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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

Plaintiffs

- and -

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

BOOK OF AUTHORITIES OF THE OBJECTORS

(Motion for settlement approval returnable February 4, 2013)

January 30, 2013

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26.	*Western Canadian Shopping Centres v. Dutton*, 2001 SCC 46

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27.	*The Oxford English Dictionary*, 2nd ed., s.v. "integral"
28.	*Words & Phrases*, Volume 4, s.v. "integral"
29.	*Black's Law Dictionary*, 6th ed., s.v. "integral"

TAB 1

Case Name:

Allen-Vanguard Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF a Plan of Arrangement and Reorganization of Allen-Vanguard Corporation under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended and Section 186 of the Ontario Business Corporations Act., R.S.O. 1990, c. B.16, as amended, Applicants

[2011] O.J. No. 3946

2011 ONSC 5017

81 C.B.R. (5th) 270

2011 CarswellOnt 8984

Court File No. CV-09-00008502-00CL

Ontario Superior Court of Justice
Commercial List

C.L. Campbell J.

Heard: November 16, 2010.
Judgment: August 25, 2011.

(113 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Sanction by court -- Motions by directors, officers and underwriters to enjoin actions allowed -- Cross-motion by plaintiffs to vary Sanction Order dismissed -- Initial Order stayed Laneville action against corporation, which plaintiffs sought to continue against directors -- Love action against directors, officers and underwriters claimed negligence and failure to disclose transactions -- Sanction Order permitted only claims contemplated by s. 5.1(2) of CCAA, which these were not -- Plaintiffs could not claim against directors for acts undertaken in Corporation's name prior to initial order -- Release deprived underwriters of indemnity and plaintiffs never sought leave for derivative action -- Sanction Order was relied on by parties.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Stays -- Of concurrent proceedings -- Motions by directors, officers and underwriters to enjoin actions allowed -- Cross-motion by plaintiffs to vary Sanction Order dismissed -- Initial Order stayed Laneville action against corporation, which plaintiffs sought to continue against directors -- Love action against directors, officers and underwriters claimed negligence and failure to disclose transactions -- Sanction Order permitted only claims contemplated by s. 5.1(2) of CCAA, which these were not -- Plaintiffs could not claim against directors for acts undertaken in Corporation's name prior to initial order -- Release deprived underwriters of indemnity and plaintiffs never sought leave for derivative action -- Sanction Order was relied on by parties.

Corporations, partnerships and associations law -- Corporations -- Directors and officers -- Personal liability of directors to persons other than the corporation -- Joint and several liability -- Derivative actions -- Powers of court -- Conduct of the action -- Oppression remedy -- Stay, discontinuance, settlement or dismissal -- Motions by directors, officers and underwriters to enjoin actions allowed -- Cross-motion by plaintiffs to vary Sanction Order dismissed -- Initial Order stayed Laneville action against corporation, which plaintiffs sought to continue against directors -- Love action against directors, officers and underwriters claimed negligence and failure to disclose transactions -- Sanction Order permitted only claims contemplated by s. 5.1(2) of CCAA, which these were not -- Plaintiffs could not claim against directors for acts undertaken in Corporation's name prior to initial order -- Release deprived underwriters of indemnity and plaintiffs never sought leave for derivative action -- Sanction Order was relied on by parties.

Securities regulation -- Civil liability -- Misrepresentation in a prospectus -- Persons liable -- Underwriters -- Motions by directors, officers and underwriters to enjoin actions allowed -- Cross-motion by plaintiffs to vary Sanction Order dismissed -- Initial Order stayed Laneville action against corporation, which plaintiffs sought to continue against directors -- Love action against directors, officers and underwriters claimed negligence and failure to disclose transactions -- Sanction Order permitted only claims contemplated by s. 5.1(2) of CCAA, which these were not -- Plaintiffs could not claim against directors for acts undertaken in Corporation's name prior to initial order -- Release deprived underwriters of indemnity and plaintiffs never sought leave for derivative action -- Sanction Order was relied on by parties.

