect.

10 The Supreme Court in *Sierra Club* at para. 53 stated the test that must be met. A confidentiality order should only be granted when:

> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

11 Under the first branch of this test:

> • the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question;
>
> • the important commercial interest must be one which can be expressed in terms of a public interest in confidentiality, and the public interest in confidentiality must outweigh the public interest in openness of the courts; and

• consideration of reasonably alternative measures does not require the adoption of the absolutely least restrictive option, but does require the courts to restrict an order as much as is reasonably possible while preserving the commercial interest in question.

12 In the second branch of the test, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which in turn is connected to the principle of open and accessible court proceedings. The balancing of these considerations will determine whether the confidentiality order ought to be granted.

13 I now turn to consideration of the four exhibits the respondent seeks to keep confidential in the appeal.

Exhibits 17C, 33C, and 42C

14 These three exhibits relate to the relationship of GasTOPS with the government of Canada. Exhibit 17C is a Proposal to Develop ECMS Intellectual Property Rights. Each page of the proposal is marked "GasTOPS Ltd. Proprietary Information". Exhibit 33C is a Department of National Defence (DND) grant of license to GasTOPS. It contains a confidentiality clause prohibiting GasTOPS from disclosing the licensed intellectual property, except as authorized by the agreement or with the prior consent of the licensor. Exhibit 42C is a contract between GasTOPS and the government of Canada. Large and bold type on its face indicates that it contains a security requirement. The contract specifies that GasTOPS "hold a valid Facility Security Clearance with approved document safeguarding at the level of SECRET, issued by the Industrial Security Division (ISD) of the Department of Supply and Services (DSS)."

Exhibit 764C

15 Exhibit 764C is GasTOPS' Business Plan for Fiscal Year 1997-1998. It contains marketing strategies, revenue information and the cost structure of GasTOPS. The age of the document raises the question whether disclosure of the information that it contains, which was clearly commercially sensitive at the time it was written, would continue to constitute a serious risk to GasTOPS' commercial interest.

16 Counsel for GasTOPS stresses that this particular business plan was prepared after GasTOPS had lost the defendants as employees as well as a large part of its business. This business plan, he said, was prepared for the Board of Directors to decide how to recover, or even whether an attempt to recover was feasible. The document was introduced at trial to show the effect of the defendants' actions on GasTOPS as an operating company. The document contains a lot of material not relevant to this action, relating to other products and other contracts that are still ongoing. That is because the projects in this particular industry, by their nature and complexity, are long-lived. The time from conception of a project and the making of a proposal to the formation of a contract and its execution can easily span more than a decade. The document describes projects both with DND, the U.S. Navy and other military and commercial interests that are still ongoing. It also describes the processes and methodology of GasTOPS in carrying out its projects.

Conclusion

17 I am satisfied that disclosure of these documents would pose a serious risk to GasTOPS' commercial interests, and that the risk is real and substantial. I am also satisfied that there is a public interest in not disclosing these documents. These documents contain intellectual property, information connected to national defence, and subject matter over which third parties have required secrecy in their commercial dealings with GasTOPS. These public interests in this case outweigh the public interest in openness of the courts. Also, these documents would scarcely be of any interest to anyone other than potential competitors in the same business.

18 With respect to all four documents, I am satisfied that redaction is not a reasonable alternative. Redaction is possible with Exhibit 764C, but would result in a document that conveyed little meaning. I see no other reasonable alternative to protect the interests involved than by keeping these documents confidential.

19 I was advised that argument at trial related to these documents took place in open court, and that it was anticipated that keeping them confidential would not require that any portion of the appeal hearing be conducted in camera.

20 I have also considered that GasTOPS introduced these exhibits at trial with the security provided by the trial judge's order that they would be kept confidential.

21 Having weighed the salutary effects of the confidentiality order requested in this motion against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which includes the public interest in open and accessible court proceedings, I am satisfied that the interests in keeping these four exhibits confidential outweighs the public interest in their disclosure.

22 I order that trial exhibits 17C, 33C, 42C and 764C shall remain confidential. As the record in this case is electronic, electronic versions of these exhibits are to be filed on a separate disk that will not be available to the public. The copies of the exhibits filed in support of this motion will also not be available to the public. There will be no restriction on the remainder of the appeal file, subject to any further order.

Order accordingly.

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2000 CarswellAlta 662, 2000 ABQB 442, [2000] A.W.L.D. 654, [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201, [2000] A.J. No. 771, 98 A.C.W.S. (3d) 334

2000 CarswellAlta 662, 2000 ABQB 442, [2000] A.W.L.D. 654, [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201, [2000] A.J. No. 771, 98 A.C.W.S. (3d) 334

Canadian Airlines Corp., Re

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

In the Matter of the Business Corporations Act (Alberta) S.A. 1981, c. B-15, as Amended, Section 185

In the Matter of Canadian Airlines Corporation and Canadian Airlines International Ltd.

Alberta Court of Queen's Bench

Paperny J.

Heard: June 5-19, 2000
Judgment: June 27, 2000[FN*]
Docket: Calgary 0001-05071

Counsel: *A.L. Friend, Q.C.*, *H.M. Kay, Q.C.*, *R.B. Low, Q.C.*, and *L. Goldbach*, for Petitioners.

S.F. Dunphy, *P. O'Kelly*, and *E. Kolers*, for Air Canada and 853350 Alberta Ltd.

D.R. Haigh, Q.C., *D.N. Nishimura*, *A.Z.A. Campbell* and *D. Tay*, for Resurgence Asset Management LLC.

L.R. Duncan, Q.C., and *G. McCue*, for Neil Baker, Michael Salter, Hal Metheral, and Roger Midiaty.

F.R. Foran, Q.C., and *P.T. McCarthy, Q.C.*, for Monitor, PwC.

G.B. Morawetz, *R.J. Chadwick* and *A. McConnell*, for Senior Secured Noteholders and the Bank of Nova Scotia Trust Co.

C.J. Shaw, Q.C., for Unionized Employees.

T. Mallett and *C. Feasby*, for Amex Bank of Canada.

E.W. Halt, for J. Stephens Allan, Claims Officer.

M. Hollins, for Pacific Costal Airlines.

2000 CarswellAlta 662, 2000 ABQB 442, [2000] A.W.L.D. 654, [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201, [2000] A.J. No. 771, 98 A.C.W.S. (3d) 334

P. Pastewka, for JHHD Aircraft Leasing No. 1 and No. 2.

J. Thom, for Royal Bank of Canada.

J. Medhurst-Tivadar, for Canada Customs and Revenue Agency.

R. Wilkins, Q.C., for Calgary and Edmonton Airport Authority.

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Airline brought application for approval of plan of arrangement under Companies' Creditors Arrangement Act — Investment corporation brought counter-application for declaration that plan constituted merger or transfer of airline's assets to AC Corp., that plan would not affect investment corporation, and directing repurchase of notes pursuant to trust indenture, and that actions of airline and AC Corp. in formulating plan were oppressive and unfairly prejudicial to them — Application granted; counter-application dismissed — All statutory conditions were fulfilled and plan was fair and reasonable — Fairness did not require equal treatment of all creditors — Aim of plan was to allow airline to sustain operations and permanently adjust debt structure to reflect current market for asset values and carrying costs, in return for AC Corp. providing guarantee of restructured obligations — Plan was not oppressive to minority shareholders who, in alternative bankruptcy scenario, would receive less than under plan — Reorganization of share capital did not cancel minority shareholders' shares, and did not violate s. 167 of Business Corporations Act of Alberta — Act contemplated reorganizations in which insolvent corporation would eliminate interests of common shareholders, without requiring shareholder approval — Proposed transaction was not "sale, lease or exchange" of airline's property which required shareholder approval — Requirements for "related party transaction" under Policy 9.1 of Ontario Securities Commission were waived, since plan was fair and reasonable — Plan resulted in no substantial injustice to minority creditors, and represented reasonable balancing of all interests — Evidence did not support investment corporation's position that alternative existed which would render better return for minority shareholders — In insolvency situation, oppression of minority shareholder interests must be assessed against altered financial and legal landscape, which may result in shareholders' no longer having true interest to be protected — Financial support and corporate integration provided by other airline was not assumption of benefit by other airline to detriment of airline, but benefited airline and its stakeholders — Investment corporation was not oppressed — Corporate reorganization provisions in plan could not be severed from debt restructuring — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 5.1(2) — Business Corporations Act, S.A. 1981, c. B-15, s. 167.

Cases considered by *Paperny J.*:

Alabama, New Orleans, Texas & Pacific Junction Railway, Re (1890), [1891] 1 Ch. 213, 60 L.J. Ch. 221, [1886-90] All E.R. Rep. Ext. 1143, 64 L.T. 127, 7 T.L.R. 171, 2 Meg. 377 (Eng. C.A.) — referred to

Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.) — referred to

Algoma Steel Corp. v. Royal Bank (April 16, 1992), Doc. Toronto B62/91-A (Ont. Gen. Div.) — referred to

Bruce Agra Foods Inc. v. Everfresh Beverages Inc. (Receiver of) (1996), 45 C.B.R. (3d) 169, 22 O.T.C. 247 (Ont. Gen. Div.) — referred to

Cadillac Fairview Inc., Re (February 6, 1995), Doc. B348/94 (Ont. Gen. Div. [Commercial List]) — considered

Cadillac Fairview Inc., Re (March 7, 1995), Doc. B28/95 (Ont. Gen. Div. [Commercial List]) — referred to

Campeau Corp., Re (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) — referred to

Crabtree (Succession de) c. Barrette, 47 C.C.E.L. 1, 10 B.L.R. (2d) 1, (sub nom. *Barrette v. Crabtree (Succession de)*) 53 Q.A.C. 279, (sub nom. *Barrette v. Crabtree (Succession de)*) 150 N.R. 272, (sub nom. *Barrette v. Crabtree Estate*) 101 D.L.R. (4th) 66, (sub nom. *Barrette v. Crabtree Estate*) [1993] 1 S.C.R. 1027 (S.C.C.) — referred to

Diligenti v. RWMD Operations Kelowna Ltd. (1976), 1 B.C.L.R. 36 (B.C. S.C.) — referred to

First Edmonton Place Ltd. v. 315888 Alberta Ltd. (1988), 60 Alta. L.R. (2d) 122, 40 B.L.R. 28 (Alta. Q.B.) — referred to

Hochberger v. Rittenberg (1916), 54 S.C.R. 480, 36 D.L.R. 450 (S.C.C.) — referred to

Keddy Motor Inns Ltd., Re (1992), 90 D.L.R. (4th) 175, 13 C.B.R. (3d) 245, 6 B.L.R. (2d) 116, (sub nom. *Keddy Motor Inns Ltd., Re (No. 4)*) 110 N.S.R. (2d) 246, (sub nom. *Keddy Motor Inns Ltd., Re (No. 4)*) 299 A.P.R. 246 (N.S. C.A.) — referred to

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20, 72 C.R. (N.S.) 20 (Alta. Q.B.) — referred to

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) — considered

Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, 34 B.C.L.R. (2d) 122, 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363 (B.C. C.A.) — considered

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1, (sub nom. *Olympia & York Developments Ltd., Re*) 12 O.R. (3d) 500 (Ont. Gen. Div.) — considered

Pente Investment Management Ltd. v. Schneider Corp. (1998), 113 O.A.C. 253, (sub nom. *Maple Leaf Foods Inc. v. Schneider Corp.*) 42 O.R. (3d) 177, 44 B.L.R. (2d) 115 (Ont. C.A.) — referred to

Quintette Coal Ltd., Re (1992), 13 C.B.R. (3d) 146, 68 B.C.L.R. (2d) 219 (B.C. S.C.) — referred to

Repap British Columbia Inc., Re (1998), 1 C.B.R. (4th) 49, 50 B.C.L.R. (3d) 133 (B.C. S.C.) — considered

Royal Oak Mines Inc., Re (1999), 14 C.B.R. (4th) 279 (Ont. S.C.J. [Commercial List]) — considered

Sammi Atlas Inc., Re (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) — considered

Savage v. Amoco Acquisition Co. (1988), 59 Alta. L.R. (2d) 260, 68 C.B.R. (N.S.) 154, 40 B.L.R. 188, (sub nom. *Amoco Acquisition Co. v. Savage*) 87 A.R. 321 (Alta. C.A.) — considered

Savage v. Amoco Acquisition Co. (1988), 60 Alta. L.R. (2d) lv, 89 A.R. 80n, 70 C.B.R. (N.S.) xxxii, 89 N.R. 398n, 40

B.L.R. xxxii (S.C.C.) — considered

SkyDome Corp., Re (March 21, 1999), Doc. 98-CL-3179 (Ont. Gen. Div. [Commercial List]) — referred to

T. Eaton Co., Re (1999), 14 C.B.R. (4th) 288 (Ont. S.C.J. [Commercial List]) — considered

T. Eaton Co., Re (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) — considered

Wandlyn Inns Ltd., Re (1992), 15 C.B.R. (3d) 316 (N.B. Q.B.) — referred to

Statutes considered:

Aeronautics Act, R.S.C. 1985, c. A-2

Generally — referred to

Air Canada Public Participation Act, R.S.C. 1985, c. 35 (4th Supp.)

Generally — referred to

Business Corporations Act, S.A. 1981, c. B-15

Generally — referred to

s. 167 [am. 1996, c. 32, s. 1(4)] — considered

s. 167(1) [am. 1996, c. 32, s. 1(4)] — considered

s. 167(1)(e) — considered

s. 167(1)(f) — considered

s. 167(1)(g.1) [en. 1996, c. 32, s. 1(4)] — considered

s. 183 — considered

s. 185 — considered

s. 185(2) — considered

s. 185(7) — considered

s. 234 — considered

Canada Transportation Act, S.C. 1996, c. 10

Generally — referred to

s. 47 — referred to

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

Generally — considered

s. 2 "debtor company" — referred to

s. 5.1 [en. 1997, c. 12, s. 122] — considered

s. 5.1(1) [en. 1997, c. 12, s. 122] — referred to

s. 5.1(2) [en. 1997, c. 12, s. 122] — referred to

s. 6 [am. 1992, c. 27, s. 90(1)(f); am. 1996, c. 6, s. 167(1)(d)] — considered

s. 12 — referred to

Competition Act, R.S.C. 1985, c. C-34

Generally — referred to

APPLICATION by airline for approval of plan of arrangement; COUNTER-APPLICATION by investment corporation for declaration that plan constituted merger or transfer of airline's assets to AC Corp., that plan would not affect investment corporation, and directing repurchase of notes pursuant to trust indenture, and that actions of airline and AC Corp. in formulating plan were oppressive and unfairly prejudicial; COUNTER-APPLICATION by minority shareholders.

Paperny J.:

I. Introduction

1 After a decade of searching for a permanent solution to its ongoing, significant financial problems, Canadian Airlines Corporation ("CAC") and Canadian Airlines International Ltd. ("CAIL") seek the court's sanction to a plan of arrangement filed under the *Companies' Creditors Arrangement Act* ("CCAA") and sponsored by its historic rival, Air Canada Corporation ("Air Canada"). To Canadian, this represents its last choice and its only chance for survival. To Air Canada, it is an opportunity to lead the restructuring of the Canadian airline industry, an exercise many suggest is long overdue. To over 16,000 employees of Canadian, it means continued employment. Canadian Airlines will operate as a separate entity and continue to provide domestic and international air service to Canadians. Tickets of the flying public will be honoured and their frequent flyer points maintained. Long term business relationships with trade creditors and suppliers will continue.

2 The proposed restructuring comes at a cost. Secured and unsecured creditors are being asked to accept significant compromises and shareholders of CAC are being asked to accept that their shares have no value. Certain unsecured creditors oppose the plan, alleging it is oppressive and unfair. They assert that Air Canada has appropriated the key assets of Canadian to itself. Minority shareholders of CAC, on the other hand, argue that Air Canada's financial support to Canadian, before and during this restructuring process, has increased the value of Canadian and in turn their shares. These two positions are irreconcilable, but do reflect the perception by some that this plan asks them to sacrifice too much.

2000 CarswellAlta 662, 2000 ABQB 442, [2000] A.W.L.D. 654, [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201, [2000] A.J. No. 771, 98 A.C.W.S. (3d) 334

3 Canadian has asked this court to sanction its plan under s. 6 of the CCAA. The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all the stakeholders. Faced with an insolvent organization, its role is to look forward and ask: does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.

II. Background

Canadian Airlines and its Subsidiaries

4 CAC and CAIL are corporations incorporated or continued under the *Business Corporations Act* of Alberta, S.A. 1981, c. B-15 ("ABCA"). 82% of CAC's shares are held by 853350 Alberta Ltd.("853350") and the remaining 18% are held publicly. CAC, directly or indirectly, owns the majority of voting shares in and controls the other Petitioner, CAIL and these shares represent CAC's principal asset. CAIL owns or has an interest in a number of other corporations directly engaged in the airline industry or other businesses related to the airline industry, including Canadian Regional Airlines Limited ("CRAL"). Where the context requires, I will refer to CAC and CAIL jointly as "Canadian" in these reasons.

5 In the past fifteen years, CAIL has grown from a regional carrier operating under the name Pacific Western Airlines ("PWA") to one of Canada's two major airlines. By mid-1986, Canadian Pacific Air Lines Limited ("CP Air"), had acquired the regional carriers Nordair Inc. ("Nordair") and Eastern Provincial Airways ("Eastern"). In February, 1987, PWA completed its purchase of CP Air from Canadian Pacific Limited. PWA then merged the four predecessor carriers (CP Air, Eastern, Nordair, and PWA) to form one airline, "Canadian Airlines International Ltd.", which was launched in April, 1987.

6 By April, 1989, CAIL had acquired substantially all of the common shares of Wardair Inc. and completed the integration of CAIL and Wardair Inc. in 1990.

7 CAIL and its subsidiaries provide international and domestic scheduled and charter air transportation for passengers and cargo. CAIL provides scheduled services to approximately 30 destinations in 11 countries. Its subsidiary, Canadian Regional Airlines (1998) Ltd. ("CRAL 98") provides scheduled services to approximately 35 destinations in Canada and the United States. Through code share agreements and marketing alliances with leading carriers, CAIL and its subsidiaries provide service to approximately 225 destinations worldwide. CAIL is also engaged in charter and cargo services and the provision of services to third parties, including aircraft overhaul and maintenance, passenger and cargo handling, flight simulator and equipment rentals, employee training programs and the sale of Canadian Plus frequent flyer points. As at December 31, 1999, CAIL operated approximately 79 aircraft.

8 CAIL directly and indirectly employs over 16,000 persons, substantially all of whom are located in Canada. The balance of the employees are located in the United States, Europe, Asia, Australia, South America and Mexico. Approximately 88% of the active employees of CAIL are subject to collective bargaining agreements.

Events Leading up to the CCAA Proceedings

9 Canadian's financial difficulties significantly predate these proceedings.

10 In the early 1990s, Canadian experienced significant losses from operations and deteriorating liquidity. It completed a financial restructuring in 1994 (the "1994 Restructuring") which involved employees contributing $200,000,000 in new equity in return for receipt of entitlements to common shares. In addition, Aurora Airline Investments, Inc. ("Aurora"), a subsidiary of AMR Corporation ("AMR"), subscribed for $246,000,000 in preferred shares of CAIL. Other AMR subsidiaries entered into comprehensive services and marketing arrangements with CAIL. The governments of Canada, British Columbia and Alberta provided an aggregate of $120,000,000 in loan guarantees. Senior creditors, junior creditors and shareholders of CAC and CAIL and its subsidiaries converted approximately $712,000,000 of obligations into common shares of CAC or

convertible notes issued jointly by CAC and CAIL and/or received warrants entitling the holder to purchase common shares.

11 In the latter half of 1994, Canadian built on the improved balance sheet provided by the 1994 Restructuring, focussing on strict cost controls, capacity management and aircraft utilization. The initial results were encouraging. However, a number of factors including higher than expected fuel costs, rising interest rates, decline of the Canadian dollar, a strike by pilots of Time Air and the temporary grounding of Inter-Canadien's ATR-42 fleet undermined this improved operational performance. In 1995, in response to additional capacity added by emerging charter carriers and Air Canada on key transcontinental routes, CAIL added additional aircraft to its fleet in an effort to regain market share. However, the addition of capacity coincided with the slow-down in the Canadian economy leading to traffic levels that were significantly below expectations. Additionally, key international routes of CAIL failed to produce anticipated results. The cumulative losses of CAIL from 1994 to 1999 totalled $771 million and from January 31, 1995 to August 12, 1999, the day prior to the issuance by the Government of Canada of an Order under Section 47 of the *Canada Transportation Act* (relaxing certain rules under the *Competition Act* to facilitate a restructuring of the airline industry and described further below), the trading price of Canadian's common shares declined from $7.90 to $1.55.

12 Canadian's losses incurred since the 1994 Restructuring severely eroded its liquidity position. In 1996, Canadian faced an environment where the domestic air travel market saw increased capacity and aggressive price competition by two new discount carriers based in western Canada. While Canadian's traffic and load factor increased indicating a positive response to Canadian's post-restructuring business plan, yields declined. Attempts by Canadian to reduce domestic capacity were offset by additional capacity being introduced by the new discount carriers and Air Canada.

13 The continued lack of sufficient funds from operations made it evident by late fall of 1996 that Canadian needed to take action to avoid a cash shortfall in the spring of 1997. In November 1996, Canadian announced an operational restructuring plan (the "1996 Restructuring") aimed at returning Canadian to profitability and subsequently implemented a payment deferral plan which involved a temporary moratorium on payments to certain lenders and aircraft operating lessors to provide a cash bridge until the benefits of the operational restructuring were fully implemented. Canadian was able successfully to obtain the support of its lenders and operating lessors such that the moratorium and payment deferral plan was able to proceed on a consensual basis without the requirement for any court proceedings.

14 The objective of the 1996 Restructuring was to transform Canadian into a sustainable entity by focussing on controllable factors which targeted earnings improvements over four years. Three major initiatives were adopted: network enhancements, wage concessions as supplemented by fuel tax reductions/rebates, and overhead cost reductions.

15 The benefits of the 1996 Restructuring were reflected in Canadian's 1997 financial results when Canadian and its subsidiaries reported a consolidated net income of $5.4 million, the best results in 9 years.

16 In early 1998, building on its 1997 results, Canadian took advantage of a strong market for U.S. public debt financing in the first half of 1998 by issuing U.S. $175,000,000 of senior secured notes in April, 1998 ("Senior Secured Notes") and U.S. $100,000,000 of unsecured notes in August, 1998 ("Unsecured Notes").

17 The benefits of the 1996 Restructuring continued in 1998 but were not sufficient to offset a number of new factors which had a significant negative impact on financial performance, particularly in the fourth quarter. Canadian's eroded capital base gave it limited capacity to withstand negative effects on traffic and revenue. These factors included lower than expected operating revenues resulting from a continued weakness of the Asian economies, vigorous competition in Canadian's key western Canada and the western U.S. transborder markets, significant price discounting in most domestic markets following a labour disruption at Air Canada and CAIL's temporary loss of the ability to code-share with American Airlines on certain transborder flights due to a pilot dispute at American Airlines. Canadian also had increased operating expenses primarily due to the deterioration of the value of the Canadian dollar and additional airport and navigational fees imposed by NAV Canada which were not recoverable by Canadian through fare increases because of competitive pressures. This resulted in Canadian and its subsidiaries reporting a consolidated loss of $137.6 million for 1998.

2000 CarswellAlta 662, 2000 ABQB 442, [2000] A.W.L.D. 654, [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201, [2000] A.J. No. 771, 98 A.C.W.S. (3d) 334

18 As a result of these continuing weak financial results, Canadian undertook a number of additional strategic initiatives including entering the *oneworldTM* Alliance, the introduction of its new "Proud Wings" corporate image, a restructuring of CAIL's Vancouver hub, the sale and leaseback of certain aircraft, expanded code sharing arrangements and the implementation of a service charge in an effort to recover a portion of the costs relating to NAV Canada fees.

19 Beginning in late 1998 and continuing into 1999, Canadian tried to access equity markets to strengthen its balance sheet. In January, 1999, the Board of Directors of CAC determined that while Canadian needed to obtain additional equity capital, an equity infusion alone would not address the fundamental structural problems in the domestic air transportation market.

20 Canadian believes that its financial performance was and is reflective of structural problems in the Canadian airline industry, most significantly, over capacity in the domestic air transportation market. It is the view of Canadian and Air Canada that Canada's relatively small population and the geographic distribution of that population is unable to support the overlapping networks of two full service national carriers. As described further below, the Government of Canada has recognized this fundamental problem and has been instrumental in attempts to develop a solution.

Initial Discussions with Air Canada

21 Accordingly, in January, 1999, CAC's Board of Directors directed management to explore all strategic alternatives available to Canadian, including discussions regarding a possible merger or other transaction involving Air Canada.

22 Canadian had discussions with Air Canada in early 1999. AMR also participated in those discussions. While several alternative merger transactions were considered in the course of these discussions, Canadian, AMR and Air Canada were unable to reach agreement.

