# TAB B

Français

# Courts of Justice Act

## R.S.O. 1990, CHAPTER C.43

**Consolidation Period:** From December 31, 2011 to the e-Laws currency date.

Last amendment: 2009, c. 33, Sched. 6, s. 50.

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**Court of Appeal jurisdiction**

6. (1) An appeal lies to the Court of Appeal from,

(a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;

(b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19 (1) (a) or an order from which an appeal lies to the Divisional Court under another Act;

(c) a certificate of assessment of costs issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court. R.S.O. 1990, c. C.43, s. 6 (1); 1994, c. 12, s. 1; 1996, c. 25, s. 9 (17).

**Combining of appeals from other courts**

(2) The Court of Appeal has jurisdiction to hear and determine an appeal that lies to the Divisional Court or the Superior Court of Justice if an appeal in the same proceeding lies to and is taken to the Court of Appeal. R.S.O. 1990, c. C.43, s. 6 (2); 1996, c. 25, s. 9 (17).

**Idem**

(3) The Court of Appeal may, on motion, transfer an appeal that has already been commenced in the Divisional Court or the Superior Court of Justice to the Court of Appeal for the purpose of subsection (2). R.S.O. 1990, c. C.43, s. 6 (3); 1996, c. 25, s. 9 (17).

# TAB C

Français

# Securities Act

## R.S.O. 1990, CHAPTER S.5

**Consolidation Period:** From September 1, 2013 to the e-Laws currency date.

Last amendment: 2013, c. 2, Sched. 13.

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INTERPRETATION

**Interpretation, other general matters**

**Definitions**

1. (1) In this Act,

. . .

"security" includes,

(a) any document, instrument or writing commonly known as a security,

(b) any document constituting evidence of title to or interest in the capital, assets, property, profits, earnings or royalties of any person or company,

(c) any document constituting evidence of an interest in an association of legatees or heirs,

(d) any document constituting evidence of an option, subscription or other interest in or to a security,

(e) a bond, debenture, note or other evidence of indebtedness or a share, stock, unit, unit certificate, participation certificate, certificate of share or interest, preorganization certificate or subscription other than,

(i) a contract of insurance issued by an insurance company licensed under the *Insurance Act*, and

(ii) evidence of a deposit issued by a bank listed in Schedule I, II or III to the *Bank Act* (Canada), by a credit union or league to which the *Credit Unions and Caisses Populaires Act, 1994* applies, by a loan corporation or trust corporation registered under the *Loan and Trust Corporations Act* or by an association to which the *Cooperative Credit Associations Act* (Canada) applies,

(f) any agreement under which the interest of the purchaser is valued for purposes of conversion or surrender by reference to the value of a proportionate interest in a specified portfolio of assets, except a contract issued by an insurance company licensed under the *Insurance Act* which provides for payment at maturity of an amount not less than three quarters of the premiums paid by the purchaser for a benefit payable at maturity,

(g) any agreement providing that money received will be repaid or treated as a subscription to shares, stock, units or interests at the option of the recipient or of any person or company,

(h) any certificate of share or interest in a trust, estate or association,

(i) any profit-sharing agreement or certificate,

(j) any certificate of interest in an oil, natural gas or mining lease, claim or royalty voting trust certificate,

(k) any oil or natural gas royalties or leases or fractional or other interest therein,

(l) any collateral trust certificate,

(m) any income or annuity contract not issued by an insurance company,

(n) any investment contract,

(o) any document constituting evidence of an interest in a scholarship or educational plan or trust, and

(p) any commodity futures contract or any commodity futures option that is not traded on a commodity futures exchange registered with or recognized by the Commission under the *Commodity Futures Act* or the form of which is not accepted by the Director under that Act,

whether any of the foregoing relate to an issuer or proposed issuer; ("valeur mobilière")

# TAB D

Français

# Class Proceedings Act, 1992

## S.O. 1992, CHAPTER 6

**Consolidation Period:** From June 22, 2006 to the e-Laws currency date.

Last amendment: 2006, c.19, Sched.C, s.1(1).

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**Definitions**

**1.** In this Act,

"common issues" means,

(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; ("questions communes")

"court" means the Superior Court of Justice but does not include the Small Claims Court; ("tribunal")

"defendant" includes a respondent; ("défendeur")

"plaintiff" includes an applicant. ("demandeur") 1992, c. 6, s. 1; 2006, c. 19, Sched. C, s. 1 (1).

**Plaintiff's class proceeding**

**2.** (1) One or more members of a class of persons may commence a proceeding in the court on behalf of the members of the class. 1992, c. 6, s. 2 (1).

**Motion for certification**

(2) A person who commences a proceeding under subsection (1) shall make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing the person representative plaintiff. 1992, c. 6, s. 2 (2).

**Idem**

(3) A motion under subsection (2) shall be made,

(a) within ninety days after the later of,

(i) the date on which the last statement of defence, notice of intent to defend or notice of appearance is delivered, and

(ii) the date on which the time prescribed by the rules of court for delivery of the last statement of defence, notice of intent to defend or a notice of appearance expires without its being delivered; or

(b) subsequently, with leave of the court. 1992, c. 6, s. 2 (3).

**Defendant's class proceeding**

**3.** A defendant to two or more proceedings may, at any stage of one of the proceedings, make a motion to a judge of the court for an order certifying the proceedings as a class proceeding and appointing a representative plaintiff. 1992, c. 6, s. 3.

**Classing defendants**

**4.** Any party to a proceeding against two or more defendants may, at any stage of the proceeding, make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing a representative defendant. 1992, c. 6, s. 4.

**Certification**

**5.** (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1).

**Idem, subclass protection**

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,

(a) would fairly and adequately represent the interests of the subclass;

(b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and

(c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members. 1992, c. 6, s. 5 (2).

**Evidence as to size of class**

(3) Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class. 1992, c. 6, s. 5 (3).

**Adjournments**

(4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence. 1992, c. 6, s. 5 (4).

**Certification not a ruling on merits**

(5) An order certifying a class proceeding is not a determination of the merits of the proceeding. 1992, c. 6, s. 5 (5).

**Certain matters not bar to certification**

**6.** The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
2. The relief claimed relates to separate contracts involving different class members.
3. Different remedies are sought for different class members.
4. The number of class members or the identity of each class member is not known.
5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members. 1992, c. 6, s. 6.

**Refusal to certify: proceeding may continue in altered form**

**7.** Where the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for the purpose, the court may,

(a) order the addition, deletion or substitution of parties;

(b) order the amendment of the pleadings or notice of application; and

(c) make any further order that it considers appropriate. 1992, c. 6, s. 7.

**Contents of certification order**

**8.** (1) An order certifying a proceeding as a class proceeding shall,

(a) describe the class;

(b) state the names of the representative parties;

(c) state the nature of the claims or defences asserted on behalf of the class;

(d) state the relief sought by or from the class;

(e) set out the common issues for the class; and

(f) specify the manner in which class members may opt out of the class proceeding and a date after which class members may not opt out. 1992, c. 6, s. 8 (1).

**Subclass protection**

(2) Where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, subsection (1) applies with necessary modifications in respect of the subclass. 1992, c. 6, s. 8 (2).

**Amendment of certification order**

(3) The court, on the motion of a party or class member, may amend an order certifying a proceeding as a class proceeding. 1992, c. 6, s. 8 (3).

**Opting out**

**9.** Any member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order. 1992, c. 6, s. 9.

**Where it appears conditions for certification not satisfied**

**10.** (1) On the motion of a party or class member, where it appears to the court that the conditions mentioned in subsections 5 (1) and (2) are not satisfied with respect to a class proceeding, the court may amend the certification order, may decertify the proceeding or may make any other order it considers appropriate. 1992, c. 6, s. 10 (1).

**Proceeding may continue in altered form**

(2) Where the court makes a decertification order under subsection (1), the court may permit the proceeding to continue as one or more proceedings between different parties. 1992, c. 6, s. 10 (2).

**Powers of court**

(3) For the purposes of subsections (1) and (2), the court has the powers set out in clauses 7 (a) to (c). 1992, c. 6, s. 10 (3).

**Stages of class proceedings**

**11.** (1) Subject to section 12, in a class proceeding,

(a) common issues for a class shall be determined together;

(b) common issues for a subclass shall be determined together; and

(c) individual issues that require the participation of individual class members shall be determined individually in accordance with sections 24 and 25. 1992, c. 6, s. 11 (1).

**Separate judgments**

(2) The court may give judgment in respect of the common issues and separate judgments in respect of any other issue. 1992, c. 6, s. 11 (2).

**Court may determine conduct of proceeding**

**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. 1992, c. 6, s. 12.

**Court may stay any other proceeding**

**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. 1992, c. 6, s. 13.

**Participation of class members**

**14.** (1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding. 1992, c. 6, s. 14 (1).

**Idem**

(2) Participation under subsection (1) shall be in whatever manner and on whatever terms, including terms as to costs, the court considers appropriate. 1992, c. 6, s. 14 (2).

**Discovery**

**Discovery of parties**

**15.** (1) Parties to a class proceeding have the same rights of discovery under the rules of court against one another as they would have in any other proceeding. 1992, c. 6, s. 15 (1).

**Discovery of class members with leave**

(2) After discovery of the representative party, a party may move for discovery under the rules of court against other class members. 1992, c. 6, s. 15 (2).

**Idem**

(3) In deciding whether to grant leave to discover other class members, the court shall consider,

(a) the stage of the class proceeding and the issues to be determined at that stage;

(b) the presence of subclasses;

(c) whether the discovery is necessary in view of the claims or defences of the party seeking leave;

(d) the approximate monetary value of individual claims, if any;

(e) whether discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be discovered; and

(f) any other matter the court considers relevant. 1992, c. 6, s. 15 (3).

**Idem**

(4) A class member is subject to the same sanctions under the rules of court as a party for failure to submit to discovery. 1992, c. 6, s. 15 (4).

**Examination of class members before a motion or application**

**16.** (1) A party shall not require a class member other than a representative party to be examined as a witness before the hearing of a motion or application, except with leave of the court. 1992, c. 6, s. 16 (1).

**Idem**

(2) Subsection 15 (3) applies with necessary modifications to a decision whether to grant leave under subsection (1). 1992, c. 6, s. 16 (2).

**Notice of certification**

**17.** (1) Notice of certification of a class proceeding shall be given by the representative party to the class members in accordance with this section. 1992, c. 6, s. 17 (1).

**Court may dispense with notice**

(2) The court may dispense with notice if, having regard to the factors set out in subsection (3), the court considers it appropriate to do so. 1992, c. 6, s. 17 (2).

**Order respecting notice**

(3) The court shall make an order setting out when and by what means notice shall be given under this section and in so doing shall have regard to,

(a) the cost of giving notice;

(b) the nature of the relief sought;

(c) the size of the individual claims of the class members;

(d) the number of class members;

(e) the places of residence of class members; and

(f) any other relevant matter. 1992, c. 6, s. 17 (3).

**Idem**

(4) The court may order that notice be given,

(a) personally or by mail;

(b) by posting, advertising, publishing or leafleting;

(c) by individual notice to a sample group within the class; or

(d) by any means or combination of means that the court considers appropriate. 1992, c. 6, s. 17 (4).

**Idem**

(5) The court may order that notice be given to different class members by different means. 1992, c. 6, s. 17 (5).

**Contents of notice**

(6) Notice under this section shall, unless the court orders otherwise,

(a) describe the proceeding, including the names and addresses of the representative parties and the relief sought;

(b) state the manner by which and time within which class members may opt out of the proceeding;

(c) describe the possible financial consequences of the proceeding to class members;

(d) summarize any agreements between representative parties and their solicitors respecting fees and disbursements;

(e) describe any counterclaim being asserted by or against the class, including the relief sought in the counterclaim;

(f) state that the judgment, whether favourable or not, will bind all class members who do not opt out of the proceeding;

(g) describe the right of any class member to participate in the proceeding;

(h) give an address to which class members may direct inquiries about the proceeding; and

(i) give any other information the court considers appropriate. 1992, c. 6, s. 17 (6).

**Solicitations of contributions**

(7) With leave of the court, notice under this section may include a solicitation of contributions from class members to assist in paying solicitor's fees and disbursements. 1992, c. 6, s. 17 (7).

**Notice where individual participation is required**

**18.** (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, the representative party shall give notice to those members in accordance with this section. 1992, c. 6, s. 18 (1).

**Idem**

(2) Subsections 17 (3) to (5) apply with necessary modifications to notice given under this section. 1992, c. 6, s. 18 (2).

**Contents of notice**

(3) Notice under this section shall,

(a) state that common issues have been determined in favour of the class;

(b) state that class members may be entitled to individual relief;

(c) describe the steps to be taken to establish an individual claim;

(d) state that failure on the part of a class member to take those steps will result in the member not being entitled to assert an individual claim except with leave of the court;

(e) give an address to which class members may direct inquiries about the proceeding; and

(f) give any other information that the court considers appropriate. 1992, c. 6, s. 18 (3).

**Notice to protect interests of affected persons**

**19.** (1) At any time in a class proceeding, the court may order any party to give such notice as it considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding. 1992, c. 6, s. 19 (1).

**Idem**

(2) Subsections 17 (3) to (5) apply with necessary modifications to notice given under this section. 1992, c. 6, s. 19 (2).

**Approval of notice by the court**

**20.** A notice under section 17, 18 or 19 shall be approved by the court before it is given. 1992, c. 6, s. 20.

**Delivery of notice**

**21.** The court may order a party to deliver, by whatever means are available to the party, the notice required to be given by another party under section 17, 18 or 19, where that is more practical. 1992, c. 6, s. 21.

**Costs of notice**

**22.** (1) The court may make any order it considers appropriate as to the costs of any notice under section 17, 18 or 19, including an order apportioning costs among parties. 1992, c. 6, s. 22 (1).

**Idem**

(2) In making an order under subsection (1), the court may have regard to the different interests of a subclass. 1992, c. 6, s. 22 (2).

**Statistical evidence**

23. (1) For the purposes of determining issues relating to the amount or distribution of a monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics. 1992, c. 6, s. 23 (1).

**Idem**

(2) A record of statistical information purporting to be prepared or published under the authority of the Parliament of Canada or the legislature of any province or territory of Canada may be admitted as evidence without proof of its authenticity. 1992, c. 6, s. 23 (2).

**Notice**

(3) Statistical information shall not be admitted as evidence under this section unless the party seeking to introduce the information has,

(a) given reasonable notice of it to the party against whom it is to be used, together with a copy of the information;

(b) complied with subsections (4) and (5); and

(c) complied with any requirement to produce documents under subsection (7). 1992, c. 6, s. 23 (3).

**Contents of notice**

(4) Notice under this section shall specify the source of any statistical information sought to be introduced that,

(a) was prepared or published under the authority of the Parliament of Canada or the legislature of any province or territory of Canada;

(b) was derived from market quotations, tabulations, lists, directories or other compilations generally used and relied on by members of the public; or

(c) was derived from reference material generally used and relied on by members of an occupational group. 1992, c. 6, s. 23 (4).

**Idem**

(5) Except with respect to information referred to in subsection (4), notice under this section shall,

(a) specify the name and qualifications of each person who supervised the preparation of statistical information sought to be introduced; and

(b) describe any documents prepared or used in the course of preparing the statistical information sought to be introduced. 1992, c. 6, s. 23 (5).

**Cross-examination**

(6) A party against whom statistical information is sought to be introduced under this section may require, for the purposes of cross-examination, the attendance of any person who supervised the preparation of the information. 1992, c. 6, s. 23 (6).

**Production of documents**

(7) Except with respect to information referred to in subsection (4), a party against whom statistical information is sought to be introduced under this section may require the party seeking to introduce it to produce for inspection any document that was prepared or used in the course of preparing the information, unless the document discloses the identity of persons responding to a survey who have not consented in writing to the disclosure. 1992, c. 6, s. 23 (7).

**Aggregate assessment of monetary relief**

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. 1992, c. 6, s. 24 (1).

**Average or proportional application**

(2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis. 1992, c. 6, s. 24 (2).

**Idem**

(3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members. 1992, c. 6, s. 24 (3).

**Court to determine whether individual claims need to be made**

(4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order. 1992, c. 6, s. 24 (4).

**Procedures for determining claims**

(5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims. 1992, c. 6, s. 24 (5).

**Idem**

(6) In specifying procedures under subsection (5), the court shall minimize the burden on class members and, for the purpose, the court may authorize,

(a) the use of standardized proof of claim forms;

(b) the receipt of affidavit or other documentary evidence; and

(c) the auditing of claims on a sampling or other basis. 1992, c. 6, s. 24 (6).

**Time limits for making claims**

(7) When specifying procedures under subsection (5), the court shall set a reasonable time within which individual class members may make claims under this section. 1992, c. 6, s. 24 (7).

**Idem**

(8) A class member who fails to make a claim within the time set under subsection (7) may not later make a claim under this section except with leave of the court. 1992, c. 6, s. 24 (8).

**Extension of time**

(9) The court may give leave under subsection (8) if it is satisfied that,

(a) there are apparent grounds for relief;

(b) the delay was not caused by any fault of the person seeking the relief; and

(c) the defendant would not suffer substantial prejudice if leave were given. 1992, c. 6, s. 24 (9).

**Court may amend subs. (1) judgment**

(10) The court may amend a judgment given under subsection (1) to give effect to a claim made with leave under subsection (8) if the court considers it appropriate to do so. 1992, c. 6, s. 24 (10).

**Individual issues**

**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. 1992, c. 6, s. 25 (1).

**Directions as to procedure**

(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. 1992, c. 6, s. 25 (2).

**Idem**

(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. 1992, c. 6, s. 25 (3).

**Time limits for making claims**

(4) The court shall set a reasonable time within which individual class members may make claims under this section. 1992, c. 6, s. 25 (4).

**Idem**

(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. 1992, c. 6, s. 25 (5).

**Extension of time**

(6) Subsection 24 (9) applies with necessary modifications to a decision whether to give leave under subsection (5). 1992, c. 6, s. 25 (6).

**Determination under cl. (1) (c) deemed court order**

(7) A determination under clause (1) (c) is deemed to be an order of the court. 1992, c. 6, s. 25 (7).

**Judgment distribution**

**26.** (1) The court may direct any means of distribution of amounts awarded under section 24 or 25 that it considers appropriate. 1992, c. 6, s. 26 (1).

**Idem**

(2) In giving directions under subsection (1), the court may order that,

(a) the defendant distribute directly to class members the amount of monetary relief to which each class member is entitled by any means authorized by the court, including abatement and credit;

(b) the defendant pay into court or some other appropriate depository the total amount of the defendant's liability to the class until further order of the court; and

(c) any person other than the defendant distribute directly to class members the amount of monetary relief to which each member is entitled by any means authorized by the court. 1992, c. 6, s. 26 (2).

**Idem**

(3) In deciding whether to make an order under clause (2) (a), the court shall consider whether distribution by the defendant is the most practical way of distributing the award for any reason, including the fact that the amount of monetary relief to which each class member is entitled can be determined from the records of the defendant. 1992, c. 6, s. 26 (3).

**Idem**

(4) The court may order that all or a part of an award under section 24 that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members, if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order. 1992, c. 6, s. 26 (4).

**Idem**

(5) The court may make an order under subsection (4) whether or not all class members can be identified or all of their shares can be exactly determined. 1992, c. 6, s. 26 (5).

**Idem**

(6) The court may make an order under subsection (4) even if the order would benefit,

(a) persons who are not class members; or

(b) persons who may otherwise receive monetary relief as a result of the class proceeding. 1992, c. 6, s. 26 (6).

**Supervisory role of the court**

(7) The court shall supervise the execution of judgments and the distribution of awards under section 24 or 25 and may stay the whole or any part of an execution or distribution for a reasonable period on such terms as it considers appropriate. 1992, c. 6, s. 26 (7).

**Payment of awards**

(8) The court may order that an award made under section 24 or 25 be paid,

(a) in a lump sum, forthwith or within a time set by the court; or

(b) in instalments, on such terms as the court considers appropriate. 1992, c. 6, s. 26 (8).

**Costs of distribution**

(9) The court may order that the costs of distribution of an award under section 24 or 25, including the costs of notice associated with the distribution and the fees payable to a person administering the distribution, be paid out of the proceeds of the judgment or may make such other order as it considers appropriate. 1992, c. 6, s. 26 (9).

**Return of unclaimed amounts**

(10) Any part of an award for division among individual class members that remains unclaimed or otherwise undistributed after a time set by the court shall be returned to the party against whom the award was made, without further order of the court. 1992, c. 6, s. 26 (10).

**Judgment on common issues**

**27.** (1) A judgment on common issues of a class or subclass shall,

(a) set out the common issues;

(b) name or describe the class or subclass members;

(c) state the nature of the claims or defences asserted on behalf of the class or subclass; and

(d) specify the relief granted. 1992, c. 6, s. 27 (1).

**Effect of judgment on common issues**

(2) A judgment on common issues of a class or subclass does not bind,

(a) a person who has opted out of the class proceeding; or

(b) a party to the class proceeding in any subsequent proceeding between the party and a person mentioned in clause (a). 1992, c. 6, s. 27 (2).

**Idem**

(3) A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding, but only to the extent that the judgment determines common issues that,

(a) are set out in the certification order;

(b) relate to claims or defences described in the certification order; and

(c) relate to relief sought by or from the class or subclass as stated in the certification order. 1992, c. 6, s. 27 (3).

**Limitations**

**28.** (1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,

(a) the member opts out of the class proceeding;

(b) an amendment that has the effect of excluding the member from the class is made to the certification order;

(c) a decertification order is made under section 10;

(d) the class proceeding is dismissed without an adjudication on the merits;

(e) the class proceeding is abandoned or discontinued with the approval of the court; or

(f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise. 1992, c. 6, s. 28 (1).

**Idem**

(2) Where there is a right of appeal in respect of an event described in clauses (1) (a) to (f), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of. 1992, c. 6, s. 28 (2).