Motion by the former directors and officers of the Corporation to enforce the terms of the Sanction Order and enjoin the class actions against them. Motion by the underwriters to stay or dismiss the shareholder class action against them. Cross-motion by the plaintiffs to vary the Sanction Order to permit the proposed actions. The Initial Order was made in December 2009 and stayed the existing Laneville action against the corporation. 100 per cent of affected creditors voted in favour of the plan, which the Corporation would have been unable to carry on without, and the Sanction Order was made. In the Laneville action, the shareholders alleged the corporation, directors and officers were liable for negligence, misrepresentation and oppression. The plaintiffs sought to continue the Laneville action against the directors. After the Sanction Order was made, the Love action was commenced by shareholders against the directors, officers and Corporation's underwriters and claimed negligence and failure to disclose transactions.

HELD: Motions allowed. Cross-motion dismissed. The released contained in the Sanction Order clearly permitted only those claims against directors that were contemplated by s. 5.1(2). These claims were not the type of claims contemplated by s. 5.1(2). It would be inconsistent with the CCAA to allow the plaintiffs to proceed with their oppression claim against the directors for acts or omissions undertaken in the Corporation's name prior to the Initial Order being made. The plaintiffs did not oppose the Sanction Order, so took their chances that the order would permit their claim to proceed. Allowing the claim to proceed would permit an inappropriate sort of priority for unsecured creditors. The claims against the directors in both actions were enjoined. Protection for the underwriters was not discussed when the Sanction Order was approved, but s. 5.1(2) was to be read narrowly to ensure to objectives of the CCAA. Furthermore, s. 5.1(2) could not be used to create a cause of action that would otherwise require court approval and leave. The plaintiffs had plenty of opportunity to seek leave to commence a derivative action but never did. The terms of the release in the Sanction Order deprived the underwriters of any indemnity they would otherwise be entitled to from the Corporation. The claim against the underwriters was struck in negligence and misrepresentation. Had the plaintiffs claimed and provided full particulars of fraud, such a claim may have survived as the terms of the release did not extend to fraud. The plaintiffs' motion to vary the terms of the Sanction Order was dismissed. It would be inappropriate to vary an order that was relied on by all parties and approved by all affected creditors.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 5.1(1), s. 5.1(2), s. 5.1(3)

Excise Tax Act, R.S.C. 1985, c. E-15,

Ontario Business Corporations Act, R.S.O. 1990, c. B.16, s. 131(1), s. 246(1)

Ontario Securities Act, s. 130, s. 138.3

Counsel:

Ronald G. Slaght, Q.C. and Eli S. Lederman for the Directors and Officers of Allen-Vanguard Corporation.

C. Scott Ritchie, Michael G. Robb and Daniel E.H. Bach for class action plaintiffs.

Alan L.W. D'Silva and Daniel S. Murdoch for Underwriters.

REASONS FOR DECISION

1 **C.L. CAMPBELL J.**:-- Two motions were heard together: the first by former directors and officers of Allen-Vanguard to enforce the terms of a Sanction Order, which the directors and officers say release them as well as Allen-Vanguard from all claims except those specifically provided for in section 5.1(2) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA.") In addition, the former directors assert that the claims of the Plaintiffs in two proposed Class Actions are not sustainable against them in law under s. 5.1(2) of the CCAA.

2 The second motion by the Underwriters of Allen-Vanguard seeks to dismiss or stay the action brought against the Underwriters by shareholders in a proposed Class Action.

3 A cross-motion brought by Plaintiffs in the two proposed Class Actions seeks, if required, variation of the terms contained in the Sanction Order granted December 16, 2009, to permit the Class Actions to proceed.

4 By way of an endorsement dated February 9, 2011, the Court sought further information from the parties with respect to the factual circumstances that surrounded the agreement that was embodied in the terms of the Sanction Order. That information has been provided and will be referred to later in these Reasons.

5 The claims that the directors who are the moving parties seek to effectively enjoin are those brought in two Class Actions (hereinafter the "Laneville action" and the "Love action"), wherein former shareholders seek damages against directors, officers and Underwriters based on alleged misrepresentation to shareholders by the Defendants about the effect on Allen-Vanguard of its purchase of another company in 2007.

Background

6 As of December 2009, Allen-Vanguard was insolvent. An Application was made on December 9 for an Initial Order under the CCAA, appointment of a Monitor and a Plan Filing and Meeting Order. The effect of the Initial Order among other matters stayed the existing Class proceeding.

7 The circumstances that surrounded the Plan Filing/Meeting Order, the Court was advised, were necessary to avoid a bankruptcy. The subsequent vote on December 9, 2010 was approved in favour of the Plan by 100% of affected creditors.