23 Following the termination of merger discussions between Canadian and Air Canada, senior management of Canadian, at the direction of the Board and with the support of AMR, renewed its efforts to secure financial partners with the objective of obtaining either an equity investment and support for an eventual merger with Air Canada or immediate financial support for a merger with Air Canada.

Offer by Onex

24 In early May, the discussions with Air Canada having failed, Canadian focussed its efforts on discussions with Onex Corporation ("Onex") and AMR concerning the basis upon which a merger of Canadian and Air Canada could be accomplished.

25 On August 23, 1999, Canadian entered into an Arrangement Agreement with Onex, AMR and Airline Industry Revitalization Co. Inc. ("AirCo") (a company owned jointly by Onex and AMR and controlled by Onex). The Arrangement Agreement set out the terms of a Plan of Arrangement providing for the purchase by AirCo of all of the outstanding common and non-voting shares of CAC. The Arrangement Agreement was conditional upon, among other things, the successful completion of a simultaneous offer by AirCo for all of the voting and non-voting shares of Air Canada. On August 24, 1999, AirCo announced its offers to purchase the shares of both CAC and Air Canada and to subsequently merge the operations of the two airlines to create one international carrier in Canada.

26 On or about September 20, 1999 the Board of Directors of Air Canada recommended against the AirCo offer. On or about October 19, 1999, Air Canada announced its own proposal to its shareholders to repurchase shares of Air Canada. Air Canada's announcement also indicated Air Canada's intention to make a bid for CAC and to proceed to complete a merger with Canadian subject to a restructuring of Canadian's debt.

2000 CarswellAlta 662, 2000 ABQB 442, [2000] A.W.L.D. 654, [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201, [2000] A.J. No. 771, 98 A.C.W.S. (3d) 334

27 There were several rounds of offers and counter-offers between AirCo and Air Canada. On November 5, 1999, the Quebec Superior Court ruled that the AirCo offer for Air Canada violated the provisions of the *Air Canada Public Participation Act*. AirCo immediately withdrew its offers. At that time, Air Canada indicated its intention to proceed with its offer for CAC.

28 Following the withdrawal of the AirCo offer to purchase CAC, and notwithstanding Air Canada's stated intention to proceed with its offer, there was a renewed uncertainty about Canadian's future which adversely affected operations. As described further below, Canadian lost significant forward bookings which further reduced the company's remaining liquidity.

Offer by 853350

29 On November 11, 1999, 853350 (a corporation financed by Air Canada and owned as to 10% by Air Canada) made a formal offer for all of the common and non-voting shares of CAC. Air Canada indicated that the involvement of 853350 in the take-over bid was necessary in order to protect Air Canada from the potential adverse effects of a restructuring of Canadian's debt and that Air Canada would only complete a merger with Canadian after the completion of a debt restructuring transaction. The offer by 853350 was conditional upon, among other things, a satisfactory resolution of AMR's claims in respect of Canadian and a satisfactory resolution of certain regulatory issues arising from the announcement made on October 26, 1999 by the Government of Canada regarding its intentions to alter the regime governing the airline industry.

30 As noted above, AMR and its subsidiaries and affiliates had certain agreements with Canadian arising from AMR's investment (through its wholly owned subsidiary, Aurora Airline Investments, Inc.) in CAIL during the 1994 Restructuring. In particular, the Services Agreement by which AMR and its subsidiaries and affiliates provided certain reservations, scheduling and other airline related services to Canadian provided for a termination fee of approximately $500 million (as at December 31, 1999) while the terms governing the preferred shares issued to Aurora provided for exchange rights which were only retractable by Canadian upon payment of a redemption fee in excess of $500 million (as at December 31, 1999). Unless such provisions were amended or waived, it was practically impossible for Canadian to complete a merger with Air Canada since the cost of proceeding without AMR's consent was simply too high.

31 Canadian had continued its efforts to seek out all possible solutions to its structural problems following the withdrawal of the AirCo offer on November 5, 1999. While AMR indicated its willingness to provide a measure of support by allowing a deferral of some of the fees payable to AMR under the Services Agreement, Canadian was unable to find any investor willing to provide the liquidity necessary to keep Canadian operating while alternative solutions were sought.

32 After 853350 made its offer, 853350 and Air Canada entered into discussions with AMR regarding the purchase by 853350 of AMR's shareholding in CAIL as well as other matters regarding code sharing agreements and various services provided to Canadian by AMR and its subsidiaries and affiliates. The parties reached an agreement on November 22, 1999 pursuant to which AMR agreed to reduce its potential damages claim for termination of the Services Agreement by approximately 88%.

33 On December 4, 1999, CAC's Board recommended acceptance of 853350's offer to its shareholders and on December 21, 1999, two days before the offer closed, 853350 received approval for the offer from the Competition Bureau as well as clarification from the Government of Canada on the proposed regulatory framework for the Canadian airline industry.

34 As noted above, Canadian's financial condition deteriorated further after the collapse of the AirCo Arrangement transaction. In particular:

> a) the doubts which were publicly raised as to Canadian's ability to survive made Canadian's efforts to secure additional financing through various sale-leaseback transactions more difficult;

b) sales for future air travel were down by approximately 10% compared to 1998;

c) CAIL's liquidity position, which stood at approximately $84 million (consolidated cash and available credit) as at September 30, 1999, reached a critical point in late December, 1999 when it was about to go negative.

35 In late December, 1999, Air Canada agreed to enter into certain transactions designed to ensure that Canadian would have enough liquidity to continue operating until the scheduled completion of the 853350 take-over bid on January 4, 2000. Air Canada agreed to purchase rights to the Toronto-Tokyo route for $25 million and to a sale-leaseback arrangement involving certain unencumbered aircraft and a flight simulator for total proceeds of approximately $20 million. These transactions gave Canadian sufficient liquidity to continue operations through the holiday period.

36 If Air Canada had not provided the approximate $45 million injection in December 1999, Canadian would likely have had to file for bankruptcy and cease all operations before the end of the holiday travel season.

37 On January 4, 2000, with all conditions of its offer having been satisfied or waived, 853350 purchased approximately 82% of the outstanding shares of CAC. On January 5, 1999, 853350 completed the purchase of the preferred shares of CAIL owned by Aurora. In connection with that acquisition, Canadian agreed to certain amendments to the Services Agreement reducing the amounts payable to AMR in the event of a termination of such agreement and, in addition, the unanimous shareholders agreement which gave AMR the right to require Canadian to purchase the CAIL preferred shares under certain circumstances was terminated. These arrangements had the effect of substantially reducing the obstacles to a restructuring of Canadian's debt and lease obligations and also significantly reduced the claims that AMR would be entitled to advance in such a restructuring.

38 Despite the $45 million provided by Air Canada, Canadian's liquidity position remained poor. With January being a traditionally slow month in the airline industry, further bridge financing was required in order to ensure that Canadian would be able to operate while a debt restructuring transaction was being negotiated with creditors. Air Canada negotiated an arrangement with the Royal Bank of Canada ("Royal Bank") to purchase a participation interest in the operating credit facility made available to Canadian. As a result of this agreement, Royal Bank agreed to extend Canadian's operating credit facility from $70 million to $120 million in January, 2000 and then to $145 million in March, 2000. Canadian agreed to supplement the assignment of accounts receivable security originally securing Royal's $70 million facility with a further Security Agreement securing certain unencumbered assets of Canadian in consideration for this increased credit availability. Without the support of Air Canada or another financially sound entity, this increase in credit would not have been possible.

39 Air Canada has stated publicly that it ultimately wishes to merge the operations of Canadian and Air Canada, subject to Canadian completing a financial restructuring so as to permit Air Canada to complete the acquisition on a financially sound basis. This pre-condition has been emphasized by Air Canada since the fall of 1999.

40 Prior to the acquisition of majority control of CAC by 853350, Canadian's management, Board of Directors and financial advisors had considered every possible alternative for restoring Canadian to a sound financial footing. Based upon Canadian's extensive efforts over the past year in particular, but also the efforts since 1992 described above, Canadian came to the conclusion that it must complete a debt restructuring to permit the completion of a full merger between Canadian and Air Canada.

41 On February 1, 2000, Canadian announced a moratorium on payments to lessors and lenders. As a result of this moratorium Canadian defaulted on the payments due under its various credit facilities and aircraft leases. Absent the assistance provided by this moratorium, in addition to Air Canada's support, Canadian would not have had sufficient liquidity to continue operating until the completion of a debt restructuring.

42 Following implementation of the moratorium, Canadian with Air Canada embarked on efforts to restructure significant obligations by consent. The further damage to public confidence which a CCAA filing could produce required Canadian

to secure a substantial measure of creditor support in advance of any public filing for court protection.

43 Before the Petitioners started these CCAA proceedings, Air Canada, CAIL and lessors of 59 aircraft in its fleet had reached agreement in principle on the restructuring plan.

44 Canadian and Air Canada have also been able to reach agreement with the remaining affected secured creditors, being the holders of the U.S. $175 million Senior Secured Notes, due 2005, (the "Senior Secured Noteholders") and with several major unsecured creditors in addition to AMR, such as Loyalty Management Group Canada Inc.

45 On March 24, 2000, faced with threatened proceedings by secured creditors, Canadian petitioned under the CCAA and obtained a stay of proceedings and related interim relief by Order of the Honourable Chief Justice Moore on that same date. Pursuant to that Order, PricewaterhouseCoopers, Inc. was appointed as the Monitor, and companion proceedings in the United States were authorized to be commenced.

46 Since that time, due to the assistance of Air Canada, Canadian has been able to complete the restructuring of the remaining financial obligations governing all aircraft to be retained by Canadian for future operations. These arrangements were approved by this Honourable Court in its Orders dated April 14, 2000 and May 10, 2000, as described in further detail below under the heading "The Restructuring Plan".

47 On April 7, 2000, this court granted an Order giving directions with respect to the filing of the plan, the calling and holding of meetings of affected creditors and related matters.

48 On April 25, 2000 in accordance with the said Order, Canadian filed and served the plan (in its original form) and the related notices and materials.

49 The plan was amended, in accordance with its terms, on several occasions, the form of Plan voted upon at the Creditors' Meetings on May 26, 2000 having been filed and served on May 25, 2000 (the "Plan").

The Restructuring Plan

50 The Plan has three principal aims described by Canadian:

(a) provide near term liquidity so that Canadian can sustain operations;

(b) allow for the return of aircraft not required by Canadian; and

(c) permanently adjust Canadian's debt structure and lease facilities to reflect the current market for asset values and carrying costs in return for Air Canada providing a guarantee of the restructured obligations.

51 The proposed treatment of stakeholders is as follows:

1. Unaffected Secured Creditors- Royal Bank, CAIL's operating lender, is an unaffected creditor with respect to its operating credit facility. Royal Bank holds security over CAIL's accounts receivable and most of CAIL's operating assets not specifically secured by aircraft financiers or the Senior Secured Noteholders. As noted above, arrangements entered into between Air Canada and Royal Bank have provided CAIL with liquidity necessary for it to continue operations since January 2000.

Also unaffected by the Plan are those aircraft lessors, conditional vendors and secured creditors holding security over CAIL's aircraft who have entered into agreements with CAIL and/or Air Canada with respect to the restructur-

ing of CAIL's obligations. A number of such agreements, which were initially contained in the form of letters of intent ("LOIs"), were entered into prior to the commencement of the CCAA proceedings, while a total of 17 LOIs were completed after that date. In its Second and Fourth Reports the Monitor reported to the court on these agreements. The LOIs entered into after the proceedings commenced were reviewed and approved by the court on April 14, 2000 and May 10, 2000.

The basis of the LOIs with aircraft lessors was that the operating lease rates were reduced to fair market lease rates or less, and the obligations of CAIL under the leases were either assumed or guaranteed by Air Canada. Where the aircraft was subject to conditional sale agreements or other secured indebtedness, the value of the secured debt was reduced to the fair market value of the aircraft, and the interest rate payable was reduced to current market rates reflecting Air Canada's credit. CAIL's obligations under those agreements have also been assumed or guaranteed by Air Canada. The claims of these creditors for reduced principal and interest amounts, or reduced lease payments, are Affected Unsecured Claims under the Plan. In a number of cases these claims have been assigned to Air Canada and Air Canada disclosed that it would vote those claims in favour of the Plan.

2. Affected Secured Creditors- The Affected Secured Creditors under the Plan are the Senior Secured Noteholders with a claim in the amount of US$175,000,000. The Senior Secured Noteholders are secured by a diverse package of Canadian's assets, including its inventory of aircraft spare parts, ground equipment, spare engines, flight simulators, leasehold interests at Toronto, Vancouver and Calgary airports, the shares in CRAL 98 and a $53 million note payable by CRAL to CAIL.

The Plan offers the Senior Secured Noteholders payment of 97 cents on the dollar. The deficiency is included in the Affected Unsecured Creditor class and the Senior Secured Noteholders advised the court they would be voting the deficiency in favour of the Plan.

3. Unaffected Unsecured Creditors-In the circular accompanying the November 11, 1999 853350 offer it was stated that:

> The Offeror intends to conduct the Debt Restructuring in such a manner as to seek to ensure that the unionized employees of Canadian, the suppliers of new credit (including trade credit) and the members of the flying public are left unaffected.
>
> The Offeror is of the view that the pursuit of these three principles is essential in order to ensure that the long term value of Canadian is preserved.

Canadian's employees, customers and suppliers of goods and services are unaffected by the CCAA Order and Plan.

Also unaffected are parties to those contracts or agreements with Canadian which are not being terminated by Canadian pursuant to the terms of the March 24, 2000 Order.

4. Affected Unsecured Creditors- CAIL has identified unsecured creditors who do not fall into the above three groups and listed these as Affected Unsecured Creditors under the Plan. They are offered 14 cents on the dollar on their claims. Air Canada would fund this payment.

The Affected Unsecured Creditors fall into the following categories:

a. Claims of holders of or related to the Unsecured Notes (the "Unsecured Noteholders");

b. Claims in respect of certain outstanding or threatened litigation involving Canadian;

c. Claims arising from the termination, breach or repudiation of certain contracts, leases or agreements to which Canadian is a party other than aircraft financing or lease arrangements;

d. Claims in respect of deficiencies arising from the termination or re-negotiation of aircraft financing or lease arrangements;

e. Claims of tax authorities against Canadian; and

f. Claims in respect of the under-secured or unsecured portion of amounts due to the Senior Secured Noteholders.

52 There are over $700 million of proven unsecured claims. Some unsecured creditors have disputed the amounts of their claims for distribution purposes. These are in the process of determination by the court-appointed Claims Officer and subject to further appeal to the court. If the Claims Officer were to allow all of the disputed claims in full and this were confirmed by the court, the aggregate of unsecured claims would be approximately $1.059 million.

53 The Monitor has concluded that if the Plan is not approved and implemented, Canadian will not be able to continue as a going concern and in that event, the only foreseeable alternative would be a liquidation of Canadian's assets by a receiver and/or a trustee in bankruptcy. Under the Plan, Canadian's obligations to parties essential to ongoing operations, including employees, customers, travel agents, fuel, maintenance and equipment suppliers, and airport authorities are in most cases to be treated as unaffected and paid in full. In the event of a liquidation, those parties would not, in most cases, be paid in full and, except for specific lien rights and statutory priorities, would rank as ordinary unsecured creditors. The Monitor estimates that the additional unsecured claims which would arise if Canadian were to cease operations as a going concern and be forced into liquidation would be in excess of $1.1 billion.

54 In connection with its assessment of the Plan, the Monitor performed a liquidation analysis of CAIL as at March 31, 2000 in order to estimate the amounts that might be recovered by CAIL's creditors and shareholders in the event of disposition of CAIL's assets by a receiver or trustee. The Monitor concluded that a liquidation would result in a shortfall to certain secured creditors, including the Senior Secured Noteholders, a recovery by ordinary unsecured creditors of between one cent and three cents on the dollar, and no recovery by shareholders.

55 There are two vociferous opponents of the Plan, Resurgence Asset Management LLC ("Resurgence") who acts on behalf of its and/or its affiliate client accounts and four shareholders of CAC. Resurgence is incorporated pursuant to the laws of New York, U.S.A. and has its head office in White Plains, New York. It conducts an investment business specializing in high yield distressed debt. Through a series of purchases of the Unsecured Notes commencing in April 1999, Resurgence clients hold $58,200,000 of the face value of or 58.2% of the notes issued. Resurgence purchased 7.9 million units in April 1999. From November 3, 1999 to December 9, 1999 it purchased an additional 20,850,000 units. From January 4, 2000 to February 3, 2000 Resurgence purchased an additional 29,450,000 units.

56 Resurgence seeks declarations that: the actions of Canadian, Air Canada and 853350 constitute an amalgamation, consolidation or merger with or into Air Canada or a conveyance or transfer of all or substantially all of Canadian's assets to Air Canada; that any plan of arrangement involving Canadian will not affect Resurgence and directing the repurchase of their notes pursuant to the provisions of their trust indenture and that the actions of Canadian, Air Canada and 853350 are oppressive and unfairly prejudicial to it pursuant to section 234 of the Business Corporations Act.

57 Four shareholders of CAC also oppose the plan. Neil Baker, a Toronto resident, acquired 132,500 common shares at a cost of $83,475.00 on or about May 5, 2000. Mr. Baker sought to commence proceedings to "remedy an injustice to the minority holders of the common shares". Roger Midiaty, Michael Salter and Hal Metheral are individual shareholders who were added as parties at their request during the proceedings. Mr. Midiaty resides in Calgary, Alberta and holds 827 CAC shares

which he has held since 1994. Mr. Metheral is also a Calgary resident and holds approximately 14,900 CAC shares in his RRSP and has held them since approximately 1994 or 1995. Mr. Salter is a resident of Scottsdale, Arizona and is the beneficial owner of 250 shares of CAC and is a joint beneficial owner of 250 shares with his wife. These shareholders will be referred in the Decision throughout as the "Minority Shareholders".

58 The Minority Shareholders oppose the portion of the Plan that relates to the reorganization of CAIL, pursuant to section 185 of the *Alberta Business Corporations Act* ("ABCA"). They characterize the transaction as a cancellation of issued shares unauthorized by section 167 of the ABCA or alternatively is a violation of section 183 of the ABCA. They submit the application for the order of reorganization should be denied as being unlawful, unfair and not supported by the evidence.

III. Analysis

59 Section 6 of the CCAA provides that:

> 6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (b) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

60 Prior to sanctioning a plan under the CCAA, the court must be satisfied in regard to each of the following criteria:

> (1) there must be compliance with all statutory requirements;
>
> (2) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and
>
> (3) the plan must be fair and reasonable.

61 A leading articulation of this three-part test appears in *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) at 182-3, aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.) and has been regularly followed, see for example *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) at 172 and *Re T. Eaton Co.* (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) at paragraph 7. Each of these criteria are reviewed in turn below.

1. Statutory Requirements

62 Some of the matters that may be considered by the court on an application for approval of a plan of compromise and arrangement include:

> (a) the applicant comes within the definition of "debtor company" in section 2 of the CCAA;
>
> (b) the applicant or affiliated debtor companies have total claims within the meaning of section 12 of the CCAA in

excess of $5,000,000;

(c) the notice calling the meeting was sent in accordance with the order of the court;

(d) the creditors were properly classified;

(e) the meetings of creditors were properly constituted;

(f) the voting was properly carried out; and

(g) the plan was approved by the requisite double majority or majorities.

63 I find that the Petitioners have complied with all applicable statutory requirements. Specifically:

(a) CAC and CAIL are insolvent and thus each is a "debtor company" within the meaning of section 2 of the CCAA. This was established in the affidavit evidence of Douglas Carty, Senior Vice President and Chief Financial Officer of Canadian, and so declared in the March 24, 2000 Order in these proceedings and confirmed in the testimony given by Mr. Carty at this hearing.

(b) CAC and CAIL have total claims that would be claims provable in bankruptcy within the meaning of section 12 of the CCAA in excess of $5,000,000.

(c) In accordance with the April 7, 2000 Order of this court, a Notice of Meeting and a disclosure statement (which included copies of the Plan and the March 24th and April 7th Orders of this court) were sent to the Affected Creditors, the directors and officers of the Petitioners, the Monitor and persons who had served a Notice of Appearance, on April 25, 2000.

(d) As confirmed by the May 12, 2000 ruling of this court (leave to appeal denied May 29, 2000), the creditors have been properly classified.

(e) Further, as detailed in the Monitor's Fifth Report to the Court and confirmed by the June 14, 2000 decision of this court in respect of a challenge by Resurgence Asset Management LLC ("Resurgence"), the meetings of creditors were properly constituted, the voting was properly carried out and the Plan was approved by the requisite double majorities in each class. The composition of the majority of the unsecured creditor class is addressed below under the heading "Fair and Reasonable".

2. Matters Unauthorized

64 This criterion has not been widely discussed in the reported cases. As recognized by Blair J. in *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.) and Farley J. in *Re Cadillac Fairview Inc.* (February 6, 1995), Doc. B348/94 (Ont. Gen. Div. [Commercial List]), within the CCAA process the court must rely on the reports of the Monitor as well as the parties in ensuring nothing contrary to the CCAA has occurred or is contemplated by the plan.

65 In this proceeding, the dissenting groups have raised two matters which in their view are unauthorized by the CCAA: firstly, the Minority Shareholders of CAC suggested the proposed share capital reorganization of CAIL is illegal under the ABCA and Ontario Securities Commission Policy 9.1, and as such cannot be authorized under the CCAA and secondly, certain unsecured creditors suggested that the form of release contained in the Plan goes beyond the scope of release permitted under the CCAA.

a. Legality of proposed share capital reorganization

66 Subsection 185(2) of the ABCA provides:

> (2) If a corporation is subject to an order for reorganization, its articles may be amended by the order to effect any change that might lawfully be made by an amendment under section 167.

67 Sections 6.1(2)(d) and (e) and Schedule "D" of the Plan contemplate that:

a. All CAIL common shares held by CAC will be converted into a single retractable share, which will then be retracted by CAIL for $1.00; and

b. All CAIL preferred shares held by 853350 will be converted into CAIL common shares.

68 The Articles of Reorganization in Schedule "D" to the Plan provide for the following amendments to CAIL's Articles of Incorporation to effect the proposed reorganization:

> (a) consolidating all of the issued and outstanding common shares into one common share;
>
> (b) redesignating the existing common shares as "Retractable Shares" and changing the rights, privileges, restrictions and conditions attaching to the Retractable Shares so that the Retractable Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital;
>
> (c) cancelling the Non-Voting Shares in the capital of the corporation, none of which are currently issued and outstanding, so that the corporation is no longer authorized to issue Non-Voting Shares;
>
> (d) changing all of the issued and outstanding Class B Preferred Shares of the corporation into Class A Preferred Shares, on the basis of one (1) Class A Preferred Share for each one (1) Class B Preferred Share presently issued and outstanding;
>
> (e) redesignating the existing Class A Preferred Shares as "Common Shares" and changing the rights, privileges, restrictions and conditions attaching to the Common Shares so that the Common Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital; and
>
> (f) cancelling the Class B Preferred Shares in the capital of the corporation, none of which are issued and outstanding after the change in paragraph (d) above, so that the corporation is no longer authorized to issue Class B Preferred Shares;

Section 167 of the ABCA

69 Reorganizations under section 185 of the ABCA are subject to two preconditions:

a. The corporation must be "subject to an order for re-organization"; and

b. The proposed amendments must otherwise be permitted under section 167 of the ABCA.

70 The parties agreed that an order of this court sanctioning the Plan would satisfy the first condition.

2000 CarswellAlta 662, 2000 ABQB 442, [2000] A.W.L.D. 654, [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201, [2000] A.J. No. 771, 98 A.C.W.S. (3d) 334

71 The relevant portions of section 167 provide as follows:

> 167(1) Subject to sections 170 and 171, the articles of a corporation may by special resolution be amended to
>
> (e) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued,
>
> (f) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series into the same or a different number of shares of other classes or series,
>
> (g.1) cancel a class or series of shares where there are no issued or outstanding shares of that class or series,

72 Each change in the proposed CAIL Articles of Reorganization corresponds to changes permitted under s. 167(1) of the ABCA, as follows:

Proposed Amendment in Schedule "D"	Subsection 167(1), ABCA
(a) — consolidation of Common Shares	167(1)(f)
(b) — change of designation and rights	167(1)(e)
(c) — cancellation	167(1)(g.1)
(d) — change in shares	167(1)(f)
(e) — change of designation and rights	167(1)(e)
(f) — cancellation	167(1)(g.1)

73 The Minority Shareholders suggested that the proposed reorganization effectively cancels their shares in CAC. As the above review of the proposed reorganization demonstrates, that is not the case. Rather, the shares of CAIL are being consolidated, altered and then retracted, as permitted under section 167 of the ABCA. I find the proposed reorganization of CAIL's share capital under the Plan does not violate section 167.

74 In R. Dickerson et al, *Proposals for a New Business Corporation Law for Canada*, Vol.1: Commentary (the "Dickerson Report") regarding the then proposed Canada Business Corporations Act, the identical section to section 185 is described as having been inserted with the object of enabling the "court to effect any necessary amendment of the articles of the corporation in order to achieve the objective of the reorganization without having to comply with the formalities of the Draft Act, particularly shareholder approval of the proposed amendment".