**Discontinuance, abandonment and settlement**

**29.** (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate. 1992, c. 6, s. 29 (1).

**Settlement without court approval not binding**

(2) A settlement of a class proceeding is not binding unless approved by the court. 1992, c. 6, s. 29 (2).

**Effect of settlement**

(3) A settlement of a class proceeding that is approved by the court binds all class members. 1992, c. 6, s. 29 (3).

**Notice: dismissal, discontinuance, abandonment or settlement**

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

(a) an account of the conduct of the proceeding;

(b) a statement of the result of the proceeding; and

(c) a description of any plan for distributing settlement funds. 1992, c. 6, s. 29 (4).

**Appeals**

**Appeals: refusals to certify and decertification orders**

**30.** (1) A party may appeal to the Divisional Court from an order refusing to certify a proceeding as a class proceeding and from an order decertifying a proceeding. 1992, c. 6, s. 30 (1).

**Appeals: certification orders**

(2) A party may appeal to the Divisional Court from an order certifying a proceeding as a class proceeding, with leave of the Superior Court of Justice as provided in the rules of court. 1992, c. 6, s. 30 (2); 2006, c. 19, Sched. C, s. 1 (1).

**Appeals: judgments on common issues and aggregate awards**

(3) A party may appeal to the Court of Appeal from a judgment on common issues and from an order under section 24, other than an order that determines individual claims made by class members. 1992, c. 6, s. 30 (3).

**Appeals by class members on behalf of the class**

(4) If a representative party does not appeal or seek leave to appeal as permitted by subsection (1) or (2), or if a representative party abandons an appeal under subsection (1) or (2), any class member may make a motion to the court for leave to act as the representative party for the purposes of the relevant subsection. 1992, c. 6, s. 30 (4).

**Idem**

(5) If a representative party does not appeal as permitted by subsection (3), or if a representative party abandons an appeal under subsection (3), any class member may make a motion to the Court of Appeal for leave to act as the representative party for the purposes of subsection (3). 1992, c. 6, s. 30 (5).

**Appeals: individual awards**

(6) A class member may appeal to the Divisional Court from an order under section 24 or 25 determining an individual claim made by the member and awarding more than $3,000 to the member. 1992, c. 6, s. 30 (6).

**Idem**

(7) A representative plaintiff may appeal to the Divisional Court from an order under section 24 determining an individual claim made by a class member and awarding more than $3,000 to the member. 1992, c. 6, s. 30 (7).

**Idem**

(8) A defendant may appeal to the Divisional Court from an order under section 25 determining an individual claim made by a class member and awarding more than $3,000 to the member. 1992, c. 6, s. 30 (8).

**Idem**

(9) With leave of the Superior Court of Justice as provided in the rules of court, a class member may appeal to the Divisional Court from an order under section 24 or 25,

(a) determining an individual claim made by the member and awarding $3,000 or less to the member; or

(b) dismissing an individual claim made by the member for monetary relief. 1992, c. 6, s. 30 (9); 2006, c. 19, Sched. C, s. 1 (1).

**Idem**

(10) With leave of the Superior Court of Justice as provided in the rules of court, a representative plaintiff may appeal to the Divisional Court from an order under section 24,

(a) determining an individual claim made by a class member and awarding $3,000 or less to the member; or

(b) dismissing an individual claim made by a class member for monetary relief. 1992, c. 6, s. 30 (10); 2006, c. 19, Sched. C, s. 1 (1).

**Idem**

(11) With leave of the Superior Court of Justice as provided in the rules of court, a defendant may appeal to the Divisional Court from an order under section 25,

(a) determining an individual claim made by a class member and awarding $3,000 or less to the member; or

(b) dismissing an individual claim made by a class member for monetary relief. 1992, c. 6, s. 30 (11); 2006, c. 19, Sched. C, s. 1 (1).

**Costs**

**31.** (1) In exercising its discretion with respect to costs under subsection 131 (1) of the *Courts of Justice Act*, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest. 1992, c. 6, s. 31 (1).

**Liability of class members for costs**

(2) Class members, other than the representative party, are not liable for costs except with respect to the determination of their own individual claims. 1992, c. 6, s. 31 (2).

**Small claims**

(3) Where an individual claim under section 24 or 25 is within the monetary jurisdiction of the Small Claims Court where the class proceeding was commenced, costs related to the claim shall be assessed as if the claim had been determined by the Small Claims Court. 1992, c. 6, s. 31 (3).

**Fees and disbursements**

**32.** (1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

(a) state the terms under which fees and disbursements shall be paid;

(b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and

(c) state the method by which payment is to be made, whether by lump sum, salary or otherwise. 1992, c. 6, s. 32 (1).

**Court to approve agreements**

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor. 1992, c. 6, s. 32 (2).

**Priority of amounts owed under approved agreement**

(3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award. 1992, c. 6, s. 32 (3).

**Determination of fees where agreement not approved**

(4) If an agreement is not approved by the court, the court may,

(a) determine the amount owing to the solicitor in respect of fees and disbursements;

(b) direct a reference under the rules of court to determine the amount owing; or

(c) direct that the amount owing be determined in any other manner. 1992, c. 6, s. 32 (4).

**Agreements for payment only in the event of success**

**33.** (1) Despite the *Solicitors Act* and *An Act Respecting Champerty*, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding. 1992, c. 6, s. 33 (1).

**Interpretation: success in a proceeding**

(2) For the purpose of subsection (1), success in a class proceeding includes,

(a) a judgment on common issues in favour of some or all class members; and

(b) a settlement that benefits one or more class members. 1992, c. 6, s. 33 (2).

**Definitions**

(3) For the purposes of subsections (4) to (7),

"base fee" means the result of multiplying the total number of hours worked by an hourly rate; ("honoraires de base")

"multiplier" means a multiple to be applied to a base fee. ("multiplicateur") 1992, c. 6, s. 33 (3).

**Agreements to increase fees by a multiplier**

(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier. 1992, c. 6, s. 33 (4).

**Motion to increase fee by a multiplier**

(5) A motion under subsection (4) shall be heard by a judge who has,

(a) given judgment on common issues in favour of some or all class members; or

(b) approved a settlement that benefits any class member. 1992, c. 6, s. 33 (5).

**Idem**

(6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose. 1992, c. 6, s. 33 (6).

**Idem**

(7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,

(a) shall determine the amount of the solicitor's base fee;

(b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and

(c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement. 1992, c. 6, s. 33 (7).

**Idem**

(8) In making a determination under clause (7) (a), the court shall allow only a reasonable fee. 1992, c. 6, s. 33 (8).

**Idem**

(9) In making a determination under clause (7) (b), the court may consider the manner in which the solicitor conducted the proceeding. 1992, c. 6, s. 33 (9).

**Motions**

**34.** (1) The same judge shall hear all motions before the trial of the common issues. 1992, c. 6, s. 34 (1).

**Idem**

(2) Where a judge who has heard motions under subsection (1) becomes unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose. 1992, c. 6, s. 34 (2).

**Idem**

(3) Unless the parties agree otherwise, a judge who hears motions under subsection (1) or (2) shall not preside at the trial of the common issues. 1992, c. 6, s. 34 (3).

**Rules of court**

**35.** The rules of court apply to class proceedings. 1992, c. 6, s. 35.

**Crown bound**

**36.** This Act binds the Crown. 1992, c. 6, s. 36.

**Application of Act**

**37.** This Act does not apply to,

(a) a proceeding that may be brought in a representative capacity under another Act;

(b) a proceeding required by law to be brought in a representative capacity; and

(c) a proceeding commenced before this Act comes into force. 1992, c. 6, s. 37.

**38.** OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THIS ACT). 1992, c. 6, s. 38.

**39.** OMITTED (ENACTS SHORT TITLE OF THIS ACT). 1992, c. 6, s. 39.

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Français

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# TAB E

Province of Alberta

# CLASS PROCEEDINGS ACT

Statutes of Alberta, 2003
Chapter C-16.5

Current as of March 1, 2011

Office Consolidation

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## Division 2
## Participation of Class Members

**Participation of class members**

**16(1)** For the purposes of ensuring the fair and adequate representation of the interests of the class or any subclass or for any other reason that the Court considers appropriate, the Court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding if, in the opinion of the Court, this would be useful to the class.

(2) Participation under subsection (1) must be in the manner and on the terms or conditions, including terms or conditions as to costs, that the Court considers appropriate.

**Opting out**

**17(1)** A person who meets the criteria to be a class member in respect of a class proceeding is a class member in the class proceeding unless the person opts out of the class proceeding.

(2) The Court may, in a certification order or at any time,

(a) specify the manner in which and the time within which the members of a class, or any individual member of a class, may opt out of the proceeding, and

(b) impose terms or conditions subject to which the class members or an individual member may opt out of the proceeding.

(3) A person who opts out of a class proceeding ceases, effective from the time the person opts out, to be a class member of the class proceeding.

(4) Notwithstanding anything in this section, where the Court certifies a proceeding pursuant to an application by a defendant, a class member is prohibited from opting out of the class proceeding other than with leave of the Court.

(5) If the Court grants leave under subsection (4) for a person to opt out of a class proceeding, that person has, as a matter of right, the right to apply to the Court to be added, on any terms or conditions that the Court considers appropriate, as a named plaintiff for the purposes of allowing that plaintiff to conduct the plaintiff's own case.

(6) Notwithstanding anything in this section, the Court may at any time determine whether or not a person is a class member and may

# TAB F

# MANITOBA

## THE CLASS PROCEEDINGS ACT

C.C.S.M. c. C130

## LOI SUR LES RECOURS COLLECTIFS

c. C130 de la *C.P.L.M.*

This is an unofficial consolidation showing the provisions of the Act in force as of the date shown below.

The official sources for this Act are the original Act and any amending Acts, as published by the Queen's Printer.

La présente loi est une codification non officielle indiquant les dispositions qui sont en vigueur à la date indiquée ci-dessous.

La loi originale et, le cas échéant, les lois modificatives publiées par l'Imprimeur de la Reine sont les sources officielles de la présente loi.

Last consolidated: 2010-06-17
Current as of: 2013-09-12

Date de codification : 2010-06-17
À jour en date du : 2013-09-12

**Unavailability of certification judge**
**14(2)** If the judge who has heard motions under subsection (1) becomes unavailable for any reason to hear a motion in the class proceeding, the chief justice of the court may assign another judge to hear the motion.

**Instruction de motions par un autre juge**
**14(2)** Si le juge qui a instruit des motions en vertu du paragraphe (1) n'est plus en mesure, pour quelque raison que ce soit, d'instruire une motion dans le cadre du recours collectif, le juge en chef du tribunal peut affecter un autre juge du tribunal à l'instruction de la motion.

**Certification judge not to preside at trial**
**14(3)** Except with the consent of the parties, a judge who hears a motion under subsection (1) or (2) may not preside at the trial of the common issues.

**Interdiction**
**14(3)** Le juge qui instruit une motion en vertu du paragraphe (1) ou (2) ne peut, sans le consentement des parties, présider l'instruction des questions communes.

## DIVISION 2

## PARTICIPATION OF CLASS MEMBERS

## SECTION 2

## PARTICIPATION DES MEMBRES DU GROUPE

**Participation of class members**
**15(1)** In order to ensure the fair and adequate representation of the interests of the class or a subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding.

**Participation des membres du groupe**
**15(1)** Afin de s'assurer que les intérêts du groupe ou d'un sous-groupe sont représentés de façon juste et appropriée ou pour tout autre motif valable, le tribunal peut, en tout temps dans le cadre d'un recours collectif, permettre à un ou plusieurs membres du groupe de participer au recours.

**Court order re participation by class members**
**15(2)** Participation by a class member under subsection (1) must be in the manner and on the terms, including terms as to costs, that the court considers appropriate.

**Conditions rattachées à la participation**
**15(2)** La participation prévue au paragraphe (1) a lieu de la façon et aux conditions — y compris les conditions rattachées aux dépens — que le tribunal estime indiquées.

**Opting out of class proceeding**
**16** A member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.

**Retrait**
**16** Tout membre d'un groupe engagé dans un recours collectif peut s'en retirer de la façon et dans le délai indiqués dans l'ordonnance d'attestation.

**Discovery**
**17(1)** Parties to a class proceeding have the same rights of examination for discovery under the *Queen's Bench Rules* against one another as they would have in any other proceeding.

**Interrogatoire préalable**
**17(1)** Les parties à un recours collectif ont, l'une à l'égard de l'autre, les mêmes droits à l'interrogatoire préalable en vertu des *Règles de la Cour du Banc de la Reine* que si elles étaient parties à toute autre instance.

# TAB G

# *The Class Actions Act*

*being*

Chapter C-12.01 of the *Statutes of Saskatchewan, 2001* (effective January 1, 2002) as amended by the *Statutes of Saskatchewan*, 2007, c.21.

**NOTE:**
This consolidation is not official. Amendments have been incorporated for convenience of reference and the original statutes and regulations should be consulted for all purposes of interpretation and application of the law. In order to preserve the integrity of the original statutes and regulations, errors that may have appeared are reproduced in this consolidation.

**Opting out of a class action**

**18** A class member involved in a class action may opt out of the action in the manner and within the time stated in the certification order.

2007, c.21, s.10.

**Discovery**

**19**(1) Parties to a class action have the same rights of discovery as they would have in any other action.

(2) After the examination for discovery of the representative plaintiff or, in an action mentioned in section 8, one or more of the representative plaintiffs, a defendant may, with leave of the court, conduct an examination for discovery of other class members.

(3) In determining whether to grant a defendant leave to conduct an examination for discovery of other class members, the court shall consider:

(a) the stage of the class action and the issues to be determined at that stage;

(b) the presence of subclasses;

(c) whether the examination for discovery is necessary in view of the defences of the party seeking leave;

(d) the approximate monetary value of individual claims, if any;

(e) whether an examination for discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be examined; and

(f) any other matter the court considers appropriate.

2001, c.C-12.01, s.19.

**Sanctions for failure to submit to examination for discovery**

**20** A class member who fails to submit to an examination for discovery is subject to the sanctions set out in *The Queen's Bench Rules*.

2001, c.C-12.01, s.20.

## PART IV
## Notices

**Notice of certification**

**21**(1) Notice that an action has been certified as a class action must be given by the representative plaintiff to the class members in accordance with this section.

(2) The court may dispense with notice if, having regard to the factors set out in subsection (3), the court considers it appropriate to do so.

# TAB H

Québec

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**Updated to 1 September 2013**
This document has official status.

# Civil Code of Québec

## PRELIMINARY PROVISION

The Civil Code of Québec, in harmony with the Charter of human rights and freedoms (chapter C-12) and the general principles of law, governs persons, relations between persons, and property.

The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the jus commune, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.

## BOOK ONE
## PERSONS

### TITLE ONE
### ENJOYMENT AND EXERCISE OF CIVIL RIGHTS

1. Every human being possesses juridical personality and has the full enjoyment of civil rights.

1991, c. 64, a. 1.

2. Every person has a patrimony.

The patrimony may be divided or appropriated to a purpose, but only to the extent provided by law.

1991, c. 64, a. 2.

3. Every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy.

These rights are inalienable.

1991, c. 64, a. 3.

4. Every person is fully able to exercise his civil rights.

2894. Interruption does not occur if the application is dismissed, the suit discontinued or perempted.

1991, c. 64, a. 2894.

2895. Where the application of a party is dismissed without a decision having been made on the merits of the action and where, on the date of the judgment, the prescriptive period has expired or will expire in less than three months, the plaintiff has an additional period of three months from service of the judgment in which to claim his right.

The same applies to arbitration; the three-month period then runs from the time the award is made, from the end of the arbitrators' mandate, or from the service of the judgment annulling the award.

1991, c. 64, a. 2895.

2896. An interruption resulting from a judicial demand continues until the judgment acquires the authority of a final judgment (res judicata) or, as the case may be, until a transaction is agreed between the parties.

The interruption has effect with regard to all the parties in respect of any right arising from the same source.

1991, c. 64, a. 2896.

2897. An interruption which results from the bringing of a class action benefits all the members of the group who have not requested their exclusion from the group.

1991, c. 64, a. 2897.

2898. Acknowledgement of a right, as well as renunciation of the benefit of a period of time which has elapsed, interrupts prescription.

1991, c. 64, a. 2898.

2899. A judicial demand or any other act of interruption against the principal debtor or against a surety interrupts prescription with regard to both.

1991, c. 64, a. 2899.

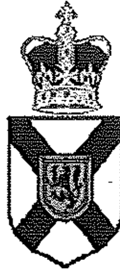
2900. Interruption with regard to one of the creditors or debtors of a solidary or indivisible obligation has effect with regard to the others.

1991, c. 64, a. 2900.

# TAB I

# BILL NO. 19

## (as introduced)



*2nd Session, 60th General Assembly*
*Nova Scotia*
*56 Elizabeth II, 2007*

Government Bill

# Class Proceedings Act

The Honourable Cecil P. Clarke
Minister of Justice

First Reading: November 26, 2007

Second Reading: November 30, 2007

Third Reading: December 13, 2007 (LINK TO BILL AS PASSED)

## An Act Respecting Class Proceedings

Be it enacted by the Governor and Assembly as follows:

19 (1) A person who is a member of a class involved in a class proceeding may opt out of the class proceeding

(a) in the manner and within the time specified in the certification order; or

(b) with leave of the court and on the terms or conditions the court considers appropriate.

(2) A person referred to in subsection (1) who opts out of the class proceeding ceases, from the time the person opts out and subject to any terms or conditions referred to in subsection (1), to be a member of the class involved in the class proceeding.

(3) Notwithstanding anything contained in this Section, the court may at any time determine whether or not a person is a class or subclass member, subject to any terms or conditions the court considers appropriate.

# TAB J

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**IMPORTANT INFORMATION**

This Act is Current to September 4, 2013

# Class Proceedings Act

## [RSBC 1996] CHAPTER 50

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**Opting out and opting in**

**16** (1) A member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.

(2) Subject to subsection (4), a person who is not a resident of British Columbia may, in the manner and within the time specified in the certification order made in respect of a class proceeding, opt in to that class proceeding if the person would be, but for not being a resident of British Columbia, a member of the class involved in the class proceeding.

(3) A person referred to in subsection (2) who opts in to a class proceeding is from that time a member of the class involved in the class proceeding for every purpose of this Act.

(4) A person may not opt in to a class proceeding under subsection (2) unless the subclass of which the person is to become a member has or will have, at the time the person becomes a member, a representative plaintiff who satisfies the requirements of section 6 (1) (a), (b) and (c).

(5) If a subclass is created as a result of persons opting in to a class proceeding under subsection (2), the representative plaintiff for that subclass must ensure that the certification order for the class proceeding is amended, if necessary, to comply with section 8 (2).

# TAB K

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**Important Information**
(Includes details about the availability of printed and electronic versions of the Statutes.)

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Responsible Department

---

SNL2001 CHAPTER C-18.1

## CLASS ACTIONS ACT

Amended:

2004 c47 s10

# CHAPTER C-18.1

## AN ACT TO PERMIT AN ACTION BY ONE PERSON ON BEHALF OF A CLASS OF PERSONS

(Assented to December 13, 2001 )

*Analysis*

**Discovery**

18. (1) A party to a class action has the same rights of discovery as they would have in another action in the court.

(2) After the examination for discovery of a representative plaintiff, a defendant may, with leave of the court, discover other class members.

(3) In deciding whether to grant a defendant leave to discover other class members, the court may consider

(a) the stage of the class action and the issues to be determined at that stage;

(b) the presence of subclasses;

(c) whether the examination for discovery is necessary in view of the defence of the party seeking leave;

(d) the approximate monetary value of the individual claims, if any;

(e) whether discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be examined; and

(f) another matter the court considers relevant.

(4) A class member is subject to the same sanctions under the Rules of the Supreme Court, 1986 as a party for failure to submit to an examination for discovery.

2001 cC-18.1 s18

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# TAB L

**3rd Session, 55th Legislature**
**New Brunswick**
**54-55 Elizabeth II, 2005-2006**

**3$^{e}$ session, 55$^{e}$ législature**
**Nouveau-Brunswick**
**54-55 Elizabeth II, 2005-2006**

# BILL 50

# PROJET DE LOI 50

## CLASS PROCEEDINGS ACT

## LOI SUR LES RECOURS COLLECTIFS

Read first time: April 25, 2006

Première lecture : le 25 avril 2006

Read second time:

Deuxième lecture :

Committee:

Comité :

Read third time:

Troisième lecture :

**HON. BRADLEY GREEN, Q.C.**

**L'HON. BRADLEY GREEN, c.r.**

Justice of the court may assign another judge of the court to hear the motion.

pour entendre une motion dans le cadre du recours collectif, le juge en chef de la cour peut affecter un autre juge de la cour à entendre la motion.

**16**(2) A judge who hears a motion under subsection (1) may but need not preside at the trial of the common issues.

**16**(2) Le juge qui entend une motion en vertu du paragraphe (1) peut, mais ne doit pas nécessairement, présider l'instruction des questions communes.

## Division B

## Participation of Class Members

### Participation of class members

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

**17**(2) Participation under subsection (1) shall be in the manner and on the terms or conditions, including terms or conditions as to costs, that the court considers appropriate.

### Opting out and opting in

**18**(1) A person who is a member of a class involved in a class proceeding may opt out of the class proceeding

(*a*) in the manner and within the time specified in the certification order, or

(*b*) with leave of the court and on the terms or conditions the court considers appropriate.

**18**(2) A person referred to in subsection (1) who opts out of the class proceeding ceases, from the time the person opts out and subject to any terms or conditions referred to in subsection (1), to be a member of the class involved in the class proceeding.

**18**(3) Subject to subsection (5), a person who is not a resident of New Brunswick and who would otherwise be a member of a class involved in the class proceeding may opt into the class proceeding

(*a*) in the manner and within the time specified in the certification order, or

(*b*) with leave of the court and on the terms or conditions the court considers appropriate.