8 The circumstances that surrounded the December 9, 2010 Application and Order were a variation on a CCAA process that has come to be known as a "pre-packaged" Application. The secured creditors agreed to a restructuring of their secured debt in circumstances involving a going concern sale of assets where, had a bankruptcy ensued, there would have been no recovery for creditors or shareholders beyond very incomplete recovery for those secured creditors.

9 The First Report of the then proposed Monitor, Deloitte and Touche, in support of the Initial Order, outlined the transaction that had been proposed to all creditors as early as September 2009, posted on SEDAR and to which (apart from the question of releases) no party was opposed on December 9.

10 The Plan provided for the Secured Lenders foregoing a portion of their existing debt and fees, converting the remainder of the existing debt into a multi-year restructured term loan with terms more favourable to the Company and a new revolving credit facility.

11 The Court accepted the opinion of Deloitte & Touche that without the proposed transaction, the Company would likely not be able to meet its financial obligations as they became due and would likely be unable to carry on the business beyond the very short-term, which would then necessitate liquidation.

12 The conclusion by Deloitte & Touche, accepted by the Court, was that the restructuring process in the Plan maximized the value of the Company for the benefit of all stakeholders and represented the best offer from that process.

13 The alternative faced by the Company was that of a forced liquidation, which as estimated by the Monitor would result in a shortfall to secured lenders in excess of $100 million.

The Laneville Action

14 The proposed Class Action Plaintiff in the Laneville action issued on October 9, 2009 a Statement of Claim dated November 26, 2009, which sought appointment on behalf of a Representative Plaintiff and for a class of Allen-Vanguard shareholders who allege that Allen-Vanguard Corporation and its directors and officers are liable for various misrepresentations, negligence and oppression.

15 The Statement of Claim detailed a transaction that occurred in 2007 for which the Class Plaintiffs claim the directors and officers failed to properly value and account for in the financial statements of Allen-Vanguard, when Allen-Vanguard purchased all of the shares of a private corporation called Mid-Eng Systems Inc.

16 In addition, the Class Plaintiff claims damages for negligent misrepresentation not only under the common law but as well under s. 138.3 of the *Ontario Securities Act* in connection with the same transaction.

17 The only creditor objection to the Plan taken at the time of the Initial Order was from counsel for the Proposed Class Plaintiff in the Laneville action, who sought an adjournment of the vote based on the wording of the proposed release terms.

18 The adjournment of the vote was not granted given the financial fragility of Allen-Vanguard, and the sanction hearing, which was to deal with the wording of the proposed release terms, was set for December 16, 2009.

19 The Second Report of the Monitor, dated December 10, 2010, advised the Court of the terms of the release and injunctions that had been negotiated, the terms of which were put forward for approval on an unopposed basis. No objection was taken at the sanction hearing by counsel for the Class Plaintiff and no amendment to the Release portion of the Sanction Order sought. Whatever had been negotiated between the parties came before the Court on an unopposed basis. Counsel for the Class Action Plaintiffs and for the Defendant directors had input into and agreed to the wording.

20 The Court has been advised that by agreement of counsel, the wording of the Release was negotiated by the parties with the recognition that there would likely remain an issue on which the Court would have to rule. That issue is now the subject of the first motion and the cross motion. I have been advised as a result of the inquiry of February 9, 2011 and what is now obvious as a result of the recent correspondence (including an affidavit sworn June 30, 2011 and objected to) is that Plaintiffs' counsel in the Laneville action and counsel for the directors had quite different views in respect of the kinds of claims that could be included in s. 5.1(2).

21 As I now understand it, counsel for the Allen-Vanguard Corporation made no representation or agreement that the claims in the Laneville action were within those permitted by s. 5.1(2) of the CCAA.

22 Counsel for the Plaintiff in the Laneville action believe that the language in the Sanction Order preserves the claims in both the Laneville action and the Love action, including the claims against the Underwriters. It is submitted by the Plaintiff that the jurisprudence in respect of s. 5.1(2) permits not only claims against directors but as well officers to the extent there is insurance coverage, and that the Plaintiffs' position is consistent with the jurisprudence under s. 5.1(2).

23 Counsel for the Directors and for Underwriters submit that counsel for the Plaintiff knew or ought to have known at the time they agreed to the language of the Plan of Arrangement and the draft Sanction Order that the claims asserted against the Directors and Officers of Allen-Vanguard might nevertheless fail to meet one of the exceptions set out in s. 5.1(2) of the CCAA.