75 The architects of the business corporation act model which the ABCA follows, expressly contemplated reorganizations in which the insolvent corporation would eliminate the interest of common shareholders. The example given in the Dickerson Report of a reorganization is very similar to that proposed in the Plan:

> For example, the reorganization of an insolvent corporation may require the following steps: first, reduction or even elimination of the interest of the common shareholders; second, relegation of the preferred shareholders to the status of common shareholders; and third, relegation of the secured debenture holders to the status of either unsecured Noteholders or preferred shareholders.

76 The rationale for allowing such a reorganization appears plain; the corporation is insolvent, which means that on liquidation the shareholders would get nothing. In those circumstances, as described further below under the heading "Fair and Reasonable", there is nothing unfair or unreasonable in the court effecting changes in such situations without shareholder

approval. Indeed, it would be unfair to the creditors and other stakeholders to permit the shareholders (whose interest has the lowest priority) to have any ability to block a reorganization.

77 The Petitioners were unable to provide any case law addressing the use of section 185 as proposed under the Plan. They relied upon the decisions of *Re Royal Oak Mines Inc.* (1999), 14 C.B.R. (4th) 279 (Ont. S.C.J. [Commercial List]) and *T. Eaton Co., supra* in which Farley J.of the Ontario Superior Court of Justice emphasized that shareholders are at the bottom of the hierarchy of interests in liquidation or liquidation related scenarios.

78 Section 185 provides for amendment to articles by court order. I see no requirement in that section for a meeting or vote of shareholders of CAIL, quite apart from shareholders of CAC. Further, dissent and appraisal rights are expressly removed in subsection (7). To require a meeting and vote of shareholders and to grant dissent and appraisal rights in circumstances of insolvency would frustrate the object of section 185 as described in the Dickerson Report.

79 In the circumstances of this case, where the majority shareholder holds 82% of the shares, the requirement of a special resolution is meaningless. To require a vote suggests the shares have value. They do not. The formalities of the ABCA serve no useful purpose other than to frustrate the reorganization to the detriment of all stakeholders, contrary to the CCAA.

Section 183 of the ABCA

80 The Minority Shareholders argued in the alternative that if the proposed share reorganization of CAIL were not a cancellation of their shares in CAC and therefore allowed under section 167 of the ABCA, it constituted a "sale, lease, or exchange of substantially all the property" of CAC and thus required the approval of CAC shareholders pursuant to section 183 of the ABCA. The Minority Shareholders suggested that the common shares in CAIL were substantially all of the assets of CAC and that all of those shares were being "exchanged" for $1.00.

81 I disagree with this creative characterization. The proposed transaction is a reorganization as contemplated by section 185 of the ABCA. As recognized in *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154 (Alta. C.A.) aff'd (1988), 70 C.B.R. (N.S.) xxxii (S.C.C.), the fact that the same end might be achieved under another section does not exclude the section to be relied on. A statute may well offer several alternatives to achieve a similar end.

Ontario Securities Commission Policy 9.1

82 The Minority Shareholders also submitted the proposed reorganization constitutes a "related party transaction" under Policy 9.1 of the Ontario Securities Commission. Under the Policy, transactions are subject to disclosure, minority approval and formal valuation requirements which have not been followed here. The Minority Shareholders suggested that the Petitioners were therefore in breach of the Policy unless and until such time as the court is advised of the relevant requirements of the Policy and grants its approval as provided by the Policy.

83 These shareholders asserted that in the absence of evidence of the going concern value of CAIL so as to determine whether that value exceeds the rights of the Preferred Shares of CAIL, the Court should not waive compliance with the Policy.

84 To the extent that this reorganization can be considered a "related party transaction", I have found, for the reasons discussed below under the heading "Fair and Reasonable", that the Plan, including the proposed reorganization, is fair and reasonable and accordingly I would waive the requirements of Policy 9.1.

b. Release

85 Resurgence argued that the release of directors and other third parties contained in the Plan does not comply with the

provisions of the CCAA.

86 The release is contained in section 6.2(2)(ii) of the Plan and states as follows:

> As of the Effective Date, each of the Affected Creditors will be deemed to forever release, waive and discharge all claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action and liabilities...that are based in whole or in part on any act, omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to the Applicants and Subsidiaries, the CCAA Proceedings, or the Plan against:(i) The Applicants and Subsidiaries; (ii) The Directors, Officers and employees of the Applicants or Subsidiaries in each case as of the date of filing (and in addition, those who became Officers and/or Directors thereafter but prior to the Effective Date); (iii) The former Directors, Officers and employees of the Applicants or Subsidiaries, or (iv) the respective current and former professionals of the entities in subclauses (1) to (3) of this s.6.2(2) (including, for greater certainty, the Monitor, its counsel and its current Officers and Directors, and current and former Officers, Directors, employees, shareholders and professionals of the released parties) acting in such capacity.

87 Prior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company. In 1997, section 5.1 was added to the CCAA. Section 5.1 states:

> 5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> (2) A provision for the compromise of claims against directors may not include claims that:
>
> (a) relate to contractual rights of one or more creditors; or
>
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> (3) The Court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

88 Resurgence argued that the form of release does not comply with section 5.1 of the CCAA insofar as it applies to individuals beyond directors and to a broad spectrum of claims beyond obligations of the Petitioners for which their directors are "by law liable". Resurgence submitted that the addition of section 5.1 to the CCAA constituted an exception to a long standing principle and urged the court to therefore interpret s. 5.1 cautiously, if not narrowly. Resurgence relied on *Crabtree (Succession de) c. Barrette*, [1993] 1 S.C.R. 1027 (S.C.C.) at 1044 and *Bruce Agra Foods Inc. v. Everfresh Beverages Inc. (Receiver of)* (1996), 45 C.B.R. (3d) 169 (Ont. Gen. Div.) at para. 5 in this regard.

89 With respect to Resurgence's complaint regarding the breadth of the claims covered by the release, the Petitioners asserted that the release is not intended to override section 5.1(2). Canadian suggested this can be expressly incorporated into the form of release by adding the words "*excluding the claims excepted by s. 5.1(2) of the CCAA*" immediately prior to subsection (iii) and clarifying the language in Section 5.1 of the Plan. Canadian also acknowledged, in response to a concern raised by Canada Customs and Revenue Agency, that in accordance with s. 5.1(1) of the CCAA, directors of CAC and CAIL could only be released from liability arising before March 24, 2000, the date these proceedings commenced. Canadian suggested this was also addressed in the proposed amendment. Canadian did not address the propriety of including individuals in addition to directors in the form of release.

90 In my view it is appropriate to amend the proposed release to expressly comply with section 5. 1(2) of the CCAA and

to clarify Section 5.1 of the Plan as Canadian suggested in its brief. The additional language suggested by Canadian to achieve this result shall be included in the form of order. Canada Customs and Revenue Agency is apparently satisfied with the Petitioners' acknowledgement that claims against directors can only be released to the date of commencement of proceedings under the CCAA, having appeared at this hearing to strongly support the sanctioning of the Plan, so I will not address this concern further.

91 Resurgence argued that its claims fell within the categories of excepted claims in section 5.1(2) of the CCAA and accordingly, its concern in this regard is removed by this amendment. Unsecured creditors JHHD Aircraft Leasing No. 1 and No. 2 suggested there may be possible wrongdoing in the acts of the directors during the restructuring process which should not be immune from scrutiny and in my view this complaint would also be caught by the exception captured in the amendment.

92 While it is true that section 5.2 of the CCAA does not authorize a release of claims against third parties other than directors, it does not prohibit such releases either. The amended terms of the release will not prevent claims from which the CCAA expressly prohibits release. Aside from the complaints of Resurgence, which by their own submissions are addressed in the amendment I have directed, and the complaints of JHHD Aircraft Leasing No. 1 and No. 2, which would also be addressed in the amendment, the terms of the release have been accepted by the requisite majority of creditors and I am loathe to further disturb the terms of the Plan, with one exception.

93 Amex Bank of Canada submitted that the form of release appeared overly broad and might compromise unaffected claims of affected creditors. For further clarification, Amex Bank of Canada's potential claim for defamation is unaffected by the Plan and I am prepared to order Section 6.2(2)(ii) be amended to reflect this specific exception.

3. Fair and Reasonable

94 In determining whether to sanction a plan of arrangement under the CCAA, the court is guided by two fundamental concepts: "fairness" and "reasonableness". While these concepts are always at the heart of the court's exercise of its discretion, their meanings are necessarily shaped by the unique circumstances of each case, within the context of the Act and accordingly can be difficult to distill and challenging to apply. Blair J. described these concepts in *Olympia & York Developments Ltd. v. Royal Trust Co.*, *supra*, at page 9:

> "Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the Companies' Creditors Arrangement Act. Fairness is the quintessential expression of the court's equitable jurisdiction — although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation which make its exercise an exercise in equity — and "reasonableness" is what lends objectivity to the process.

95 The legislation, while conferring broad discretion on the court, offers little guidance. However, the court is assisted in the exercise of its discretion by the purpose of the CCAA: to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and, in many instances, a much broader constituency of affected persons. Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable, economically and socially, to liquidation: *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), [1989] 2 W.W.R. 566 (Alta. Q.B.) at 574; *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*, [1989] 3 W.W.R. 363 (B.C. C.A.) at 368.

96 The sanction of the court of a creditor-approved plan is not to be considered as a rubber stamp process. Although the majority vote that brings the plan to a sanction hearing plays a significant role in the court's assessment, the court will consider other matters as are appropriate in light of its discretion. In the unique circumstances of this case, it is appropriate to consider a number of additional matters:

a. The composition of the unsecured vote;

b. What creditors would receive on liquidation or bankruptcy as compared to the Plan;

c. Alternatives available to the Plan and bankruptcy;

d. Oppression;

e. Unfairness to Shareholders of CAC; and

f. The public interest.

a. Composition of the unsecured vote

97 As noted above, an important measure of whether a plan is fair and reasonable is the parties' approval and the degree to which it has been given. Creditor support creates an inference that the plan is fair and reasonable because the assenting creditors believe that their interests are treated equitably under the plan. Moreover, it creates an inference that the arrangement is economically feasible and therefore reasonable because the creditors are in a better position then the courts to gauge business risk. As stated by Blair J. at page 11 of *Olympia & York Developments Ltd.*, *supra*:

> As other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspect of the Plan or descending into the negotiating arena or substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas.

98 However, given the manner of voting under the CCAA, the court must be cognizant of the treatment of minorities within a class: see for example *Re Quintette Coal Ltd.* (1992), 13 C.B.R. (3d) 146 (B.C. S.C.) and *Re Alabama, New Orleans, Texas & Pacific Junction Railway* (1890), 60 L.J. Ch. 221 (Eng. C.A.). The court can address this by ensuring creditors' claims are properly classified. As well, it is sometimes appropriate to tabulate the vote of a particular class so the results can be assessed from a fairness perspective. In this case, the classification was challenged by Resurgence and I dismissed that application. The vote was also tabulated in this case and the results demonstrate that the votes of Air Canada and the Senior Secured Noteholders, who voted their deficiency in the unsecured class, were decisive.

99 The results of the unsecured vote, as reported by the Monitor, are:

1. For the resolution to approve the Plan: 73 votes (65% in number) representing $494,762,304 in claims (76% in value);

2. Against the resolution: 39 votes (35% in number) representing $156,360,363 in claims (24% in value); and

3. Abstentions: 15 representing $968,036 in value.

100 The voting results as reported by the Monitor were challenged by Resurgence. That application was dismissed.

101 The members of each class that vote in favour of a plan must do so in good faith and the majority within a class must act without coercion in their conduct toward the minority. When asked to assess fairness of an approved plan, the court will not countenance secret agreements to vote in favour of a plan secured by advantages to the creditor: see for example, *Hochberger v. Rittenberg* (1916), 36 D.L.R. 450 (S.C.C.)

102 In *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) at 192-3 aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.), dissenting priority mortgagees argued the plan violated the principle of equality due to an agreement between

the debtor company and another priority mortgagee which essentially amounted to a preference in exchange for voting in favour of the plan. Trainor J. found that the agreement was freely disclosed and commercially reasonable and went on to approve the plan, using the three part test. The British Columbia Court of Appeal upheld this result and in commenting on the minority complaint McEachern J.A. stated at page 206:

> In my view, the obvious benefits of settling rights and keeping the enterprise together as a going concern far outweigh the deprivation of the appellants' wholly illusory rights. In this connection, the learned chambers judge said at p.29:
>
> > I turn to the question of the right to hold the property after an order absolute and whether or not this is a denial of something of that significance that it should affect these proceedings. There is in the material before me some evidence of values. There are the principles to which I have referred, as well as to the rights of majorities and the rights of minorities.
> >
> > Certainly, those minority rights are there, but it would seem to me that in view of the overall plan, in view of the speculative nature of holding property in the light of appraisals which have been given as to value, that this right is something which should be subsumed to the benefit of the majority.

103 Resurgence submitted that Air Canada manipulated the indebtedness of CAIL to assure itself of an affirmative vote. I disagree. I previously ruled on the validity of the deficiency when approving the LOIs and found the deficiency to be valid. I found there was consideration for the assignment of the deficiency claims of the various aircraft financiers to Air Canada, namely the provision of an Air Canada guarantee which would otherwise not have been available until plan sanction. The Monitor reviewed the calculations of the deficiencies and determined they were calculated in a reasonable manner. As such, the court approved those transactions. If the deficiency had instead remained with the aircraft financiers, it is reasonable to assume those claims would have been voted in favour of the plan. Further, it would have been entirely appropriate under the circumstances for the aircraft financiers to have retained the deficiency and agreed to vote in favour of the Plan, with the same result to Resurgence. That the financiers did not choose this method was explained by the testimony of Mr. Carty and Robert Peterson, Chief Financial Officer for Air Canada; quite simply it amounted to a desire on behalf of these creditors to shift the "deal risk" associated with the Plan to Air Canada. The agreement reached with the Senior Secured Noteholders was also disclosed and the challenge by Resurgence regarding their vote in the unsecured class was dismissed There is nothing inappropriate in the voting of the deficiency claims of Air Canada or the Senior Secured Noteholders in the unsecured class. There is no evidence of secret vote buying such as discussed in *Re Northland Properties Ltd.*

104 If the Plan is approved, Air Canada stands to profit in its operation. I do not accept that the deficiency claims were devised to dominate the vote of the unsecured creditor class, however, Air Canada, as funder of the Plan is more motivated than Resurgence to support it. This divergence of views on its own does not amount to bad faith on the part of Air Canada. Resurgence submitted that only the Unsecured Noteholders received 14 cents on the dollar. That is not accurate, as demonstrated by the list of affected unsecured creditors included earlier in these Reasons. The Senior Secured Noteholders did receive other consideration under the Plan, but to suggest they were differently motivated suggests that those creditors did not ascribe any value to their unsecured claims. There is no evidence to support this submission.

105 The good faith of Resurgence in its vote must also be considered. Resurgence acquired a substantial amount of its claim after the failure of the Onex bid, when it was aware that Canadian's financial condition was rapidly deteriorating. Thereafter, Resurgence continued to purchase a substantial amount of this highly distressed debt. While Mr. Symington maintained that he bought because he thought the bonds were a good investment, he also acknowledged that one basis for purchasing was the hope of obtaining a blocking position sufficient to veto a plan in the proposed debt restructuring. This was an obvious ploy for leverage with the Plan proponents

106 The authorities which address minority creditors' complaints speak of "substantial injustice" (*Re Keddy Motor Inns Ltd.* (1992), 13 C.B.R. (3d) 245 (N.S. C.A.), "confiscation" of rights (*Re Campeau Corp.* (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.); *Re SkyDome Corp.* (March 21, 1999), Doc. 98-CL-3179 (Ont. Gen. Div. [Commercial List])) and majorities

"feasting upon" the rights of the minority (*Re Quintette Coal Ltd.* (1992), 13 C.B.R. (3d) 146 (B.C. S.C.). Although it cannot be disputed that the group of Unsecured Noteholders represented by Resurgence are being asked to accept a significant reduction of their claims, as are all of the affected unsecured creditors, I do not see a "substantial injustice", nor view their rights as having been "confiscated" or "feasted upon" by being required to succumb to the wishes of the majority in their class. No bad faith has been demonstrated in this case. Rather, the treatment of Resurgence, along with all other affected unsecured creditors, represents a reasonable balancing of interests. While the court is directed to consider whether there is an injustice being worked within a class, it must also determine whether there is an injustice with respect the stakeholders as a whole. Even if a plan might at first blush appear to have that effect, when viewed in relation to all other parties, it may nonetheless be considered appropriate and be approved: *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.) and *Re Northland Properties Ltd.*, *supra* at 9.

107 Further, to the extent that greater or discrete motivation to support a Plan may be seen as a conflict, the Court should take this same approach and look at the creditors as a whole and to the objecting creditors specifically and determine if their rights are compromised in an attempt to balance interests and have the pain of compromise borne equally.

108 Resurgence represents 58.2% of the Unsecured Noteholders or $96 million in claims. The total claim of the Unsecured Noteholders ranges from $146 million to $161 million. The affected unsecured class, excluding aircraft financing, tax claims, the noteholders and claims under $50,000, ranges from $116.3 million to $449.7 million depending on the resolutions of certain claims by the Claims Officer. Resurgence represents between 15.7% - 35% of that portion of the class.

109 The total affected unsecured claims, excluding tax claims, but including aircraft financing and noteholder claims including the unsecured portion of the Senior Secured Notes, ranges from $673 million to $1,007 million. Resurgence represents between 9.5% - 14.3% of the total affected unsecured creditor pool. These percentages indicate that at its very highest in a class excluding Air Canada's assigned claims and Senior Secured's deficiency, Resurgence would only represent a maximum of 35% of the class. In the larger class of affected unsecured it is significantly less. Viewed in relation to the class as a whole, there is no injustice being worked against Resurgence.

110 The thrust of the Resurgence submissions suggests a mistaken belief that they will get more than 14 cents on liquidation. This is not borne out by the evidence and is not reasonable in the context of the overall Plan.

b. Receipts on liquidation or bankruptcy

111 As noted above, the Monitor prepared and circulated a report on the Plan which contained a summary of a liquidation analysis outlining the Monitor's projected realizations upon a liquidation of CAIL ("Liquidation Analysis").

112 The Liquidation Analysis was based on: (1) the draft unaudited financial statements of Canadian at March 31, 2000; (2) the distress values reported in independent appraisals of aircraft and aircraft related assets obtained by CAIL in January, 2000; (3) a review of CAIL's aircraft leasing and financing documents; and (4) discussions with CAIL Management.

113 Prior to and during the application for sanction, the Monitor responded to various requests for information by parties involved. In particular, the Monitor provided a copy of the Liquidation Analysis to those who requested it. Certain of the parties involved requested the opportunity to question the Monitor further, particularly in respect to the Liquidation Analysis and this court directed a process for the posing of those questions.

114 While there were numerous questions to which the Monitor was asked to respond, there were several areas in which Resurgence and the Minority Shareholders took particular issue: pension plan surplus, CRAL, international routes and tax pools. The dissenting groups asserted that these assets represented overlooked value to the company on a liquidation basis or on a going concern basis.

Pension Plan Surplus

115 The Monitor did not attribute any value to pension plan surplus when it prepared the Liquidation Analysis, for the following reasons:

> 1) The summaries of the solvency surplus/deficit positions indicated a cumulative net deficit position for the seven registered plans, after consideration of contingent liabilities;
>
> 2) The possibility, based on the previous splitting out of the seven plans from a single plan in 1988, that the plans could be held to be consolidated for financial purposes, which would remove any potential solvency surplus since the total estimated contingent liabilities exceeded the total estimated solvency surplus;
>
> 3) The actual calculations were prepared by CAIL's actuaries and actuaries representing the unions could conclude liabilities were greater; and
>
> 4) CAIL did not have a legal opinion confirming that surpluses belonged to CAIL.

116 The Monitor concluded that the entitlement question would most probably have to be settled by negotiation and/or litigation by the parties. For those reasons, the Monitor took a conservative view and did not attribute an asset value to pension plans in the Liquidation Analysis. The Monitor also did not include in the Liquidation Analysis any amount in respect of the claim that could be made by members of the plan where there is an apparent deficit after deducting contingent liabilities.

117 The issues in connection with possible pension surplus are: (1) the true amount of any of the available surplus; and (2) the entitlement of Canadian to any such amount.

118 It is acknowledged that surplus prior to termination can be accessed through employer contribution holidays, which Canadian has taken to the full extent permitted. However, there is no basis that has been established for any surplus being available to be withdrawn from an ongoing pension plan. On a pension plan termination, the amount available as a solvency surplus would first have to be further reduced by various amounts to determine whether there was in fact any true surplus available for distribution. Such reductions include contingent benefits payable in accordance with the provisions of each respective pension plan, any extraordinary plan wind up cost, the amounts of any contribution holidays taken which have not been reflected, and any litigation costs.

119 Counsel for all of Canadian's unionized employees confirmed on the record that the respective union representatives can be expected to dispute all of these calculations as well as to dispute entitlement.

120 There is a suggestion that there might be a total of $40 million of surplus remaining from all pension plans after such reductions are taken into account. Apart from the issue of entitlement, this assumes that the plans can be treated separately, that a surplus could in fact be realized on liquidation and that the Towers Perrin calculations are not challenged. With total pension plan assets of over $2 billion, a surplus of $40 million could quickly disappear with relatively minor changes in the market value of the securities held or calculation of liabilities. In the circumstances, given all the variables, I find that the existence of any surplus is doubtful at best and I am satisfied that the Monitor's Liquidation Analysis ascribing it zero value is reasonable in this circumstances.

CRAL

121 The Monitor's liquidation analysis as at March 31, 2000 of CRAL determined that in a distress situation, after payments were made to its creditors, there would be a deficiency of approximately $30 million to pay Canadian Regional's unsecured creditors, which include a claim of approximately $56.5 million due to Canadian. In arriving at this conclusion, the Monitor reviewed internally prepared unaudited financial statements of CRAL as of March 31, 2000, the Houlihan Lokey

Howard and Zukin, distress valuation dated January 21, 2000 and the Simat Helliesen and Eichner valuation of selected CAIL assets dated January 31, 2000 for certain aircraft related materials and engines, rotables and spares. The Avitas Inc., and Avmark Inc. reports were used for the distress values on CRAL's aircraft and the CRAL aircraft lease documentation. The Monitor also performed its own analysis of CRAL's liquidation value, which involved analysis of the reports provided and details of its analysis were outlined in the Liquidation Analysis.

122 For the purpose of the Liquidation Analysis, the Monitor did not consider other airlines as comparable for evaluation purposes, as the Monitor's valuation was performed on a distressed sale basis. The Monitor further assumed that without CAIL's national and international network to feed traffic into and a source of standby financing, and considering the inevitable negative publicity which a failure of CAIL would produce, CRAL would immediately stop operations as well.

123 Mr. Peterson testified that CRAL was worth $260 million to Air Canada, based on Air Canada being a special buyer who could integrate CRAL, on a going concern basis, into its network. The Liquidation Analysis assumed the windup of each of CRAL and CAIL, a completely different scenario.

124 There is no evidence that there was a potential purchaser for CRAL who would be prepared to acquire CRAL or the operations of CRAL 98 for any significant sum or at all. CRAL has value to CAIL, and in turn, could provide value to Air Canada, but this value is attributable to its ability to feed traffic to and take traffic from the national and international service operated by CAIL. In my view, the Monitor was aware of these features and properly considered these factors in assessing the value of CRAL on a liquidation of CAIL.

125 If CAIL were to cease operations, the evidence is clear that CRAL would be obliged to do so as well immediately. The travelling public, shippers, trade suppliers, and others would make no distinction between CAIL and CRAL and there would be no going concern for Air Canada to acquire.

International Routes

126 The Monitor ascribed no value to Canadian's international routes in the Liquidation Analysis. In discussions with CAIL management and experts available in its aviation group, the Monitor was advised that international routes are unassignable licenses and not property rights. They do not appear as assets in CAIL's financials. Mr. Carty and Mr. Peterson explained that routes and slots are *not* treated as assets by airlines, but rather as rights in the control of the Government of Canada. In the event of bankruptcy/receivership of CAIL, CAIL's trustee/receiver could not sell them and accordingly they are of no value to CAIL.

127 Evidence was led that on June 23, 1999 Air Canada made an offer to purchase CAIL's international routes for $400 million cash plus $125 million for aircraft spares and inventory, along with the assumption of certain debt and lease obligations for the aircraft required for the international routes. CAIL evaluated the Air Canada offer and concluded that the proposed purchase price was insufficient to permit it to continue carrying on business in the absence of its international routes. Mr. Carty testified that something in the range of $2 billion would be required.

128 CAIL was in desperate need of cash in mid December, 1999. CAIL agreed to sell its Toronto — Tokyo route for $25 million. The evidence, however, indicated that the price for the Toronto — Tokyo route was not derived from a valuation, but rather was what CAIL asked for, based on its then-current cash flow requirements. Air Canada and CAIL obtained Government approval for the transfer on December 21, 2000.