**18**(4) A person referred to in subsection (3) who opts into a class proceeding is, from the time the person opts in

## Section B

## Contribution et participation des membres du groupe

### Contribution des membres du groupe

**17**(1) Afin de s'assurer que les intérêts du groupe ou d'un sous-groupe sont représentés de façon juste et appropriée ou pour tout autre motif valable, la cour peut en tout temps dans le cadre d'un recours collectif permettre à un ou plusieurs membres du groupe de contribuer au recours collectif.

**17**(2) La contribution prévue au paragraphe (1) a lieu de la façon et aux modalités ou conditions, notamment en matière de dépens, que la cour estime appropriées.

### Choix de se retirer ou de participer

**18**(1) Toute personne qui est membre d'un groupe engagé dans un recours collectif peut s'en retirer :

*a*) soit de la façon et dans le délai indiqués dans l'ordonnance de certification;

*b*) soit avec l'autorisation de la cour et aux modalités ou conditions qu'elle estime appropriées.

**18**(2) Toute personne visée au paragraphe (1) qui se retire d'un recours collectif cesse d'être un membre du groupe engagé dans le recours collectif à compter de la date de son retrait et sous réserve de toutes modalités ou conditions mentionnées au paragraphe (1).

**18**(3) Sous réserve du paragraphe (5), une personne qui n'est pas un résident du Nouveau-Brunswick mais qui serait par ailleurs un membre du groupe engagé dans le recours collectif peut participer au recours collectif :

*a*) soit de la façon et dans le délai indiqués dans l'ordonnance de certification;

*b*) soit avec l'autorisation de la cour et aux modalités ou conditions qu'elle estime appropriées.

**18**(4) Toute personne visée au paragraphe (3) qui participe à un recours collectif est un membre du groupe en-

and subject to any terms or conditions referred to in subsection (3), a member of the class involved in the class proceeding.

gagé dans le recours collectif à compter de la date de sa participation et sous réserve de toutes modalités ou conditions mentionnées au paragraphe (3).

**18**(5) A person shall not opt into a class proceeding under subsection (3) unless the subclass of which the person is to become a member has or will have, at the time the person becomes a member, a representative plaintiff who satisfies the requirements set out in paragraphs 8(1)(*a*), (*b*) and (*c*).

**18**(5) Une personne ne peut participer à un recours collectif en vertu du paragraphe (3) à moins que le sous-groupe dont elle deviendra membre ait ou aura, au moment où elle devient membre, un représentant demandeur qui remplit les conditions énoncées aux alinéas 8(1)*a*), *b*) et *c*).

**18**(6) If a subclass is created as a result of persons opting into a class proceeding under subsection (3), the representative plaintiff for that subclass shall ensure that the certification order for the class proceeding is amended, if necessary, to comply with subsection 10(2).

**18**(6) Si la participation des personnes à un recours collectif en vertu du paragraphe (3) entraîne la création d'un sous-groupe, le représentant demandeur pour ce sous-groupe doit, en cas de besoin, s'assurer que l'ordonnance de certification concernant ce recours collectif soit modifiée pour se conformer au paragraphe 10(2).

**18**(7) Notwithstanding anything in this section, if the court certifies a proceeding as a class proceeding on a motion by a defendant, a class member shall not opt out of the class proceeding other than with leave of the court.

**18**(7) Malgré les autres dispositions du présent article, si la cour certifie sur motion du défendeur une instance comme recours collectif, un membre du groupe ne peut pas se retirer du recours collectif sans l'autorisation de la cour.

**18**(8) Notwithstanding anything in this section, the court may at any time determine whether or not a person is a class or subclass member subject to any terms or conditions the court considers appropriate.

**18**(8) Malgré les autres dispositions du présent article, la cour peut en tout temps déterminer si une personne est un membre d'un groupe ou d'un sous-groupe, sous réserve des modalités ou conditions que la cour estime appropriées.

**Discovery**

**19**(1) Parties to a class proceeding have the same rights of discovery under the Rules of Court against one another as they would have in any other proceeding.

**Enquête préalable**

**19**(1) Les parties à un recours collectif ont, l'une à l'égard de l'autre, les mêmes droits à l'enquête préalable en vertu des Règles de procédure que si elles étaient parties à toute autre instance.

**19**(2) After discovery of the representative plaintiff or, if there are subclasses, one or more of the representative plaintiffs, a defendant may, with leave of the court, discover other class members.

**19**(2) Après avoir effectué l'enquête préalable du représentant demandeur ou, s'il existe des sous-groupes, de l'un ou plusieurs des représentants demandeurs, un défendeur peut, avec l'autorisation de la cour, effectuer une enquête préalable de tout autre membre du groupe.

**19**(3) In deciding whether to grant a defendant leave to discover other class members, the court shall consider

(*a*) the stage of the class proceeding and the issues to be determined at that stage,

(*b*) the presence of subclasses,

**19**(3) Afin de décider si elle doit accorder à un défendeur l'autorisation d'effectuer une enquête préalable de tout autre membre du groupe, la cour tient compte de ce qui suit :

*a*) l'étape du recours collectif et les questions à trancher à cette étape;

*b*) l'existence de sous-groupes;

(*a*) an account of the conduct of the class proceeding,

(*b*) a statement of the result of the class proceeding, and

(*c*) a description of any plan for distributing any settlement funds.

**37**(6) Subsections 21(3) to (5) apply with the necessary modifications to a notice referred to in subsection (5) of this section.

**Appeals**

**38**(1) Any party may appeal, without leave, to The Court of Appeal of New Brunswick from

(*a*) a judgment on common issues, or

(*b*) an order under Division B of this Part, other than an order that determines individual claims made by class or subclass members.

**38**(2) With leave of a judge of The Court of Appeal of New Brunswick, a class or subclass member, a representative plaintiff or a defendant may appeal to that court any order

(*a*) determining an individual claim made by a class or subclass member, or

(*b*) dismissing an individual claim for monetary relief made by a class or subclass member.

**38**(3) With leave of a judge of The Court of Appeal of New Brunswick, any party may appeal to that court from

(*a*) a certification order or an order refusing to certify a proceeding as a class proceeding, or

(*b*) a decertification order.

**38**(4) If a representative plaintiff for a class or subclass does not appeal or seek leave to appeal as permitted by subsection (1) or (3) within the time limit for bringing an appeal set under the Rules of Court or if a representative plaintiff abandons an appeal under subsection (1) or (3), any member of the class or subclass may make a motion

*a*) un compte rendu du déroulement du recours collectif;

*b*) un exposé du résultat du recours collectif;

*c*) une description de tout plan de distribution des sommes faisant objet du règlement amiable.

**37**(6) Les paragraphes 21(3) à (5) s'appliquent, avec les adaptations nécessaires, à l'avis mentionné au paragraphe (5) du présent article.

**Appels**

**38**(1) Toute partie peut, sans autorisation, interjeter appel devant la Cour d'appel du Nouveau-Brunswick :

*a*) soit d'un jugement sur les questions communes;

*b*) soit d'une ordonnance rendue en vertu de la section B de la présente partie, à l'exception d'une ordonnance statuant sur les demandes individuelles des membres du groupe ou du sous-groupe.

**38**(2) Avec l'autorisation d'un juge de la Cour d'appel du Nouveau-Brunswick, un membre du groupe ou du sous-groupe, un représentant demandeur ou un défendeur peut interjeter appel devant cette cour de toute ordonnance qui, selon le cas :

*a*) statue sur une demande individuelle d'un membre du groupe ou du sous-groupe;

*b*) rejette une demande de mesure de redressement pécuniaire individuelle présentée par un membre du groupe ou du sous-groupe.

**38**(3) Avec l'autorisation d'un juge de la Cour d'appel du Nouveau-Brunswick, toute partie peut interjeter appel devant cette cour :

*a*) soit d'une ordonnance de certification ou d'une ordonnance refusant de certifier une instance comme recours collectif;

*b*) soit d'une ordonnance annulant la certification.

**38**(4) Si le représentant demandeur d'un groupe ou d'un sous-groupe n'interjette pas appel ou ne demande pas l'autorisation d'interjeter appel en vertu du paragraphe (1) ou (3) dans le délai imparti pour le dépôt d'un appel aux termes des Règles de procédure ou si le représentant demandeur se désiste de l'appel prévu au paragraphe (1) ou

to a judge of The Court of Appeal of New Brunswick for leave to act as the representative plaintiff for the purposes of subsection (1) or (3).

(3), tout membre du groupe ou du sous-groupe peut demander, par voie de motion, à un juge de la Cour d'appel du Nouveau-Brunswick l'autorisation d'agir comme représentant demandeur aux fins du paragraphe (1) ou (3).

**38**(5) A motion by a class or subclass member for leave to act as the representative plaintiff under subsection (4) shall be made within 30 days after the expiry of the appeal period available to the representative plaintiff or by such other date as the judge of The Court of Appeal of New Brunswick may order.

**38**(5) La motion visant à autoriser un membre du groupe ou du sous-groupe à agir comme représentant demandeur en vertu du paragraphe (4) est introduite dans les trente jours suivant l'expiration du délai d'appel dont dispose le représentant demandeur ou dans tout autre délai imparti par le juge de la Cour d'appel du Nouveau-Brunswick.

## PART 5

## COSTS, FEES AND DISBURSEMENTS

### Costs

**39**(1) With respect to any proceeding or other matter under this Act, costs may be awarded in accordance with the Rules of Court.

**39**(2) Class members, other than a representative plaintiff, are not liable for costs except with respect to the determination of their own individual claims.

### Agreements respecting fees and disbursements

**40**(1) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff shall be in writing and shall

(*a*) state the terms or conditions under which fees and disbursements are to be paid,

(*b*) give an estimate of the expected fee, whether or not that fee is contingent on success in the class proceeding,

(*c*) if interest is payable on fees or disbursements referred to in paragraph (*a*), state the manner in which the interest will be calculated, and

(*d*) state the method by which payment is to be made, whether by lump sum or otherwise.

**40**(2) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court, on the motion of the solicitor.

## PARTIE 5

## DÉPENS, HONORAIRES ET DÉBOURS

### Dépens

**39**(1) Des dépens peuvent être accordés conformément aux Règles de procédure relativement à toute instance ou toute autre affaire aux termes de la présente loi.

**39**(2) Les membres du groupe, à l'exception d'un représentant demandeur, ne sont pas redevables des dépens sauf à l'égard de la décision sur leur propre demande individuelle.

### Ententes relatives aux honoraires et aux débours

**40**(1) L'entente relative aux honoraires et aux débours conclue entre un avocat et un représentant demandeur est consignée par écrit et indique :

*a*) les modalités ou les conditions de paiement des honoraires et des débours;

*b*) une estimation des honoraires prévus, qu'ils soient subordonnés à l'issu favorable du recours collectif ou non;

*c*) si des intérêts sont payables sur les honoraires ou débours mentionnés à l'alinéa *a*), le mode de calcul des intérêts;

*d*) le mode de paiement choisi, que ce soit par une somme forfaitaire ou autrement.

**40**(2) L'entente relative aux honoraires et aux débours conclue entre un avocat et un représentant demandeur n'est exécutoire qu'avec l'autorisation de la cour, sur motion de l'avocat.

# Legislative Assembly of New Brunswick



**Status of Legislation - First Reading Bill**

## Class Proceedings Act

**Legislature :** 55
**Session :** 3
**Bill No. :** 50
**Member :** Hon. Green
**First Reading :** 2006-4-25
**Second Reading :** 2006-4-26
**Committee of the Whole :**
**Amended :**
**Third Reading :** 2006-6-8
**Royal Assent :** 2006-6-22
**Download PDF :**

**Text of Bill :**
Chapter Outline


PART 1

INTERPRETATION AND APPLICATION

Definitions ........................................ 1

certification order — ordonnance de certification

class proceeding — recours collectif

common issues — questions communes

court — cour

decertification order — ordonnance annulant la certification

defendant — défendeur

party — partie

plaintiff — demandeur

representative plaintiff — représentant demandeur

settlement class — groupe faisant l'objet d'un règlement amiable

Application of Act ........................................ 2

PART 2

CERTIFICATION

Opting out and opting in

18(1) A person who is a member of a class involved in a class proceeding may opt out of the class proceeding

(a) in the manner and within the time specified in the certification order, or

(b) with leave of the court and on the terms or conditions the court considers appropriate.

18(2) A person referred to in subsection (1) who opts out of the class proceeding ceases, from the time the person opts out and subject to any terms or conditions referred to in subsection (1), to be a member of the class involved in the class proceeding.

18(3) Subject to subsection (5), a person who is not a resident of New Brunswick and who would otherwise be a member of a class involved in the class proceeding may opt into the class proceeding

(a) in the manner and within the time specified in the certification order, or

(b) with leave of the court and on the terms or conditions the court considers appropriate.

18(4) A person referred to in subsection (3) who opts into a class proceeding is, from the time the person opts in and subject to any terms or conditions referred to in subsection (3), a member of the class involved in the class proceeding.

18(5) A person shall not opt into a class proceeding under subsection (3) unless the subclass of which the person is to become a member has or will have, at the time the person becomes a member, a representative plaintiff who satisfies the requirements set out in paragraphs 8(1)(a), (b) and (c).

18(6) If a subclass is created as a result of persons opting into a class proceeding under subsection (3), the representative plaintiff for that subclass shall ensure that the certification order for the class proceeding is amended, if necessary, to comply with subsection 10(2).

18(7) Notwithstanding anything in this section, if the court certifies a proceeding as a class proceeding on a motion by a defendant, a class member shall not opt out of the class proceeding other

than with leave of the court.

18(8) Notwithstanding anything in this section, the court may at any time determine whether or not a person is a class or subclass member subject to any terms or conditions the court considers appropriate.

# TAB M

*Case Name:*

## 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;**
**v.**
**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.**

**[2000] S.C.J. No. 63**

**[2000] A.C.S. no 63**

**2001 SCC 46**

**2001 CSC 46**

**[2001] 2 S.C.R. 534**

**[2001] 2 R.C.S. 534**

**201 D.L.R. (4th) 385**

**272 N.R. 135**

**[2002] 1 W.W.R. 1**

**J.E. 2001-1430**

**94 Alta. L.R. (3d) 1**

**286 A.R. 201**

**8 C.P.C. (5th) 1**

**106 A.C.W.S. (3d) 397**

**REJB 2001-25017**

File No.: 27138.

Supreme Court of Canada

Hearing and judgment: December 13, 2000.
Reasons delivered: July 13, 2001.

**Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Binnie, Arbour and LeBel JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA (62 paras.)

*Practice -- Class actions -- Plaintiffs suing defendants for breach of fiduciary duties and mismanagement of funds -- Defendants applying for order to strike plaintiffs' claim to sue in representative capacity -- Whether requirements for class action met -- If so, whether class action should be allowed -- Whether defendants entitled to examination and discovery of each class member -- Alberta Rules of Court, Alta. Reg. 390/68, Rule 42.*

L and W, together with 229 other investors, became participants in the federal government's Business Immigration Program by purchasing debentures in WCSC, which was incorporated by D, its sole shareholder, for the purpose of helping investor-class immigrants qualify as permanent residents in Canada. WCSC solicited funds through two offerings to invest in income-producing properties. After the investors' funds were deposited, WCSC purchased from CRI, for $5,550,000, the rights to a Crown surface lease and also agreed to commit a further $16.5 million for surface improvements. To finance WCSC's obligations to CRI, D directed that the Series A debentures be issued in an aggregate principal amount of $22,050,000 to some of the investors. D advanced more funds to CRI and corresponding debentures were issued, in particular the Series E and F debentures. Eventually, the debentures were pooled. When CRI announced that it could not pay the interest due on the debentures, L and W, the representative plaintiffs, commenced a class action complaining that D and various affiliates and advisors of WCSC breached fiduciary duties to the investors by mismanaging their funds. The defendants applied to the Court of Queen's Bench for a declaration and order striking that portion of the 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 denied the application. The majority of the Court of Appeal upheld that decision but granted the defendants the right to discovery from each of the 231 plaintiffs. The defendants appealed to this Court, and the plaintiffs cross-appealed taking issue with the Court of Appeal's allowance of individualized discovery from each class member.

Held: The appeal should be dismissed and the cross-appeal allowed.

In Alberta, class-action practice is governed by Rule 42 of the Alberta Rules of Court but, in the absence of 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. Class actions should be allowed to proceed under Rule 42 where the following conditions are met: (1) the class is capable of clear definition; (2) there are issues of law or fact 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. 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. 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". On procedural matters, all potential class members should 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. This should be done before any decision is made that purports to prejudice or otherwise affect the interests of class members. The court also retains discretion to determine how the individual issues should be addressed, once common issues have been resolved. In the absence of comprehensive class-action legislation, courts must address procedural complexities on a case-by-case basis in a flexible and liberal manner, seeking a balance between efficiency and fairness.

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 Association, [1970] 1 All E.R. 1094 (C.A.), at p. 1102 (quoted in Hunt, supra, at pp. 974-75). 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.

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 General Motors of Canada Ltd. v. Naken, [1983] 1 S.C.R. 72, precludes a generous approach to class actions. I respectfully disagree. First, when Naken 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 Naken 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, Naken 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" (p. 76). 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

# TAB N

** Preliminary Version **

*Case Name:*

# Canada Post Corp. v. Lépine

**Canada Post Corporation, Appellant;**
**v.**
**Michel Lépine, Respondent, and**
**Attorney General of Canada and Cybersurf Corp., Interveners.**

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

**2009 SCC 16**

**[2009] 1 S.C.R. 549**

**[2009] 1 R.C.S. 549**

**387 N.R. 91**

**304 D.L.R. (4th) 539**

**67 C.P.C. (6th) 201**

**EYB 2009-156806**

**J.E. 2009-620**

**2009 CarswellQue 2490**

File No.: 32299.

Supreme Court of Canada

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

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

(58 paras.)

**Appeal From:**

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

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

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

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

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

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

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

42 A class action takes place outside the framework of the traditional duel between a single plaintiff and a single defendant. In many class proceedings, the representative acts on behalf of a very large class. The decision that is made not only affects the representative and the defendants, but may also affect all claimants in the classes covered by the action. For this reason, adequate information is necessary to satisfy the requirement that individual rights be safeguarded in a class proceeding. The notice procedure is indispensable in that it informs members about how the judgment authorizing the class action or certifying the class proceeding affects them, about the rights - in particular the possibility of opting out of the class action - they have under the judgment, and sometimes, as here, about a settlement in the case. In the instant case, the question raised by the respondent relates not to the Ontario statute but to the way it was applied by the Ontario Superior Court of Justice in a case in which that court knew that a parallel proceeding was under way in Quebec. Were the notices provided for in the Ontario court's judgment therefore consistent, in the context in which they were published, with the fundamental principles of procedure applicable to class actions?

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

44 In the context of the instant case, I agree with the opinion expressed by the Quebec Court of Appeal and with the findings of the trial judge on the notice issue. The procedure adopted in the Ontario judgment certifying the class proceeding for the purpose of notifying Quebec members of the national class established in the judgment contravened the

# TAB O

2009 CarswellQue 9842, 2009 SCC 43, J.E. 2009-1852, 62 M.P.L.R. (4th) 1, 311 D.L.R. (4th) 1, 394 N.R. 1, [2009] 3 S.C.R. 65, 181 A.C.W.S. (3d) 218

Marcotte c. Longueuil (Ville)

Michel Marcotte, Appellant and City of Longueuil, Respondent and Attorney General of Ontario, Intervener

Usinage Pouliot Inc., Appellant and City of Longueuil, Respondent

Supreme Court of Canada

McLachlin C.J.C., Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: January 19, 2009
Judgment: October 8, 2009
Docket: 32213, 32214

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Proceedings: affirmed *Marcotte c. Longueuil (Ville)* (2007), 2007 QCCA 866, 2007 QCCA 867, 2007 CarswellQue 5318, [2007] R.J.Q. 1467, Brossard J.C.A., Dufresne J.C.A., Rochon J.C.A. (Que. C.A.); affirmed *Usinage Pouliot inc. c. Longueuil (Ville)* (2006), 2006 CarswellQue 12030, 2006 QCCS 6517, Hébert J.C.S. (Que. S.C.); affirmed *Marcotte c. Longueuil (Ville)* (2006), 2006 CarswellQue 12027, 2006 QCCS 6516, Hébert J.C.S. (Que. S.C.)

Counsel: Marie Audren, Emmanuelle Rolland, for Appellants

Nicole Gibeau, Louis Bouchart D'Orval, for Respondent

Sara Blake, Lise Favreau, for Intervener

Subject: Civil Practice and Procedure; Public; Property; Restitution; Tax — Miscellaneous

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Refusal to certify

In early 2000s, cities on Montreal's South Shore were merged into large agglomeration — Legislature aimed to achieve equality in tax burdens among residents of amalgamated cities, and Quebec National Assembly accordingly

such a recalculation would give rise to a liquid and exigible claim, which would cause prescription to start running in respect of an action for restitution, with the underlying problems I mentioned above. In my view, this makes it all the more clear that the Court of Appeal was right to uphold the Superior Court's judgment and deny the appellants authorization to institute class actions. The actions would he of no assistance in interrupting prescription, since prescription has not yet started to run. The demands do not lead to the conclusion being sought. But this is not the only problem raised by the appellants' motions.

***G. Composition of the Group***

40 Owing to the specific characteristics of an action to quash a municipal by-law, difficulties arise with respect to the operation of certain procedural rules governing the establishment of and changes to the group covered by a class action. Thus, because of the fact that such a declaration would apply in respect of all ratepayers, members of the group would not be able to withdraw effectively from the action in nullity. This is contrary to the rules respecting the institution and conduct of class actions, which give them the option of withdrawing from or refusing to participate in such actions and set time limits for doing so (arts. 1006(*e*) and 1007 C.C.P.).