24 In the result, the issue of what was or was not agreed to as part of the Sanction Order comes down to the question of whether or not the wording of s. 5.1(2) of the CCAA, read in context of statutory interpretation, is sufficient to permit continuance of claims in the Laneville and Love actions.

25 As reported by the Monitor in the First Report, the Plan contemplated two releases: a General Release and an Equity Claims Release, both of which had been contemplated in the proposed Plan. Neither the Equity Claims Release nor the General Release was intended to release or deal with or affect in any respect claims under ss. 5.1(1), (2) and (3) of the CCAA, which read:

> 5.1(1) a compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> 5.1(2) A provision for the compromise of claims against directors may not include claims that
>
> (a) relate to contractual rights of one or more creditors; or
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressed conduct of directors.
>
> 5.1(3) the court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

26 The Monitor in its Second Report remarked as follows:

> 28. The injunctions provided in the Plan are limited by section 5.1(2) of the CCAA. The injunctions barring any person from commencing, continuing or pursuing any proceeding on or after the Effective Time for a claim that such person may have against the Company or any current or former officer of the Company of the type referred to in subsection 5.1(2) of the CCAA ... but permit any such subsection 5.1(2) claim to proceed against a current or former director of the company except that any such claim against a current or former director of the company is permitted recourse, and sole recourse, to the Company's insurance policies in respect of its current and former directors. The estimated value of any coverage under such insurance is $30 million as per the Luxton Affidavit.
> 29. The Monitor is aware of at least one group of stakeholders affected and by the Supplemental Injunction, being a group of current and former shareholders of the Company that have served a Notice of Action and Statement of Claim on the Company seeking approximately $80 million in damages from the Company and

its directors and officers, as further described in the monitors First Report. As stated above the terms of the Supplemental Injunction would permit this claim to survive against the current and former directors of the Company with recourse limited to the Companies insurance as referenced above."

27 The Releases and Sanctions are contained in the language of the Sanction Order. A summary of the provisions with paragraph references to the Sanction Order is as follows:

22. Releases are essential to the Plan
23. All Persons give full release to each of the Released Parties including contribution and indemnity but directors not released in respect of any claim of the kind referred to in section 5.1(2) of the CCAA.
24. Release of Applicant and current and former directors provided that nothing therein releases a director or current or former officer in respect of any claim of the kind referred to in section 5.1(2) of the CCAA.
25. All Persons enjoined and estopped from commencing or continuing actions with the exception of any claim against the directors of the kind referred to in section 5.1(2) of the CCAA..
26. Injunction and bar with respect to section 5.1(2) against the applicant ... and that the sole recourse for any claims against a current or former director or officer of the Applicant Limited to any recoveries from the Applicants insurance policies in respect of current or former directors and officers
27. Laneville Action dismissed as against the Applicant without prejudice to discovery rights against representative of the Applicant.

The Love Action

28 On February 8, 2010, after the Sanction Order had been made, another Proposed Representative Plaintiff, Gordon Love, commenced a second action and is represented by the same counsel as in the Laneville action. The Statement of Claim, dated March 10, 2010 against the directors and officers of Allen-Vanguard Corporation, includes claims against Cannacord Financial Ltd (and others collectively referred to as "Underwriters.")

29 An Amended Statement of Claim dated August 10, 2010 asserts in the Love action claims for negligence against directors, officers and Underwriters, all arising out of the transaction and alleged failure to properly disclose the transaction in the financial statements and transaction referred to in paragraph 15 above in respect of a 2007 acquisition.

Issues

1. Do the Laneville action and the Love action and their proposed class claims fall within those claims non-exempt under s. 5.1(2) of the CCAA?
2. Does the language of the Release contained in the Sanction Order apart from s. 5.1(2) permit either the Laneville or Love actions, including that against Underwriters, to continue?
3. Is there any basis on which the Court could or should vary the terms of the Release section of the Sanction Order?

30 Having reviewed the language of the Releases contained in the Sanction Order, I am satisfied that the only basis that the release language permits claims as against the directors is if they are those contemplated in s. 5.1(2) of the CCAA not to be released.