129 Resurgence complained that despite this evidence of offers for purchase and actual sales of international routes and other evidence of sales of slots, the Monitor did not include Canadian's international routes in the Liquidation Analysis and only attributed a total of $66 million for all intangibles of Canadian. There is some evidence that slots at some foreign airports may be bought or sold in some fashion. However, there is insufficient evidence to attribute any value to other slots which CAIL has at foreign airports. It would appear given the regulation of the airline industry, in particular, the *Aeronautics*

Act and the *Canada Transportation Act*, that international routes for a Canadian air carrier only have full value to the extent of federal government support for the transfer or sale, and its preparedness to allow the then-current license holder to sell rather than act unilaterally to change the designation. The federal government was prepared to allow CAIL to sell its Toronto — Tokyo route to Air Canada in light of CAIL's severe financial difficulty and the certainty of cessation of operations during the Christmas holiday season in the absence of such a sale.

130 Further, statements made by CAIL in mid-1999 as to the value of its international routes and operations in response to an offer by Air Canada, reflected the amount CAIL needed to sustain liquidity without its international routes and was not a representation of market value of what could realistically be obtained from an arms length purchaser. The Monitor concluded on its investigation that CAIL's Narida and Heathrow slots had a realizable value of $66 million, which it included in the Liquidation Analysis. I find that this conclusion is supportable and that the Monitor properly concluded that there were no other rights which ought to have been assigned value.

Tax Pools

131 There are four tax pools identified by Resurgence and the Minority Shareholders that are material: capital losses at the CAC level, undepreciated capital cost pools, operating losses incurred by Canadian and potential for losses to be reinstated upon repayment of fuel tax rebates by CAIL.

Capital Loss Pools

132 The capital loss pools at CAC will not be available to Air Canada since CAC is to be left out of the corporate reorganization and will be severed from CAIL. Those capital losses can essentially only be used to absorb a portion of the debt forgiveness liability associated with the restructuring. CAC, who has virtually all of its senior debt compromised in the plan, receives compensation for this small advantage, which cost them nothing.

Undepreciated capital cost ("UCC")

133 There is no benefit to Air Canada in the pools of UCC unless it were established that the UCC pools are in excess of the fair market value of the relevant assets, since Air Canada could create the same pools by simply buying the assets on a liquidation at fair market value. Mr. Peterson understood this pool of UCC to be approximately $700 million. There is no evidence that the UCC pool, however, could be considered to be a source of benefit. There is no evidence that this amount is any greater than fair market value.

Operating Losses

134 The third tax pool complained of is the operating losses. The debt forgiven as a result of the Plan will erase any operating losses from prior years to the extent of such forgiven debt.

Fuel tax rebates

135 The fourth tax pool relates to the fuel tax rebates system taken advantage of by CAIL in past years. The evidence is that on a consolidated basis the total potential amount of this pool is $297 million. According to Mr. Carty's testimony, CAIL has not been taxable in his ten years as Chief Financial Officer. The losses which it has generated for tax purposes have been sold on a 10 - 1 basis to the government in order to receive rebates of excise tax paid for fuel. The losses can be restored retroactively if the rebates are repaid, but the losses can only be carried forward for a maximum of seven years. The evidence of Mr. Peterson indicates that Air Canada has no plan to use those alleged losses and in order for them to be useful to Air Canada, Air Canada would have to complete a legal merger with CAIL, which is not provided for in the plan and is not contemplated by Air Canada until some uncertain future date. In my view, the Monitor's conclusion that there was no value to any tax pools in the Liquidation Analysis is sound.

136 Those opposed to the Plan have raised the spectre that there may be value unaccounted for in this liquidation analysis or otherwise. Given the findings above, this is merely speculation and is unsupported by any concrete evidence.

c. Alternatives to the Plan

137 When presented with a plan, affected stakeholders must weigh their options in the light of commercial reality. Those options are typically liquidation measured against the plan proposed. If not put forward, a hope for a different or more favourable plan is not an option and no basis upon which to assess fairness. On a purposive approach to the CCAA, what is fair and reasonable must be assessed against the effect of the Plan on the creditors and their various claims, in the context of their response to the plan. Stakeholders are expected to decide their fate based on realistic, commercially viable alternatives (generally seen as the prime motivating factor in any business decision) and not on speculative desires or hope for the future. As Farley J. stated in *T. Eaton Co.* (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) at paragraph 6:

> One has to be cognizant of the function of a balancing of their prejudices. Positions must be realistically assessed and weighed, all in the light of what an alternative to a successful plan would be. Wishes are not a firm foundation on which to build a plan; nor are ransom demands.

138 The evidence is overwhelming that all other options have been exhausted and have resulted in failure. The concern of those opposed suggests that there is a better plan that Air Canada can put forward. I note that significant enhancements were made to the plan during the process. In any case, this is the Plan that has been voted on. The evidence makes it clear that there is not another plan forthcoming. As noted by Farley J. in *T. Eaton Co.*, *supra*, "no one presented an alternative plan for the interested parties to vote on" (para. 8).

d. Oppression

Oppression and the CCAA

139 Resurgence and the Minority Shareholders originally claimed that the Plan proponents, CAC and CAIL and the Plan supporters 853350 and Air Canada had oppressed, unfairly disregarded or unfairly prejudiced their interests, under Section 234 of the ABCA. The Minority Shareholders (for reasons that will appear obvious) have abandoned that position.

140 Section 234 gives the court wide discretion to remedy corporate conduct that is unfair. As remedial legislation, it attempts to balance the interests of shareholders, creditors and management to ensure adequate investor protection and maximum management flexibility. The Act requires the court to judge the conduct of the company and the majority in the context of equity and fairness: *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28 (Alta. Q.B.). Equity and fairness are measured against or considered in the context of the rights, interests or reasonable expectations of the complainants: *Diligenti v. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36 (B.C. S.C.).

141 The starting point in any determination of oppression requires an understanding as to what the rights, interests, and reasonable expectations are and what the damaging or detrimental effect is on them. MacDonald J. stated in *First Edmonton Place*, *supra* at 57:

> In deciding what is unfair, the history and nature of the corporation, the essential nature of the relationship between the corporation and the creditor, the type of rights affected in general commercial practice should all be material. More concretely, the test of unfair prejudice or unfair disregard should encompass the following considerations: The protection of the underlying expectation of a creditor in the arrangement with the corporation, the extent to which the acts complained of were unforeseeable where the creditor could not reasonably have protected itself from such acts and the detriment to the interests of the creditor.

142 While expectations vary considerably with the size, structure, and value of the corporation, all expectations must be reasonably and objectively assessed: *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (Ont. C.A.).

143 Where a company is insolvent, only the creditors maintain a meaningful stake in its assets. Through the mechanism of liquidation or insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder. The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims are not being paid in full. It is through the lens of insolvency that the court must consider whether the acts of the company are in fact oppressive, unfairly prejudicial or unfairly disregarded. CCAA proceedings have recognized that shareholders may not have "a true interest to be protected" because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company: *Royal Oak Mines Ltd., supra*, para. 4., *Re Cadillac Fairview Inc.* (March 7, 1995), Doc. B28/95 (Ont. Gen. Div. [Commercial List]), and *T. Eaton Company, supra.*

144 To avail itself of the protection of the CCAA, a company must be insolvent. The CCAA considers the hierarchy of interests and assesses fairness and reasonableness in that context. The court's mandate not to sanction a plan in the absence of fairness necessitates the determination as to whether the complaints of dissenting creditors and shareholders are legitimate, bearing in mind the company's financial state. The articulated purpose of the Act and the jurisprudence interpreting it, "widens the lens" to balance a broader range of interests that includes creditors and shareholders and beyond to the company, the employees and the public, and tests the fairness of the plan with reference to its impact on all of the constituents.

145 It is through the lens of insolvency legislation that the rights and interests of both shareholders and creditors must be considered. The reduction or elimination of rights of both groups is a function of the insolvency and not of oppressive conduct in the operation of the CCAA. The antithesis of oppression is fairness, the guiding test for judicial sanction. If a plan unfairly disregards or is unfairly prejudicial it will not be approved. However, the court retains the power to compromise or prejudice rights to effect a broader purpose, the restructuring of an insolvent company, provided that the plan does so in a fair manner.

Oppression allegations by Resurgence

146 Resurgence alleges that it has been oppressed or had its rights disregarded because the Petitioners and Air Canada disregarded the specific provisions of their trust indenture, that Air Canada and 853350 dealt with other creditors outside of the CCAA, refusing to negotiate with Resurgence and that they are generally being treated inequitably under the Plan.

147 The trust indenture under which the Unsecured Notes were issued required that upon a "change of control", 101% of the principal owing thereunder, plus interest would be immediately due and payable. Resurgence alleges that Air Canada, through 853350, caused CAC and CAIL to purposely fail to honour this term. Canadian acknowledges that the trust indenture was breached. On February 1, 2000, Canadian announced a moratorium on payments to lessors and lenders, including the Unsecured Noteholders. As a result of this moratorium, Canadian defaulted on the payments due under its various credit facilities and aircraft leases.

148 The moratorium was not directed solely at the Unsecured Noteholders. It had the same impact on other creditors, secured and unsecured. Canadian, as a result of the moratorium, breached other contractual relationships with various creditors. The breach of contract is not sufficient to found a claim for oppression in this case. Given Canadian's insolvency, which Resurgence recognized, it cannot be said that there was a reasonable expectation that it would be paid in full under the terms of the trust indenture, particularly when Canadian had ceased making payments to other creditors as well.

149 It is asserted that because the Plan proponents engaged in a restructuring of Canadian's debt before the filing under the CCAA, that its use of the Act for only a small group of creditors, which includes Resurgence is somehow oppressive.

150 At the outset, it cannot be overlooked that the CCAA does not require that a compromise be proposed to *all* creditors of an insolvent company. The CCAA is a flexible, remedial statute which recognizes the unique circumstances that lead to and away from insolvency.

151 Next, Air Canada made it clear beginning in the fall of 1999 that Canadian would have to complete a financial restructuring so as to permit Air Canada to acquire CAIL on a financially sound basis and as a wholly owned subsidiary. Following the implementation of the moratorium, absent which Canadian could not have continued to operate, Canadian and Air Canada commenced efforts to restructure significant obligations by consent. They perceived that further damage to public confidence that a CCAA filing could produce, required Canadian to secure a substantial measure of creditor support in advance of any public filing for court protection. Before the Petitioners started the CCAA proceedings on March 24, 2000, Air Canada, CAIL and lessors of 59 aircraft in its fleet had reached agreement in principle on the restructuring plan.

152 The purpose of the CCAA is to create an environment for negotiations and compromise. Often it is the stay of proceedings that creates the necessary stability for that process to unfold. Negotiations with certain key creditors in advance of the CCAA filing, rather than being oppressive or conspiratorial, are to be encouraged as a matter of principle if their impact is to provide a firm foundation for a restructuring. Certainly in this case, they were of critical importance, staving off liquidation, preserving cash flow and allowing the Plan to proceed. Rather than being detrimental or prejudicial to the interests of the other stakeholders, including Resurgence, it was beneficial to Canadian and all of its stakeholders.

153 Resurgence complained that certain transfers of assets to Air Canada and its actions in consolidating the operations of the two entities prior to the initiation of the CCAA proceedings were unfairly prejudicial to it.

154 The evidence demonstrates that the sales of the Toronto — Tokyo route, the Dash 8s and the simulators were at the suggestion of Canadian, who was in desperate need of operating cash. Air Canada paid what Canadian asked, based on its cash flow requirements. The evidence established that absent the injection of cash at that critical juncture, Canadian would have ceased operations. It is for that reason that the Government of Canada willingly provided the approval for the transfer on December 21, 2000.

155 Similarly, the renegotiation of CAIL's aircraft leases to reflect market rates supported by Air Canada covenant or guarantee has been previously dealt with by this court and found to have been in the best interest of Canadian, not to its detriment. The evidence establishes that the financial support and corporate integration that has been provided by Air Canada was not only in Canadian's best interest, but its only option for survival. The suggestion that the renegotiations of these leases, various sales and the operational realignment represents an assumption of a benefit by Air Canada to the detriment of Canadian is not supported by the evidence.

156 I find the transactions predating the CCAA proceedings, were in fact Canadian's life blood in ensuring some degree of liquidity and stability within which to conduct an orderly restructuring of its debt. There was no detriment to Canadian or to its creditors, including its unsecured creditors. That Air Canada and Canadian were so successful in negotiating agreements with their major creditors, including aircraft financiers, without resorting to a stay under the CCAA underscores the serious distress Canadian was in and its lenders recognition of the viability of the proposed Plan.

157 Resurgence complained that other significant groups held negotiations with Canadian. The evidence indicates that a meeting was held with Mr. Symington, Managing Director of Resurgence, in Toronto in March 2000. It was made clear to Resurgence that the pool of unsecured creditors would be somewhere between $500 and $700 million and that Resurgence would be included within that class. To the extent that the versions of this meeting differ, I prefer and accept the evidence of Mr. Carty. Resurgence wished to play a significant role in the debt restructuring and indicated it was prepared to utilize the litigation process to achieve a satisfactory result for itself. It is therefore understandable that no further negotiations took place. Nevertheless, the original offer to affected unsecured creditors has been enhanced since the filing of the plan on April 25, 2000. The enhancements to unsecured claims involved the removal of the cap on the unsecured pool and an increase from

12 to 14 cents on the dollar.

158 The findings of the Commissioner of Competition establishes beyond doubt that absent the financial support provided by Air Canada, Canadian would have failed in December 1999. I am unable to find on the evidence that Resurgence has been oppressed. The complaint that Air Canada has plundered Canadian and robbed it of its assets is not supported but contradicted by the evidence. As described above, the alternative is liquidation and in that event the Unsecured Noteholders would receive between one and three cents on the dollar. The Monitor's conclusions in this regard are supportable and I accept them.

e. Unfairness to Shareholders

159 The Minority Shareholders essentially complained that they were being unfairly stripped of their only asset in CAC — the shares of CAIL. They suggested they were being squeezed out by the new CAC majority shareholder 853350, without any compensation or any vote. When the reorganization is completed as contemplated by the Plan, their shares will remain in CAC but CAC will be a bare shell.

160 They further submitted that Air Canada's cash infusion, the covenants and guarantees it has offered to aircraft financiers, and the operational changes (including integration of schedules, "quick win" strategies, and code sharing) have all added significant value to CAIL to the benefit of its stakeholders, including the Minority Shareholders. They argued that they should be entitled to continue to participate into the future and that such an expectation is legitimate and consistent with the statements and actions of Air Canada in regard to integration. By acting to realign the airlines before a corporate reorganization, the Minority Shareholders asserted that Air Canada has created the expectation that it is prepared to consolidate the airlines with the participation of a minority. The Minority Shareholders take no position with respect to the debt restructuring under the CCAA, but ask the court to sever the corporate reorganization provisions contained in the Plan.

161 Finally, they asserted that CAIL has increased in value due to Air Canada's financial contributions and operational changes and that accordingly, before authorizing the transfer of the CAIL shares to 853350, the current holders of the CAIL Preferred Shares, the court must have evidence before it to justify a transfer of 100% of the equity of CAIL to the Preferred Shares.

162 That CAC will have its shareholding in CAIL extinguished and emerge a bare shell is acknowledged. However, the evidence makes it abundantly clear that those shares, CAC's "only asset", have no value. That the Minority Shareholders are content to have the debt restructuring proceed suggests by implication that they do not dispute the insolvency of both Petitioners, CAC and CAIL.

163 The Minority Shareholders base their expectation to remain as shareholders on the actions of Air Canada in acquiring only 82% of the CAC shares before integrating certain of the airlines' operations. Mr. Baker (who purchased *after* the Plan was filed with the Court and almost six months after the take over bid by Air Canada) suggested that the contents of the bid circular misrepresented Air Canada's future intentions to its shareholders. The two dollar price offered and paid per share in the bid must be viewed somewhat skeptically and in the context in which the bid arose. It does not support the speculative view that some shareholders hold, that somehow, despite insolvency, their shares have some value on a going concern basis. In any event, any claim for misrepresentation that Minority Shareholders might have arising from the take over bid circular against Air Canada or 853350, if any, is unaffected by the Plan and may be pursued after the stay is lifted.

164 In considering Resurgence's claim of oppression I have already found that the financial support of Air Canada during this restructuring period has benefited Canadian and its stakeholders. Air Canada's financial support and the integration of the two airlines has been critical to keeping Canadian afloat. The evidence makes it abundantly clear that without this support Canadian would have ceased operations. However it has not transformed CAIL or CAC into solvent companies.

165 The Minority Shareholders raise concerns about assets that are ascribed limited or no value in the Monitor's report as

does Resurgence (although to support an opposite proposition). Considerable argument was directed to the future operational savings and profitability forecasted for Air Canada, its subsidiaries and CAIL and its subsidiaries. Mr. Peterson estimated it to be in the order of $650 to $800 million on an annual basis, commencing in 2001. The Minority Shareholders point to the tax pools of a restructured company that they submit will be of great value once CAIL becomes profitable as anticipated. They point to a pension surplus that at the very least has value by virtue of the contribution holidays that it affords. They also look to the value of the compromised claims of the restructuring itself which they submit are in the order of $449 million. They submit these cumulative benefits add value, currently or at least realizable in the future. In sharp contrast to the Resurgence position that these acts constitute oppressive behaviour, the Minority Shareholders view them as enhancing the value of their shares. They go so far as to suggest that there may well be a current going concern value of the CAC shares that has been conveniently ignored or unquantified and that the Petitioners must put evidence before the court as to what that value is.

166 These arguments overlook several important facts, the most significant being that CAC and CAIL are insolvent and will remain insolvent until the debt restructuring is fully implemented. These companies are not just technically or temporarily insolvent, they are massively insolvent. Air Canada will have invested upward of $3 billion to complete the restructuring, while the Minority Shareholders have contributed nothing. Further, it was a fundamental condition of Air Canada's support of this Plan that it become the sole owner of CAIL. It has been suggested by some that Air Canada's share purchase at two dollars per share in December 1999 was unfairly prejudicial to CAC and CAIL's creditors. Objectively, any expectation by Minority Shareholders that they should be able to participate in a restructured CAIL is not reasonable.

167 The Minority Shareholders asserted the plan is unfair because the effect of the reorganization is to extinguish the common shares of CAIL held by CAC and to convert the voting and non-voting Preferred Shares of CAIL into common shares of CAIL. They submit there is no expert valuation or other evidence to justify the transfer of CAIL's equity to the Preferred Shares. There is no equity in the CAIL shares to transfer. The year end financials show CAIL's shareholder equity at a deficit of $790 million. The Preferred Shares have a liquidation preference of $347 million. There is no evidence to suggest that Air Canada's interim support has rendered either of these companies solvent, it has simply permitted operations to continue. In fact, the unaudited consolidated financial statements of CAC for the quarter ended March 31, 2000 show total shareholders equity went from a deficit of $790 million to a deficit of $1.214 million, an erosion of $424 million.

168 The Minority Shareholders' submission attempts to compare and contrast the rights and expectations of the CAIL preferred shares as against the CAC common shares. This is not a meaningful exercise; the Petitioners are not submitting that the Preferred Shares have value and the evidence demonstrates unequivocally that they do not. The Preferred Shares are merely being utilized as a corporate vehicle to allow CAIL to become a wholly owned subsidiary of Air Canada. For example, the same result could have been achieved by issuing new shares rather than changing the designation of 853350's Preferred Shares in CAIL.

169 The Minority Shareholders have asked the court to sever the reorganization from the debt restructuring, to permit them to participate in whatever future benefit might be derived from the restructured CAIL. However, a fundamental condition of this Plan and the expressed intention of Air Canada on numerous occasions is that CAIL become a wholly owned subsidiary. To suggest the court ought to sever this reorganization from the debt restructuring fails to account for the fact that it is not two plans but an integral part of a single plan. To accede to this request would create an injustice to creditors whose claims are being seriously compromised, and doom the entire Plan to failure. Quite simply, the Plan's funder will not support a severed plan.

170 Finally, the future profits to be derived by Air Canada are not a relevant consideration. While the object of any plan under the CCAA is to create a viable emerging entity, the germane issue is what a prospective purchaser is prepared to pay in the circumstances. Here, we have the one and only offer on the table, Canadian's last and only chance. The evidence demonstrates this offer is preferable to those who have a remaining interest to a liquidation. Where secured creditors have compromised their claims and unsecured creditors are accepting 14 cents on the dollar in a potential pool of unsecured claims totalling possibly in excess of $1 billion, it is not unfair that shareholders receive nothing.

e. The Public Interest

2000 CarswellAlta 662, 2000 ABQB 442, [2000] A.W.L.D. 654, [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201, [2000] A.J. No. 771, 98 A.C.W.S. (3d) 334

171 In this case, the court cannot limit its assessment of fairness to how the Plan affects the direct participants. The business of the Petitioners as a national and international airline employing over 16,000 people must be taken into account.

172 In his often cited article, *Reorganizations Under the Companies' Creditors Arrangement Act* (1947), 25 Can.Bar R.ev. 587 at 593 Stanley Edwards stated:

> Another reason which is usually operative in favour of reorganization is the interest of the public in the continuation of the enterprise, particularly if the company supplies commodities or services that are necessary or desirable to large numbers of consumers, or if it employs large numbers of workers who would be thrown out of employment by its liquidation. This public interest may be reflected in the decisions of the creditors and shareholders of the company and is undoubtedly a factor which a court would wish to consider in deciding whether to sanction an arrangement under the C.C.A.A.

173 In *Re Repap British Columbia Inc.* (1998), 1 C.B.R. (4th) 49 (B.C. S.C.) the court noted that the fairness of the plan must be measured against the overall economic and business environment and against the interests of the citizens of British Columbia who are affected as "shareholders" of the company, and creditors, of suppliers, employees and competitors of the company. The court approved the plan even though it was unable to conclude that it was necessarily fair and reasonable. In *Re Quintette Coal Ltd., supra*, Thackray J. acknowledged the significance of the coal mine to the British Columbia economy, its importance to the people who lived and worked in the region and to the employees of the company and their families. Other cases in which the court considered the public interest in determining whether to sanction a plan under the CCAA include *Re Canadian Red Cross Society / Société Canadienne de la Croix-Rouge* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) and *Algoma Steel Corp. v. Royal Bank* (April 16, 1992), Doc. Toronto B62/91-A (Ont. Gen. Div.)

174 The economic and social impacts of a plan are important and legitimate considerations. Even in insolvency, companies are more than just assets and liabilities. The fate of a company is inextricably tied to those who depend on it in various ways. It is difficult to imagine a case where the economic and social impacts of a liquidation could be more catastrophic. It would undoubtedly be felt by Canadian air travellers across the country. The effect would not be a mere ripple, but more akin to a tidal wave from coast to coast that would result in chaos to the Canadian transportation system.

175 More than sixteen thousand unionized employees of CAIL and CRAL appeared through counsel. The unions and their membership strongly support the Plan. The unions represented included the Airline Pilots Association International, the International Association of Machinists and Aerospace Workers, Transportation District 104, Canadian Union of Public Employees, and the Canadian Auto Workers Union. They represent pilots, ground workers and cabin personnel. The unions submit that it is essential that the employee protections arising from the current restructuring of Canadian not be jeopardized by a bankruptcy, receivership or other liquidation. Liquidation would be devastating to the employees and also to the local and national economies. The unions emphasize that the Plan safeguards the employment and job dignity protection negotiated by the unions for their members. Further, the court was reminded that the unions and their members have played a key role over the last fifteen years or more in working with Canadian and responsible governments to ensure that Canadian survived and jobs were maintained.

176 The Calgary and Edmonton Airport authorities, which are not for profit corporations, also supported the Plan. CAIL's obligations to the airport authorities are not being compromised under the Plan. However, in a liquidation scenario, the airport authorities submitted that a liquidation would have severe financial consequences to them and have potential for severe disruption in the operation of the airports.

177 The representations of the Government of Canada are also compelling. Approximately one year ago, CAIL approached the Transport Department to inquire as to what solution could be found to salvage their ailing company. The Government saw fit to issue an order in council, pursuant to section 47 of the *Transportation Act*, which allowed an opportunity for CAIL to approach other entities to see if a permanent solution could be found. A standing committee in the House of Commons reviewed a framework for the restructuring of the airline industry, recommendations were made and undertakings

were given by Air Canada. The Government was driven by a mandate to protect consumers and promote competition. It submitted that the Plan is a major component of the industry restructuring. Bill C-26, which addresses the restructuring of the industry, has passed through the House of Commons and is presently before the Senate. The Competition Bureau has accepted that Air Canada has the only offer on the table and has worked very closely with the parties to ensure that the interests of consumers, employees, small carriers, and smaller communities will be protected.