***H. Jurisdictional Issues***

41 The actions the appellants wish to institute fall undeniably within the ambit of art. 33 C.C.P. But other causes of nullity, such as formal defects and irregularities, would instead fall within the framework of annulment proceedings over which the Superior Court is granted jurisdiction in statutes relating to municipalities, such as the *Cities and Towns Act*, s. 397, and the *Municipal Code of Québec*, R.S.Q., c. C-27.1, arts. 689 and 690. In many cases, there is a fine line between the subject matter of a motion for annulment and that of an action in nullity under art. 33 (see Rousseau, at pp. 766-68; Hétu and Duplessis, at p. 8 553; *Immeubles Port Louis Ltée c. Lafontaine (Village)*, at pp. 343-46, *per* Gonthier J.). Recourse to the class action in such situations could hamper the conduct of proceedings that are in principle simple and quick, and would hardly be consistent with the principle of proportionality set out in art. 4.2 C.C.P.

***I. Principle of Proportionality***

42 Even though there is no need to invoke the principle of proportionality to justify the dismissal of the motions to authorize the class actions in issue here, I think it would be helpful to add a few comments about this principle, as I would not wish to limit it to a principle of interpretation that confers no real power on the courts in respect of the conduct of civil proceedings in Quebec.

43 The principle of proportionality set out in art. 4.2 C.C.P. is not entirely new. To be considered proper, a proceeding must be consistent with it (see Y.M. Morisette, "Gestion d'instance, proportionnalité et preuve civile: état provisoire des questions" (2009), 50 *C. de D.* 381). Moreover, the requirement of proportionality in the conduct of proceedings reflects the nature of the civil justice system, which, while frequently called on to settle private disputes, discharges state functions and constitutes a public service. This principle means that litigation must be consistent with the principles of good faith and of balance between litigants and must not result in an abuse of the public service provided by the institutions of the civil justice system. There are of course special rules for the most diverse

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# TAB P

2006 CarswellQue 3689, 2006 SCC 19, J.E. 2006-1081, 51 C.C.P.B. 163, 2006 C.L.L.C. 220-033, 2006 C.E.B. & P.G.R. 8200, 266 D.L.R. (4th) 542, 149 L.A.C. (4th) 225, 348 N.R. 201, [2006] 1 S.C.R. 666

Bisaillon c. Concordia University

Concordia University (Appellant) and Richard Bisaillon, Régie des rentes du Québec, Concordia University Faculty Association (CUFA), John Hall and Howard Fink (Respondents)

Concordia University Faculty Association (CUFA) (Appellant) and Richard Bisaillon, Régie des rentes du Québec, Concordia University, John Hall and Howard Fink (Respondents)

Supreme Court of Canada

McLachlin C.J.C., Bastarache, Binnie, LeBel, Deschamps, Abella, Charron JJ.

Heard: December 14, 2005
Judgment: May 18, 2006
Docket: 30363

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Counsel: Nancy Boyle, Guy Du Pont, Nick Rodrigo, Jean-Philippe Groleau for Appellant/Respondent, Concordia University

John T. Keenan, Harold C. Lehrer for Respondent/Appellant, Concordia University Faculty Association

Mario Évangéliste, Marie Pépin for Respondent, Richard Bisaillon

No one for Respondents, Régie des rentes du Québec, John Hall, Howard Fink

Subject: Corporate and Commercial; Civil Practice and Procedure; Labour and Employment; Public

Pensions --- Practice in pension actions — Jurisdiction

Employer university offered unique pension plan to all employees, more than 80 per cent of whom were unionized and represented by nine unions — Each collective agreement mentioned pension plan — Unionized employee B brought motion for authorization to bring class action against employer — B alleged employer granted itself contri

96 In my view, the absurd multiplicity of proceedings associated with the respondent's claim is symptomatic of a misapplication of the *Weber* test. Bringing the claim in front of the Quebec Superior Court's inherent jurisdiction is the only way to avoid this result because it is the only solution that recognizes that the essential character of this dispute transcends any one collective agreement, and thus the exclusive jurisdiction of any labour arbitrator. It is the only principled and practical way for the respondent's claim to finally be resolved. At the same time, and for the same reason this claim escapes the labour arbitrator's exclusive jurisdiction in the first place, a decision by the Quebec Superior Court will not imperil any of the terms negotiated individually by any of the unions involved. Such matters remain the exclusive domain of the labour arbitrator.

97 In reaching this conclusion, I do not comment on whether the respondent's proposed class action should be certified as such. That is a matter for the Quebec Superior Court to decide. Accordingly, the possibility that some litigants may opt out of the class action and begin their own court proceedings is irrelevant at this stage. The respondent's claim may be argued individually, authorized as a class action, or joined with independent actions by other beneficiaries; it may even need to be resolved by an appellate court. But whichever of these options ultimately materializes, an application to the Quebec Superior Court is still the only procedure that offers the hope of conclusively settling how the appellant university should finance the Fund.

98 I also do not purport to decide whether the respondent has a "sufficient interest" to proceed with this claim independently of his union: see art. 55 of the *Code of Civil Procedure*, R.S.Q., c. C-25. This Court has only been asked to determine whether the Quebec Superior Court has jurisdiction. Now that this has been established, though, that court may still refuse to render judgment if it is not convinced of the sufficiency of the respondent's interest in the claim: see art. 462 of the *Code of Civil Procedure*. Again, any uncertainty concerning the answer to this question cannot serve to remove jurisdiction from the Quebec Superior Court. To the contrary, the Quebec Superior Court is the only forum vested with the jurisdiction to hear this claim whomever may be most suited to advance it.

**5. Conclusion**

99 While a labour arbitrator enjoys exclusive jurisdiction over matters whose essential character arises out of the interpretation, application, administration or violation of a collective agreement, his/her exclusive jurisdiction does not extend beyond that point. Rather, in such a situation, the inherent jurisdiction of the superior court will be engaged. In the present appeal, the respondent's claim transcends the collective agreement binding him to the appellant university and directly implicates the Fund of which he is but one of many beneficiaries. The essential character of this dispute cannot be said to arise out of a collective agreement.

100 I would dismiss the appeal.

*Appeal allowed.*

*Pourvoi accueilli.*

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# TAB Q

1981 CarswellQue 105, [1981] 1 S.C.R. 553, 38 N.R. 205, J.E. 81-553

1981 CarswellQue 105, [1981] 1 S.C.R. 553, 38 N.R. 205, J.E. 81-553

Nault c. Canadian Consumer Co.

Robert Nault, Appellant and Canadian Consumer Company Limited, Respondent

Supreme Court of Canada

Martland, Dickson, Beetz, McIntyre and Chouinard JJ.

Judgment: February 18, 1981
Judgment: May 11, 1981
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Proceedings: On appeal from the Court of Appeal for Quebec

Counsel: *Pierre Sylvestre* and *Mario Bouchard*, for the appellant.

*George R. Hendy* and *William Brock*, for the respondent.

Subject: Civil Practice and Procedure

Practice --- Parties — Representative or class actions

Appellant applying for leave to bring class action for specific performance of contract — Respondent failing to deliver cutlery ordered and paid for by appellant in response to newspaper advertisement — Specific performance alone being inadequate remedy for all members of class who had ordered and not received cutlery — Difficult to establish entirely homogeneous class because of choice of contract remedies offered by art. 1065 of Civil Code — Appellant not in position to provide adequate representation for class as required by s. 1033(d) of Code of Civil Procedure — Leave to bring action denied — Civil Code, art. 1065 — Code of Civil Procedure, s. 1003.

**English version of the judgment of the Court delivered by *Chouinard J.*:**

1 Appellant was given leave to bring a class action by a judgment of the Superior Court on May 9, 1979, and this judgment was reversed by the Court of Appeal on January 14, 1980, hence his appeal.

2 In his reasons concurred in by Turgeon J.A., Lamer J.A., as he then was, summarized the issue as follows:

[TRANSLATION] On November 19, 1978 Robert Nault, the respondent in this appeal and applicant in the Superior Court, read advertising in the newspaper *Dimanche-Matin* by which Canadian Consumer Company Limited, the appellant, was offering cutlery for $16.88. Mr. Nault completed the order form for two sets of cutlery, indicating on the detachable coupon his Chargex account number, for the sum of $39.97, representing the cost of two sets of cutlery plus sales tax and shipping costs. The amount of $39.97 was in fact received by Canadian Consumer a few days later, on November 24, 1978. When the company delayed in sending him his merchandise, Nault contacted them several times and filed complaints with the federal Consumer Affairs Bureau of the Department of Consumer and Corporate Affairs. On March 8, 1979 he received a cheque, dated March 2, 1979, refunding the amount paid by him. He chose not to cash it and filed in the Superior Court a motion to bring a class action. The substantive conclusions which he intends eventually to seek for himself and all others in the "group" which he wishes to represent are as follows:

> To order delivery of the cutlery bought by members;
>
> To order respondent to pay members of the group damages on account of the delay in delivery, consisting of interest at the legal rate on the purchase price, from the expiry of one month after the date of payment;

The group he wishes to represent, and of which he says he is a member, is described as follows:

> Any person who has accepted one of the public offers made in the form of advertising in a newspaper of the Province of Quebec, by which the respondent offered to sell "six place settings" of Old Colony cutlery, who has made payment, and who has not received the cutlery bought within one month of payment;

3 Article 1003 *C.C.P.* lists the conditions on which the prior authorization necessary to bring a class action may be given:

> *1003.* The Court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:
>
> (a) the recourses of the members raise identical, similar or related questions of law or fact;
>
> (b) the facts alleged seem to justify the conclusions sought;
>
> (c) the composition of the group makes the application of article 59 or 67 difficult or impracticable; and
>
> (d) the member to whom the Court intends to ascribe the status of representative is in a position to represent the members adequately.

4 In accordance with para. (*d*) of this article, Lamer J.A. concluded that the motion for authorization should be dismissed because appellant is not in a position to provide adequate representation for the members of the group

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described in the motion. This is because the conclusion sought is too limited to give effect to the rights of members of the group. Apart from interest at the legal rate on the amount paid of $39.97, from one month after payment until delivery, which I shall deal with in greater detail below, the only conclusion sought is "delivery of the cutlery bought by members". This single conclusion could not enable appellant to adequately represent the members of the group, in which as Lamer J.A. pointed out, [TRANSLATION] "the personal interests varied as follows:

> 1. those who, like himself, did not wish to be repaid, whether an offer had been made to them or not, and who continued to want only the cutlery and/or damages;
>
> 2. those who accepted the refund and who wanted to have damages;
>
> 3. those who in fact obtained the cutlery, but later than one month after making payment, and who wanted interest on the amount paid for the period elapsed beyond the month;
>
> 4. those who had no cutlery, received no refund and wanted their money and interest;
>
> 5. finally, those who only wanted the cutlery or a refund."

5 Lamer J.A. then raised the question of whether, in view of the provision of art. 1005 *C.C.P.* that "the judgment granting the motion describes the group whose members will be bound by any judgment", the judge could have limited the group so as to make appellant an adequate representative. In the circumstances of the case at bar, he felt that in the absence of an amended motion the judge could not impose on appellant a duty to represent a group other than the one he was seeking to represent, even if it constituted a sub-group. The motion accordingly had to be dismissed, as we have seen, for the reason that appellant is not in a position to provide adequate representation for members of the group described in the motion.

6 It would appear to me that in an action on a contract it is often going to be difficult to establish an entirely homogeneous group because of the choice of remedies offered by art. 1065 *C.C.*, in the event of a default by the debtor:

> *1065.* Every obligation renders the debtor liable in damages in case of a breach of it on his part. The creditor may, in cases which admit of it, demand also a specific performance of the obligation, and that he be authorized to execute it at the debtor's expense, or that the contract from which the obligation arises be set aside; subject to the special provisions contained in this code, and without prejudice, in either case, to his claim for damages.

7 For my part, I would hesitate to adopt an interpretation as a result of which a class action could not be brought on a contract, and in my opinion it suffices for the conclusion sought to be capable of providing an appropriate remedy for all the members of the group, leaving those who prefer some other remedy to disassociate themselves from the group.

8 I do not propose to discuss this point any further, because in my view there is in any case another compelling

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reason why the motion for authorization should have been dismissed.

9 This reason was not considered either in the Superior Court or in the Court of Appeal, but was argued in this Court at the latter's request.

10 It is that the conclusion sought, by itself, apart from the interest asked for (which I shall discuss below) could not have been allowed because it is, contrary to art. 469 *C.C.P.*, unenforceable.

11 The fact is that cutlery is not a certain and determinate thing, and if respondent does not voluntarily carry out the judgment ordering him to make delivery, that judgment cannot be made the subject of compulsory execution by seizure.

12 As Dorion J. observed in *North American Iron & Metal Co., Re* [FN1] at p. 8: [TRANSLATION] "Everyone is agreed on the meaning of the words 'certain and determinate thing': it is a thing the identity of which is known."

13 The case at bar involves cutlery of the king described in the advertisement but not identified, not individualized.

14 This is not a case in which performance of the obligation in kind can be obtained under art. 1065 *C.C.*

15 Applying the rules of art. 1065 *C.C.* to obligations to give, Mignault observed in *Le droit civil canadien*, vol. 5, at p. 405:

> [TRANSLATION] 3. *Obligation to give a thing which is not individually specified*, as for example, A *horse*. — There is no direct means of forcing the debtor to carry out his obligation; for if he does not wish to buy a horse and give it to his creditor, the law obviously cannot compel him to do so. The creditor then has only one recourse, a judgment for damages.

16 In the *Traité de Droit civil du Québec*, vol. 7-bis, at p. 233, No. 339, Faribault wrote:

> [TRANSLATION] When the object of the obligation to give is not a specific thing, it cannot be performed in kind. The creditor's only recourse then is a claim for damages.

17 In "L'exécution spécifique des contrats en droit québécois", (1958-59), 5 McGill L.J. 108, Jean Louis Baudoin writes, at p. 111:

> [TRANSLATION] In the contract of sale, specific performance depends solely on the nature of the item sold. When this is an indefinite or unascertained thing, as in a sale by number, weight or measure, the right of ownership does not pass to the buyer before the counting, weighing or measuring have taken place; specific performance is impossible because the subject-matter of the contract is insufficiently identified. On the other hand, if the subject-matter is a definite item, whether movable or immovable, performance in kind is always granted by

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the courts. As the buyer of movable property becomes the owner even before delivery, he can claim it from the seller or from any third party. In the event of a refusal by the latter to give up the property in question, the creditor may be seizure in revendication obtain physical and legal possession of it.

18 For the time when ownership passes to the buyer, as mentioned in the preceding passage, reference may be made to arts. 1025 and 1026 *C.C.*

19 The same author further states, at p. 127:

[TRANSLATION] The choice given to the creditor by our law may become a dangerous weapon against him. This risk is twofold. First, the creditor's claim must be so presented that the judgment allowing it can be enforced. Accordingly, if he words his conclusions badly, he risks losing any remedy he may have against his debtor. Second, the courts cannot decide *ultra petita* (art. 113 *C.C.P.*): the judge cannot supply an alternative conclusion which has been omitted, as under our law he is required to consider only the actual claim of the creditor. If, therefore, the latter opts for specific performance, when in the court's opinion this is essentially impossible, he cannot be awarded any monetary compensation. This rule is followed to the point that any judgment ordering a type of performance not recognized by the law is invariably reversed by the appellate courts. To avoid this problem of form, the creditor nowadays generally submits a principal conclusion asking for specific performance and an alternative conclusion asking for damages.

20 In *Melançon v. Commissaires d'écoles de Grand' Mère*[FN2], which concerned an action for repayment of part of the price paid for bricks, due to a failure to deliver the entire quantity, Rivard J. observed, at pp. 502-3:

[TRANSLATION] Finally, it should be noted that the general rule of art. 1065 is that failure to perform the obligation makes the debtor liable for damages. The creditor may *also* ask for specific performance of the contract or that it be set aside "in cases which admit of it".

Can the commissioners ask for specific performance in the case at bar? One should not lose sight of the fact that delivery cannot be made without the vendor's co-operation, that no one can make it but him, and he does not wish to do so. In any event, the commissioners asked Melançon to perform his obligation, they gave him notice to deliver: and he refused. Even after this first refusal, he could certainly, in response to the action, have offered to perform, as performance of an obligation is always admissible up to the time of judgment. He did not wish to do so, he maintained the position he had taken, he persisted and continues to persist in refusing delivery. How can he then complain that the commissioners have not called on him to do what they asked, which he refused and still refuses to do?

21 As Tancelin observed, *Théorie du droit des obligations*, 1975, at p. 367, dealing with obligations to give a generic thing, as in the case at bar, [TRANSLATION] "... His [the debtor's] refusal to perform may then prevent performance in kind and the creditor must accept damages". See also on the obligation to perform, *Quebec County Railway Company v. Montcalm Land Company Limited*[FN3].

22 Accordingly, I am of the opinion that the motion for authorization should be dismissed on the ground that the

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conclusion sought by the class action in question, namely delivery of the cutlery, unaccompanied by an alternative conclusion, could not be allowed because it is unenforceable.

23 However, appellant argued that on a motion for authorization of a class action the judge should take an active part and revise the proposed conclusion to make it admissible. Appellant relied on various articles in the title regarding the conduct of the class action once authorization has been given and the action brought. He also relied on art. 1005 *C.C.P.*:

> *1005.* The judgment granting the motion:
>
> (a) describes the group whose members will be bound by any judgment;
>
> (b) identifies the principal questions to be dealt with collectively and the related conclusions sought;
>
> (c) orders the publication of a notice to the members.
>
> The judgment also determines the date after which a member can no longer request his exclusion from the group, the delay for exclusion cannot be less than thirty days nor more than six months after the date of the notice to the members. Such delay is peremptory; the court may nevertheless permit the exclusion of a member who shows that in fact it was impossible for him to act sooner.

24 It appears from this article that the judge should not simply allow or refuse the authorization, but in allowing it should make certain rulings. He must describe the group whose members will be bound by any judgment, identify the principal questions that are to be dealt with collectively and the related conclusions sought, and order publication of a notice to the members. He must also determine the date after which a member can no longer request his exclusion from the group.

25 The judge undoubtedly enjoys some discretion in this regard, and is not bound strictly by the claims presented by the applicant. However, there is little in the record of the case at bar to indicate what the judge could have done under this article. It is rather a case in which the judge could not correct the written pleadings. In my view, the judge could not have amended the conclusions sought by attaching an alternative conclusion conflicting with the express wish of appellant, who was not willing to accept any reimbursement. After alleging that on or about March 8, 1979 he received from respondent a cheque for $39.36 in repayment of the purchase price (this cheque is filed as Exhibit R-4), appellant alleged:

> [TRANSLATION] Applicant never solicited this repayment, refuses it and therefore does not intend to cash the said cheque;

26 I do not see how the judge could add a conclusion which had been so categorically rejected by appellant himself.

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27 There only remains to consider the possibility that appellant could amend his pleadings.

28 In his factum, appellant submitted the following claim:

> [TRANSLATION]
>
> ALLOW this appeal;
>
> REVERSE the judgment of the Court of Appeal;
>
> GRANT appellant authorization to bring a class action in accordance with the conclusions of the initial motion;
>
> IDENTIFY any other alternative conclusion which the Court sees fit to award in the interests of members of the group.

29 At the hearing, appellant further submitted an oral motion for leave to amend, to add an alternative claim for damages corresponding to the amount paid plus interest on that amount.

30 I do not think this motion can be granted at this stage. Apart from adding a conclusion which is in conflict with appellant's initial intent, its only effect would be to allow him to obtain considerable costs.

31 Appellant admitted receiving a cheque, which he filed as an exhibit, given to him to repay the amount which his conclusion now seeks to claim. The result would be that, if delivery is not made within the time limit, appellant would obtain the payment he was offered on March 8, 1979, while at the same time subjecting respondent to costs which would have been avoided if appellant had accepted at that time what he is now demanding.

32 That leaves the claim for interest. Appellant asked that respondent be ordered to pay the members of the group damages on account of the delay in delivery, consisting of interest at the legal rate on the purchase price, commencing one month after payment.

33 Do the facts alleged appear to justify a finding that appellant is entitled to interest commencing one month after payment? Under art. 1070 *C.C.*, damages are not due until the debtor is in default. Appellant did not allege that he had put respondent in default. The notice published by respondent indicated no deadline for delivery. According to art. 1067 *C.C.*, commencing an action at law constitutes putting the debtor in default. In a class action what procedure constitutes commencing an action — a motion for authorization or the instituting of an action when authorization has been given? Do the facts alleged appear to justify a finding that appellant is entitled to interest after March 8, 1979, the date on which respondent offered to reimburse the sum paid by appellant? These are points which were not argued in this Court, but which I felt should be mentioned to illustrate more clearly why this motion for a class action cannot be allowed by this Court on the conclusion relating to interest alone.

34 For these reasons, I would not allow the motion for leave to amend submitted by appellant at the hearing and

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I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

Solicitors of record:

Solicitors for the appellant: *Sylvestre, Brisson, Dupin, Charbonneau & Bourdeau*, Montreal.

Solicitors for the respondent: *Phillips & Vineberg*, Montreal.

FN1 (1923), 36 K.B. 1 (Que. C.A.).

FN2 (1934), 58 K.B. 498.

FN3 (1928), 46 K.B. 262.

END OF DOCUMENT

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# TAB R

*Case Name:*

**Fischer v. IG Investment Management Ltd.**

**Between**
**Dennis Fischer, Sheila Snyder, Lawrence Dykun, Ray Shugar and Wayne Dzeoba, Plaintiffs (Respondents), and**
**IG Investment Management Ltd., CI Mutual Funds Inc., Franklin Templeton Investments Corp., AGF Funds Inc. and AIC Limited, Defendants (Appellants)**

[2012] O.J. No. 343

**2012 ONCA 47**

**287 O.A.C. 148**

**15 C.P.C. (7th) 81**

**109 O.R. (3d) 498**

**346 D.L.R. (4th) 598**

**211 A.C.W.S. (3d) 785**

**2012 CarswellOnt 635**

Dockets: C53852, C53853

Ontario Court of Appeal
Toronto, Ontario

**W.K. Winkler C.J.O., G.J. Epstein J.A. and G.I. Pardu J. (ad hoc)**

Heard: December 6, 2011.
Judgment: January 27, 2012.