31 The object of the CCAA is to facilitate the restructuring of an insolvent corporation. In order to effect restructuring, a compromise of creditors' claims is almost inevitably an essential ingredient of a Plan under the CCAA.

32 The Plan, to be effective and to obtain Court approval, requires consensus and agreement by various classes of creditors. Many of the issues that arise before a Plan is approved by the Court involve a contestation between creditor groups as to how they should be classified and what extent of what group approval should be appropriately required. No motion was brought to seek to lift the stay in respect of actions provided for in the Initial Order.

33 In this case, no creditor came forward to oppose approval of the Plan, including the terms of the release language as set out in the Sanction Order. The effect of a Sanction Order is to create a contract between creditors. (See *Canadian Red Cross Society* (2002), 35 C.B.R. (4th) 43 (Ont. S.C.J.).

34 The most significant feature of the CCAA Applications that have come before the Court in the last two or three years is that the negotiation has taken place to achieve consensus among creditors often before the Initial Order under the statute.

35 One can rightly understand the reluctance on the part of a provider of interim financing to continue to do so on an indefinite basis, when the approval process may be dragged out for days, weeks or months.

36 All secured creditors whose security continues to deteriorate during the period of negotiation will seek an early determination of the consensus necessary for approval of a Plan; otherwise, liquidation may be preferable.

37 Such consensus requires agreement among many stakeholders, including not just creditors but as well current and former directors and officers, many of whose continued cooperation is necessary and integral to a Plan's success.

38 To avoid the inequity that would result from creditor claims that were outstanding as against directors at the time of a CCAA application, s. 5.1(2) was amended in 1997 to its present form. As Hart J. noted in *Re-Liberty Oil & Gas Ltd.* 2002 ABQB 949 at paragraph 4, before the enactment of this section, the legislation provided for compromises of claims only against the petitioning company. The new section extends relief against directors of the petitioning company subject to exceptions.

39 It is appropriate to approach statutory interpretation with the assumption that meaning is to be accorded to each of the words used in the provision within the overall purpose of the CCAA. The absence of other words can also be purposeful.

40 The CCAA has been said to be a skeletal statute designed to give flexibility and expediency in the ability of the company, with the concurrence of its creditors, to accomplish a restructuring of its debt in the avoidance of liquidation or bankruptcy, and does not contain a comprehensive code that lays out all that is permitted or barred. (See *ATB Financial v. Metcalfe & Mansfield Alternative Investments 11 Corp.*, 2008 ONCA 587 per Blair J.A. para. 44.)

41 Since the hearing in this matter, the Supreme Court of Canada has rendered a decision in *Century Services Inc. v. Canada (Attorney General)* 2010 SCC 60, which endorses the broad principles of the CCAA and the discretion granted to the Court to effect a restructuring if possible or an orderly liquidation.

42 The case involved a contest between the deemed trust provisions of the *Excise Tax Act* and the CCAA. Madam Justice Deschamps, speaking for the majority, noted the need for clarity of the underlying purpose with respect to the CCAA.

43 Paragraphs 12 to 14, 17, 58-59 and 63 of that decision read as follows:

> 12. Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R.J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.
>
> 13. Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute -- it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.
>
> 14. Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

...

17. Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected -- notably creditors and employees -- and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

...

58. *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59. Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> *Elan Corp. v. Comiskey* reflex, (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting.)

...

63. Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) what are the sources of a court's authority during *CCAA* proceedings? (2) what are the limits of this authority?

44 I have quoted from the above decision at length to stress the nature of the discretion that is inherent in the CCAA statute to allow the Court to fashion a structure or process to best benefit stakeholders. Consistent with that purpose and as a matter of statutory interpretation, it is appropriate to look at the interpretation of s. 5.1(1) and (2) of the CCAA. Section 5.1(1) deals with "obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations."

45 A Plan can therefore provide for the compromise of claims against directors where a director may in law be liable for the payment of a company's obligation with the exceptions set out in s. 5.1(2).

46 In my view, the best that can be said of s. 5 is that it is not as clearly drafted as it might have been.

47 It is noteworthy that in the first line of s. 5.1(2), the only claims that may not be excluded in a compromise are those against "directors." Claims that can be excluded in a compromise include those against "officers" and the "company" itself. Why is this the case? One reason undoubtedly is the personal liability that directors face under both Federal and Provincial legislation, or the personal undertaking of a director to a creditor such as a personal guarantee. (See *C.I.T. Financial v Lambert* 2005 BCSC 1779.)