178 In summary, in assessing whether a plan is fair and reasonable, courts have emphasized that perfection is not required: see for example *Re Wandlyn Inns Ltd.* (1992), 15 C.B.R. (3d) 316 (N.B. Q.B.), *Quintette Coal*, *supra* and *Repap*, *supra*. Rather, various rights and remedies must be sacrificed to varying degrees to result in a reasonable, viable compromise for all concerned. The court is required to view the "big picture" of the plan and assess its impact as a whole. I return to *Algoma Steel v. Royal Bank*, *supra* at 9 in which Farley J. endorsed this approach:

> What might appear on the surface to be unfair to one party when viewed in relation to all other parties may be considered to be quite appropriate.

179 Fairness and reasonableness are not abstract notions, but must be measured against the available commercial alternatives. The triggering of the statute, namely insolvency, recognizes a fundamental flaw within the company. In these imperfect circumstances there can never be a perfect plan, but rather only one that is supportable. As stated in *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) at 173:

> A plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment.

180 I find that in all the circumstances, the Plan is fair and reasonable.

IV. Conclusion

181 The Plan has obtained the support of many affected creditors, including virtually all aircraft financiers, holders of executory contracts, AMR, Loyalty Group and the Senior Secured Noteholders.

182 Use of these proceedings has avoided triggering more than $1.2 billion of incremental claims. These include claims of passengers with pre-paid tickets, employees, landlords and other parties with ongoing executory contracts, trade creditors and suppliers.

183 This Plan represents a solid chance for the continued existence of Canadian. It preserves CAIL as a business entity. It maintains over 16,000 jobs. Suppliers and trade creditors are kept whole. It protects consumers and preserves the integrity of our national transportation system while we move towards a new regulatory framework. The extensive efforts by Canadian and Air Canada, the compromises made by stakeholders both within and without the proceedings and the commitment of the Government of Canada inspire confidence in a positive result.

184 I agree with the opposing parties that the Plan is not perfect, but it is neither illegal nor oppressive. Beyond its fair and reasonable balancing of interests, the Plan is a result of bona fide efforts by all concerned and indeed is the only alternative to bankruptcy as ten years of struggle and creative attempts at restructuring by Canadian clearly demonstrate. This Plan is one step toward a new era of airline profitability that hopefully will protect consumers by promoting affordable and accessible air travel to all Canadians.

185 The Plan deserves the sanction of this court and it is hereby granted. The application pursuant to section 185 of the ABCA is granted. The application for declarations sought by Resurgence are dismissed. The application of the Minority Shareholders is dismissed.

2000 CarswellAlta 662, 2000 ABQB 442, [2000] A.W.L.D. 654, [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201, [2000] A.J. No. 771, 98 A.C.W.S. (3d) 334

Application granted; counter-applications dismissed.

FN* Leave to appeal refused 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, [2000] 10 W.W.R. 314, 2000 ABCA 238, 20 C.B.R. (4th) 46 (Alta. C.A. [In Chambers]).

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Silver v. Imax Corp.

MARVIN NEIL SILVER and CLIFF COHEN (Plaintiffs) v. IMAX CORPORATION, RICHARD L. GELFOND, BRADLEY J. WECHSLER and FRANCIS T. JOYCE (Defendants)

Ontario Superior Court of Justice

van Rensburg J.

Heard: April 15, 2008
Judgment: May 6, 2008
Docket: CV-06-3257-00

Counsel: D. Lascaris, M. Robb for Plaintiffs

D. Peebles, L. Lung for Respondents, Defendants, Proposed Defendants

Subject: Civil Practice and Procedure; Corporate and Commercial; Securities

Civil practice and procedure --- Discovery — Examination for discovery — Conduct of examination — Objecting and refusing to answer.

Securities --- Trading in securities — Civil liability for secondary market disclosure.

Cases considered by *van Rensburg J.*:

Bank Leu AG v. Gaming Lottery Corp. (1999), 1999 CarswellOnt 3365, 43 C.P.C. (4th) 73 (Ont. S.C.J.) — referred to

Caputo v. Imperial Tobacco Ltd. (2002), 25 C.P.C. (5th) 78, 2002 CarswellOnt 3270 (Ont. Master) — considered

Caputo v. Imperial Tobacco Ltd. (2003), 33 C.P.C. (5th) 214, 2003 CarswellOnt 2154 (Ont. S.C.J.) — referred to

Statutes considered:

Securities Act, R.S.O. 1990, c. S.5

Generally — referred to

Pt. XXIII.1 [en. 2002, c. 22, s. 185] — pursuant to

s. 138.3 [en. 2002, c. 22, s. 185] — referred to

s. 138.4(1) [en. 2002, c. 22, s. 185] — referred to

s. 138.4(6) [en. 2002, c. 22, s. 185] — referred to

s. 138.4(6)(a)(i) [en. 2002, c. 22, s. 185] — referred to

s. 138.4(6)(a)(ii) [en. 2002, c. 22, s. 185] — referred to

s. 138.4(7) [en. 2002, c. 22, s. 185] — referred to

s. 138.8 [en. 2002, c. 22, s. 185] — considered

Rules considered:

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

Generally — referred to

R. 39.03 — referred to

***van Rensburg J.*:**

1 This is a motion to compel answers to questions refused during cross-examinations on a pending motion. The questions are set out at Schedule "A" to the Notice of Motion dated April 9, 2008. By the time the motion was argued, the respondents had agreed to answer certain refusals and some of the questions had been abandoned or withdrawn. In total the parties were seeking rulings on some 26 questions.

The Proceedings

2 This is the first proceeding to be brought under Part XXIII.1 of the Ontario *Securities Act* (the "Act"). Section 138.3 provides a statutory cause of action for secondary market misrepresentation. To paraphrase the section, where a responsible issuer releases a document containing a misrepresentation, persons or companies who acquire or dispose of the issuer's securities between the time of the misrepresentation and its public correction have a cause of action without regard to reliance, against the responsible issuer and others, including its directors at the time of release of the document and its officers who authorized, permitted or acquiesced in its release.

3 Section 138.4 of the Act is entitled "Burden of Proof and Defences". Relevant to these proceedings are the defences set out in subsection (6) which (again paraphrasing) states that a person or corporation is not liable under s. 138.3 in relation to a misrepresentation if that person or corporation proves that: (i) before release of the document containing the misrepresentation, the person or company conducted or caused to be conducted a reasonable investi-

gation; and (ii) at the time of release of the document, the person or company had no reasonable grounds to believe that the document contained the misrepresentation. Subsection (7) lists certain factors to be considered by the court in determining such a defence. Also relevant is ss. 138.4(1). Where a misrepresentation is in a document that is not a core document [such as a press release] the plaintiff must prove that the person or company (a) knew, at the time that the document was released that the document contained the misrepresentation; (b) at or before the time that the document was released, deliberately avoided acquiring knowledge that the document contained the misrepresentation; or (c) was, through action or failure to act, guilty of gross misconduct in connection with the release of the document that contained the misrepresentation. There are other provisions under s. 138.4 that may be relevant to these proceedings, however the denial of knowledge of any misrepresentation and the "reasonable investigation" due diligence defence are the focus of the affidavits put forward by the prospective defendants at this time, and help to define the scope of the proceedings for the purpose of this refusals motion.

4 Section 138.8 provides what the parties have described as a "gatekeeper" function for the court in respect of such proceedings, requiring leave to commence proceedings in respect of the statutory cause of action, and setting out the procedure to be followed in bringing and opposing a motion for leave. That section provides as follows:

> 138.8(1) No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,
>
> (a) the action is being brought in good faith; and
>
> (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.
>
> (2) Upon an application under this section, the plaintiff and each defendant shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely.
>
> (3) The maker of such an affidavit may be examined on it in accordance with the rules of court.
>
> (4) A copy of the application for leave to proceed and any affidavits filed with the court shall be sent to the Commission when filed.

5 These proceedings were initially commenced by two separate proposed class actions in September 2006. On September 20, 2006 the plaintiffs issued a joint Statement of Claim in this action. The Claim sought damages against Imax Corporation ("Imax") and certain other defendants for common law causes of action, including negligent and fraudulent misrepresentation and conspiracy. In November 2006 a motion was served for leave under Part XXIII.1 of the Act, for certification of these proceedings as a class action and for leave to add certain additional persons as defendants. Counsel and the court have agreed that, although there is no requirement for the certification and leave motions to be heard together, argument with respect to all such relief will proceed in the first week of June 2008.

6 A proposed amended claim, entitled Fresh Statement of Claim, is in the leave materials. This document sets forth the statutory claims the plaintiffs propose to advance. The specific representation at issue in these proceedings is defined in the Fresh Statement of Claim as follows:

> **"Representation"** means the statement explicitly and/or implicitly contained in the **February Press Release** and expressly repeated in the **Form 10-K** and **Annual Report**, that Imax's revenue for the 2005 fiscal year were prepared and reported in accordance with **GAAP** and that such revenues met or exceeded the earnings guidance previously issued by Imax.
>
> **"February Press Release"** is defined as the press release dated and released on February 17, 2006 by Imax and

"Form 10'K" is defined as Imax's Form 10-K for the fiscal year ended December 31, 2005, which was required to be filed with the Securities and Exchange Commission under the *United States Securities and Exchange Act of 1934*, and which included the **Annual Report. "Annual Report"** is defined as Imax's annual report for the year ended December 31, 2005, which contained Imax's management's discussion and analysis and audited annual financial statements for the same period.

7 The plaintiffs allege that Imax's financial results between February 17, 2006 and August 9, 2006 did not comply with Generally Accepted Accounting Principles ("GAAP") and were materially false and misleading. The February Press Release reported that the company had successfully completed 14 theatre system installations in the most recent quarter, a record for a single quarter. On March 9, 2006 Imax released its audited financial results for 2005 and announced that it was putting itself up for sale. On June 20, 2006, the U.S. Securities and Exchange Commission ("SEC") wrote to Imax to request an interview to discuss, among other things, Imax's revenue recognition policies and practices. On August 9, 2006 Imax issued a press release disclosing the SEC request and that, of the 14 theatre systems it had previously stated were completed in the fourth quarter of 2005, ten had not opened during that quarter, and that the screens for seven of the ten were not installed until 2006, and in some cases not until the second half of 2006. Initially Imax took the position with the SEC that its 2005 financial statements complied with GAAP. In July 2007 Imax restated its 2005 financial results and moved to subsequent periods revenue that it had initially recognized on the ten theatre installations in the fourth quarter of 2005.

8 In support of their motion the plaintiffs filed the affidavit evidence of the proposed representative plaintiffs, three proposed experts and a member of the class counsel team. In response, each respondent (including parties proposed to be added as defendants) has sworn an affidavit. There are also affidavits of a proposed defence expert and the affidavit of a law clerk employed by the respondents' counsel.

9 Each of the individual respondents' affidavits, with the exception of the affidavit of Kenneth Copland, assert that the respondent during the period February 17, 2006 to August 9, 2006:

(a) fulfilled his or her duties as an officer and/or director of Imax with respect to the reporting of its expected and ongoing financial performance with care and diligence;

(b) believed, based upon a reasonable investigation, that Imax's financial statements for 2005 had been prepared in accordance with GAAP;

(c) believed that the Representation was accurate when made and had no reasonable grounds to believe that it was false;

(d) relied upon Imax's auditors, PriceWaterhouseCoopers ("PWC") to properly prepare Imax's financial statements for public disclosure and regulatory filing;

(e) together with other Imax management, concluded that internal control over financial reporting was effective and that there were no material weaknesses in internal control;

(f) together with other Imax management, conducted a reasonable investigation, including seeking advice and guidance from PwC in relation to revenue recognition, to ensure that Imax properly applied GAAP to its financial statements for the 2005 fiscal year and reported their efforts in that respect to the Audit Committee and to the Board;

(g) understood, upon investigation, that the Audit Committee had met regularly with PwC, including meeting without management and concluded that PwC had a full opportunity to advise the Audit Committee of any issues regarding management and the adequacy of Imax's systems of accounting, and relied on PwC's audit of

Imax's financial statements and of the company's internal control over financial reporting; and

(h) relied on PWC's March 9, 2006 audit opinion that concluded that Imax's financial statements were prepared in conformity with GAAP.

10 Each of the deponents also adopts the evidence of Kenneth Copland "to the extent of [his or her] own personal knowledge". Mr. Copland is the Chair of the Audit Committee of Imax. His affidavit contains detailed factual information concerning Imax's business and accounting practices and policies, in particular with respect to revenue recognition for theatre systems, the involvement of management and PwC in reporting and auditing the 2005 financial results and the restatement in 2007. The Copland affidavit attaches numerous exhibits.

11 The plaintiffs conducted an examination under Rule 39.03 of Lisa Coulman, a partner of Pricewaterhouse-Coopers, Imax's auditors during the relevant period. The deponents of the affidavits filed in respect of the motion have also been cross-examined. The examinations resulted in numerous undertakings and refusals. It is only certain remaining refusals from the examinations of the respondents that are at issue in this motion.

The Applicable Test

12 Typically, the test for whether a question should be answered in an examination for discovery is whether the information to be elicited has a "semblance of relevance" to the issues in the action. The same test is applicable to cross-examinations of deponents in motions. In such cross-examinations, a deponent may be asked questions not only about the facts deposed in his or her affidavit, but also questions within his or her knowledge which are relevant to any issue on the motion. Master Macleod in *Caputo v. Imperial Tobacco Ltd.* (2002), 25 C.P.C. (5th) 78 (Ont. Master) (affd. on appeal at (2003), 33 C.P.C. (5th) 214 (Ont. S.C.J.)) put the rules succinctly as follows:

- If you put it in, you admit its relevance and can be cross-examined on it — at least within the four corners of the affidavit;

- You can't avoid cross-examination on a relevant issue by leaving it out;

- You can't get the right to cross-examine on an irrelevant issue by putting it in your own affidavit; and

- You can be cross-examined on the truth of facts deposed or answers given but not on irrelevant issues directed solely at credibility.

13 Counsel for the respondents argued for a more restrictive test than "semblance of relevance" for determining the propriety of any question during cross-examinations in the leave proceedings. The first argument for restraint was based on the fact that there are as yet no defendants to the statutory claims. It was submitted that there is no pre-action right of discovery and as a general rule a plaintiff cannot compel production and disclosure from a prospective defendant.

14 Respondents' counsel also urged the court to adopt a restrictive approach, arguing that the gatekeeper function of the court is the counterbalance to the new statutory cause of action that relieves a shareholder in certain circumstances from having to prove reliance on an issuer's misrepresentation. This function has been described by the Canadian Securities Administrators (2000), 23 OSCB, as follows:

> One of the risks of creating statutory liability for misrepresentations or failures to make timely disclosure is the potential for investors to bring actions lacking any real basis in the hope that the issuer will pay a settlement just to avoid the cost of litigation. To limit unmeritorious litigation or strike suits, plaintiffs would be required to ob-

tain leave of the court to commence an action. In granting leave, the court would have to be satisfied that the action (i) is being brought in good faith, and (ii) has a reasonable possibility of success.

15 The respondents argued that the "semblance of relevance" test would negate the gatekeeper function of the court. They argued for a limitation on the right to question, keeping in mind the general principle that a shareholder is not entitled to compel a company to produce confidential documents.

16 Respondents' counsel did not propose an alternative workable test, but argued for restraint on the part of the court in ordering the respondents to provide extensive production of otherwise confidential information and documentation at this stage in the proceedings.

17 In my view these arguments are not persuasive. The fact that proposed defendants are not required generally under the Rules to make documentary production and are not subject to discovery is irrelevant, as is the observation that shareholders do not generally have access to confidential records of issuers. The *Securities Act* provides its own procedure in respect of the statutory remedy, that specifically requires proposed defendants to put forward information (presumably otherwise confidential and non-compellable information to the extent it may be relevant to their defence) and that specifically authorizes examination on such information. A shareholder who seeks leave to commence a claim under s. 138.8 has special powers that are available in the context of such a claim and not generally.

18 This is clearly not a pleadings motion, that is, the court is not ruling on whether the claims set forth by the plaintiff in its pleadings, if true, set forth a cause of action or are frivolous or vexatious. In this motion, much more is required of both the plaintiffs and the respondents. The plaintiffs cannot rely on their allegations, but must put forward evidence, which in turn can be tested in cross-examination. Likewise, in opposing leave, each prospective defendant must come forward with its defences, with evidence in support. The merits of the claim are clearly relevant, and based on the evidence adduced and tested, the plaintiffs must establish their good faith and that the action has a reasonable possibility of success at trial.

19 The challenge is that these are the first proceedings under Part XXIII.1 of the Act. The Act provides no guidance as to the interpretation of the threshold test and what type, quality and quantity of evidence a court is to consider in making a determination of the plaintiffs' good faith and the reasonable possibility of the plaintiffs' success at trial. We are left with what the statute prescribes — a mandatory requirement for each plaintiff and each proposed defendant to set out facts by affidavit, with the right to cross-examine the deponents of such affidavits. There is no indication in the statute that evidence put forward or examined upon must be restricted to what is in the public record. Indeed, the facts to support a due diligence defence are generally in the possession and control of the party asserting such a defence. There is no requirement in the statutory procedure for an affiant to attach documentary exhibits, but it is not unusual for exhibits to be attached to affidavits, and the parties in this case have attached extensive exhibits to their affidavits.

20 This is not a discovery process, in the sense that the parties are not compelled to produce affidavits of documents disclosing all relevant documents within their power or control, and they are not subject to examination on everything having a semblance of relevance to the action, including the common law claims. In deciding this motion the court must take a hard look at what facts are potentially relevant and material to the statutory claim and defences, as presented in the draft pleading and in the respondents' affidavits. Any question which is clearly not tethered to this inquiry in the sense that it is pursuing other potential wrongdoing or practices of Imax, would have no semblance of relevance. However a question that is potentially relevant to the facts alleged in respect to the statutory claims set out in the proposed statement of claim and in the defences raised in the responding affidavits must be answered even if it might also reveal some other potential issues or wrongdoing not currently contemplated by the statutory claim.

21 Finally, I note the observation of Master Macleod in *Caputo* , that a ruling on the propriety of a question on

cross-examination at this stage does not determine the admissibility of such evidence at the hearing itself. It will remain open to the respondents to argue that any piece of oral or documentary evidence elicited in examination, notwithstanding its "semblance of relevance" at this stage, is inadmissible as irrelevant at the time of the full consideration of the leave motion.

The Specific Refusals

22 The parties grouped the refusals into five headings, which I will follow in these reasons.

1. The Imax Investigation of the "Delhi Post"

The pertinent background facts are taken from the respondents' factum:

> In the course of the examination of the PwC representative, Lisa Coulman, information emerged that in November 2005 Imax was alerted to a post written on a Yahoo! Internet message board (the "Delhi post"), stating that Imax was the subject of an SEC investigation and containing numerous allegations of fraud by Imax with respect to "faking" theatre system installations and in particular the Delhi, India installation. The contents of the post were also emailed to the company and according to the email copied to the SEC. The post was anonymous and the company was not in fact under investigation by the SEC at the time. There was no reply when Imax responded directly to the author's email asking for further information. The Imax Board asked its in-house counsel, Robert Lister, to investigate the allegations. The Imax affiants were examined under oath as to the origin of and reaction to the post, about the instructions given to Mr. Lister, about involvement of PwC in the process and about the result of the investigation. PwC was advised of the post and it reviewed the contract, the installer's report, the customer acceptance package and other documents pertinent to the Company's relationship with that customer. PwC concluded that the accounting position which Imax had taken for Q3 was acceptable. Mr. Lister completed a report which he presented to the Board. The Board concluded that there was no evidence of fraud or wrongdoing, and that revenue had been properly recognized. Nevertheless, the recommendation was made by Mr. Lister that for the Q4 and the year end audit, the company should enhance the documentation it gave to PwC of its proposed revenue recognition determinations for various installations and that process was followed.

23 Several questions about the Delhi post and its investigation were answered and a number of questions initially refused have been answered in whole or in part. In the answers to undertakings the respondents indicated that Jeff Vance, as head of the company's SOX program, was asked by the Audit Committee to conduct a separate investigation into the financial accounting issues arising from the allegations in the Delhi post. He prepared a separate report on the accounting issues and reported directly to the Audit Committee, and a copy of his report has been produced.

24 The remaining refusals are as follows:

> Q. 72 (Gelfond) To produce the agreement relating to the Delhi cinema and any documentation evidencing acceptance of the theatre system (i.e. the Certificate of Acceptance) whenever it may have been executed or delivered.
>
> Q. 71 (Gelfond) To produce a list of all persons interviewed during the Yahoo! Posting investigation.
>
> Q. 70 (Gelfond) To produce the documents examined in the investigation of the Yahoo! Posting, in order to allow Mr. Lister or the Audit Committee to form a view about it.
>
> Q. 56 (Wechsler) With respect to the report prepared by Mr. Lister following the investigation into the Yahoo! Post, to advise what inquiries were made and what factual conclusions the report based its conclusions

on.

> Q. 55 (Wechsler) To produce a copy of the report prepared by Rob Lister analyzing the allegations arising from the Yahoo! Message board posting.

25 The respondents argued that questions about the underlying contracts and other documents in relation to the Delhi installation are irrelevant to the issues in these proceedings. They also claim solicitor-client privilege and litigation privilege in respect of the investigation undertaken and report provided by Mr. Lister as in-house counsel.

26 In her examination Ms Coulson noted that revenue for the Delhi installation was eventually moved from Q3 to Q4 2005. This theatre installation was not referenced in the February 2006 press release as one of the 14 installations that had been completed in Q4 2005, and accordingly does not form part of the misrepresentation alleged in these proceedings. The Delhi post however alleged improper revenue recognition by Imax and the timing occurred shortly before the February 2006 press release. Whether and to what extent the respondents were put on notice that there was a concern about the company's approach to revenue recognition in respect of as-yet incomplete theatre installations, the reaction of Imax management, the investigations undertaken and the conclusions reached and relied upon are all potentially relevant to the due diligence defence of the respondents in relation to the misrepresentation.

27 The evidence to which I was referred does not satisfy me that the dominant purpose for the investigation carried out by Mr. Lister was to respond to anticipated litigation. While the respondents point to the fact that the Delhi post was copied to the SEC, so that there was a reasonable apprehension that proceedings could result, there is no evidence that the investigation by Mr. Lister was premised on the potential SEC proceedings or undertaken for the purpose of responding to such anticipated proceedings. The Board was informed of the allegations in the Delhi post and asked Mr. Lister to investigate. Ultimately the investigation satisfied the Board that there was no evidence of fraud or wrongdoing and that revenue had been properly recognized. The steps that were taken by Mr. Lister in carrying out the investigation, the documents reviewed and the individuals with whom he spoke in conducting the investigation in order that he could report back to the Board, as well as his report and specific recommendations, are not covered by litigation privilege.

28 I am also of the view that any solicitor-client privilege that might attach to Mr. Lister's report to the Board as a communication between counsel and its client has been waived. The summary from the respondents' factum suggests that the Board relied on Mr. Lister's report in concluding that there was no fraud and that revenue had properly been recognized, and specifically refers to a recommendation from Mr. Lister that was followed. Where a party contends that its state of mind is based on legal advice received, there is an implied waiver of privilege in respect of that advice (*Bank Leu AG v. Gaming Lottery Corp.*, [1999] O.J. No. 3949 (Ont. S.C.J.)). The full extent of Mr. Lister's report respecting the Delhi post, including all recommendations and advice is relevant to the due diligence defence, and any privilege that would otherwise apply has been waived.

29 Questions 71, 70, 56 and 55 shall be answered. Q. 72 as framed, need not be answered. The documents relating to the Delhi cinema are not directly relevant to these proceedings. Of course, if such documents were examined in the investigation of the Delhi post, then they will be produced in response to Q. 70.

2. The 2005 Year End Audit (by Imax and PwC)

The following refusals have been grouped under this heading:

> Q. 75 (Gelfond) To produce the contracts relating to the 10 theatre systems described in the August 9, 2006 press release which were included in revenue for the fourth quarter of 2005 for theatres that were not opened in that quarter.

Q. 76 (Gelfond) To provide copies of all reports on installations provided by the business affairs unit to Mr. Gelfond or Mr. Wechsler during the fourth quarter of 2005 and in January of 2006.

Q. 110 (Copland) To advise which Imax customers were asked to proceed with installations prior to the quarter in which the theatre was scheduled to open, and which Imax personnel made that request.

Q. 111 (Copland) With respect to customers of whom a request was made to proceed with installations prior to the quarter in which the theatre was scheduled to open, to advise whether in any of those cases, the request was to accept installation at a date earlier than that envisioned by the contract with the customer.

Q. 130 (Gamble) To produce any written amending agreements prepared during the 2005 audit to reflect verbal agreements made during 2005 between Imax and its customers, and any documentation assembled to evidence those verbal amending agreements, whether they are the amending agreements referred to at para. 1 of tab B3 of Ex. 16 (the February 27, 2007 OSC letter to Imax) or some other agreements.

Q. 146 (Joyce) To determine whether there were multiple iterations of the list of installations that could potentially be complete in Q4 2005 prepared by Imax's finance or business affairs groups, and if so, how many iterations, whether copies were retained, and if they were retained, to produce copies of them.

Q. 147 (Joyce) To produce project completion reports for any installation that was on any iteration of the financial department list of installations that could be complete in Q4 2005.