(84 paras.)

*Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Certification -- Appeal by mutual fund managers from order of Divisional Court allowing respondents' appeal and granting certification of proposed class action dismissed -- Respondent investors sued appellants for damages for permitting market timing that caused significant losses to respondents -- Securities Commission had investigated appellants and required them to pay $205,600,000*

69 While this speculation about future opting out may ultimately prove to be correct, it ignores the well-settled principle that a right to opt out is an important element of procedural fairness in class proceedings. It is not an illusory right that should be negated by speculation, judicial or otherwise. Further, on a practical level, the fact that the economics of judicial recourse is a potential barrier to proceeding individually is an argument in favour of - not against - certification of a class proceeding.

70 The motion judge's third reason for dismissing the plaintiffs' argument regarding procedural fairness misconstrues the very rationale for and approach to class proceedings in this province. According to the motion judge, at paras. 67-69, even if a class action were to be certified, investors would not truly have their day in court unless individual assessment trials were required. In support of this conclusion, the motion judge noted that class action litigation is prosecuted by representative plaintiffs and class counsel and, accordingly, investors "would be non-participants in the resolution of the common issues" (at para. 69). The motion judge then equated the non-participation by investors in the OSC proceedings with the so-called non-participation by investors in a class action, at para. 69:

> In my opinion, the issue in this case is not whether the investors *who were non-participants in the OSC proceedings and who would be non-participants in the resolution of the common issues* had or would have procedural fairness. The issue is whether they have had access to justice and whether the other important values of the *Class Proceedings Act, 1992* have been satisfied. The considerable power of the subjective and emotive plea that the investors have not had their day in court misdirects the analysis from the access to justice and other policy issues that inform the preferable procedure debate ... [Emphasis added.]

71 The notion that class members would not have their day in court unless individual assessment trials were to take place is contrary to the very essence of a class proceeding. Were it to be accepted as a general principle, it would serve to defeat every certification motion. The fundamental purpose of the class proceeding is to provide access to justice, not to deny it. Equating the *total* lack of participation by investors in the OSC proceedings with their alleged non-participation in resolving the common issues in the class proceeding ignores the underlying representative structure of a class proceeding. The purpose of ensuring that there is an adequate representative plaintiff is to ensure that the rights of each class member are protected and the claims of each are advanced vigorously.

72 As stated in *Hollick*, at para. 15: "by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own". This economy is achieved, in part, by appointing a representative plaintiff who shares a sufficient common interest with other members of the class and by allowing the representative plaintiff, under court supervision, to conduct the litigation on behalf of class members. The notion of representation that is inherent in the procedural mechanism of a class proceeding is a very far cry from the complete absence of participation by investors in the OSC proceedings. The motion judge erred in dismissing this critical distinction as simply a "subjective and emotive plea" that has nothing to do with access to justice.

73 Moreover, the above passage clearly reveals the motion judge's failure to properly consider the accessibility of the OSC proceedings insofar as the class members are concerned. To repeat, in his view, "the issue in this case is not whether the investors ... had or would have procedural fairness. The issue is whether they have had access to justice". Yet access to justice by the investors surely could not be achieved through the completion of a process that was not made accessible to them.

74 By ignoring the essential differences between the scope of the OSC's jurisdiction and remedial powers and by treating as irrelevant the lack of participation in those proceedings by class members or their representatives, the motion judge viewed the OSC proceedings as if they were a reasonable alternative to a class proceeding. He then analyzed the motion before him as though the key issue were the propriety of the settlements attained through the s. 127 proceedings. Thereafter, he applied the settlement approval criteria under the *CPA* to the settlements flowing from the OSC proceedings as a basis for finding that those proceedings were a reasonable alternative to the proposed class proceeding. This circular analysis compounded the initial error in principle.

75 The Divisional Court properly identified the motion judge's error in applying the test for approval of a settlement to the preferable procedure question under s. 5(1)(d) of the CPA. Molloy J. explained in detail, at paras. 48-57, why these criteria are not applicable at the certification stage. I would add that settlement criteria relative to a class action settlement cannot be applied to an OSC settlement for the simple reason that those criteria are based on a certification

# TAB S

*Case Name:*

**Currie v. McDonald's Restaurants of Canada Ltd.**

**Between**
**Greg Currie, plaintiff/respondent, and**
**McDonald's Restaurants of Canada Limited, McDonald's Corporation and Simon Marketing Inc., defendants/appellants**

**[2005] O.J. No. 506**

74 O.R. (3d) 321

250 D.L.R. (4th) 224

195 O.A.C. 244

7 C.P.C. (6th) 60

137 A.C.W.S. (3d) 250

Dockets: C41264, C41289 and C41361

Ontario Court of Appeal
Toronto, Ontario

**R.J. Sharpe, R.P. Armstrong and R.A. Blair JJ.A.**

Heard: November 15, 2004.
Judgment: February 16, 2005.

(53 paras.)

*Civil procedure -- Parties -- Class or representative actions -- Representative plaintiff -- Appeals -- International law and conflict of laws -- Conflict of laws -- Foreign judgments -- Recognition of judgments of foreign state.*

Appeal by the defendant, McDonald's Restaurants of Canada Ltd, from an order that allowed this matter to proceed, despite the fact that similar claims had been settled by class action. McDonald's

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

**28** The right to opt out is an important procedural protection afforded to unnamed class action plaintiffs. Taking appropriate steps to opt out and remove themselves from the action allows unnamed class action plaintiffs to preserve legal rights that would otherwise be determined or compromised in the class proceeding. Although she was not referring to inter-jurisdictional issues, in Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534 at para. 49, McLachlin C.J.C. identified the importance of notice as it relates to the right to opt out: "A judgment is binding on a class member only if the class member is notified of the suit and given an opportunity to exclude himself or herself from the proceeding." The right afforded to plaintiff class members to opt out has been found to provide some protection to out-of-province claimants who would prefer to litigate their claims elsewhere: Webb v. K-Mart Canada Ltd. (1999), 45 O.R. (3d) 389 at 404 (S.C.J.). It is obvious, however, that if the right to opt out is to be meaningful, the unnamed plaintiff must know about it and that, in turn, implicates the adequacy of the notice afforded to the unnamed plaintiff.

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

**30** In my view, provided (a) there is a real and substantial connection linking the cause of action to the foreign jurisdiction, (b) the rights of non-resident class members are adequately represented, and (c) non-resident class members are accorded procedural fairness including adequate notice, it may be appropriate to attach jurisdictional consequences to an unnamed plaintiff's failure to opt out. In those circumstances, failure to opt out may be regarded as a form of passive attornment sufficient to support the jurisdiction of the foreign court. I would add two qualifications: First, as stated by 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

41 The appellants argue that the motion judge erred in law by applying a higher standard to the notice than would be applied in an Ontario class action. They point out that under Ontario law, there is no absolute requirement for effective notice in class actions and, where the stake of an individual class member is extremely low, notice requirements may be tailored accordingly. In the present case, the individual class member could assert no more than a mathematical chance to win a prize and given the low value of such a claim, Ontario law sets a very low standard. The Class Proceedings Act, S.O. 1992, c. 6, ss. 17 and 20 direct the Ontario courts making directions regarding notice to consider, inter alia, the cost of notice, the size of the class and the nature of the relief sought. The Act specifically permits the court, having regard to these matters, to dispense with notice where appropriate (s. 17(2)). In consumer class actions involving large plaintiff classes asserting claims that are essentially insignificant on an individual basis, Canadian courts have approved notice arguably less effective than that approved in the case at bar: Chadha v. Bayer, above; Wilson v. Servier Canada Inc. (2002), above.

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

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

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

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

# TAB T

*Case Name:*

# Labatt Brewing Co. v. NHL Enterprises Canada

**Between**
**Labatt Brewing Company Limited and Labatt Breweries of Canada LP, Applicants (Respondents), and**
**NHL Enterprises Canada, L.P., NHL Interactive Cyberenterprises, LLC, NHL Enterprises, L.P., NHL Enterprises B.V., Molson Coors Canada Inc. and Millercoors LLC, Respondents (Appellants)**

**[2011] O.J. No. 3207**

**2011 ONCA 511**

**282 O.A.C. 151**

**106 O.R. (3d) 677**

**86 B.L.R. (4th) 226**

**2011 CarswellOnt 6140**

Dockets: C53817 and C53818

**Ontario Court of Appeal**
**Toronto, Ontario**

**D.R. O'Connor A.C.J.O., J.C. MacPherson and P.S. Rouleau JJ.A.**

Heard: July 7, 2011.
Judgment: July 12, 2011.

(23 paras.)

*Civil litigation -- Civil procedure -- Pleadings -- Material facts -- Appeal by NHL and Molson Coors Canada (Molson) from order that Labatt Brewing Company (Labatt) and NHL had reached binding sponsorship agreement on November 12, 2010, and as result, NHL was not free to enter into similar agreement with Molson on February 8, 2011, allowed and judgment set aside -- Application judge's conclusion not anchored in pleadings, evidence, positions or submissions of parties -- NHL and Molson not given opportunity to address ultimate conclusion reached by application judge -- As issues between parties were not defined by and confined to those pleaded, NHL and Molson were denied procedural fairness.*

1 THE COURT:-- In this expedited appeal, the appellants NHL Enterprises, L.P. ("NHL") and Molson Coors Canada Inc. ("Molson") and several related companies appeal from the judgment of Newbould J. dated June 3, 2011. On an application brought by Labatt Brewing Company Limited ("Labatt") and a related company, he held that the NHL and Labatt reached a binding sponsorship agreement on November 12, 2010. As a result, the NHL was not free to enter into a similar agreement (for substantially more money) with Molson on February 8, 2011.

2 In its application, Labatt sought an interpretation of the s. 7 renewal provision contained in the previous sponsorship agreement between the NHL and Labatt. The provision provided for a 60-day exclusive negotiation period.

3 The appellants advance four grounds of appeal as expressed in the NHL's factum:

> (a) Did the application judge err by considering whether the NHL and Labatt had reached a binding sponsorship agreement on November 12, given that such a position was not advanced by Labatt in the proceeding below and the NHL did not have an opportunity to respond to it?
> (b) Did the application judge err in finding that the NHL and Labatt reached a binding sponsorship agreement on November 12, given that neither party believed that such an agreement existed and both parties had agreed that any such agreement had to take the form of a signed document?
> (c) Did the application judge err by finding that (i) the doctrines of waiver and promissory estoppel could be used by Labatt to prevent the Exclusive Negotiating Period from expiring, and (ii) the NHL intentionally and unequivocally waived such expiry for an indefinite period of time?
> (d) In the event that Labatt was entitled to a remedy, did the application judge err by enjoining the NHL and Molson from implementing the Molson Agreement, rather than directing a reference for damages?

4 In our view, this appeal can, and should, be resolved on the basis of the first issue. The central conclusion of the application judge was that on November 12, 2010 the NHL and Labatt had reached a binding sponsorship agreement for the July 1, 2011-June 30, 2014 period.

5 The problem is that this central conclusion was not anchored in the pleadings, evidence, positions or submissions of any of the parties. Indeed the application judge recognized this when he said in his reasons: "I realize that this result is not exactly what either side contended." As such, it was procedurally unfair, or contrary to natural justice, for the application judge to reach this conclusion on this record.

6 In *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.), Doherty J.A. held that it was both fundamentally unfair and inherently unreliable for a trial judge to make findings against a defendant on the basis of a theory of legal liability not advanced by the claimant. He said, at paras. 61-63:

> The injection of a novel theory of liability into the case via the reasons for judgment was fundamentally unfair to [the defendants].
>
> In addition to fairness concerns which standing alone would warrant appellate intervention, the introduction of a new theory of liability in the reasons for judgment also raises concerns about the reliability of that theory. We rely on the adversarial process to get at the truth. That process assumes that the truth best emerges after a full and vigorous competition amongst the various opposing parties. A theory of liability that emerges for the first time in the reasons for judgment is never tested in the crucible of the adversarial process. We simply do not know how [the trial judge's] lost opportunity theory would have held up had it been subject to the rigours of the adversarial process. We do know, however, that all arguments that were in fact advanced by [the plaintiff] and were therefore subject to the adversarial process were found wanting by [the trial judge].
>
> [The trial judge] erred in finding liability on a theory never pleaded and with respect to which battle was never joined at trial. This error alone requires reversal.

# TAB U

**SUPREME COURT OF CANADA**
**Att. Gen. of Can. v. Inuit Tapirisat et al., [1980] 2 S.C.R. 735**
**Date: 1980-10-07**

The Attorney General of Canada *(Defendant) Appellant;*

and

Inuit Tapirisat of Canada and the National Anti-poverty Organization *(Plaintiffs) Respondents.*

1980: February 12; 1980: October 7.

Present: Laskin C.J. and Martland, Dickson, Beetz, Estey, McIntyre and Chouinard JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

*Administrative law — Decision of CRTC — Review by Governor in Council — Rules of natural justice and duty of fairness — Whether Governor in Council subject to judicial review — National Transportation Act, R.S.C. 1970, c. N-17 as amended, s. 64 — Railway Act, R.S.C. 1970, c. R-2 as amended, ss. 320, 321(l) — Interpretation Act, R.S.C. 1970, c. 1-23, s. 28.*

After the approval by the CRTC of a new rate structure for Bell Canada, the plaintiffs-respondents appealed the CRTC decision to the Governor General in Council pursuant to s. 64(1) of the *National Transportation Act.* Their petitions having been denied, the respondents attacked the decisions of the Governor General in Council alleging that they had not been given a hearing in accordance with the principles of natural justice. This appeal arises from an application made in the Trial Division of the Federal Court for an order striking out the plaintiffs' statement of claim on the ground that the statement disclosed "no reasonable cause of action". The application was granted but the Federal Court of Appeal set aside the order of the Trial Division judge. Hence the appeal to this Court.

*Held:* The appeal should be allowed.

The substance of the question before this Court in this appeal is whether there is a duty to observe natural justice in, or at least a duty of fairness incumbent on, the Governor in Council in dealing with parties such as the respondents upon their submission of a petition under s. 64(1) of the *National Transportation Act.*

Such petitions are to be contrasted with the mechanism for appeal to the Federal Court of Appeal on questions of law or jurisdiction provided in subs. (2) and following of s. 64. The courts have held that the rules of natural justice and the duty to act fairly depend on the

[Page 736]

circumstances of the case, the nature of the inquiry or investigation, the subject matter that is being dealt with, the consequences on the persons affected and so forth. The mere fact that a decision is made pursuant to a statutory power

> In my opinion, the appellant should have been told why his services were no longer required and given an opportunity, whether orally or in writing as the Board might determine, to respond. The Board itself, I would think, would wish to be certain that it had not made a mistake in some fact or circumstance which it deemed relevant to its determination. Once it had the appellant's response, it would be for the Board to decide on what action to take, without its decision being reviewable elsewhere, always premising good faith. Such a course provides fairness to the appellant, and it is fair as well to the Board's right, as a public authority to decide, once it had the appellant's response, whether a person in his position should be allowed to continue in office to the point where his right to procedural protection was enlarged. Status in office deserves this minimal protection, however brief the period for which the office is held.

The House of Lords in the earlier decision of *Pearlberg v. Varty*[1], had in effect found a presumption that the rules of natural justice apply to a tribunal entrusted with judicial or quasi-judicial functions but that no such presumption arises where the body is charged with administrative or executive functions. In the latter case courts will

[Page 747]

act on the presumption that Parliament had not intended to act unfairly and will "in suitable cases" imply an obligation in the body or person to act with fairness. See Lord Pearson at p. 547. Lord Hailsham L.C., combining the idea of fairness and natural justice, put it this way at p. 540:

> The doctrine of natural justice has come in for increasing consideration in recent years and the courts generally, and your Lordships' House in particular, have, I think rightly, advanced its frontiers considerably. But at the same time they have taken an increasingly sophisticated view of what it requires in individual cases.

Tucker L.J., thirty years earlier, came closer to our situation in this appeal when he said in *Russell v. Duke of Norfolk*[2], at p. 118:

> The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.

The arena in which the broad rules of natural justice arose and the even broader rule *of* fairness now performs is described by Lord Denning M.R. in *Selvarajan v.*

---

[5] [1972] 1 W.L.R. 534.
[6] [1949] I All E.R. 109.

*Race Relations Board*[3] where His Lordship, after enumerating a number of authorities dealing with tribunals generally concerned with a *lis inter partes* in a variety of administrative fields, said at p. 19:

> In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case

[Page 748]

> made against him and be afforded a fair opportunity of answering it.

(Even in those instances the Court went on to add that such a body may adopt its own procedure, can employ staff for all preliminary work, but in the end must come to its own decision.)

Let it be said at the outset that the mere fact that a statutory power is vested in the Governor in Council does not mean that it is beyond review. If that body has failed to observe a condition precedent to the exercise of that power, the court can declare that such purported exercise is a nullity. In *Wilson v. Esquimalt and Nanaimo Railway Company*[4], for example, the Privy Council considered the position of the Lieutenant-Governor of British Columbia under the *Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917,* S.B.C. 1917, c. 71. The effectiveness of a Crown land grant issued by order of the Lieutenant-Governor in Council was contested on the grounds that the Lieutenant-Governor in Council had no "reasonable proof" before them that the grantees had improved the lands in question or occupied them with an intention to reside thereon. The Court of Appeal found that there was no such evidence and hence declared the Order in Council to be void. The Privy Council proceeded on the basis that before the Lieutenant-Governor in Council could make the grant in question, it must determine that the statutorily prescribed conditions had been met by the applicant for the grant. As here, the allegation was made that the owners did not have "an adequate opportunity" to show that there was no factual foundation for the grant made by the Lieutenant-Governor in Council. The Privy Council found against this submission stating at p. 213 through Duff J., sitting as a member of the Board:

> The respondents were given the fullest opportunity to present before the Lieutenant-Governor in Council everything they might to urge against the view that the depositions produced in themselves constituted "reasonable proof," and they had the fullest opportunity also of supporting their contention that the depositions alone, in

[Page 749]

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[7] [1976] 1 All E.R. 12.

[8] [1922] 1 A.C. 202.

# TAB V

** Preliminary Version **

*Case Name:*
**Sun Indalex Finance, LLC v. United Steelworkers**

**Sun Indalex Finance, LLC, Appellant;**
**v.**
**United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville, Respondents.**
**And between**
**George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors, Appellant;**
**v.**
**United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville, Respondents.**
**And between**
**FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited, Appellant;**
**v.**
**United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville, Respondents.**
**And between**
**United Steelworkers, Appellant;**
**v.**
**Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership) and Superintendent of Financial Services, Respondents, and**
**Superintendent of Financial Services, Insolvency Institute of Canada, Canadian Labour Congress, Canadian Federation of Pensioners, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers Association, Interveners.**

[2013] S.C.J. No. 6

**[2013] A.C.S. no 6**

**2013 SCC 6**

**301 O.A.C. 1**

**96 C.B.R. (5th) 171**

**8 B.L.R. (5th) 1**

**354 D.L.R. (4th) 581**

**2013EXP-356**

**2013EXPT-246**

**J.E. 2013-185**

**D.T.E. 2013T-97**

**EYB 2013-217414**

**439 N.R. 235**

**2013 CarswellOnt 733**

**223 A.C.W.S. (3d) 1049**

**20 P.P.S.A.C. (3d) 1**

2 C.C.P.B. (2nd) 1

**[2013] W.D.F.L. 1591**

**[2013] W.D.F.L. 1592**

File No.: 34308.

Supreme Court of Canada

Heard: June 5, 2012;
Judgment: February 1, 2013.

**Present: McLachlin C.J. and LeBel, Deschamps, Abella, Rothstein, Cromwell and Moldaver JJ.**

(280 paras.)

**Appeal From:**

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Priority -- Appeals from judgment setting aside decision concluding that deemed trust did not apply to wind-up deficiencies allowed -- Statutory deemed trust extended to contributions employer had to make to ensure that pension fund was sufficient to cover liabilities upon wind-up -- However, deemed trust was superseded by security granted to creditor that loaned money to employer during insolvency proceedings -- Although employer, as plan administrator, might have put itself in position of conflict of interest by failing to give plan's members proper notice of motion requesting financing of its operations during restructuring process, there was no realistic possibility that, had members received notice and had CCAA court found they were secured creditors, it would have ordered priorities differently -- Consequently, it was not appropriate to order equitable remedy such as constructive trust ordered by Court of Appeal.*

*Pensions and benefits law -- Private pension plans -- Bankruptcy, effect of -- Appeals from judgment setting aside decision concluding that deemed trust did not apply to wind-up deficiencies allowed -- Statutory deemed trust extended to contributions employer had to make to ensure that pension fund was sufficient to cover liabilities upon wind-up -- However, deemed trust was superseded by security granted to creditor that loaned money to employer during insolvency proceedings -- Although employer, as plan administrator, might have put itself in position of conflict of interest by failing to give plan's members proper notice of motion requesting financing of its operations during restructuring process, there was no realistic possibility that, had members received notice and had CCAA court found they were secured creditors, it would have ordered priorities differently -- Consequently, it was not appropriate to order equitable remedy such as constructive trust ordered by Court of Appeal.*

Appeals from a judgment of the Ontario Court of Appeal setting aside a decision concluding that a deemed trust did not apply to wind-up deficiencies. Indalex became insolvent in 2009. At that time, Indalex was the administrator of two registered pension plans. Indalex obtained protection under the Companies' Creditors Arrangement Act ("CCAA"). Both plans faced funding deficiencies when Indalex filed for the CCAA stay. Indalex's financial distress threatened the interests of all the plan members. Indalex was authorized to borrow US$24.4 million from the DIP lenders and grant them priority over all other creditors. Indalex subsequently received a bid for approximately US$30 million, and the buyer did not assume responsibility for the pension plans' wind-up deficiencies. The plan members contended that Indalex had breached its fiduciary obligations by failing to meet its obligations as a plan administrator throughout the insolvency proceedings. The plan members brought motions for a declaration that a deemed trust equal in amount to the unfunded pension liability was enforceable against the proceeds of the sale. They contended that they had priority over the secured creditors. The court concluded that the deemed trust did not apply to the wind-up deficiencies because the associated payments were not "due" or "accruing due" as of the date of the wind up. The Ontario Court of Appeal allowed the plan members' appeals. It found that the deemed trust created by section 57(4) of the Pension Benefits Act applied to all amounts due with respect to plan wind-up deficiencies. The Court of Appeal also concluded that a constructive trust was an appropriate remedy for Indalex's breach of its fiduciary obligations.