48 By way of example, s. 131(1) of the OBCA provides that directors are made personally liable for unpaid wages of the corporation's employees to a maximum of six months. Reading through s. 5.1(1) and (2), there is nothing in the wording that would prevent the compromise of such claims against officers or the company itself, but not as against directors. The CCAA does not contain a definition of the word "creditor" but does of the terms "secured creditor," "unsecured creditor" and "shareholder." It would seem that for the purposes of the CCAA and in particular s. 5.1(2), a creditor would include both a secured creditor and an unsecured creditor, but would not include a shareholder.

49 Section 5.1(2) refers only to creditors and not shareholders as prospective claimants, whether in contract, tort or statutory oppression.

50 In this case, the claims by the Class Action Plaintiffs are on behalf of shareholders against directors, since the effect of the CCAA stayed the action against the company Allen-Vanguard. The claims arise with respect to a 2007 transaction and the pre-filing financial statements, but the claims do not involve officers or the company, only directors.

51 While framed in negligence, the claims in these actions seek to involve the remedy of oppression under the OBCA to enlist the broad scope of remedy possible under that statute. However, it is only in respect of unpaid obligations of the company and other contract-type claims where the law imposes liability on the Defendant directors that invokes the exception in s. 5.1(2). It is noteworthy that the word "negligence" does not appear in the section at all.

52 In their essence, the claims in the two actions allege a failure on the part of the directors in 2007 and the company to enter into a provident transaction and the transaction represented a misrepresentation to shareholders of the value of the transaction causing a reduction in shareholder value. Such claims are not of the same kind as those contemplated in section 5.1(1). They do not relate to "obligations of the company where the directors are by law liable."

53 The claims relate to transactions that were well in advance of the Initial CCAA Order. In *Re Canadian Airlines Corp.* 2000 ABQB 442 (leave refused to ABCA, [2000] A.J. No. 1028, and to SCC, [2001] S.C.C.A. No. 60), it was held that claims against the directors should only be released if they arose prior to the date of the CCAA proceeding.

54 I agree that the oppression remedy is expansive in scope and empowers the Court to make determinations and orders that can have a direct and even a radical impact on the internal management and status of a corporation, including even an order winding up the corporation. (See *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.) and *Incorporated Broadcasters Ltd. v. CanWest Global*, [2001] O.J. No. 4882, 2001 CanLII 28395 (Ont. S.C.) at paragraphs 101-105.) Oppression as it occurs within s. 5.1(2) of the CCAA must be read within the context of the section itself.

55 The claims in the Love and Laneville actions are in negligence and no other remedy is sought apart from a claim for damages and access to whatever insurance may be available to respond to claims against directors and officers. There is nothing before the Court to suggest that the insurers, assuming there is a valid policy, are aware of the restriction on remedy.

56 I see no basis from the pleadings in this action for which it would be appropriate to consider the scope of relief that might otherwise apply under the oppression remedy section of the OBCA. Counsel for the Plaintiffs in the Proposed Class Actions cannot bolster their position by limiting recovery to the applicable Directors and Officers Insurance, when there is no basis for the claim at all, either under the language of the Release or the meaning to be accorded to s. 5.1(2).

57 In *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, the Supreme Court of Canada commented on the expectations of stakeholders including but not limited to shareholders, in considering a Plan of Arrangement in the context of an oppression claim. Part of the test for "oppression" referred to in that decision is an expectation on the part of the claimant to be "treated in a certain way and that failure to meet the expectation involved unfair conduct."

58 I fail to understand how the expectation of one or more shareholder groups can be any different with respect to the impugned transaction than those of creditors or indeed the company itself vis-à-vis the directors, particularly since neither the officers nor the company itself is pursued.

59 The Sanction Order in this case by its terms provided release of the claims now sought to be pursued. By the terms of the Sanction Order, the only reasonable expectation of stakeholders would be that unless specifically authorized by the Order, any claim against directors would be barred. Potential claims against directors were not assigned to class plaintiffs nor was direction sought by any party about the effect of s. 5.1 prior to the issuance of the Order. Given the issue now before the Court and the disagreement of the parties, perhaps the better practice would have been to advise the Court of the issue and "carve" it out of the Plan.