Q. 148 (Joyce) To produce copies of any client acceptance forms for theatres that were on any iteration of the financial department list of installations that could be complete in Q4 2005.

Q. 46 (Wechsler) To produce copies of biweekly status reports regarding signings, along with any attachments, for 2004, 2005 and until the end of the class period in 2006.

Q. 50 (Wechsler) To describe any internal records kept by the company in respect of the existence or status of signings, sales or installations of theatre systems in the period 2004, 2005 and to the end of the class period in 2006.

Q. 51 (Wechsler) To produce any internal records kept by the company in respect of the existence or status of signings, sales or installations of theatre systems in the period 2004, 2005 and to the end of the class period in 2006.

Q. 121 (Gamble) To provide a copy of the spreadsheet prepared by the company in early 2006 quantifying, in terms of labour, material and travel costs, the percentage of the work that needed to be completed for the Q4 2005 installations.

30 The primary objection to answering these questions was that they are in the nature of discovery. As noted, I do not accept the respondents' more restrictive approach to what is a proper question at this stage. Applying the "semblance of relevance" test, the issue here is whether the question relates to Imax's revenue recognition for the questioned theatre systems at issue in Q4 2005. I have reviewed each of the refusals in the context of the examination in question. In my view, underlying information concerning the theatre systems in question is potentially relevant as having informed the decisions of Imax management with respect to revenue recognition, and in evaluating whether each of the respondents, including Imax, exercised due diligence. The respondents argued vigorously that, once Imax asserted its reliance on the advice of PwC, this essentially created a "brick wall" for the plaintiffs. The respondents may choose to make that argument in the leave motion, but it does not limit the scope of questioning available to the plaintiffs at this stage.

31 I order that Questions 75, 76, 110, 111, 130, 146, 147, 148 and 121 are proper questions and shall be answered. Question 50 is in fact an undertaking and shall be answered. Questions 51 and 46 are in my view too broad in terms of the type of document requested and the period of time covered in the question and need not be answered.

3. The Imax Revenue Recognition Policies

The refusals are as follows:

> Q. 44 (Wechsler) If an internal handbook or policy book exists with respect to revenue recognition, to produce same.
>
> Q. 124 (Gamble) To produce memos written by Ed MacNeil [V.P. Finance and Special Projects] on the impact of EITF 00-21 on Imax revenue recognition policy.
>
> Q. 126 (Gamble) To provide the amendments made to the written revenue recognition policy after the Delhi investigation report.
>
> Q. 151 (Joyce) To produce a copy of any memorandum written for circulation by any member of the finance team in December 2005 or prior to the middle of January 2006, on the issue of whether revenue should be recognized on an entire theatre system prior to a completion of each and every aspect of Imax's obligations under a contract with a customer.

32 All of these questions meet the "semblance of relevance" test and shall be answered. Mr. Copland's affidavit sets out the approach that was followed in accounting for revenue from theatre systems in the prior years and in respect of 2005, and makes specific reference to the company's accounting policies, rules and guidelines. The respondents assert that Imax's restatement of its 2005 financial statements resulted from a decision to revise its accounting policies in 2007. Imax's approach to revenue recognition for its theatre systems is at the core of these proceedings and any internal policies and directions that informed the process would be relevant.

4. The Imax Internal Review of its draft 2005 Form 10-K

> Q. 11 (Girvan) If drafts of the 2005 10-K are still in existence, to provide revisions, if any, as they relate to Imax's accounting practices, its internal controls and its revenue recognition practices.
>
> Q. 99 (Braun) To advise whether there is a difference between the draft financial statements presented to the Audit Committee on March 1, 2006 and the financial statements released on March 9, 2006 and to produce the draft financial statements.

33 Both of these questions relate to information that would have been available to the members of the Audit Committee in their deliberations and approval of the Imax 2005 financial statements and 10-K, both of which are alleged to have contained misrepresentations. As such, any drafts that they considered during their review are potentially relevant to the due diligence defence. Questions 11 and 99 shall be answered.

5. The Imax Re-statement process

> Q. 60 (Wechsler) To advise of all the facts and produce copies of any documents provided to PwC between March 2006 and July 2007 in relation to the 2005 transactions.

Q. 61 (Wechsler) To produce the back-up documentation provided to PwC in relation to the 2005 Kazan, Brampton, McMinnville and Lark installations, between the issuance of the clean audit opinion in March 2006, and the July 2007 restatement.

Q. 23 (Girvan) To provide the Minutes of the Board and Audit Committee meetings which considered the SEC's comments on Imax's revenue recognition policy and the possibility of a restatement.

34 In her examination Ms Coulman testified that during the restatement process PwC was made aware of additional obligations that the company might have around the ten installations in 2005. She also stated that there were facts that they learned subsequent to the signing of the clean audit opinion that could have impacted her assessment of the judgments made by the company. I note that counsel in that examination refused to give an undertaking to advise respecting the additional facts that came to PwC's attention that could have affected their audit opinion, on the grounds that this was not an examination for discovery. While that refusal was not before me in this motion, I refer to Ms Coulman's examination on this point because it is the background to Questions 60 and 61, which are from the examination of Mr. Wechsler.

35 Question 60 need not be answered. I have reviewed Mr. Steep's explanation in the transcript as to his concern about the question as well as the scope of PwC's review in its initial audit and in connection with the restatement, and I agree that the question as framed is too broad. Question 61 relates to certain installations referred to by Ms Coulson where she states that PwC became aware of new information. There is a proper foundation for this question and it shall be answered.

36 With respect to Question 23, the objection was that there might be material in the Minutes of the Board and Audit Committee meetings that contained legal advice and would be privileged. I agree with the respondents' position respecting this question. Question 23 shall be answered, and the respondents are entitled to redact the portions of the minutes that reflect legal advice received by the Board or the Audit Committee.

Conclusion

37 Questions 71, 70, 56, 55, 75, 76, 110, 111, 130, 146, 147, 148, 50, 124, 126, 151, 11, 99, 61 and 23 from the Refusals & Undertakings Chart listed at Schedule "A" of the Notice of Motion shall be answered.

38 A telephone conference may be arranged through my office if the parties are unable to agree on the costs of this motion.

END OF DOCUMENT

2008 CarswellOnt 7227, 93 O.R. (3d) 200, 304 D.L.R. (4th) 713

2008 CarswellOnt 7227, 93 O.R. (3d) 200, 304 D.L.R. (4th) 713

Ainslie v. CV Technologies Inc.

DAVID AINSLIE and MURIEL MARENTETTE (Plaintiffs) and CV TECHNOLOGIES INC., GRANT THORNTON LLP, JACQUELINE J. SHAN, GORDON G. TALLMAN and HARRY BUDDLE (Defendants)

Ontario Superior Court of Justice

Lax J.

Heard: November 21, 2008
Judgment: December 3, 2008
Docket: Toronto 07-CV-336986PD1

Proceedings: additional reasons at *Ainslie v. CV Technologies Inc.* (2008), 2008 CarswellOnt 7735, Lax J. (Ont. S.C.J.) [Ontario]

Counsel: W.V. Sasso, J. Strosberg, M.G. Robb for Plaintiffs

A.L.W. D'Silva, P. O'Kelly for Defendants, CV Technologies Inc., Harry Buddle, Gordon Tallman, Jacqueline J. Shan

R. Heintzman, M. Fleming for Defendant, Grant Thornton LLP

Subject: Corporate and Commercial; Securities; Civil Practice and Procedure

Securities --- Offences — Practice and procedure — Miscellaneous.

Cases considered by *Lax J.*:

Beck v. Bradstock (1976), 2 C.P.C. 90, 14 O.R. (2d) 333, 1976 CarswellOnt 330 (Ont. H.C.) — considered

Canada Post Corp. v. Key Mail Canada Inc. (2005), 2005 CarswellOnt 3980, 202 O.A.C. 158, 77 O.R. (3d) 294, 259 D.L.R. (4th) 309 (Ont. C.A.) — referred to

CanWest MediaWorks Inc. v. Canada (Attorney General) (2007), (sub nom. *CanWest Media Works Inc. v. Canada (Attorney General)*) 227 O.A.C. 116, 2007 CarswellOnt 5198, 2007 ONCA 567, 48 C.P.C. (6th) 281 (Ont. C.A.) — referred to

Epstein v. First Marathon Inc. / Société First Marathon Inc. (2000), 2000 CarswellOnt 346, 2 B.L.R. (3d) 30, 41 C.P.C. (4th) 159 (Ont. S.C.J.) — referred to

Fehringer v. Sun Media Corp. (2001), 54 O.R. (3d) 31, 2001 CarswellOnt 3187, 14 C.P.C. (5th) 112 (Ont. S.C.J.) — considered

Kaighin Capital Inc. v. Canadian National Sportsmen's Shows (1987), 58 O.R. (2d) 790, 1987 CarswellOnt 405, 17 C.P.C. (2d) 59 (Ont. H.C.) — referred to

Lang v. Kligerman (1998), 1998 CarswellOnt 3631 (Ont. C.A.) — referred to

Meditrust Healthcare Inc. v. Shoppers Drug Mart (2000), 2000 CarswellOnt 3629 (Ont. S.C.J.) — referred to

Royal Bank v. Société Générale (Canada) (2006), 2006 CarswellOnt 8091, 219 O.A.C. 83, 31 B.L.R. (4th) 63 (Ont. C.A.) — referred to

Schreiber v. Mulroney (2007), 2007 CarswellOnt 6505, (sub nom. *Schreiber c. Mulroney*) 87 O.R. (3d) 651, 87 O.R. (3d) 643 (Ont. S.C.J.) — referred to

Silver v. Imax Corp. (2008), 2008 CarswellOnt 2657 (Ont. S.C.J.) — considered

Silver v. Imax Corp. (2008), 2008 CarswellOnt 4087 (Ont. S.C.J.) — referred to

Sun-Times Media Group Inc. v. Black (2007), 2007 CarswellOnt 1186 (Ont. S.C.J. [Commercial List]) — referred to

Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co. (1995), 46 C.P.C. (3d) 110, 27 O.R. (3d) 291, 1995 CarswellOnt 1461 (Ont. Gen. Div.) — referred to

Statutes considered:

Securities Act, R.S.O. 1990, c. S.5

Generally — referred to

Pt. XXIII.1 [en. 2002, c. 22, s. 185] — pursuant to

s. 138.3 [en. 2002, c. 22, s. 185] — referred to

s. 138.8 [en. 2002, c. 22, s. 185] — considered

s. 138.8(1) [en. 2002, c. 22, s. 185] — considered

s. 138.8(2) [en. 2002, c. 22, s. 185] — considered

s. 138.8(3) [en. 2002, c. 22, s. 185] — considered

s. 138.8(4) [en. 2002, c. 22, s. 185] — referred to

Rules considered:

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

R. 20 — referred to

R. 20.04 — referred to

R. 20.04(1) — referred to

R. 39.03 — pursuant to

Lax J.:

1 This is one of the first actions to be brought under Part XXIII.1 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5 as amended ("OSA"). The amendments (familiarly known as Bill 198) permit a statutory cause of action for misrepresentation in the secondary market if the plaintiffs obtain leave from the court pursuant to section 138.8 of the Act. At issue on this motion is the interpretation of subsection 138.8(2), which has not previously been interpreted.

2 Section 138.8 provides:

138.8(1) No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,

(a) the action is being brought in good faith; and

(b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

(2) Upon an application under this section, the plaintiff and each defendant shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely. (emphasis added)

(3) The maker of such an affidavit may be examined on it in accordance with the rules of court.

(4) A copy of the application for leave to proceed and any affidavits filed with the court shall be sent to the Commission when filed.

3 The plaintiffs' action is against CV Technologies Inc. and three of its former or present officers and directors ("CV") and against CV's former auditors, Grant Thornton LLP ("GT"). The Statement of Claim alleges that CV in its 2006 fiscal year and in the first quarter of its 2007 fiscal year falsely represented that CV's financial statements were prepared and reported in accordance with GAAP. The plaintiffs allege that the statements improperly recognized sales of its Cold-FX products to customers in the United States as revenue earned in those periods and that this did not fairly present CV's financial results. The plaintiffs therefore assert that CV's public filings contained misrepresentations and that CV and certain of its officers and directors are liable to the plaintiffs for damages. The plaintiffs also allege that GT is liable to the plaintiffs based on claims of negligence and negligent misrepresentation in connection with the audit performed by GT of CV's financial statements for its 2006 fiscal year.

4 The leave motion and the certification motion are scheduled to be heard together in June 2009. The plaintiffs have delivered affidavits in support of both motions and have confirmed that they have put before the court all material facts and the evidentiary basis necessary for the court to decide the leave motion. The CV defendants have filed the affidavits of two expert witnesses on which they intend to rely in opposing the leave and certification motions. GT has filed no affidavit material in response to the plaintiffs' leave motion and intends to rely on the facts disclosed in the plaintiffs' motion materials upon which they propose to cross-examine.

5 It is the plaintiffs' position that a proper interpretation of subsection 138.8(2) requires each of the proposed defendants to file an affidavit sworn in their name upon which they can be cross-examined. They bring this motion to compel each defendant to forthwith file and serve an affidavit setting forth the material facts upon which each intends to rely in response to the plaintiffs' motion for leave to plead the causes of action in s. 138.3 of the Act and to attend to be cross-examined on their affidavits. Alternatively, the plaintiffs seek an order requiring each defendant to be examined under Rule 39.03 of the *Rules of Civil Procedure*.

6 The defendants submit that the plaintiffs' position is an improper attempt to dictate the evidence on which the defendants can rely in opposition to the leave motion and that it affords the plaintiffs greater rights than in an action where it is unnecessary to obtain leave. They argue that this is inconsistent with the plain meaning of the section and improperly shifts the onus from the plaintiffs to the defendants contrary to its legislative intent.

Legislative Background to Bill 198

7 The genesis of the secondary market liability provisions including section 138.8 can be found in the 1997 interim and final reports of the Toronto Stock Exchange Committee on Corporate Disclosure (more commonly referred to as the "Allen Committee").[FN1] The mandate of the Allen Committee was to examine the adequacy of continuous disclosure by public companies in Canada and to consider whether additional remedies should be made available to investors or regulators for breaches by companies of their continuous disclosure obligations.

8 The Allen Committee recommended the adoption of a statutory civil liability regime for the secondary securities market as a means of deterring misleading continuous disclosure by issuers. In doing so, it emphasized that deterrence, rather than investor compensation, was the focus of its recommendations.[FN2]

9 In response to the Allen Committee's recommendations, the Canadian Securities Administrators (the "CSA") proposed draft legislation to amend the Act and implement a secondary market liability regime. It recognized and endorsed the Allen Committee's objective which was to create a system of statutory liability that would contain enough checks and balances through, for example, the availability of due diligence defences and limitations on liability by means of damage caps so that issuers and their directors would be deterred from inadequate or untimely disclosure without, at the same time, creating a regime that would favour short term over long term investors. The focus on deterrence was in part a recognition that while compensation of a prospectus investor would generally involve the culpable issuer returning subscription money it received from aggrieved investors, by contrast, compensation of aggrieved secondary market investors would come at the expense of other innocent investors, particularly the issuer's continuing shareholders.[FN3]

10 Initially, neither the Allen Committee, nor the CSA, proposed a gatekeeper mechanism such as that now found in section 138.8(1) of the Act. However, in response to comments received by the CSA during the public consultation process, the CSA recommended this as a means to dissuade plaintiffs from bringing "strike suits" — that is, coercive and unmeritorious claims which are aimed at pressuring a defendant into a settlement in order to avoid costly litigation.[FN4] These had become increasingly frequent in securities class action litigation in the United States and ultimately led to legislative reforms there.

11 The Allen Committee had concluded that the litigation environment in Canada was sufficiently different to

the United States to make it unlikely that meritless class actions would be brought, but after the release in 1997 of the Allen Committee Final Report, a "strike suit" showed up in an Ontario courtroom.[FN5] The issuer community, which had opposed the introduction of secondary market liability provisions, was successful in persuading the CSA of the need to introduce measures to deter the potential for them.

12 In recommending that the Act include a screening mechanism, the CSA concluded that, irrespective of whether it was believed that the proposed legislation would result in strike suits, a screening mechanism was necessary in order to prevent corporate defendants from being exposed to proceedings "that cause real harm to longterm shareholders and resulting damage to our capital markets."[FN6] The 2000 Draft Legislation proposed by the CSA retained the "loser pay" costs, proportionate liability and damage cap provisions recommended by the Allen Committee, but added the screening mechanism now found in section 138.8(1). The CSA described its purpose as follows:

> This screening mechanism is designed not only to minimize the prospects of an adverse court award in the absence of a meritorious claim but, more importantly, to try to ensure that unmeritorious litigation and the time and expense it imposes on defendants, is avoided or brought to an end early in the litigation process.[FN7] (emphasis added)

13 In the result, the CSA revised its proposed legislation to incorporate a provision requiring plaintiffs to obtain leave from the court in order to bring an action for secondary market liability. The CSA's proposed legislation for secondary market liability was ultimately adopted, with some modifications in Bill 198 which was introduced for first reading in the Legislature on October 30, 2002 and was given royal assent on December 9, 2002. Following technical amendments to certain sections of the secondary market liability provisions, Part XXIII.1 of the Act was proclaimed into force on December 31, 2005.

The Interpretation of Section 138.8(2)

14 Section 138.8(1) sets out a two-part test for obtaining leave to bring an action under Part XXIII.1 of the OSA and places the onus on the plaintiffs to demonstrate that (1) their proposed action is brought in good faith and (2) has a reasonable prospect for success at trial. As section 138.8(1) requires an examination of the merits, the plaintiffs submit that the section is supplemented with sections 138.8 (2) and (3). They rely on the mandatory language in subsection 138.8(2) ["and *each* defendant *shall*"] and submit that without the benefit of this requirement and the ability to cross-examine, a plaintiff would be deprived of the tools necessary to meet the standard the legislature created in section 138.8(1).

15 This submission ignores the legislative purpose of section 138.8. The section was not enacted to benefit plaintiffs or to level the playing field for them in prosecuting an action under Part XXIII.1 of the Act. Rather, it was enacted to protect defendants from coercive litigation and to reduce their exposure to costly proceedings. No onus is placed upon proposed defendants by section 138.8. Nor are they required to assist plaintiffs in securing evidence upon which to base an action under Part XXIII.1. The essence of the leave motion is that putative plaintiffs are required to demonstrate the propriety of their proposed secondary market liability claim *before* a defendant is required to respond. Subsection 138.8(2) must be interpreted to reflect this underlying policy rationale and the legislature's intention in imposing a 'gatekeeper mechanism'.

16 The plaintiffs appear to be interpreting subsection 138.8(2) as if it read: "Upon an application under this section, the plaintiff and each defendant shall serve and file one or more affidavits". But, the subsection continues: "setting forth the material facts upon which each intends to rely". If there are no material facts upon which a defendant intends to rely in responding to a leave motion, how can it be that a defendant is required to file an affidavit? Similarly, if a defendant files one or more affidavits, how can a plaintiff require that defendant to file other affidavits? By discounting this language, the plaintiffs are proposing an interpretation which relieves them of their obligation to

demonstrate that their proposed action meets the pre-conditions for granting leave under the Act.

17 The plaintiffs' interpretation also fails to address the language used in subsections (3) and (4). Subsection 138.8(3) reads: "The maker of such an affidavit may be examined on it in accordance with the rules of court." Subsection 138.8(4) reads: "A copy of the application for leave to proceed and *any* affidavits filed with the court shall be sent to the Commission when filed". Had it been the intention of the Legislature to require the parties to file affidavits, irrespective of the onus placed upon the moving party, the legislature would have substituted the word "the" for "any" in subsection 138.8(4) and the words "the plaintiff and each defendant" for "maker" in subsection 138.8(3). I also note that the legislature attached no consequences to the failure of 'each defendant' to file an affidavit.

18 In terms of onus, a useful analogy can be found in the summary judgment rule, Rule 20, of the *Rules of Civil Procedure*. Rule 20.04 provides:

> **20.04**(1) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of the party's pleadings but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial (emphasis added).

19 Similar to subsection 138.8(2), Rule 20.04 utilizes language suggesting that a responding party "must" or "shall" file affidavit material. Notwithstanding the use of such language, under Rule 20, a responding party retains the option to counter the motion by simply cross-examining the moving party, rather than by leading any direct evidence on the motion. In this regard, Rule 20.04 has been interpreted as requiring the respondent to a summary judgment motion to "lead trump or risk losing". Notably, however, the onus to establish that there is no genuine issue for trial remains with the moving party. The onus does not shift to the respondent to show that a genuine issue for trial does in fact exist.[FN8]

20 Similarly, in a motion under section 138.8 of the Act, the onus to demonstrate that the proposed claim meets the required threshold remains with the plaintiffs. The onus does not shift to the defendants. A defendant that does not "lead trump" by filing affidavit evidence in response to a motion under section 138.8 may well take the risk that leave will be granted to the plaintiffs. It does not follow, however, that a defendant is obligated to file evidence or produce an affidavit from each named defendant. It is a well-established principle that, as a general proposition, it is counsel who decides on the witnesses whose evidence will be put forward.[FN9]

21 The plaintiffs submit that their interpretation of s. 138.8(2) and (3) is consistent with the only judicial interpretation of Part XXIII.1 of the OSA, referring to the decision in *Silver v. Imax Corp.*[FN10] In that case, the proposed defendants (the corporation and certain directors) chose to file affidavits setting out the statutory defences upon which they intended to rely in response to a motion for leave pursuant to s. 138.8(1). The issue in *Imax* was the permissible scope of the examination on those affidavits authorized by subsection 138.8(3).

22 In concluding that the defendants were required to answer questions that met the 'semblance of relevance' test, van Rensburg J. appears to have been influenced by the unfairness that would result if the defendants were able to file evidence asserting statutory defences but were immune to having that evidence fully tested by cross-examination. Her comments must be considered in this context: As she stated:

> [17] ... The *Securities Act* provides its own procedure in respect of the statutory remedy, that specifically requires proposed defendants to put forward information (presumably otherwise confidential and non-compellable information to the extent it may be relevant to their defence) (emphasis added) ...

. . . . .

> [19] ... There is no indication in the statute that evidence put forward or examined upon must be restricted to what is in the public record. Indeed the facts to support a due diligence defence are generally in the possession and control of the party asserting such a defence. ...

23 In *Imax*, van Rensburg J. considered subsection 138.8(2) to prescribe a "mandatory requirement for each plaintiff and each proposed defendant to set out the facts by affidavit with the right to cross-examine". I respectfully suggest that these comments should be confined to the facts and circumstances at issue in *Imax*. These comments were made in *obiter* in resolving a refusals motion in circumstances where the defendants had filed affidavit material. It is important to recognize that in *Imax*, the court was not addressing the interpretation of subsection 138.8(2). The reasons make no reference to the Allen Committee Reports or CSA Notice 53-302, which are admissible as evidence of the purpose of legislation and the intention of the legislature. I regard these documents as essential interpretive tools, but it would appear that they were not provided to the court in *Imax*

24 In my view, the 'gatekeeper provision' was intended to set a bar. That bar would be considerably lowered if the plaintiffs' view is correct. As I have already indicated, a defendant who does not file affidavit material accepts the risk that it may be impairing its ability to successfully defeat the motion for leave and is probably foregoing the right to assert the statutory defences under Part XXIII.1 of the Act. However, parties are entitled to present their case as they see fit and this includes the right to oppose the leave motion on the basis of the record put forward by the plaintiffs as GT intends, or on the basis of the affidavits of experts as CV intends.

25 To accept the plaintiffs' submissions would require each defendant to produce evidence that may not be necessary for the leave motion and would serve no purpose other than to expose those defendants to a time-consuming and costly discovery process. It would sanction 'fishing expeditions' prior to the plaintiffs obtaining leave to proceed with their proposed action. This is an unreasonable interpretation of subsection 138.8(2). It is inconsistent with the scheme and object of the Act. Properly interpreted, the ordinary meaning of subsection 138.8(2) is that a proposed defendant must file an affidavit only where it intends to lead evidence of material facts in response to the motion for leave.

Rule 39.03

26 It is well-established that a proposed examination under rule 39.03 will not be permitted if it is being used for an ulterior or improper purpose or is nothing more than a 'fishing expedition'.[FN11] In *Beck v. Bradstock*, for example, the Court refused to permit an examination under rule 39.03 — notwithstanding that the information from the proposed examination would be relevant to the motion at issue — because the plaintiff intended to use the proposed examination for the improper purpose of obtaining information to commence an action against the witness. The Court held that such an examination would constitute an abuse of process.[FN12]

27 In addition, an examination under Rule 39.03 is improper if the purpose of the examination is to prematurely inquire into a party's defences or otherwise commence the discovery process before the close of pleadings.[FN13] For instance, in *Fehringer v. Sun Media Corp.*, the plaintiff sought to examine the defendants under rule 39.03 in relation to a motion for certification. The court held that the proposed examinations under rule 39.03 constitute an abuse of process insofar as those examinations would (i) allow the plaintiffs to conduct a general examination of the defendants before the close of pleadings and (ii) impose a significant cost burden on those defendants before it was know if the action was certifiable.[FN14]

28 The *Securities Act* provides its own procedure in respect of the statutory remedy and it should not be presumed that all of the rights and procedures under the *Rules* apply.[FN15] Subsection 138.8(3) of the OSA specifically provides that "the maker of such affidavit may be examined". This provision would be redundant and unnecessary if the *Rules* applied to permit the plaintiffs to examine any witnesses they chose.