HELD: Appeals allowed. A contribution had "accrued" when the liabilities were completely constituted, even if the payment itself would not fall due until a later date. The fact that the precise amount of the contribution was not determined as of the time of the wind-up did not make it a contingent contribution that could not have accrued for accounting purposes. The relevant provisions, the legislative history and the purpose were all consistent with inclusion of the wind-up deficiency in the protection afforded to members with respect to employer contributions upon the wind up of their pension plan. Therefore, Court of Appeal correctly held that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency with respect to salaried plan. It was difficult to accept the Court of Appeal's sweeping intimation that the debtor in possession ("DIP") lenders would have accepted that their claim ranked below claims resulting from the deemed trust. As a result of the application of the doctrine of federal paramountcy, the DIP charge superseded the deemed trust. Although the employer, as plan administrator, might have put itself in a position of conflict of interest by failing to give the plan members proper notice of a motion requesting financing of its operations during a restructuring process, there was no realistic possibility that, had the members received notice and had the CCAA court

This is not the correct approach to take in determining the scope of the fiduciary obligations of an employer acting as plan administrator.

**64** Only persons or entities authorized by the *PBA* can act as plan administrators (ss. 1(1) and 8(1)(a)). The employer is one of them. A corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corporation also have a fiduciary duty to the corporation, the fact that the corporate employer can act as administrator of a pension plan means that s. 8(1)(a) of the *PBA* is based on the assumption that not all decisions taken by directors in managing a corporation will result in conflict with the corporation's duties to the plan's members. However, the corporate employer must be prepared to resolve conflicts where they arise. Reorganization proceedings place considerable burdens on any debtor, but these burdens do not release an employer that acts as plan administrator from its fiduciary obligations.

**65** Section 22(4) of the *PBA* explicitly provides that a plan administrator must not permit its own interest to conflict with its duties in respect of the pension fund. Thus, where an employer's own interests do not converge with those of the plan's members, it must ask itself whether there is a potential conflict and, if so, what can be done to resolve the conflict. Where interests do conflict, I do not find the two hats metaphor helpful. The solution is not to determine whether a given decision can be classified as being related to either the management of the corporation or the administration of the pension plan. The employer may well take a sound management decision, and yet do something that harms the interests of the plan's members. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.

**66** When the interests the employer seeks to advance on behalf of the corporation conflict with interests the employer has a duty to preserve as plan administrator, a solution must be found to ensure that the plan members' interests are taken care of. This may mean that the corporation puts the members on notice, or that it finds a replacement administrator, appoints representative counsel or finds some other means to resolve the conflict. The solution has to fit the problem, and the same solution may not be appropriate in every case.

**67** In the instant case, Indalex's fiduciary obligations as plan administrator did in fact conflict with management decisions that needed to be taken in the best interests of the corporation. Indalex had a number of responsibilities as plan administrator. For example, s. 56(1) of the *PBA* required it to ensure that contributions were paid when due. Section 56(2) required that it notify the Superintendent if contributions were not paid when due. It was also up to Indalex under s. 59 to commence proceedings to obtain payment of contributions that were due but not paid. Indalex, as an employer, paid all the contributions that were due. However, its insolvency put contributions that had accrued to the date of the wind up at risk. In an insolvency context, the administrator's claim for contributions that have accrued is a provable claim.

**68** In the context of this case, the fact that Indalex, as plan administrator, might have to claim accrued contributions from itself means that it would have to simultaneously adopt conflicting positions on whether contributions had accrued as of the date of liquidation and whether a deemed trust had arisen in respect of wind-up deficiencies. This is indicative of a clear conflict between Indalex's interests and those of the Plan Members. As soon as it saw, or ought to have seen, a potential for conflict, Indalex should have taken steps to ensure that the interests of the Plan Members were protected. It did not do so. On the contrary, it contested the position the Plan Members advanced. At the very least, Indalex breached its duty to avoid conflicts of interest (s. 22(4), *PBA*).

**69** Since the Plan Members seek an equitable remedy, it is important to identify the point at which Indalex should have moved to ensure that their interests were safeguarded. Before doing so, I would stress that factual contexts are needed to analyse conflicts between interests, and that it is neither necessary nor useful to attempt to map out all the situations in which conflicts may arise.

**70** As I mentioned above, insolvency puts the employer's contributions at risk. This does not mean that the decision to commence insolvency proceedings entails on its own a breach of a fiduciary obligation. The commencement of insolvency proceedings in this case on April 3, 2009 in an emergency situation was explained by Timothy R. J. Stubbs, the then-president of Indalex. The company was in default to its lender, it faced legal proceedings for unpaid bills, it had received a termination notice effective April 6 from its insurers, and suppliers had stopped supplying on credit. These circumstances called for urgent action by Indalex lest a creditor start bankruptcy proceedings and in so doing jeopardize ongoing operations and jobs. Several facts lead me to conclude that the stay sought in this case did not, in and of itself, put Indalex in a conflict of interest.

71 First, a stay operates only to freeze the parties' rights. In most cases, stays are obtained *ex parte*. One of the reasons for refraining from giving notice of the initial stay motion is to avert a situation in which creditors race to court to secure benefits that they would not enjoy in insolvency. Subjecting as many creditors as possible to a single process is seen as a way to treat all of them more equitably. In this context, plan members are placed on the same footing as the other creditors and have no special entitlement to notice. Second, one of the conclusions of the order Indalex sought was that it was to be served on all creditors, with a few exceptions, within 10 days. The notice allowed any interested party to apply to vary the order. Third, Indalex was permitted to pay all pension benefits. Although the order excluded special solvency payments, no ruling was made at that point on the merits of the creditors' competing claims, and a stay gave the Plan Members the possibility of presenting their arguments on the deemed trust rather than losing it altogether as a result of a bankruptcy proceeding, which was the alternative.

72 Whereas the stay itself did not put Indalex in a conflict of interest, the proceedings that followed had adverse consequences. On April 8, 2009, Indalex brought a motion to amend and restate the initial order in order to apply for DIP financing. This motion had been foreseen. Mr. Stubbs had mentioned in the affidavit he signed in support of the initial order that the lenders had agreed to extend their financing, but that Indalex would be in need of authorization in order to secure financing to continue its operations. However, the initial order had not yet been served on the Plan Members as of April 8. Short notice of the motion was given to the USW rather than to all the individual Plan Members, but the USW did not appear. The Plan Members were quite simply not represented on the motion to amend the initial stay order requesting authorization to grant the DIP charge.

73 In seeking to have a court approve a form of financing by which one creditor was granted priority over all other creditors, Indalex was asking the *CCAA* court to override the Plan Members' priority. This was a case in which Indalex's directors permitted the corporation's best interests to be put ahead of those of the Plan Members. The directors may have fulfilled their fiduciary duty to Indalex, but they placed Indalex in the position of failing to fulfil its obligations as plan administrator. The corporation's interest was to seek the best possible avenue to survive in an insolvency context. The pursuit of this interest was not compatible with the plan administrator's duty to the Plan Members to ensure that all contributions were paid into the funds. In the context of this case, the plan administrator's duty to the Plan Members meant, in particular, that it should at least have given them the opportunity to present their arguments. This duty meant, at the very least, that they were entitled to reasonable notice of the DIP financing motion. The terms of that motion, presented without appropriate notice, conflicted with the interests of the Plan Members. Because Indalex supported the motion asking that a priority be granted to its lender, it could not at the same time argue for a priority based on the deemed trust.

74 The Court of Appeal found a number of other breaches. I agree with Cromwell J. that none of the subsequent proceedings had a negative impact on the Plan Members' rights. The events that occurred, in particular the second DIP financing motion and the sale process, were predictable and, in a way, typical of reorganizations. Notice was given in all cases. The Plan Members were represented by able counsel. More importantly, the court ordered that funds be reserved and that a full hearing be held to argue the issues.

75 The Monitor and George Miller, Indalex U.S.'s trustee in bankruptcy, argue that the Plan Members should have appealed the Amended Initial Order authorizing the DIP charge, and were precluded from subsequently arguing that their claim ranked in priority to that of the DIP lenders. They take the position that the collateral attack doctrine bars the Plan Members from challenging the DIP financing order. This argument is not convincing. The Plan Members did not receive notice of the motion to approve the DIP financing. Counsel for the Executive Plan's members presented the argument of that plan's members at the first opportunity and repeated it each time he had an occasion to do so. The only time he withdrew their opposition was at the hearing of the motion for authorization to increase the DIP loan amount after being told that the only purpose of the motion was to increase the amount of the authorized loan. The *CCAA* judge set a hearing date for the very purpose of presenting the arguments that Indalex, as plan administrator, could have presented when it requested the amendment to the initial order. It cannot now be argued, therefore, that the Plan Members are barred from defending their interests by the collateral attack doctrine.

D. *Would an Equitable Remedy Be Appropriate in the Circumstances?*

76 The definition of "secured creditor" in s. 2 of the *CCAA* includes a trust in respect of the debtor's property. The Amended Initial Order (at para. 45) provided that the DIP lenders' claims ranked in priority to all trusts, "statutory or otherwise". Indalex U.S. was subrogated to the DIP lenders' claim by operation of the guarantee in the DIP lending agreement.

**77** Counsel for the Executive Plan's members argues that the doctrine of equitable subordination should apply to subordinate Indalex U.S.'s subrogated claim to those of the Plan Members. This Court discussed the doctrine of equitable subordination in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558, but did not endorse it, leaving it for future determination (p. 609). I do not need to endorse it here either. Suffice to say that there is no evidence that the lenders committed a wrong or that they engaged in inequitable conduct, and no party has contested the validity of Indalex U.S.'s payment of the US$10 million shortfall.

**78** This leaves the constructive trust remedy ordered by the Court of Appeal. It is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property. I agree with my colleague Cromwell J. that this condition is not met in the case at bar. I adopt his reasoning on this issue.

**79** Moreover, I am of the view that it was unreasonable for the Court of Appeal to reorder the priorities in this case. The breach of fiduciary duty identified in this case is, in substance, the lack of notice. Since the Plan Members were allowed to fully argue their case at a hearing specifically held to adjudicate their rights, the *CCAA* court was in a position to fully appreciate the parties' positions.

**80** It is difficult to see what gains the Plan Members would have secured had they received notice of the motion that resulted in the Amended Initial Order. The *CCAA* judge made it clear, and his finding is supported by logic, that there was no alternative to the DIP loan that would allow for the sale of the assets on a going-concern basis. The Plan Members presented no evidence to the contrary. They rely on conjecture alone. The Plan Members invoke other cases in which notice was given to plan members and in which the members were able to fully argue their positions. However, in none of those cases were plan members able to secure any additional benefits. Furthermore, the Plan Members were allowed to fully argue their case. As a result, even though Indalex breached its fiduciary duty to notify the Plan Members of the motion that resulted in the Amended Initial Order, their claim remains subordinate to that of Indalex U.S.

IV. Conclusion

**81** There are good reasons for giving special protection to members of pension plans in insolvency proceedings. Parliament considered doing so before enacting the most recent amendments to the *CCAA*, but chose not to (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, in force September 18, 2009, SI/2009-68; see also Bill C-501, *An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection)*, 3rd Sess., 40th Parl., March 24, 2010 (subsequently amended by the Standing Committee on Industry, Science and Technology, March 1, 2011)). A report of the Standing Senate Committee on Banking, Trade and Commerce gave the following reasons for this choice:

> Although the Committee recognizes the vulnerability of current pensioners, we do not believe that changes to the BIA regarding pension claims should be made at this time. Current pensioners can also access retirement benefits from the Canada/Quebec Pension Plan, and the Old Age Security and Guaranteed Income Supplement programs, and may have private savings and Registered Retirement Savings Plans that can provide income for them in retirement. The desire expressed by some of our witnesses for greater protection for pensioners and for employees currently participating in an occupational pension plan must be balanced against the interests of others. As we noted earlier, insolvency - at its essence - is characterized by insufficient assets to satisfy everyone, and choices must be made.
>
> The Committee believes that granting the pension protection sought by some of the witnesses would be sufficiently unfair to other stakeholders that we cannot recommend the changes requested. For example, we feel that super priority status could unnecessarily reduce the moneys available for distribution to creditors. In turn, credit availability and the cost of credit could be negatively affected, and all those seeking credit in Canada would be disadvantaged.
>
> *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at p. 98; see also p. 88.)

**274** I must also mention the failed attempt to assign Indalex in bankruptcy once the sale of its business had been approved. One of the purposes of this action was essentially to harm the interests of the members of the plans. At the time, Indalex was still wearing its two hats, at least from a legal perspective. But its duties as a fiduciary were clearly not at the forefront of its concerns. There were constant conflicts of interest throughout the process. Indalex did not attempt to resolve them; it brushed them aside. In so acting, it breached its duties as a fiduciary and its statutory obligations under s. 22(4) *PBA*.

III. Procedural Fairness in *CCAA* Proceedings

**275** The manner in which this matter was conducted in the Superior Court was, at least partially, the result of Indalex disregarding its fiduciary duties. The procedural issues that arose in that court did not assist in mitigating the consequences of these breaches. It is true that, in the end, the beneficiaries obtained, or were given, some information pertaining to the proceedings and that counsel appeared on their behalf at various stages of the proceedings. However, the basic problem is that the proceedings were not conducted according to the spirit and principles of the Canadian system of civil justice.

**276** I accept that those procedures are often urgent. The situation of a debtor requires quick and efficient action. The turtle-like pace of some civil litigation would not meet the needs of the application of the *CCAA*. However, the conduct of proceedings under this statute is not solely an administrative process. It is also a judicial process conducted according to the tenets of the adversarial system. The fundamentals of such a system must not be ignored. All interested parties are entitled to a fair procedure that allows their voices to be raised and heard. It is not an answer to these concerns to say that nothing else could be done, that no other solution would have been better, that, in substance, hearing the members would have been a waste of time. In all branches of procedure whether in administrative law, criminal law or civil action, the rights to be informed and to be heard in some way remain fundamental principles of justice. Those principles retain their place in the *CCAA*, as some authors and judges have emphasized (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 55-56; *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. C.J. (Gen. Div.)), at para. 5, *per* Farley J.). This was not done in this case, as my colleagues admit, while they downplay the consequences of these procedural flaws and breaches.

IV. Imposing a Constructive Trust

**277** In this context, I see no error in the decision of the Court of Appeal to impose a constructive trust (paras. 200-207). It was a fair decision that met the requirements of justice, under the principles set out by our Court in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, and in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217. The remedy of a constructive trust was justified in order to correct the wrong caused by Indalex (*Soulos*, at para. 36, *per* McLachlin J. (as she then was)). The facts of the situation met the four conditions that generally justify the imposition of a constructive trust (*Soulos*, at para. 45), as determined by Justice Gillese in her reasons, at paras. 203 and 204: (1) the defendant was under an equitable obligation in relation to the activities giving rise to the assets in his or her hands; (2) the assets in the hands of the defendant were shown to have resulted from deemed or actual agency activities of the defendant in breach of his or her equitable obligation to the plaintiff; (3) the plaintiff has shown a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendants remain faithful to their duties; and (4) there are no factors which would render imposition of a constructive trust unjust in all the circumstances of the case, such as the protection of the interests of intervening creditors.

**278** In crafting such a remedy, the Court of Appeal was relying on the inherent powers of the courts to craft equitable remedies, not only in respect of procedural issues, but also of substantive questions. Section 9 of the *CCAA* is broadly drafted and does not deprive courts of their power to fill in gaps in the law when this is necessary in order to grant justice to the parties (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 pp. 78-79).

**279** The imposition of the trust did not disregard the different corporate personalities of Indalex and Indalex U.S. It properly acknowledged the close relationship between the two companies, the second in effect controlling the first. This relationship could and needed to be taken into consideration in order to determine whether a constructive trust was a proper remedy.

**280** For these reasons, I would uphold the imposition of a constructive trust and I would dismiss the appeal with costs to the respondents.

# TAB W

1993 CarswellQue 2055, 55 Q.A.C. 298, J.E. 93-1227, [1993] R.J.Q. 1684, 42 C.B.R. (5th) 1

Steinberg Inc. c. Michaud

Pierre Michaud et Philippe Michaud, Appelants-intimés, c. Steinberg Inc., Intimée-requérante, et Paul Bertrand, Intimé-mis en cause

Cour d'appel du Québec

Delisle J.C.A., Deschamps J.C.A., Vallerand J.C.A.

Heard: 12 mai 1993
Judgment: 16 juin 1993
Docket: C.A. Qué. Montréal 500-09-000668-939

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Counsel: *Me James A. Wood, Me Christian Immer*, pour les appelants

*Me Raynold Langlois, Me Guy Turner*, pour l'intimée

*Me Max R. Bernard*, pour le Syndicat bancaire de Steinberg Inc.

Subject: Insolvency; Corporate and Commercial

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Application of Act

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act

**Cases considered by *Le juge Vallerand*:**

*Sovereign Life Assurance Co. v. Dodd* (1892), [1891-94] All E.R. Rep. 246, [1892] 2 Q.B. 573 (Eng. C.A.) — considered

**Cases considered by *Le juge Deschamps*:**

[54] The Act offers the respondent a way to arrive at a compromise with its creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.

[55] The case of *Browne v. Southern Canada Power Co.*.[FN23] provides an example of a dispute arising between a creditor and two guarantors, in that instance the president and the secretary-treasurer of the debtor. They argued that their position had become more onerous due to the modification of the debt due by the debtor further to an arrangement made under the Act. The decision of our Court was unanimous.

[55] Judge Barclay wrote:

> The very special remedies authorized by law for the exclusive benefit of a debtor company are not available to third parties.

[55] Judge Walsh expressed himself more explicitly:

> The Companies' Creditors Arrangement Act, however, intervened in the case of the City Gas Company to grant the company favoured treatment; this Act does not extend its favours to others, who had guaranteed the debt. The appellants cannot claim the benefit of delay that the Act affords to their company, because they became immediately liable by the default of the debtor, with whom they had bound themselves jointly and severally; and they did not demand the benefit of discussion. The appellants cannot set up exceptions personal to their debtor, and The Companies' Creditors Arrangement Act is an exception that favours the company only; nothing was shown to extend its scope to the appellants.

[55] And finally Judge McDougall (ad hoc):

> Such arrangement enured to the benefit of the company not to that of its guarantors.

[56] The possibility of extending the effect of a stay requested under the Act to directors, officers, employees, agents and consultants was studied recently in the case of *Philip's Manufacturing Ltd., Re*.[FN24] In that case, the debtor did not claim that the Act allowed the directors and others to benefit from the stay, but relied on the Court's inherent powers. The stay was refused to all parties except the debtor.

[57] If an arrangement is imposed on a creditor that prevents him from recovering part of his claim by the effect of the Act, he does not necessarily lose the benefit of other statutes that he may wish to invoke. In this sense, if the Civil Code provides a recourse in civil liability against the directors or officers, this right of the creditor cannot be wiped out, against his will, by the inclusion of a release in an arrangement.

[58] The Act and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is.

[59] Moreover, it is doubtful that the sanctioning of the arrangement can be considered definitive regarding the release given to the directors, as another party, the Syndicat des travailleurs unis de l'alimentation et du commerce, also contested the

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# TAB X

*Case Name:*
## ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.

**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 and Arrangement involving Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 4446372 Canada Inc. and 6932819 Canada Inc., Trustees of the Conduits Listed In Schedule "A" Hereto**
**Between**
**The Investors represented on the Pan-Canadian Investors Committee for Third-Party Structured Asset-Backed Commercial Paper listed in Schedule "B" hereto, Applicants (Respondents in Appeal), and Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 6932819 Canada Inc. and 4446372 Canada Inc., Trustees of the Conduits listed in Schedule "A" hereto, Respondents (Respondents in Appeal), and Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal Inc., Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Domtar Inc., Domtar Pulp and Paper Products Inc., GIRO Inc., Vêtements de sports R.G.R. Inc., 131519 Canada Inc., Air Jazz LP, Petrifond Foundation Company Limited, Petrifond Foundation Midwest Limited, Services hypothécaires la patrimoniale Inc., TECSYS Inc., Société générale de financement du Québec, VibroSystM Inc., Interquisa Canada L.P., Redcorp Ventures Ltd., Jura Energy Corporation, Ivanhoe Mines Ltd., WebTech Wireless Inc., Wynn Capital Corporation Inc., Hy Bloom Inc., Cardacian Mortgage Services, Inc., West Energy**

**Ltd., Sabre Enerty Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd. and Standard Energy Inc., Respondents (Appellants)**

[2008] O.J. No. 3164

2008 ONCA 587

45 C.B.R. (5th) 163

296 D.L.R. (4th) 135

2008 CarswellOnt 4811

168 A.C.W.S. (3d) 698

240 O.A.C. 245

47 B.L.R. (4th) 123

92 O.R. (3d) 513

Docket: C48969 (M36489)

Ontario Court of Appeal
Toronto, Ontario

**J.I. Laskin, E.A. Cronk and R.A. Blair JJ.A.**

Heard: June 25-26, 2008.
Judgment: August 18, 2008.

(121 paras.)

*Bankruptcy and insolvency law -- Proceedings in bankruptcy and insolvency -- Practice and procedure -- General principles -- Legislation -- Interpretation -- Courts -- Jurisdiction -- Federal -- Companies' Creditors Arrangement Act -- Application by certain creditors opposed to a Plan of Compromise and Arrangement for leave to appeal sanctioning of that Plan -- Pan-Canadian Investors Committee was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that formed the subject matter of the proceedings -- Plan dealt with liquidity crisis threatening Canadian market in Asset Backed Commercial Paper -- Plan was sanctioned by court -- Leave to appeal allowed and appeal dismissed -- CCAA permitted the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court -- Companies' Creditors Arrangement Act, ss. 4, 6.*

Application by certain creditors opposed to a Plan of Compromise and Arrangement for leave to appeal the sanctioning of that Plan. In August 2007, a liquidity crisis threatened the Canadian market in Asset Backed Commercial Paper (ABCP). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on US sub-prime mortgages. By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007, pending an attempt to resolve the crisis through a restructuring of that market. The Pan-Canadian Investors Committee was formed and ultimately put forward the creditor-

initiated Plan of Compromise and Arrangement that formed the subject matter of the proceedings. The Plan was sanctioned on June 5, 2008. The applicants raised an important point regarding the permissible scope of restructuring under the Companies' Creditors Arrangement Act: could the court sanction a Plan that called for creditors to provide releases to third parties who were themselves insolvent and not creditors of the debtor company? They also argued that if the answer to that question was yes, the application judge erred in holding that the Plan, with its particular releases (which barred some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

HELD: Application for leave to appeal allowed and appeal dismissed. The appeal raised issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There were serious and arguable grounds of appeal and the appeal would not unduly delay the progress of the proceedings. In the circumstances, the criteria for granting leave to appeal were met. Respecting the appeal, the CCAA permitted the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where the releases were reasonably connected to the proposed restructuring. The wording of the CCAA, construed in light of the purpose, objects and scheme of the Act, supported the court's jurisdiction and authority to sanction the Plan proposed in this case, including the contested third-party releases contained in it. The Plan was fair and reasonable in all the circumstances.

**Statutes, Regulations and Rules Cited:**

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

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 4, s. 6

Constitution Act, 1867, R.S.C. 1985, App. II, No. 5, s. 91(21), s. 92(13)

**Appeal From:**

On appeal from the sanction order of Justice Colin L. Campbell of the Superior Court of Justice, dated June 5, 2008, with reasons reported at [2008] O.J. No. 2265.

**Counsel:**

See Schedule "A" for the list of counsel.

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The judgment of the Court was delivered by

**R.A. BLAIR J.A.:--**

**A. INTRODUCTION**

**1** In August 2007 a liquidity crisis suddenly threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on U.S. sub-prime mortgages. The loss of confidence placed the Canadian financial market at risk generally and was reflective of an economic volatility worldwide.

**2** By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007 pending an attempt to resolve the crisis through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

**3** Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

<u>Leave to Appeal</u>

while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example.[5] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

> In my judgment it is not a necessary element of an arrangement for the purposes of s. 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s. 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many years to give the term its widest meaning. *Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party.* [Emphasis added.]

**67** I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in *T&N* were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial third parties are making to the ABCP restructuring. The situations are quite comparable.

*The Binding Mechanism*

**68** Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind <u>all</u> creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes[6] <u>and</u> obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

*The Required Nexus*

**69** In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

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

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

a) The parties to be released are necessary and essential to the restructuring of the debtor;
b) *The claims to be released are rationally related to the purpose of the Plan and necessary for it*;
c) The Plan cannot succeed without the releases;
d) *The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan*; and

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

72 Here, then -- as was the case in *T&N* -- there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77 he said:

> [76] I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.
>
> [77] This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

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

The Jurisprudence

74 Third party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's Bench in *Re Canadian Airlines Corp.* (2000), 265 A.R. 201, leave to appeal refused by *Resurgence Asset Management LLC v. Canadian Airlines Corp.* (2000), 266 A.R. 131 (C.A.), and [2001] S.C.C.A. No. 60, (2001) 293 A.R. 351 (S.C.C.). In *Re Muscle Tech Research and Development Inc.* (2006), 25 C.B.R (5th) 231 (Ont. S.C.J.) Justice Ground remarked (para. 8):

> [It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

75 We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of *Re Canadian Airlines*, however, the releases in those restructurings -- including *Muscle Tech* -- were not opposed. The appellants argue that those cases are wrongly decided, because the court simply does not have the authority to approve such releases.

76 In *Re Canadian Airlines* the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the well-spring of the trend towards third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

77 Justice Paperny began her analysis of the release issue with the observation at para. 87 that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company." It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in *Michaud v. Steinberg,*[7] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument -- dealt with later in these reasons -- that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92).

78 Respectfully, I would not adopt the interpretive principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

79 The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are *Michaud v. Steinberg, supra*; *NBD Bank, Canada v. Dofasco Inc.*, (1999), 46 O.R. (3d) 514 (C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada* (2001), 19 B.L.R. (3d) 286 (B.C.S.C.); and *Re Stelco Inc.* (2005), 78 O.R. (3d) 241 (C.A.) ("*Stelco I*"). I do not think these cases assist the appellants, however. With the exception of *Steinberg*, they do not involve third party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that *Steinberg* does not express a correct view of the law, and I decline to follow it.

80 In *Pacific Coastal Airlines*, Tysoe J. made the following comment at para. 24:

> [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.

81 This statement must be understood in its context, however. Pacific Coastal Airlines had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action dismissed on grounds of *res judicata* or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

82 The facts in *Pacific Coastal* are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian -- at a contractual level -- may have had some involvement with the particular dispute. Here, however, the disputes that are the subject-matter of the impugned releases are not simply "disputes between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

83 Nor is the decision of this Court in the *NBD Bank* case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly-owned subsidiary of Dofasco. The Bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors." Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the Bank. On appeal, he argued that since the Bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process -- in short, he was personally protected by the CCAA release.

84 Rosenberg J.A., writing for this Court, rejected this argument. The appellants here rely particularly upon his following observations at paras. 53-54:

> 53 In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 at 297, the *CCAA* is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.

**104** That is exactly the case here. The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action -- normally a matter of provincial concern -- or trump Quebec rules of public order is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount. Mr. Woods properly conceded this during argument.

Conclusion With Respect to Legal Authority

**105** For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.

**(2) The Plan is "Fair and Reasonable"**

**106** The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

**107** Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In the absence of a demonstrable error an appellate court will not interfere: see *Re Ravelston Corp. Ltd.* (2007), 31 C.B.R. (5th) 233 (Ont. C.A.).

**108** I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties -- including leading Canadian financial institutions -- that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the end he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

**109** The application judge was concerned about the inclusion of fraud in the contemplated releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

**110** The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers, (ii) limits the type of damages that may be claimed (no punitive damages, for example), (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order, and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

**111** The law does not condone fraud. It is the most serious kind of civil claim. There is therefore some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: *Fotinis Restaurant Corp. v. White Spot Ltd.* (1998), 38 B.L.R. (2d) 251 at paras. 9 and 18 (B.C.S.C.). There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings -- the claims here all being untested allegations of fraud -- and to include releases of such claims as part of that settlement.

**112** The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, that the need "to avoid the potential cascade of litigation that ... would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

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

a) The parties to be released are necessary and essential to the restructuring of the debtor;
b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
c) The Plan cannot succeed without the releases;
d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
g) The releases are fair and reasonable and not overly broad or offensive to public policy.

**114** These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

**115** The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they -- as individual creditors -- make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

**116** All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

**117** In insolvency restructuring proceedings almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices," inasmuch as everyone is adversely affected in some fashion.

**118** Here, the debtor corporations being restructured represent the issuers of the more than $32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in adverting to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada. He was required to consider and balance the interests of <u>all</u> Noteholders, not just the interests of the appellants, whose notes represent only about 3% of that total. That is what he did.

**119** The application judge noted at para. 126 that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized at para. 134 that:

> No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity among all stakeholders.

**120** In my view we ought not to interfere with his decision that the Plan is fair and reasonable in all the circumstances.

**D. DISPOSITION**

# TAB Y

**In re: DBSD NORTH AMERICA, INC., et al., Debtors.**

**Chapter 11, Case No. 09-13061 (REG), Jointly Administered**

**UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK**

**419 B.R. 179; 2009 Bankr. LEXIS 3341**

**October 26, 2009, Decided**

**SUBSEQUENT HISTORY:** Motion granted by In re DBSD N. Am., Inc., 421 B.R. 133, 2009 Bankr. LEXIS 4147 (Bankr. S.D.N.Y., 2009)
Affirmed by Sprint Nextel Corp. v. DBSD North Am., Inc. (In re DBSD North Am., Inc.), 2010 U.S. Dist. LEXIS 33253 (S.D.N.Y., Mar. 24, 2010)

**PRIOR HISTORY:** In re DBSD North Am., Inc., 2009 Bankr. LEXIS 3036 (Bankr. S.D.N.Y., Sept. 30, 2009)

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Debtors, operators of a next generation mobile satellite service, sought confirmation of their Chapter 11 plan. Confirmation was opposed by a first lien creditor and an unsecured creditor.

**OVERVIEW:** Debtors were authorized to offer satellite terrestrial services throughout the U.S. While their satellite was launched and operational, the debtors were still in a developmental stage and had no current source of revenue. Among other arguments, the first lien creditor contended that the debtors' plan was not feasible as required by 11 U.S.C.S. § 1129(a)(11). The court disagreed because, upon plan confirmation, the debtors would have de-leveraged by more than $ 600 million. According to the court, this major change in the debtors' debt load resulting from the debtors' reorganization considerably reduced the risk on the first lien debt. While there could be no assurance that the reorganized debtors would succeed, the court found that the evidence suggested that they would and the court was not persuaded that it was likely that they would fail. The court also concluded that the plan complied with the "cramdown" requirements imposed by 11 U.S.C.S. § 1129(b), the good faith requirement of 11 U.S.C.S. § 1129(a)(3), and the best interests of creditors requirement of 11 U.S.C.S. § 1129(a)(7). The court further found that releases and exculpation provisions in the plan were permissible.

**OUTCOME:** The court confirmed the debtors' plan.

Debtors, pursuant to section 1123(b)(3)(A) of the Bankruptcy Code, [167] represent a valid exercise of the Debtors' business judgment, and are fair, reasonable and in the best interests of the estate.

167 That section provides, that subject to provisions not applicable here:

> [HN13] (b) ... a plan may--
>
> ...
>
> (3) provide for--
>
> (A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate...

I can't agree with DISH's suggestion that the Debtors released claims of which **[**100]** they were aware. Mr. Corkery testified credibly that he was unaware of any significant potential claims against any released parties, including the Existing Shareholder. And these are not, of course, claims that DISH owns. Instead, to the extent any claims exist, they are claims that the *Debtors* own; DISH could not assert them except on behalf of the estate, and then only after getting an *STN* order upon a showing that prosecution of them was in the best interests of the estate.

[HN14] Section 1123(b)(3) permits a debtor to include a settlement of any claims it might own as a discretionary provision in its plan, and I find the Debtors' releases to be both appropriate and reasonable.

***B. The Exculpation Provisions***

The exculpation provisions, by contrast, involve claims owned by third parties (*e.g.*, stakeholders in the case, including DISH), against other third parties (*e.g.*, other stakeholders), against whom the former may have grievances. Exculpation provisions are frequently included in chapter 11 plans, because stakeholders all too often blame others for failures to get the recoveries they desire; seek vengeance against other parties; or simply wish to second guess the decisionmakers in the **[**101]** chapter 11 case.

Though exculpation provisions have a salutary purpose, that salutary purpose is insufficient by itself to make them proper as a general rule. As the Second Circuit's decision in *Metromedia*, [168] and my earlier decision in *Adelphia* [169] provide, exculpation provisions (and their first cousins, so-called "third party releases") are permissible under some circumstances, but **[*218]** not as a routine matter. [170] They may be used in *some* cases, including those where the provisions are important to a debtor's plan; the claims are "channeled" to a settlement fund rather than extinguished; the enjoined claims would indirectly impact the debtor's reorganization by way of indemnity or contribution; the released party provides substantial consideration; and where the plan otherwise provides for the full payment of the enjoined claims. [171]

168 *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136 (2d Cir. 2005).

# TAB Z

**In re: Conseco, Inc., et al., Debtors.**

**Chapter 11, Case No. 02 B 49672 (Jointly Administered)**

**UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

**301 B.R. 525; 2003 Bankr. LEXIS 1494; 42 Bankr. Ct. Dec. 55**

**November 17, 2003, Decided**
**November 17, 2003, Filed**

**DISPOSITION:** Objection to confirmation of amended plan overruled.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Many parties filed objections to the confirmation of the 6th amended Chapter 11 plan of the debtors. One group of creditors, the objecting creditors, contended that the plan could not be confirmed because it violated 11 U.S.C.S. § 524(e) by providing for the voluntary release of non-debtors by another group of creditors (releasing creditors).

**OVERVIEW:** The release at issue was part of a settlement reached between the releasing creditors and the debtors. The objecting creditors contended that the release violated 11 U.S.C.S. § 524(e) because it released non-debtors. The court found that the release could be included in the plan because it was voluntary and given in exchange for a distribution to which the releasing creditors were not otherwise entitled under the best interests of creditors test in 11 U.S.C.S. § 1129(a)(7)(A)(ii). The release was part of a voluntary settlement that could be included in the plan pursuant to 11 U.S.C.S. § 1123(b)(6).

**OUTCOME:** The objection was overruled.

**CORE TERMS:** non-debtors, settlement, billion, consensual, confirmation hearing, unusual circumstances, best interests, participating, liquidation, valuation, senior, stock, opt, preferred shares, settlement agreement, discharge of a debt, applicable provisions, vote to accept, non-consensual, confirmation, subsidiaries, inclusion, consented, objectors, valued, entity

**LexisNexis(R) Headnotes**

***Bankruptcy Law > Discharge & Dischargeability > Effects of Discharge > Third Parties***

***Bankruptcy Law > Reorganizations > Plans > Confirmation > Prerequisites > Best Interest of Creditors***
***Bankruptcy Law > Reorganizations > Plans > Contents > General Overview***
[HN1] 11 U.S.C.S. § 524(e) does not bar the inclusion of consensual releases of non-debtors in a Chapter 11 plan.

***Bankruptcy Law > Discharge & Dischargeability > Effects of Discharge > Third Parties***
***Civil Procedure > Settlements > Releases From Liability > General Overview***
[HN2] See 11 U.S.C.S. § 524(e).

***Bankruptcy Law > Discharge & Dischargeability > Effects of Discharge > Third Parties***
***Bankruptcy Law > Discharge & Dischargeability > Reorganizations***
***Bankruptcy Law > Reorganizations > Plans > Contents > General Overview***
[HN3] 11 U.S.C.S. § 524(e) provides only that the discharge of a debt of the debtor does not alter any other party's liability on the debt; it does not prohibit the inclusion of consensual releases in a Chapter 11 plan.

***Bankruptcy Law > Reorganizations > Plans > Contents > Discretionary Provisions***
[HN4] 11 U.S.C.S. § 1123(b)(6) provides that a plan may include any other appropriate provision not inconsistent with applicable provisions of that title.

***Bankruptcy Law > Discharge & Dischargeability > General Overview***
***Bankruptcy Law > Reorganizations > Plans > Contents > Discretionary Provisions***
[HN5] The voluntary release of non-debtors in a Chapter 11 plan in exchange for a distribution of stock and other assets that would otherwise go to more senior creditors does not conflict with any provision of the Bankruptcy Code.

**COUNSEL:** **[**1]** Trustee or Other Attorneys: James Sprayregen/Kirkland & Ellis for Debtor Richard Friedman, Office of US Trustee.

**JUDGES:** CAROL A. DOYLE, United States Bankruptcy Judge.

**OPINION BY:** CAROL A. DOYLE

## OPINION

**[*526]** *MEMORANDUM OPINION*

Many parties filed objections to the confirmation of the 6th Amended Plan ("Plan") of Conseco, Inc. and its related reorganizing debtors ("debtors"). Most objections were resolved, but two remained unresolved at the confirmation hearing on September 9, 2003. This opinion addresses one issue raised in one of those objections: whether the Plan may properly include the release of non-debtors by one group of creditors, the holders of Trust Originated Preferred Shares of Conseco, Inc. (collectively referred to as "TOPrS"). The TOPrS release is part of a settlement reached between the TOPrS Committee and the debtors. The objectors contend that the TOPrS release violates § 524(e) of the Bankruptcy Code because it releases non-debtors. In the alternative, they argue that a release of non-debtors should be permitted only in unusual circumstances, which do not exist in this case.

The court rejects these arguments. Section 524(e) [HN1] does not bar the inclusion of consensual releases of [**2] non-debtors in a Chapter 11 plan. The TOPrS release may be included in the Plan because it is voluntary and given in exchange for a distribution to which the TOPrS are not otherwise entitled under the best interests of creditors test in 11 U.S.C. § 1129(a)(7)(A)(ii). The objection is therefore overruled. [1]

1 The court ruled orally on this issue and the other issues raised in the two objections at the confirmation hearing on September 9, 2003. This memorandum opinion more fully addresses the release issue.

### *1. Background*

Conseco, Inc. and its many subsidiaries have a complex financial structure, with various layers of bank and bond financing. The TOPrS own preferred shares that are subordinated to most other creditors. The United States Trustee appointed a committee to represent the TOPrS. The debtors originally proposed a plan based on a $ 3.8 billion valuation of the debtors. Under this valuation, the TOPrS are not entitled to any distribution under the "best interests of [**3] creditors test" in 11 U.S.C. § 1129(a)(7)(A)(ii), which requires that each creditor who has not accepted the plan receive at least what it would get in a Chapter 7 liquidation. The TOPrS Committee objected to the debtors' plan, contending that the debtors are worth significantly more than $ 4.8 billion. If the debtors are valued at $ 4.8 billion or higher, the TOPrS would be entitled to a distribution under § 1129(a)(7)(A)(ii).

As part of the confirmation hearing on an earlier version of the Plan, the court conducted a lengthy trial to determine the value of the debtors for purposes of § 1129(a)(7)(A)(ii). At the trial, the TOPrS Committee and the debtors each tried to prove that its valuation was correct. While the court was preparing its decision, the TOPrS Committee and the debtors reached a settlement.

Under the settlement, the TOPrS Committee and the debtors agreed that the value of the debtors for purposes of § 1129(a)(7)(A)(ii) is $ 3.8 billion, the amount the debtors attempted to establish at trial. The TOPrS' distribution under the Plan is $ 0, because the TOPrS are not entitled to a distribution if the debtors are valued at $ 3.8 billion. Instead, [**4] the settlement agreement provides that TOPrS who do not opt out of the settlement will receive a distribution of 1.5% of New Conseco common stock, warrants for New Conseco [*527] stock, and a share of potential post-confirmation litigation recoveries. This distribution comes from senior creditors who will give participating TOPrS a portion of the distribution to which the senior creditors are entitled under § 1129(a)(7)(A)(ii). TOPrS who participate in the settlement give a broad release to all third parties for almost any claims relating to Conseco or its subsidiaries. The debtors filed a motion to approve this settlement under Bankruptcy Rule 9019. They also included the basic terms of the settlement and release in Article V, Par. I of the Plan.

The objectors are present and former TOPrS (the "Lead Plaintiffs") who filed a lawsuit alleging violations of various securities laws in connection with their purchase of Conseco's Trust Originated Preferred Shares. The Lead Plaintiffs object to the TOPrS release because it releases non-debtors, including defendants in their class action.

### *2. Is the TOPrS Release Permissible?*

The Lead Plaintiffs first argue that the TOPrS release violates [**5] 11 U.S.C. § 524(e) of the Bankruptcy Code because it releases entities other than the debtors. Section 524(e) provides that the [HN2] "discharge of a debt of the debtor does not affect the liability of any other entity on ... such debt." Citing cases from other circuits, the Lead Plaintiffs contend that this provision forbids the release of claims against non-debtors. However, the 7th Circuit has authoritatively rejected this argument. In *In re Specialty Equip. Cos.* , 3 F.3d 1043, 1047 (7th Cir. 1993), the 7th Circuit held that § 524(e) [HN3] provides only that the discharge of a debt of the debtor does not alter any other party's liability on the debt; it does not prohibit the inclusion of consensual releases in a Chapter 11 plan.

The Lead Plaintiffs also argue that, to the extent third party releases are ever permissible under the Bankruptcy Code, the TOPrS release is too broad and should not be included in the Plan. They cite various cases in which courts have held that a Chapter 11 plan cannot include a non-consensual release of third parties unless there are unusual circumstances. *E.g.*, *In re Dow Corning Corp.*, 280 F.3d 648, 657 (6th Cir. 2002). [**6] They assert that the requisite "unusual circumstances" do not exist here.

The Lead Plaintiffs misapprehend the nature of the releases given by participating TOPrS in Article V of the Plan. It is not a compulsory release that would require justification by special circumstances. Rather, the TOPrS' release is part of a voluntary settlement that may be included in the Plan pursuant to 11 U.S.C. § 1123(b)(6). [2] Therefore, the cases relied upon by the Lead Plaintiffs are irrelevant.

2 Section 1123(b)(6) [HN4] provides that a plan may "include any other appropriate provision not inconsistent with applicable provisions of this title."

The Lead Plaintiffs may have confused the present consensual TOPrS release with previous, non-consensual releases that have been removed from the Plan. Under Article X of earlier versions of the Plan, all creditors who accepted a distribution under the Plan would release certain non-debtors, regardless of whether the creditors voted to accept the plan. In *Specialty* [**7] *Equipment*, the 7th Circuit held that consensual releases of non-debtors are permissible, and that creditors who vote to accept a plan containing releases of non-debtors have consented to the releases. 3 F.3d at 1047. The court did not address whether creditors who did not vote for the plan could be required to release non-debtors. The debtors in this case argued that creditors who did not vote in favor of the plan but accepted a distribution under [*528] it should be deemed to have consented to the releases. However, under § 1129(a)(7)(A)(ii), a plan cannot be confirmed unless each non-accepting creditor gets at least as much as it would get in a Chapter 7 liquidation. Under previous plan provisions, creditors who did not vote to accept the plan but were clearly entitled to a distribution in a Chapter 7 liquidation had to release non-debtors to receive a distribution. These provisions violated the best interests of creditors test because they forced creditors to accept the release or to give up the distribution to which they were entitled under § 1129(a)(7)(A)(ii). In addition, under these circumstances, a creditor's mere acceptance of a distribution under the plan cannot [**8] be construed as a voluntary consent to the release.