29 The plaintiffs have yet to meet their onus under section 138.8(1). Their proposed reliance on Rule 39.03 is neither contemplated by the statute nor by the principles governing examinations under this rule. To permit the plaintiffs to accomplish indirectly what they are prevented from doing directly would amount to an abuse of process.

30 For these reasons, the plaintiffs' motion is dismissed.

31 If the parties are unable to agree on costs, they may submit Costs Outlines and brief submissions within 30 days.

FN1 Interim Report of the Committee on Corporate Disclosure, *Toward Improved Disclosure — A Search for Balance in Corporate Disclosure (Allen Committee Interim Report)*, Toronto Stock Exchange (December 1995) at p. iii; Final Report of the Committee on Corporate Disclosure, *Toward Improved Disclosure — A Search for Balance in Corporate Disclosure (Allen Committee Final Report)*, Toronto Stock Exchange (March 1997); Canadian Securities Administrators Notice 53-302 ("*CSA Notice 53-302*"), 2000 O.S.C.B. 7383 at 7385

FN2 *Allen Committee Interim Report* at p. 58; *Allen Committee Final Report* at p. 41-42; *CSA Notice 53-302* at p. 7386

FN3 *CSA Notice 53-302* at p. 7387.

FN4 Ibid at p. 7389-7390.

FN5 *Epstein v. First Marathon Inc. / Société First Marathon Inc.* (2000), 2 B.L.R. (3d) 30 (Ont. S.C.J.)

FN6 *CSA Notice 53-302* at p. 7389.

FN7 Ibid at p. 7390.

FN8 *Royal Bank v. Société Générale (Canada)* (2006), 31 B.L.R. (4th) 63 (Ont. C.A.) at paras. 35-37; *Lang v. Kligerman*, [1998] O.J. No. 3708 (Ont. C.A.) at para. 9; *Meditrust Healthcare Inc. v. Shoppers Drug Mart*, [2000] O.J. No. 3762 (Ont. S.C.J.) at para. 11. *Kaighin Capital Inc. v. Canadian National Sportsmen's Shows* (1987), 58 O.R. (2d) 790 (Ont. H.C.) at page 792.

FN9 *CanWest MediaWorks Inc. v. Canada (Attorney General)* (2007), 48 C.P.C. (6th) 281 (Ont. C.A.) at p. 285.

FN10 [2008] O.J. No. 1844 (Ont. S.C.J.), leave to appeal refused, [2008] O.J. No. 2751 (Ont. S.C.J.).

FN11 *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1995), 27 O.R. (3d) 291 (Ont. Gen. Div.) at page 299; *Schreiber v. Mulroney* (2007), 87 O.R. (3d) 643 (Ont. S.C.J.) at page 648.

FN12 (1976), 14 O.R. (2d) 333 (Ont. H.C.) at p. 337, *per* Cory J.

FN13 *Fehringer v. Sun Media Corp.* (2001), 54 O.R. (3d) 31 (Ont. S.C.J.) at page 35; See also, *Sun-Times Media Group Inc. v. Black*, 2007 CarswellOnt 1186 (Ont. S.C.J. [Commercial List]) at paras. 46-47. k

FN14 *Fehringer v. Sun Media Corp.* (2001), 54 O.R. (3d) 31 (Ont. S.C.J.) at page 35

FN15 Driedger, E. and Sullivan R., *Driedger on the Construction of Statues*, 3rd ed. (Toronto: Butterworth Canada,

1994) at page 168; *Canada Post Corp. v. Key Mail Canada Inc.* (2005), 77 O.R. (3d) 294 (Ont. C.A.).

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2009 CarswellOnt 934,

2009 CarswellOnt 934

Ainslie v. CV Technologies Inc.

DAVID AINSLIE and MURIEL MARENTETTE v. CV TECHNOLOGIES INC., GRANT THORNTON LLP, JACQUELINE J. SHAN, GORDON G. TALLMAN, AND HARRY BUDDLE

Ontario Superior Court of Justice

D. Bellamy J.

Heard: February 3, 2009
Judgment: February 11, 2009
Docket: Toronto 26/09

Proceedings: allowing leave to appeal *Ainslie v. CV Technologies Inc.* (2008), 93 O.R. (3d) 200, 2008 CarswellOnt 7227 (Ont. S.C.J.); additional reasons at *Ainslie v. CV Technologies Inc.* (2008), 2008 CarswellOnt 7735 (Ont. S.C.J.)

Counsel: William Sasso, Jay Strosberg, Michael Robb for Plaintiff / Moving Parties

Alan L.W. D'Silva for Defendants / Responding Parties, CV Technologies Inc., Shan, Tallman & Buddle

Robb C. Heintzman, Matthew Fleming for Defendant / Responding Party, Grant Thornton

Subject: Corporate and Commercial; Securities; Civil Practice and Procedure

Securities --- Miscellaneous

Secondary market liability — Practice and procedure — Motions judge dismissed secondary market leave motion pursuant to s. 138.8 of Part XXIII.1 of Securities Act — Motions judge held that s. 138.8(2) of Act did not require each defendant to file affidavit in response to plaintiff's motion for leave to bring action under Part XXIII.1 of Act — Motions judge also held that it would be abuse of process to permit appellants to rely on R. 39.03 of Rules of Civil Procedure — Appellants brought motion for leave to appeal — Motion for leave granted with respect to s. 138.8(2) of Act — Leave for appeal with respect to order regarding R. 39.03(1) was denied as there was no reason to deny correctness of order — Appellants met test under R. 62.02(4)(b) for leave to appeal — There were two other decisions that contained strong conclusory remarks regarding subsection interpreted by motions judge which contradicted interpretation ascribed to it by motions judge — There was novel issue that was open to debate and was of general public importance which required attention of appellate court — Motions judge's decision was not specific to facts of case but consisted of first interpretation of new section of Act — Result of decision was that it would po-

tentially affect conduct of all or many future leave motions brought under Part XXIII.1 of Act, together with conduct of proceedings of any other provincial legislation that followed provisions of Part XXIII.1.

Civil practice and procedure --- Practice on appeal — Interlocutory or final orders — Interlocutory orders — Leave to appeal

Motions judge dismissed secondary market leave motion pursuant to s. 138.8 of Part XXIII.1 of Securities Act — Motions judge held that s. 138.8(2) of Act did not require each defendant to file affidavit in response to plaintiff's motion for leave to bring action under Part XXIII.1 of Act — Motions judge also held that it would be abuse of process to permit appellants to rely on R. 39.03 of Rules of Civil Procedure — Appellants brought motion for leave to appeal — Motion for leave granted with respect to s. 138.8(2) of Act — Leave for appeal with respect to order regarding R. 39.03(1) was denied as there was no reason to deny correctness of order — Appellants met test under R. 62.02(4)(b) for leave to appeal — There were two other decisions that contained strong conclusory remarks regarding subsection interpreted by motions judge which contradicted interpretation ascribed to it by motions judge — There was novel issue that was open to debate and was of general public importance which required attention of appellate court — Motions judge's decision was not specific to facts of case but consisted of first interpretation of new section of Act — Result of decision was that it would potentially affect conduct of all or many future leave motions brought under Part XXIII.1 of Act, together with conduct of proceedings of any other provincial legislation that followed provisions of Part XXIII.1.

Cases considered by *D. Bellamy J.*:

Ash v. Corp. of Lloyd's (1992), (sub nom. *Ash v. Lloyd's Corp.*) 8 O.R. (3d) 282, 1992 CarswellOnt 1099 (Ont. Gen. Div.) — considered

Silver v. Imax Corp. (2008), 2008 CarswellOnt 2657 (Ont. S.C.J.) — considered

Silver v. Imax Corp. (2008), 2008 CarswellOnt 4087 (Ont. S.C.J.) — referred to

Statutes considered:

Securities Act, R.S.O. 1990, c. S.5

Generally — referred to

Pt. XXIII.1 [en. 2002, c. 22, s. 185] — referred to

s. 138.8 [en. 2002, c. 22, s. 185] — considered

s. 138.8(2) [en. 2002, c. 22, s. 185] — considered

s. 138.8(3) [en. 2002, c. 22, s. 185] — referred to

Rules considered:

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

R. 39 — pursuant to

R. 39.03 — referred to

R. 39.03(1) — pursuant to

R. 62.02(4) — pursuant to

R. 62.02(4)(a) — considered

R. 62.02(4)(b) — considered

MOTION for leave to appeal from judgment reported at *Ainslie v. CV Technologies Inc.* (2008), 93 O.R. (3d) 200, 2008 CarswellOnt 7227 (Ont. S.C.J.), dismissing secondary market leave motion pursuant to s. 138.8 of Part XXIII.1 of *Securities Act*.

***D. Bellamy J.*:**

1 The appellants seek leave to appeal an interlocutory order of Justice J. Lax, released on December 3, 2008, in which she dismissed a secondary market leave motion pursuant to s.138.8 of Part XXIII.1 of the *Ontario Securities Act*, R.S.O. 1990, c. S.5 as amended (OSA). At issue is the motions judge's interpretation of subsection s.138.8(2), which had not previously been interpreted, and the interplay between Rule 39 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 and Part XXIII.1 of the OSA.

2 Lax J. ruled that s. 138.8(2) of the OSA does not require each defendant to file an affidavit in response to the plaintiff's motion for leave to bring an action under Part XXIII.1 of the Act, which provides for secondary market liability. She also concluded that it would be an abuse of process to permit the appellants to rely on Rule 39.03, as such reliance was not contemplated either by the OSA or by the principles governing examinations under Rule 39.03.

3 For the reasons that follow, the motion for leave to appeal with respect to s.138.8 (2) of the OSA is allowed. However, the application for leave to appeal with respect to the order regarding Rule 39.03(1) is denied, as there is no good reason to doubt the correctness of the order, given the specific facts of this case.

4 The moving parties seek leave to appeal under both branches of Rule 62.02(4). They submit that this case of first impression is of undoubted general importance to the conduct of securities litigation in Ontario as well as in other provinces with similar legislation. They also submit that the motions judge's approach ignores the apparently plain, mandatory language of the statute and conflicts with another decision of this court: *Silver v. Imax Corp.*, [2008] O.J. No. 1844 (Ont. S.C.J.) (leave to appeal denied, [2008] O.J. No. 2751 (Ont. S.C.J.)). If left unchallenged, they argue, the decision may render Part XXIII.1 of the OSA ineffective, may discourage access to justice, and may leave the court in the unenviable position of having to decide a leave motion with insufficient information.

5 The responding parties argue that great deference is owed to decisions of a class action judge and, in any event, the motions judge's decision is correct. *Imax*, they submit, is not a conflicting decision. Finally, they argue that the position advocated by the moving parties is unreasonable and untenable, and that Lax, J. recognized this in her well-reasoned decision.

6 While I do not believe the moving parties meet the test under Rule 62.02(4)(a), they do meet the test under Rule 62.02(4)(b).

7 As Lax, J. correctly noted, van Rensburg, J. in *Imax* made *obiter* remarks while resolving a refusals motion in circumstances where the defendants had chosen to file affidavit material. She was interpreting subsection s.138.8(3) and not subsection 138.8(2) as Lax, J. was. To that extent, *Imax* is not a conflicting decision within the meaning of Rule 62.02(4)(a).

8 Having said that, however, it is important to note that there are two judges of the same level of court as the motions judge who have drawn the opposite conclusion from hers on this very subsection: van Rensburg, J., who ruled on the refusals motion and who is the case management judge dealing with all issues arising in the Imax matter, and Langdon, J. who disposed of the application for leave to appeal on the same matter. Justice van Rensburg had this to say about s.138.8:

> 17. ... The fact that proposed defendants are not required generally under the Rules to make documentary production and are not subject to discovery is irrelevant, as is the observation that shareholders do not generally have access to confidential records of issuers. The *Securities Act* provides its own procedure in respect of the statutory remedy, that specifically requires proposed defendants to put forward information (presumably otherwise confidential and non-compellable information to the extent it may be relevant to their defence) and that specifically authorizes examination on such information. A shareholder who seeks leave to commence a claim under s. 138.8 has special powers that are available in the context of such a claim and not generally.
>
> 18. ...In this motion, much more is required of both the plaintiffs and the respondents. The plaintiffs cannot rely on their allegations, but must put forward evidence, which in turn can be tested in cross-examination. Likewise, in opposing leave, each prospective defendant must come forward with its defences, with evidence in support. The merits of the claim are clearly relevant, and based on the evidence adduced and tested, the plaintiffs must establish their good faith and that the action has a reasonable possibility of success at trial.
>
> 19. The challenge is that these are the first proceedings under Part XXIII.1 of the Act. The Act provides no guidance as to the interpretation of the threshold test and what type, quality and quantity of evidence a court is to consider in making a determination of the plaintiffs' good faith and the reasonable possibility of the plaintiffs' success at trial. We are left with what the statute prescribes — a mandatory requirement for each plaintiff and each proposed defendant to set out facts by affidavit, with the right to cross-examine the deponents of such affidavits. There is no indication in the statute that evidence put forward or examined upon must be restricted to what is in the public record. Indeed, the facts to support a due diligence defence are generally in the possession and control of the party asserting such a defence. There is no requirement in the statutory procedure for an affiant to attach documentary exhibits, but it is not unusual for exhibits to be attached to affidavits, and the parties in this case have attached extensive exhibits to their affidavits. (emphasis added throughout)

9 In the application for leave to appeal, Langdon, J. commented on s.138.8 at paragraph 4:

> 4. S.138.8, the "gate-keeping" section, provides that a plaintiff must obtain leave from the court before commencing such an action, and that, on an application for leave, the plaintiff *and each defendant* must serve and file affidavits setting forth the material facts on which each intends to rely. (italicized emphasis in the original)

10 I infer from the italicized emphasis on the words "and each defendant," that Langdon, J. was concluding, as van Rensburg, J. had done earlier, that the OSA *required* each defendant to serve and file affidavits.

11 Therefore, even though these two other decisions are not conflicting decisions in the sense that they are not interpreting the same subsection of the OSA, both decisions contain decidedly strong conclusory remarks regarding the subsection that Justice Lax was interpreting. These observations regarding the apparently mandatory language of the subsection contradict the interpretation ascribed to it by the motions judge.

2009 CarswellOnt 934,

Conclusion

12 On a motion for leave to appeal under Rule 62.02(4)(b), I do not need to conclude that the decision was wrong or even probably wrong or that, if I had been hearing the original motion, I would have decided it differently. It is sufficient if I am satisfied that the correctness of the order is open to very serious debate: *Ash v. Corp. of Lloyd's* (1992), 8 O.R. (3d) 282 (Ont. Gen. Div.).

13 In my view, this novel issue is one that is open to very serious debate and is of general public importance requiring the attention of an appellate court. The motions judge's decision was not specific to the facts of this case, but consisted of the first interpretation of a new section of the OSA. The result of her decision is that it will potentially affect the conduct of all or many future leave motions brought under Part XXIII.1 of the OSA, together with the conduct of proceedings of any other provincial legislation that follows secondary market disclosure provisions of Part XXIII.1.

Disposition

14 For the reasons outlined above, leave to appeal the order dismissing the appellant's motion is granted on the following issue:

> Did the motions judge err in concluding that s. 138.8(2) of the *Ontario Securities Act* does not require each defendant to file an affidavit in response to the plaintiff's motion for leave to bring an action under Part XXIII.1 of the Act.

15 Leave to appeal the order regarding the availability of Rule 39.03 is denied.

Costs

16 The costs of this motion is reserved to the panel disposing of the appeal.

Motion granted.

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Ted Leroy Trucking [Century Services] Ltd., Re

Century Services Inc. (Appellant) and Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada (Respondent)

Supreme Court of Canada

Deschamps J., McLachlin C.J.C., Binnie, LeBel, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant

Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency

Tax --- Goods and Services Tax — Collection and remittance — GST held in trust

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown.

Taxation --- Taxe sur les produits et services — Perception et versement — Montant de TPS détenu en fiducie

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribu-

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

nal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Taxation --- Principes généraux — Priorité des créances fiscales dans le cadre de procédures en faillite

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

The debtor company owed the Crown under the Excise Tax Act (ETA) for GST that was not remitted. The debtor commenced proceedings under the Companies' Creditors Arrangement Act (CCAA). Under an order by the B.C. Supreme Court, the amount of the tax debt was placed in a trust account, and the remaining proceeds from the sale of the debtor's assets were paid to the major secured creditor. The debtor's application for a partial lifting of the stay of proceedings in order to assign itself into bankruptcy was granted, while the Crown's application for the immediate payment of the unremitted GST was dismissed.

The Crown's appeal to the B.C. Court of Appeal was allowed. The Court of Appeal found that the lower court was bound by the ETA to give the Crown priority once bankruptcy was inevitable. The Court of Appeal ruled that there was a deemed trust under s. 222 of the ETA or that an express trust was created in the Crown's favour by the court order segregating the GST funds in the trust account.

The creditor appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Deschamps J. (McLachlin C.J.C., Binnie, LeBel, Charron, Rothstein, Cromwell JJ. concurring): A purposive and contextual analysis of the ETA and CCAA yielded the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the CCAA when it amended the ETA in 2000. Parliament had moved away from asserting priority for Crown claims in insolvency law under both the CCAA and

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

Bankruptcy and Insolvency Act (BIA). Unlike for source deductions, there was no express statutory basis in the CCAA or BIA for concluding that GST claims enjoyed any preferential treatment. The internal logic of the CCAA also militated against upholding a deemed trust for GST claims.

Giving the Crown priority over GST claims during CCAA proceedings but not in bankruptcy would, in practice, deprive companies of the option to restructure under the more flexible and responsive CCAA regime. It seemed likely that Parliament had inadvertently succumbed to a drafting anomaly, which could be resolved by giving precedence to s. 18.3 of the CCAA. Section 222(3) of the ETA could no longer be seen as having impliedly repealed s. 18.3 of the CCAA by being passed subsequently to the CCAA, given the recent amendments to the CCAA. The legislative context supported the conclusion that s. 222(3) of the ETA was not intended to narrow the scope of s. 18.3 of the CCAA.

The breadth of the court's discretion under the CCAA was sufficient to construct a bridge to liquidation under the BIA, so there was authority under the CCAA to partially lift the stay of proceedings to allow the debtor's entry into liquidation. There should be no gap between the CCAA and BIA proceedings that would invite a race to the courthouse to assert priorities.

The court order did not have the certainty that the Crown would actually be the beneficiary of the funds sufficient to support an express trust, as the funds were segregated until the dispute between the creditor and the Crown could be resolved. The amount collected in respect of GST but not yet remitted to the Receiver General of Canada was not subject to a deemed trust, priority or express trust in favour of the Crown.

Per Fish J. (concurring): Parliament had declined to amend the provisions at issue after detailed consideration of the insolvency regime, so the apparent conflict between s. 18.3 of the CCAA and s. 222 of the ETA should not be treated as a drafting anomaly. In the insolvency context, a deemed trust would exist only when two complementary elements co-existed: first, a statutory provision creating the trust; and second, a CCAA or BIA provision confirming its effective operation. Parliament had created the Crown's deemed trust in the Income Tax Act, Canada Pension Plan and Employment Insurance Act and then confirmed in clear and unmistakable terms its continued operation under both the CCAA and the BIA regimes. In contrast, the ETA created a deemed trust in favour of the Crown, purportedly notwithstanding any contrary legislation, but Parliament did not expressly provide for its continued operation in either the BIA or the CCAA. The absence of this confirmation reflected Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings. Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings, and so s. 222 of the ETA mentioned the BIA so as to exclude it from its ambit, rather than include it as the other statutes did. As none of these statutes mentioned the CCAA expressly, the specific reference to the BIA had no bearing on the interaction with the CCAA. It was the confirmatory provisions in the insolvency statutes that would determine whether a given deemed trust would subsist during insolvency proceedings.

Per Abella J. (dissenting): The appellate court properly found that s. 222(3) of the ETA gave priority during CCAA proceedings to the Crown's deemed trust in unremitted GST. The failure to exempt the CCAA from the operation of this provision was a reflection of clear legislative intent. Despite the requests of various constituencies and case law confirming that the ETA took precedence over the CCAA, there was no responsive legislative revision and the BIA remained the only exempted statute. There was no policy justification for interfering, through interpretation, with this clarity of legislative intention and, in any event, the application of other principles of interpretation reinforced this conclusion. Contrary to the majority's view, the "later in time" principle did not favour the precedence of the CCAA, as the CCAA was merely re-enacted without significant substantive changes. According to the Interpretation Act, in such circumstances, s. 222(3) of the ETA remained the later provision. The chambers judge was required to respect the priority regime set out in s. 222(3) of the ETA and so did not have the authority to deny the Crown's request for payment of the GST funds during the CCAA proceedings.

La compagnie débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

taxe d'accise (LTA). La débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC). En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs de la débitrice a servi à payer le créancier garanti principal. La demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement immédiat des montants de TPS non remis a été rejetée.

L'appel interjeté par la Couronne a été accueilli. La Cour d'appel a conclu que le tribunal se devait, en vertu de la LTA, de donner priorité à la Couronne une fois la faillite inévitable. La Cour d'appel a estimé que l'art. 222 de la LTA établissait une fiducie présumée ou bien que l'ordonnance du tribunal à l'effet que les montants de TPS soient détenus dans un compte en fiducie créait une fiducie expresse en faveur de la Couronne.

Le créancier a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Deschamps, J. (McLachlin, J.C.C., Binnie, LeBel, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Une analyse téléologique et contextuelle de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000. Le législateur avait mis un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité, sous le régime de la LACC et celui de la Loi sur la faillite et l'insolvabilité (LFI). Contrairement aux retenues à la source, aucune disposition législative expresse ne permettait de conclure que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel sous le régime de la LACC ou celui de la LFI. La logique interne de la LACC allait également à l'encontre du maintien de la fiducie réputée à l'égard des créances découlant de la TPS.

Le fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet, dans les faits, de priver les compagnies de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC. Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle, laquelle pouvait être corrigée en donnant préséance à l'art. 18.3 de la LACC. On ne pouvait plus considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC parce qu'il avait été adopté après la LACC, compte tenu des modifications récemment apportées à la LACC. Le contexte législatif étayait la conclusion suivant laquelle l'art. 222(3) de la LTA n'avait pas pour but de restreindre la portée de l'art. 18.3 de la LACC.

L'ampleur du pouvoir discrétionnaire conféré au tribunal par la LACC était suffisant pour établir une passerelle vers une liquidation opérée sous le régime de la LFI, de sorte qu'il avait, en vertu de la LACC, le pouvoir de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation. Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse, puisque les fonds étaient détenus à part jusqu'à ce que le litige entre le créancier et la Couronne soit résolu. Le montant perçu au titre de la TPS mais non encore versé au receveur général du Canada ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Fish, J. (souscrivant aux motifs des juges majoritaires) : Le législateur a refusé de modifier les dispositions en question suivant un examen approfondi du régime d'insolvabilité, de sorte qu'on ne devrait pas qualifier l'apparente contradiction entre l'art. 18.3 de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle. Dans un contexte d'insolvabilité, on ne pourrait conclure à l'existence d'une fiducie présumée que lorsque deux éléments complémentaires étaient réunis : en premier lieu, une disposition législative qui crée la fiducie et, en second lieu, une disposition de la LACC ou de la LFI qui confirme l'existence de la fiducie. Le législateur a établi une fiducie présumée en faveur de

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la Couronne dans la Loi de l'impôt sur le revenu, le Régime de pensions du Canada et la Loi sur l'assurance-emploi puis, il a confirmé en termes clairs et explicites sa volonté de voir cette fiducie présumée produire ses effets sous le régime de la LACC et de la LFI. Dans le cas de la LTA, il a établi une fiducie présumée en faveur de la Couronne, sciemment et sans égard pour toute législation à l'effet contraire, mais n'a pas expressément prévu le maintien en vigueur de celle-ci sous le régime de la LFI ou celui de la LACC. L'absence d'une telle confirmation témoignait de l'intention du législateur de laisser la fiducie présumée devenir caduque au moment de l'introduction de la procédure d'insolvabilité. L'intention du législateur était manifestement de rendre inopérantes les fiducies présumées visant la TPS dès l'introduction d'une procédure d'insolvabilité et, par conséquent, l'art. 222 de la LTA mentionnait la LFI de manière à l'exclure de son champ d'application, et non de l'y inclure, comme le faisaient les autres lois. Puisqu'aucune de ces lois ne mentionnait spécifiquement la LACC, la mention explicite de la LFI n'avait aucune incidence sur l'interaction avec la LACC. C'était les dispositions confirmatoires que l'on trouvait dans les lois sur l'insolvabilité qui déterminaient si une fiducie présumée continuerait d'exister durant une procédure d'insolvabilité.

Abella, J. (dissidente) : La Cour d'appel a conclu à bon droit que l'art. 222(3) de la LTA donnait préséance à la fiducie présumée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Le fait que la LACC n'ait pas été soustraite à l'application de cette disposition témoignait d'une intention claire du législateur. Malgré les demandes répétées de divers groupes et la jurisprudence ayant confirmé que la LTA l'emportait sur la LACC, le législateur n'est pas intervenu et la LFI est demeurée la seule loi soustraite à l'application de cette disposition. Il n'y avait pas de considération de politique générale qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur et, de toutes manières, cette conclusion était renforcée par l'application d'autres principes d'interprétation. Contrairement à l'opinion des juges majoritaires, le principe de la préséance de la « loi postérieure » ne militait pas en faveur de la présance de la LACC, celle-ci ayant été simplement adoptée à nouveau sans que l'on ne lui ait apporté de modifications importantes. En vertu de la Loi d'interprétation, dans ces circonstances, l'art. 222(3) de la LTA demeurait la disposition postérieure. Le juge siégeant en son cabinet était tenu de respecter le régime de priorités établi à l'art. 222(3) de la LTA, et il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la LACC.

Cases considered by *Deschamps J.*:

Air Canada, Re (2003), 42 C.B.R. (4th) 173, 2003 CarswellOnt 2464 (Ont. S.C.J. [Commercial List]) — referred to

Air Canada, Re (2003), 2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List]) — referred to

Alternative granite & marbre inc., Re (2009), (sub nom. *Dep. Min. Rev. Quebec v. Caisse populaire Desjardins de Montmagny)* 2009 G.T.C. 2036 (Eng.), (sub nom. *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny)* [2009] 3 S.C.R. 286, 312 D.L.R. (4th) 577, [2009] G.S.T.C. 154, (sub nom. *9083-4185 Québec Inc. (Bankrupt), Re)* 394 N.R. 368, 60 C.B.R. (5th) 1, 2009 SCC 49, 2009 CarswellQue 10706, 2009 CarswellQue 10707 (S.C.C.) — referred to

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

Canadian Airlines Corp., Re (2000), [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 2000 CarswellAlta 662, 2000 ABQB 442, 265 A.R. 201 (Alta. Q.B.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re (2000), 2000 CarswellOnt 3269, 19

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

C.B.R. (4th) 158 (Ont. S.C.J.) — referred to

Doré c. Verdun (Municipalité) (1997), (sub nom. *Doré v. Verdun (City)*) [1997] 2 S.C.R. 862, (sub nom. *Doré v. Verdun (Ville)*) 215 N.R. 81, (sub nom. *Doré v. Verdun (City)*) 150 D.L.R. (4th) 385, 1997 CarswellQue 159, 1997 CarswellQue 850 (S.C.C.) — distinguished

Dylex Ltd., Re (1995), 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — considered

First Vancouver Finance v. Minister of National Revenue (2002), [2002] 3 C.T.C. 285, (sub nom. *Minister of National Revenue v. First Vancouver Finance*) 2002 D.T.C. 6998 (Eng.), (sub nom. *Minister of National Revenue v. First Vancouver Finance*) 2002 D.T.C. 7007 (Fr.), 288 N.R. 347, 212 D.L.R. (4th) 615, [2002] G.S.T.C. 23, [2003] 1 W.W.R. 1, 45 C.B.R. (4th) 213, 2002 SCC 49, 2002 CarswellSask 317, 2002 CarswellSask 318, [2002] 2 S.C.R. 720 (S.C.C.) — considered

Gauntlet Energy Corp., Re (2003), 30 Alta. L.R. (4th) 192, 2003 ABQB 894, 2003 CarswellAlta 1735, [2003] G.S.T.C. 193, 49 C.B.R. (4th) 213, [2004] 10 W.W.R. 180, 352 A.R. 28 (Alta. Q.B.) — referred to

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*) [1991] 2 W.W.R. 136 (B.C. C.A.) — referred to

Ivaco Inc., Re (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43 (Ont. C.A.) — referred to

Komunik Corp., Re (2010), 2010 CarswellQue 686, 2010 QCCA 183 (Que. C.A.) — referred to

Komunik Corp., Re (2009), 2009 QCCS 6332, 2009 CarswellQue 13962 (Que. S.C.) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1990 CarswellOnt 139, 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey*) 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey*) 41 O.A.C. 282 (Ont. C.A.) — considered

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — not followed

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265, 1992 CarswellBC 524 (B.C. C.A. [In Chambers]) — referred to

Philip's Manufacturing Ltd., Re (1992), 9 C.B.R. (3d) 25, 67 B.C.L.R. (2d) 84, 4 B.L.R. (2d) 142, 1992 CarswellBC 542 (B.C. C.A.) — referred to

Quebec (Deputy Minister of Revenue) c. Rainville (1979), (sub nom. *Bourgeault, Re*) 33 C.B.R. (N.S.) 301, (sub nom. *Bourgeault's Estate v. Quebec (Deputy Minister of Revenue)*) 30 N.R. 24, (sub nom. *Bourgault, Re*) 105 D.L.R. (3d) 270, 1979 CarswellQue 165, 1979 CarswellQue 266, (sub nom. *Quebec (Deputy Minister of Revenue) v. Bourgeault (Trustee of)*) [1980] 1 S.C.R. 35 (S.C.C.) — referred to

Reference re Companies' Creditors Arrangement Act (Canada) (1934), [1934] 4 D.L.R. 75, 1934 CarswellNat

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

1, 16 C.B.R. 1, [1934] S.C.R. 659 (S.C.C.) — referred to

Royal Bank v. Sparrow Electric Corp. (1997), 193 A.R. 321, 135 W.A.C. 321, [1997] 2 W.W.R. 457, 208 N.R. 161, 12 P.P.S.A.C. (2d) 68, 1997 CarswellAlta 112, 1997 CarswellAlta 113, 46 Alta. L.R. (3d) 87, (sub nom. *R. v. Royal Bank*) 97 D.T.C. 5089, 143 D.L.R. (4th) 385, 44 C.B.R. (3d) 1, [1997] 1 S.C.R. 411 (S.C.C.) — considered

Skeena Cellulose Inc., Re (2003), 2003 CarswellBC 1399, 2003 BCCA 344, 184 B.C.A.C. 54, 302 W.A.C. 54, 43 C.B.R. (4th) 187, 13 B.C.L.R. (4th) 236 (B.C. C.A.) — referred to

Skydome Corp., Re (1998), 16 C.B.R. (4th) 118, 1998 CarswellOnt 5922 (Ont. Gen. Div. [Commercial List]) — referred to

Solid Resources Ltd., Re (2002), [2003] G.S.T.C. 21, 2002 CarswellAlta 1699, 40 C.B.R. (4th) 219 (Alta. Q.B.) — referred to

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — referred to

United Used Auto & Truck Parts Ltd., Re (1999), 12 C.B.R. (4th) 144, 1999 CarswellBC 2673 (B.C. S.C. [In Chambers]) — referred to

United Used Auto & Truck Parts Ltd., Re (2000), 2000 BCCA 146, 135 B.C.A.C. 96, 221 W.A.C. 96, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, 16 C.B.R. (4th) 141, [2000] 5 W.W.R. 178 (B.C. C.A.) — referred to

Cases considered by *Fish J.*:

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — not followed

Cases considered by *Abella J.* (dissenting):

Canada (Attorney General) v. Canada (Public Service Staff Relations Board) (1977), [1977] 2 F.C. 663, 14 N.R. 257, 74 D.L.R. (3d) 307, 1977 CarswellNat 62, 1977 CarswellNat 62F (Fed. C.A.) — referred to

Doré c. Verdun (Municipalité) (1997), (sub nom. *Doré v. Verdun (City)*) [1997] 2 S.C.R. 862, (sub nom. *Doré v. Verdun (Ville)*) 215 N.R. 81, (sub nom. *Doré v. Verdun (City)*) 150 D.L.R. (4th) 385, 1997 CarswellQue 159, 1997 CarswellQue 850 (S.C.C.) — referred to

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — considered

R. v. Tele-Mobile Co. (2008), 2008 CarswellOnt 1588, 2008 CarswellOnt 1589, 2008 SCC 12, (sub nom. *Tele-Mobile Co. v. Ontario*) 372 N.R. 157, 55 C.R. (6th) 1, (sub nom. *Ontario v. Tele-Mobile Co.*) 229 C.C.C. (3d) 417, (sub nom. *Tele-Mobile Co. v. Ontario*) 235 O.A.C. 369, (sub nom. *Tele-Mobile Co. v. Ontario*) [2008] 1 S.C.R. 305, (sub nom. *R. v. Tele-Mobile Company (Telus Mobility)*) 92 O.R. (3d) 478 (note), (sub nom. *Ontario v. Tele-Mobile Co.*) 291 D.L.R. (4th) 193 (S.C.C.) — considered

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

Statutes considered by *Deschamps J.*:

Bank Act, S.C. 1991, c. 46

Generally — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 67(2) — referred to

s. 67(3) — referred to

s. 81.1 [en. 1992, c. 27, s. 38(1)] — considered

s. 81.2 [en. 1992, c. 27, s. 38(1)] — considered

s. 86(1) — considered

s. 86(3) — referred to

Bankruptcy Act and to amend the Income Tax Act in consequence thereof, Act to amend the, S.C. 1992, c. 27

Generally — referred to

s. 39 — referred to

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, Act to amend the, S.C. 1997, c. 12

s. 73 — referred to

s. 125 — referred to

s. 126 — referred to

Canada Pension Plan, R.S.C. 1985, c. C-8

Generally — referred to

s. 23(3) — referred to

s. 23(4) — referred to

Cités et villes, Loi sur les, L.R.Q., c. C-19

en général — referred to

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to

art. 2930 — referred to

Companies' Creditors Arrangement Act, Act to Amend, S.C. 1952-53, c. 3

Generally — referred to

Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36

Generally — referred to

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

Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — referred to

s. 11(4) — referred to

s. 11(6) — referred to

s. 11.02 [en. 2005, c. 47, s. 128] — referred to

s. 11.09 [en. 2005, c. 47, s. 128] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — referred to

s. 18.3 [en. 1997, c. 12, s. 125] — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 18.3(2) [en. 1997, c. 12, s. 125] — considered

s. 18.4 [en. 1997, c. 12, s. 125] — referred to

s. 18.4(1) [en. 1997, c. 12, s. 125] — considered

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

s. 18.4(3) [en. 1997, c. 12, s. 125] — considered

s. 20 — considered

s. 21 — considered

s. 37 — considered

s. 37(1) — referred to

Employment Insurance Act, S.C. 1996, c. 23

Generally — referred to

s. 86(2) — referred to

s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

s. 222(1) [en. 1990, c. 45, s. 12(1)] — referred to

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

Fairness for the Self-Employed Act, S.C. 2009, c. 33

Generally — referred to

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

s. 227(4) — referred to

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — referred to

Interpretation Act, R.S.C. 1985, c. I-21

s. 44(f) — considered

Personal Property Security Act, S.A. 1988, c. P-4.05

Generally — referred to

Sales Tax and Excise Tax Amendments Act, 1999, S.C. 2000, c. 30

Generally — referred to

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1

Generally — referred to

s. 69 — referred to

s. 128 — referred to

s. 131 — referred to

Statutes considered *Fish J.*:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 67(2) — considered

s. 67(3) — considered

Canada Pension Plan, R.S.C. 1985, c. C-8

Generally — referred to

s. 23 — considered

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

Generally — referred to

s. 11 — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 18.3(2) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered

Employment Insurance Act, S.C. 1996, c. 23

Generally — referred to

s. 86(2) — referred to

s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(1) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3)(a) [en. 1990, c. 45, s. 12(1)] — considered

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

Generally — referred to

s. 227(4) — considered

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — considered

s. 227(4.1)(a) [en. 1998, c. 19, s. 226(1)] — considered

Statutes considered *Abella J.* (dissenting):

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

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

Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

Interpretation Act, R.S.C. 1985, c. I-21

s. 2(1)"enactment" — considered

s. 44(f) — considered

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11

Generally — referred to

APPEAL by creditor from judgment reported at 2009 CarswellBC 1195, 2009 BCCA 205, [2009] G.S.T.C. 79, 98 B.C.L.R. (4th) 242, [2009] 12 W.W.R. 684, 270 B.C.A.C. 167, 454 W.A.C. 167, 2009 G.T.C. 2020 (Eng.) (B.C. C.A.), allowing Crown's appeal from dismissal of application for immediate payment of tax debt.

***Deschamps J.*:**

1 For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

2 Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

will refer to the amended provisions only where relevant.

4 On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of $305,202.30 be held by the Monitor in its trust account.

5 On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, [2009] G.S.T.C. 79, 270 B.C.A.C. 167 (B.C. C.A.)). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)*, [2005] G.S.T.C. 1, 73 O.R. (3d) 737 (Ont. C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

8 Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

9 This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

3. Analysis

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10 The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite ... any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

11 In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 Purpose and Scope of Insolvency Law

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

13 Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

15 As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims accord-

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ing to predetermined priority rules.

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

18 Early commentary and jurisprudence also endorsed the *CCAA's* remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA's* objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, October 3, 1991, at pp. 15:15-15:16).

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on*

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the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy Minister of Revenue) c. Rainville* (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

25 Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

3.2 GST Deemed Trust Under the CCAA

26 The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

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27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp., Re*, 2009 QCCS 6332 (Que. S.C.), leave to appeal granted, 2010 QCCA 183 (Que. C.A.)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as am. by S.C. 1997, c. 12, s. 126).

29 Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bank. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

30 Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at § 2).

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

32 Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

33 In *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] G.S.T.C. 23, [2002] 2 S.C.R. 720 (S.C.C.), this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the

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Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

34 The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

> **222.** (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act)*, any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed ....

35 The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

36 The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

> **37.** (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

38 An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

> **18.3** (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganiza-

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tion and in bankruptcy.

39 Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions *(CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

> **18.4** (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of
>
> (a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution ....

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

40 The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize conflicts, apparent or real, and resolve them when possible.

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219, [2003] G.S.T.C. 21 (Alta. Q.B.); *Gauntlet*

42 The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

> The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.), and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

44 Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST claims.

46 The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

47 Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

48 Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

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50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

51 Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

53 A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

54 I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA's* override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

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56 My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

3.3 Discretionary Power of a Court Supervising a CCAA Reorganization

57 Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513 (Ont. C.A.), at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List])), at para. 10, *per* Farley J.).

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 describes 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 (see Jones, at p. 484).

59 Judicial discretion must of course be exercised in furtherance of the *CCAA's* purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9 (Alta. Q.B.), at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List])], 2003 CanLII 49366, at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts

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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*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div. [Commercial List]); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96 (B.C. C.A.), aff'g (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see Metcalfe & Mansfield). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA's* supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) what are the sources of a court's authority during *CCAA* proceedings? (2) what are the limits of this authority?

64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.), at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.), paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ...

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make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

70 The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

71 It is well-established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C. C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA's* purposes, the ability to make it is within the discretion of a *CCAA* court.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

74 It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

75 The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA*, the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the

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CCAA and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA's* objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

77 The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

81 I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

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3.4 Express Trust

82 The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29 especially fn. 42).

84 Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008, sufficient to support an express trust.

85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008, denying the Crown's application to enforce the trust once it was clear that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

89 For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal

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in the court below.

Fish J. (concurring):

I

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

92 I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

94 Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

95 Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

II

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

98 The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*") where s. 227(4) *creates* a deemed trust:

> **227 (4) Trust for moneys deducted** — Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be

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property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

99 In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

(4.1) Extension of trust — Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...

...

... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

101 The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

67 (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

102 Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance*

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Act, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) the *CCAA* and in s. 67(3) the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

> **222. (1) [Deemed] Trust for amounts collected** — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).
>
> ...
>
> **(3) Extension of trust** — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> > (a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...
> >
> > ...
>
> ... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

107 Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as

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a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.), at para. 37). *All* of the deemed trust provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada be subject to no deemed trust or priority in favour of the Crown.

***Abella J. (dissenting)*:**

114 The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*EIA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

115 Section 11[FN1] of the *CCAA* stated:

> **11.** (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

> **222 (3) Extension of trust** — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> (a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

> apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest
>
> and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

116 Century Services argued that the *CCAA's* general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

> **18.3** (1) ... [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* .... The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71, at pp. 37-38). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies'*

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Creditors Arrangement Act; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *R. v. Tele-Mobile Co.*, 2008 SCC 12, [2008] 1 S.C.R. 305 (S.C.C.), where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogani*).

125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

126 The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legisla-

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

ture indicates, through its language, an intention that the general provision prevails (*Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.)).

127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> [T]he overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ...:
>
> > The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA*, is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005,[FN2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Canada (Attorney General) v. Canada (Public Service Staff Relations Board)*, [1977] 2 F.C. 663 (Fed. C.A.), dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "new law" unless they differ in substance from the repealed provision:

> **44.** Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
>
> ...
>
> (f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an enactment as "an Act or regulation or *any portion of an Act or regulation*".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

comparison, with the differences between them underlined:

> **37.**(1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

131 The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to reorder the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.
>
> (*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

Appeal allowed.

Pourvoi accueilli.

Appendix

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as at December 13, 2007)**

11. (1) Powers of court — Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up*

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Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

...

(3) Initial application court orders — A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (i);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) Other than initial application court orders — A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

...

(6) Burden of proof on application — The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) Her Majesty affected — An order made under section 11 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

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(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and\

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) When order ceases to be in effect — An order referred to in subsection (1) ceases to be in effect if

(a) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in

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that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of

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any related interest, penalties or other amounts.

18.3 (1) Deemed trusts — Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

18.4 (1) Status of Crown claims — In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

...

(3) Operation of similar legislation — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

> (ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

...

20. [Act to be applied conjointly with other Acts] — The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as at September 18, 2009)**

11. General power of court — Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

...

11.02 (1) Stays, etc. — initial application — A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) Stays, etc. — other than initial application — A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

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(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) Burden of proof on application — The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

...

11.09 (1) Stay — Her Majesty — An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

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(2) When order ceases to be in effect — The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the op-

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

eration of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

37. (1) Deemed trusts — Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

***Excise Tax Act*, R.S.C. 1985, c. E-15 (as at December 13, 2007)**

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) Amounts collected before bankruptcy — Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act)*, to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

(3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act)*, any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (as at December 13, 2007)**

67. (1) Property of bankrupt — The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person,

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

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(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) Deemed trusts — Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) Exceptions — Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) Status of Crown claims — In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) Exceptions — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any

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related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

FN1 Section 11 was amended, effective September 18, 2009, and now states:

FN2 The amendments did not come into force until September 18, 2009.

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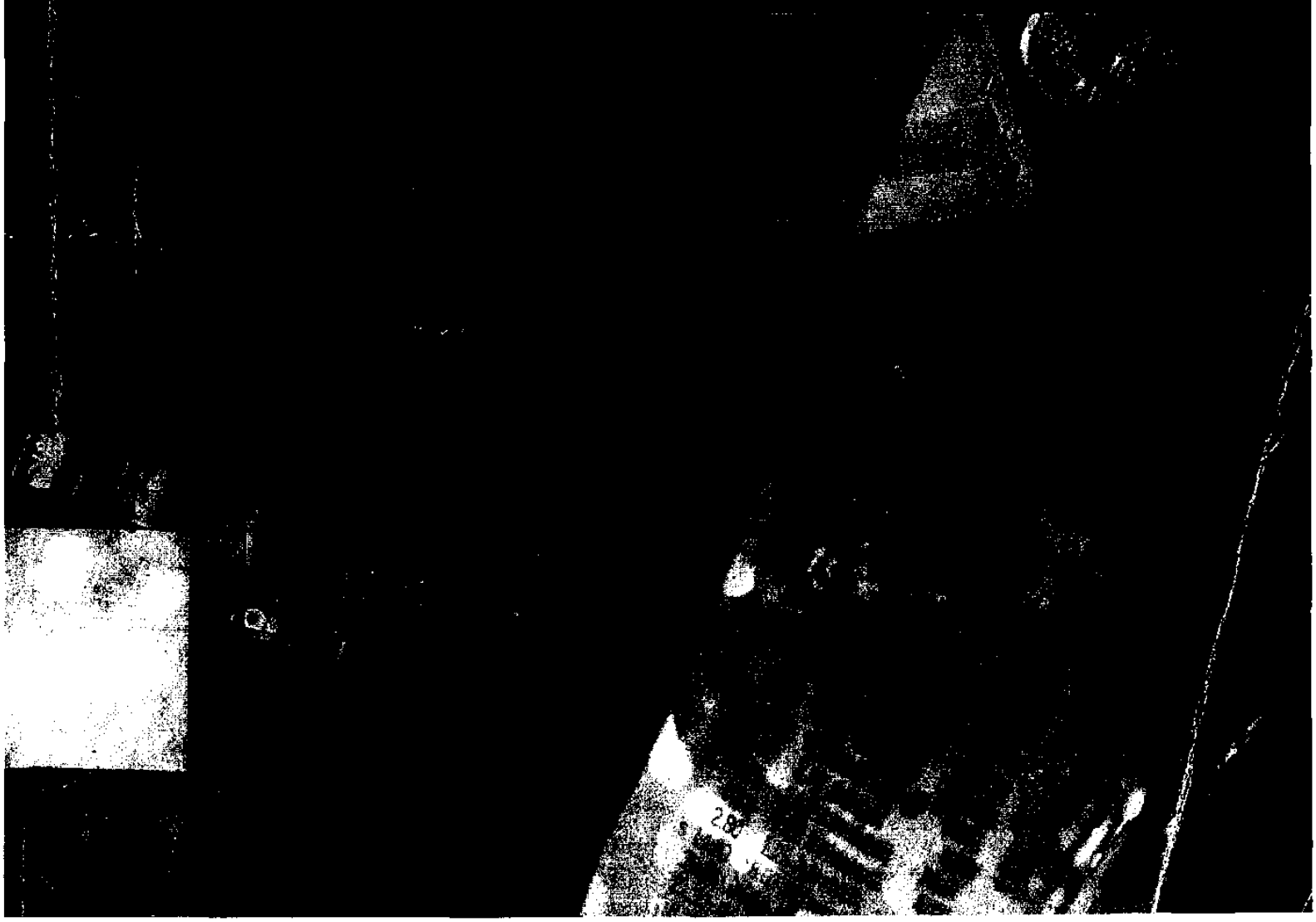
Final Report

Responsible Corporate Disclosure

Committee
on Corporate
Disclosure

TSE

Toronto Stock Exchange



Committee on
Corporate Disclosure

TSE

Toronto Stock Exchange

Final Report

Responsible Corporate Disclosure

A Search for Balance

March 1997

> enforcement are modest or diminishing and there is a need for jurisprudence to flesh out the general standards contained in the public law. ... Private enforcement can also be an effective and efficient means of holding public enforcers accountable for decisions not to prosecute. Finally, private as opposed to public enforcement can allow plaintiffs to achieve corrective justice and seek remedies for both past and future harms.[71]

Although the study quoted above focuses on competition laws, the principles articulated in it apply to any area of public policy and regulation where private individuals may seek redress for harms suffered.

5.14 After extensive deliberation, the Committee has concluded that, while adequate funding for SRAs is essential for regulation of Canada's capital markets, it will not, on its own, provide a sufficient deterrent to continuous disclosure violations. The Committee believes that the additional deterrence represented by private plaintiffs armed with a realistic remedy will be important in ensuring compliance with continuous disclosure rules in Canada. All regulators to whom the Committee has spoken, including representatives of the SEC, believe strongly that compliance is best accomplished through a combination of regulatory enforcement and private enforcement. These views, in part, prompted the recommendations for a regime of statutory civil liability.

Compliance is best accomplished through a combination of regulatory enforcement and private enforcement.

5.15 Provision of civil remedies for a misrepresentation in a prospectus, although controversial in 1933, is now accepted as a common sense solution. Extension of similar remedies to secondary markets in the U.S. required heroic judicial ingenuity in development of the concept of "fraud on the market" to replace the necessity of proof of individual reliance. Flaws in the U.S. model led to extortionate litigation and statutory reform. The Committee's model attempts to avoid the flaws but leave prosecutorial discretion, and the risk of losing an ill-founded action, in the hands of private sector market participants who are aggrieved by an issuer's disclosure.

5.16 The Committee sought to construct a model that would achieve a reasonable balance between investors on the one hand and issuers on the other. The choice is between a bureaucratic model and a market enforcement model that can be enforced as of right by market participants. There is an important role for private enforcement in deterring disclosure violations. Our model is found in Chapter 6.

The choice is between a bureaucratic model and a market enforcement model that can be enforced as of right by market participants.

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[71] *Ibid.*, at 24.

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

BOOK OF AUTHORITIES OF THE AD HOC COMMITTEE OF PURCHASERS OF THE APPLICANT'S SECURITIES, INCLUDING THE REPRESENTATIVE PLAINTIFFS IN THE ONTARIO CLASS ACTION

(Motion Returnable October 9 and 10, 2012)

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