After the court informed the parties that it would not confirm a plan containing third party releases by creditors who did not accept the plan, the debtors redrafted the Plan. In the 6th Amended Plan,

each creditor receiving a distribution under the Plan was given the opportunity to opt out of the release of non-debtors contained in Article X of the Plan. The Article X release now binds only those creditors who agreed to be bound, either by voting for the Plan or by choosing not to opt out of the release. Therefore, the Article X release is purely consensual and within the scope of releases that *Specialty Equipment* permits.

The TOPrS release in Article V, Par. I(2) of the Plan is completely separate from the release in Article X. The TOPrS release is not imposed as a condition to TOPrS receiving a distribution to which they are entitled under § 1129(a)(7)(A)(ii). Under the agreed $ 3.8 billion value of the debtors, the TOPrS are not entitled to any distribution under § 1129(a)(7)(A)(ii). Rather, participating TOPrS will receive the distribution described in Article V of the Plan only as part of a separate and completely voluntary **[**9]** compromise with the debtors and other creditors to provide TOPrS with a distribution in return (in part) for the release in Article V. This settlement agreement is the subject of a Rule 9019 settlement motion being heard with confirmation, and may properly be included in the plan under 11 U.S.C. § 1123(b)(6). Section 1123(b)(6) provides that a plan may "include any other appropriate provision not inconsistent with the applicable provisions of this title." [HN5] The voluntary release of non-debtors in exchange for a distribution of stock and other assets that would otherwise go to more senior creditors does not conflict with any provision of the Bankruptcy Code.

For these reasons, the court overrules the Lead Plaintiffs' objection that the TOPrS release violates § 524(e) and or is otherwise impermissible under the Bankruptcy Code.

Dated: November 17, 2003

ENTERED:

CAROL A. DOYLE

United States Bankruptcy Judge

# TAB AA

1998 CarswellOnt 3539, 7 C.C.L.I. (3d) 38, 27 C.P.C. (4th) 243, 165 D.L.R. (4th) 482, 113 O.A.C. 307, [1999] I.L.R. I-3629, 41 O.R. (3d) 97, [1998] O.J. No. 3622

Dabbs v. Sun Life Assurance Co. of Canada

Paul Dabbs, Plaintiff (Respondent) Moving Party and Sun Life Assurance Company of Canada, Defendant (Respondent) and Jack Maclean, Class Member (Appellant)

Ontario Court of Appeal

Laskin, Charron, O'Connor JJ.A.

Heard: August 26, 1998
Judgment: September 14, 1998[FN*]
Docket: CA C30326, M22971, M23028

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Proceedings: refused leave to appeal *Dabbs v. Sun Life Assurance Co. of Canada* ((1998)), [1998] S.C.C.A. No. 372, 235 N.R. 390 (note), 118 O.A.C. 399 (note), 41 O.R. (3d) 97n ((S.C.C.)); affirmed *Dabbs v. Sun Life Assurance Co. of Canada* ((1998)), 1998 CarswellOnt 2758, [1998] O.J. No. 2811, [1998] I.L.R. I-3575, 40 O.R. (3d) 429, 22 C.P.C. (4th) 381, 5 C.C.L.I. (3d) 18 ((Ont. Gen. Div.))

Counsel: *Michael S. Deverett*, for the appellant.

*H. Lorne Morphy, Q.C.*, and *Patricia D.S. Jackson*, for the respondent Sun Life.

*Michael A. Eizenga* and *Michael J. Peerless*, for the plaintiff.

Subject: Insurance; Civil Practice and Procedure

Practice --- Parties — Representative or class actions — General

Parties settled plaintiff's proposed class action — Class action was certified and settlement was approved — Class member appealed approval of settlement — Plaintiff applied to quash class member's appeal — Class member was permitted under Class Proceedings Act, 1992, to participate in settlement approval proceedings but not granted party status — Act confers on court power to appoint class members to be representatives and permit class members to

participate in proceedings — Role of party distinguished from role of class member — Class members can participate but not become parties — Under Act, class member may opt out of class action and pursue claim in personal capacity if dissatisfied with conduct of proceedings — Only party has right of appeal — Right of appeal under Act takes precedence over and excludes provision of general right of appeal provided in Courts of Justice Act — Class member must obtain leave to act as representative for purpose of appeal — Class member had not applied to act as representative — Class member had no right to appeal under Act — Class member's alternative motion for leave to permit him to act as representative party for purpose of appeal dismissed — Courts in three jurisdictions had already approved settlement and class member was only one who wanted to set it aside — Wishes of one class member could not govern interests of entire class — Plaintiff's application granted — Class Proceedings Act, 1992, S.O. 1992, c. 6 — Courts of Justice Act, R.S.O. 1990, c. C.43.

**Cases considered by *O'Connor J.A.*:**

*Abdool v. Anaheim Management Ltd.* (1995), 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.) — considered

*Silva v. O'Donohue* (1995), 30 M.P.L.R. (2d) 162, 130 D.L.R. (4th) 334, (sub nom. *O'Donohue v. Silva*) 87 O.A.C. 161, (sub nom. *O'Donohue v. Silva*) 27 O.R. (3d) 162 (Ont. C.A.) — referred to

*792266 Ontario Ltd. v. Monarch Trust Co. (Liquidator of)* (1996), 94 O.A.C. 384, 30 B.L.R. (2d) 219 (Ont. C.A.) — considered

**Statutes considered:**

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

Generally — referred to

s. 5 — referred to

s. 8(3) — referred to

s. 9 — referred to

s. 10(1) — referred to

s. 12 — referred to

s. 14 — considered

s. 16(1) — referred to

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s. 18 — referred to

s. 19 — referred to

s. 25 — referred to

s. 29 — referred to

s. 30(3) — considered

s. 30(5) — considered

*Courts of Justice Act*, R.S.O. 1990, c. C.43

Generally — considered

s. 6(1)(b) [rep. & sub. 1994, c. 12, s. 1] — considered

s. 134 — referred to

*Municipal Elections Act*, R.S.O. 1990, c. M.53

Generally — referred to

**Rules considered:**

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

R. 13 — referred to

APPEAL by class member of approval of settlement in class action for damages for misrepresentation; MOTION by class member for leave to appeal approval of settlement; MOTION by plaintiff to quash class member's motion for leave to appeal, reported at 5 C.C.L.I. (3d) 18, [1998] I.L.R. 1-3575, 40 O.R. (3d) 429, 22 C.P.C. (4th) 381 (Ont. Gen. Div.).

**The judgment of the court was delivered by *O'Connor J.A.*:**

1 These reasons deal with two motions. The first is a motion by the representative plaintiff in this class proceeding, Paul Dabbs, to quash an appeal brought by a class member, Jack Maclean. The second is a motion by Maclean

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1998 CarswellOnt 3539, 7 C.C.L.I. (3d) 38, 27 C.P.C. (4th) 243, 165 D.L.R. (4th) 482, 113 O.A.C. 307, [1999] I.L.R. I-3629, 41 O.R. (3d) 97, [1998] O.J. No. 3622

for leave to appeal.

**The Motion to Quash**

2 Maclean seeks to appeal the judgment of Sharpe J. dated July 3, 1998 in which he ordered that this action be certified as a class proceeding and that a settlement agreement entered into between Dabbs and others as proposed representatives of the plaintiff class and the defendant Sun Life Assurance Company of Canada ("Sun Life") be approved under s. 29 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*Act*").

3 Maclean is a member of the class and had been permitted under s. 14 of the *Act* to participate in the settlement approval proceedings. He did not ask for and was not granted party status. Maclean objected to the approval of the settlement, raising essentially the same arguments as he makes in the material filed with this court.

4 Sharpe J. rejected those arguments, approved the settlement and found it to be fair, reasonable and in the best interest of those affected by it. The courts in British Columbia and Quebec have also approved the settlement agreement. In all, it affects the interests of an estimated 400,000 class members across Canada.

5 Maclean's notice of appeal raises issues relating to procedural rulings made by Sharpe J. and to the fairness and adequacy of the settlement agreement. Dabbs moves under s. 134 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, to quash the appeal primarily on the basis that Maclean is not a party to the proceeding and therefore has no standing to bring the appeal. Sun Life supports the motion. For the reasons set out below, I agree with their position.

6 One of the objects of the *Act* is to achieve the efficient handling of potentially complex cases of mass wrongs. See *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.), per O'Brien J. at p.455. This efficiency is accomplished, in part, by the court appointment of one or more class members under s. 5 to be representative plaintiffs or defendants as the case may be. The criteria for appointment include the ability to fairly and adequately represent the interests of the class. A representative plaintiff or defendant is a party to the proceeding and has the specific rights and responsibilities for the carriage of the litigation on behalf of the class that are set out in the *Act*.

7 The *Act* makes a clear distinction between the role of a party and that of a class member.[FN1] Section 14 gives the court a broad discretion to permit class members to participate in a proceeding and to provide for the manner and terms upon which the participation is permitted. Not surprisingly, s. 14 does not provide that class members who are permitted to participate thereby become parties to the proceeding. The section does not restrict participation to those class members who are able to fairly and adequately represent the class. Indeed, the court may permit participation by those who oppose the manner in which the party representing the class is conducting the proceeding and who assert positions that differ from those of the majority of the class. While the court may consider it useful to hear from these class members and to permit them to participate in a limited manner, it could frustrate the orderly and efficient management of the proceeding if they became parties simply because of their participation.

8 If class members are dissatisfied with the conduct of a proceeding or do not wish to be bound by the result,

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they may opt out under s. 9 and pursue their claims or defences in a personal capacity.

9 The rights of appeal to the Court of Appeal in class proceedings are set out in s. 30(3) of the *Act*. It provides:

> **30.** (3) A party may appeal to the Court of Appeal from a judgment on common issues and from an order under section 24, other than an order that determines individual claims made by class members.

10 These rights are conferred on parties. Section 30(5) permits class members in certain circumstances to move for leave to act as representative parties for purposes of bringing an appeal under s. 30(3). It provides:

> (5) If a representative party does not appeal as permitted by subsection(3), or if a representative party abandons an appeal under subsection (3), any class member may make a motion to the Court of Appeal for leave to act as a representative party for the purposes of subsection 3.

Absent leave, class members have no standing to bring an appeal to this court under the *Act*.

11 Maclean is not a party to this proceeding. He did not apply to be a representative plaintiff nor did he apply to intervene as an added party under Rule 13.[FN2] He participated in the settlement approval proceedings as a class member not as a party. He therefore has no right of appeal under s. 30(3).

12 Maclean argues that because Sharpe J.'s judgment is a final order of the Ontario Court (General Division), he has a right of appeal under s. 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Section 6(1)(b) provides:

> 6(1) An appeal lies to the Court of Appeal from,
>
> .....
>
> (b) a final order of a judge of the Ontario Court (General Division), except an order referred to in clause 19(1)(a) or an order from which an appeal lies to the Divisional Court under another Act.

He argues that if the *Act* does not provide him with a right of appeal, either because he is not a party to the class proceeding or because s. 30(3) does not provide for a right of appeal from a judgment approving a settlement[FN3], then s. 6(1)(b) operates to confer a right where the *Act* has failed to do so. I do not accept that argument.

13 In my view, s. 30(3), which grants specific rights of appeal to this court in class proceedings, takes precedence over and excludes provisions of general application such as s. 6(1)(b) of the *Courts of Justice Act*. Two rules of statutory interpretation assist in determining the intention of the Legislature. First, a "general statute is made to 'yield' by regarding the special statute as an exception to the general."[FN4] Second, a more recent statute takes precedence over prior legislation because "the more recent expression of the will of the legislature should be retained."[FN5] In this case, the *Act* is the more recent enactment and specifically addresses the rights of appeal in class proceedings. The *Courts of Justice Act* was enacted earlier and is of more general ambit. These rules support

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the conclusion that the appeal provisions in s. 30(3) of the *Act* take precedence over s. 6(1)(b).

14 This conclusion is consistent with the dicta of Doherty J.A. in *792266 Ontario Ltd. v. Monarch Trust Co. (Liquidator of)* (1996), 94 O.A.C. 384 (Ont. C.A.). At p. 389, he said:

> ...I would, however, observe that this court has held that statutory provisions granting a specific right of appeal take precedence over and exclude provisions of more general application: *Overseas Missionary Fellowship v. 578369 Ontario Ltd.* (1990), 73 O.R. (2d) 73 at 75 (C.A.). that conclusion is consistent with the well-recognized principle of statutory interpretation which provides that where a statutory provision in specific legislation appears to conflict with a provision in a general statutory scheme, the former is seen as an exception to the latter: *R. v. Greenwood* (1992), 7 O.R. (3d) 1 at 6-7 (C.A.), leave to appeal to S.C.C. refused, [1992] 1 S.C.R. viii.

I agree with that statement.

15 The logic of this interpretation is apparent in this case. The intent of the *Act* is clear that the rights of appeal to this court are conferred on parties, not class members. A class member requires leave under s. 30(5) to act as a representative party for the purpose of bringing an appeal under s. 30(3). If, as Maclean argues, a class member has a right of appeal under s. 6(1)(b) of the *Courts of Justice Act,* that intent would be defeated. Further, assuming, as Dabbs and Sun Life argue, that s. 30(3) does not confer a right to appeal a judgment approving a settlement, it would make no sense for the Legislature to have provided for specific limited rights of appeal in s. 30(3) if the general right of appeal in s. 6(1)(b) was also to apply. Section 30(3) would be redundant and whatever limits result from its specific wording would be frustrated.

16 Relying upon the case of *Silva v. O'Donohue* (1995), 27 O.R. (3d) 162 (Ont. C.A.), Maclean argues that the right of appeal in s. 6(1)(b) can only be excluded by express statutory provision. In that case, the court considered appeal rights under the *Municipal Elections Act*, R.S.O. 1990, c. M.53, as amended, which provides for an appeal from a judicial recount to a judge of the Ontario Court (General Division). The *Municipal Elections Act* does not provide for a further appeal. The court found that in the absence of an express statutory exclusion of an appeal from a final order of a General Division judge, the Legislature could not be deemed to have limited the jurisdiction granted to the Court of Appeal by s. 6(1)(b). Significantly, there was no right of appeal to the Court of Appeal set out in the *Municipal Elections Act.* It is the inclusion of the specific appeal provisions in the *Act* which, in my view, operate to exclude the jurisdiction under s. 6(1)(b) for proceedings under the *Act.*

17 In summary I am of the view that s. 30(3) of the *Act* provides the rights of appeal to this court for class proceedings and that s. 6(1)(b) of the *Courts of Justice Act* does not supplement those rights.

**Maclean's Motion**

18 Maclean brought a motion for leave, if necessary, to appeal the judgment of Sharpe J. During the course of argument he requested that the court consider this motion as a motion for leave under s. 30(5) of the *Act* to permit him to act as a representative party for purposes of bringing his appeal under s. 30(3). The court indicated that it was prepared to deal with the motion on this basis. In my view, this is not an appropriate case for leave.

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19 The court's discretion to grant leave under s. 30(5) is guided by the best interests of the class and in particular by a consideration whether the class member applying would fairly and adequately represent the interests of the class. There is nothing in the record which indicates that Maclean would adequately represent the interests of this class by bringing an appeal which seeks to set aside the settlement agreement. Courts in three jurisdictions have approved the agreement. Maclean is the only class member of an estimated 400,000 who now seeks to set it aside. The wishes of one class member ought not to govern the interests of the entire class.

20 Importantly, if Maclean is dissatisfied with this settlement, he has the opportunity under the terms of Sharpe J.'s judgment and s.9 of the *Act* to opt out of the class and pursue his claim against Sun Life in his personal capacity.

21 I would therefore dismiss the motion brought by Maclean under s. 30(5) of the *Act*. For the reasons above, I would allow the motion under s. 134 of the *Courts of Justice Act* and quash the appeal. Because the motions involved a novel point raised by an individual class member, I would make no order as to costs.

*Order accordingly.*

FN* Leave to appeal refused (1998), 235 N.R. 390 (note), 118 O.A.C. 399 (note) (S.C.C.).

FN1 See ss. 8(3), 10(1), 12, 16(1), 18, 19 and 25.

FN2 Section 35 of the *Act* provides that the rules of court apply to class proceedings.

FN3 Dabbs and Sun Life argued that even if Maclean is a party, s. 30(3) does not confer a right of appeal from a judgment approving a settlement under s. 29 of the *Act*.

FN4 Elmer Driedger, *Construction of Statutes*, 2nd ed. (1983), at p. 227.

FN5 Pierre-André Côté, *The Interpretation of Legislation in Canada*, 2nd ed. (1991), at p. 301.

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# TAB BB

# REPORT

## ON

# CLASS ACTIONS

ONTARIO LAW REFORM COMMISSION

VOLUME II

Ministry of the
Attorney
General

1982

The Ontario Law Reform Commission was established by the *Ontario Law Reform Commission Act* for the purpose of reforming the law, legal procedures, and legal institutions. The Commissioners are:

DEREK MENDES DA COSTA, Q.C., LL.B., LL.M., S.J.D., LL.D., *Chairman*

H. ALLAN LEAL, Q.C., LL.M., LL.D., *Vice Chairman*

HONOURABLE RICHARD A. BELL, P.C., Q.C.

WILLIAM R. POOLE, Q.C.

BARRY A. PERCIVAL, Q.C.

M. Patricia Richardson, M.A., LL.B., is Counsel to the Commission. The Secretary of the Commission is Miss A. F. Chute, and its offices are located on the Sixteenth Floor at 18 King Street East, Toronto, Ontario, Canada M5C 1C5.

During the course of the Class Actions Project, the Honourable G. A. Gale, C.C., Q.C., LL.D., retired as Vice Chairman of the Commission because of ill health. While the Commission benefited greatly from Mr. Gale's knowledge and experience and acknowledges its indebtedness to him, we wish to state that he did not agree with all the recommendations contained in this Report, particularly those relating to costs.

ISBN 0-7743-7089-0
ISBN for this volume (2): 0-7743-7091-2

Despite the fact that the approach that we have adopted has not been proposed or implemented elsewhere, a discretionary approach to opting out has been urged by several commentators in the United States as a replacement for the absolute right of exclusion conferred by Rule 23(b)(3).[89] For the reasons indicated above, we believe that this is the correct approach.

Before leaving the opt out issue, we would like to direct our attention to three ancillary matters. First, once the court decides that the case before it is a proper one for exclusion, class members will have to exercise the right to opt out. With respect to the manner of exercising this right, the Commission is divided. A majority of the Commission recommends allowing class members to withdraw from the class simply by informing the court of their wishes in writing, as this would allow class members to leave the class in an inexpensive, expeditious manner.[90] A minority of the Commission is of the view that class members who wish to opt out should be required to come forward and make submissions to the court, indicating the reasons for their desire to exclude themselves.

Secondly, we are of the opinion that, if a right to opt out is extended, and is exercised by some or all of the class members, this fact should be recorded. Consequently, if a class member who has withdrawn from the class action were to initiate his own suit, he could invoke the record if the defendant alleged that he did not opt out and was bound by the class judgment. On the other hand, a class member who has remained in the class might commence an individual action in the hope, for example, of securing a second recovery. A defendant seeking to rely on the *res judicata* effect of the prior class suit could present the list of exclusions as an indication of the class member's failure to opt out of the earlier action. Accordingly, the Commission recommends that the judgment on the common questions or any settlement of the action should set out the names of persons who have excluded themselves from the action.[91]

Thirdly, we note that certain class action mechanisms have addressed the problem that can arise where a class member has previously instituted a separate suit against the defendant asserting the same cause of action as is the foundation of a subsequent class action. Article 1008 of the Quebec *Code of Civil Procedure*[92] provides that, in these circumstances, the class member shall be deemed to have requested exclusion from the class if he has not discontinued his earlier suit. Bill C-42[93] and Bill C-13[94] take a slightly different

---

[89] See Fisch, *supra*, note 70, at 216-17; Harvard Developments, *supra*, note 16, at 1627-28; Homburger, *supra*, note 70, at 652; and Newberg, *supra*, note 16, Vol. 5, Appendix Item 2, at 1491-92. The Kansas class action rule, Ks. Code Civ. Pro. 60-223 (1969), authorizes the court to prohibit class members from opting out of a (b)(3) class action where it "finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reasons therefor".

[90] See Draft Bill, s. 20(3).

[91] *Ibid.*, s. 20(4).

[92] C.C.P., *supra*, note 87.

[93] Bill C-42, *supra*, note 85, s. 39.17(2).

[94] Bill C-13, *supra*, note 86, s. 39.15(2).

**File Number:** ____________________

**INVESCO CANADA LTD., et al.**
Applicants (Applicants)

- and -

**SINO-FOREST CORPORATION, et al.**
Respondents (Respondents)

**IN THE SUPREME COURT OF CANADA**
**(ON APPEAL FROM COURT OF APPEAL FOR ONTARIO)**

Proceeding commenced at Toronto
Proceeding under the Class Proceedings Act, 1992

**APPLICATION FOR LEAVE TO APPEAL OF THE APPLICANTS INVESCO CANADA LTD., NORTHWEST & ETHICAL INVESTMENTS L.P., COMITÉ SYNDICAL NATIONAL DE RETRAITE BÂTIRENTE INC., MATRIX ASSET MANAGEMENT INC., GESTION FÉRIQUE, AND MONTRUSCO BOLTON INVESTMENTS INC.**

**VOLUME II OF IV**

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