60 The Court is put in a difficult position when asked in a very constrained timeframe to approve the restructuring with releases. It should certainly not be the expectation that in every instance, releases of the type here should be granted as a matter of course. Those with unpaid obligations of the company may assert that directors are liable if they fail to fulfill the company's obligation when they are legally bound to do so.

61 I am of the view that third-party releases in particular should be the exception rather than the rule. There may very well be instances in which the releases are not integral or necessary to the restructuring and should not be approved. That was not suggested in the approval process here. There was no evidence presented at the time of the granting of the Sanction Order to suggest that directors were not important to the restructuring. Indeed, the only evidence before the Court was to the contrary: that the directors were integral to the Plan's success.

62 In this case, the putative Plaintiffs did not oppose the granting of the Sanction Order and in effect took their chances that the Order might after the fact permit the limited claim referred to in the Monitor's Report.

63 All of the other stakeholders, including the secured creditors, directors, officers and the Applicant Company, approved the form of Order.

64 It is certainly speculative at this time to consider, had the form of Order proposed been objected to, to what extent the Court would have any jurisdiction to grant the language now sought by the Plaintiffs, without rejecting the Plan entirely.

65 The duty of directors is first and foremost to the company itself. The oppression remedy does not in my view permit one group (shareholders) to claim oppression when other stakeholders, for example employees or creditors or indeed the company itself, have allegedly suffered a loss that results in insolvency and are unable to seek redress and still preserve restructuring.

66 To vary or amend the Sanction Order now to permit the claims to continue might at the very least require the presence and concurrence of all of those who supported the form of Order in the first place.

67 Counsel for the proposed Plaintiffs refer to several decisions, which they urged support the proposition that shareholder actions for oppression against directors are permitted under s. 5.1(2) of the CCCA.

68 Each of those decisions, while fact-specific, in my view is consistent with a narrow range of actions warranted for a shareholder against the director under the exception to s. 5.1(2).

69 In *Re-Liberty Oil & Gas Ltd.*, 2002 ABQB 949, where the action did proceed, the allegation involved a personal representation, indeed a fraudulent one, by the defendant director to two individuals who happened to be shareholders. The complained acts were not those of the company (as here), but rather personal and direct as between the director and shareholder. In other words, there was the proximity that one would expect in a tort situation.

70 In *Worldwide Pork Corp.*, 2009 SKQB 414, the action was not permitted to proceed. At paragraphs 14 and 15 Justice Dawson said:

> It must be remembered that the oppression remedy is not designed to settle every dispute of a corporation but only those that involve and abuse of the corporate system and for which a common-law remedy does not exist.
>
> As well, the plaintiffs have pled that their claim is for damages, for loss of profits and loss of pay out dividends. There must be a causal connection between the alleged oppressive conduct and the loss claimed to be suffered by the plaintiffs. That is, there must be a causal nexus between the alleged conduct and the loss suffered by the plaintiffs. There is no pleading which sets out how the alleged loss of profit or dividends resulted from the conduct alleged to be oppressive. But in any event the losses claimed are losses as a result of Worldwide Pork not being profitable, that is, being unable to provide a return to shareholders for their investment. Such a loss cannot support an action for oppression since it comes with in the exception contained in section 5.1(2)(b) of the CCAA.

71 In *Re-Blue Star Battery Systems International Corp.* (2000), 10 B.L.R. (3d) 221, Farley J. of this Court dealt with a claim very much like that considered by the Supreme Court of Canada in *Century Services, supra,* as it involved G.S.T. At paragraph 12, he said

> Thus it appears to me that RevCan, not having put itself into position where it could (and did) perfect its derivative claims as set out in section 323(2)(a) of the

> *Excise Tax Act* never had a claim against the directors which could survive the sanction of the Plan vis-à-vis the Applicants. Nothing that this Court could do at the present time (that is, at the time when considering the CCAA sanctioned motion) could crystallize a RevCan claim against the directors. RevCan would have to take additional multiple steps over some period of time to establish a claim against the directors."

72 Farley J. went on to discuss the hypothetical of a claim in oppression against the directors as provided for in s. 5.1(2) in the context where the creditor had put the directors on notice of the promise of the company to pay the tax.

73 The argument of the Proposed Plaintiffs here is that "oppressive conduct" is not to be carved out, but that wrongful conduct that involves directors, even though the action as against the company cannot continue, it can continue against the directors.

74 What in my view is consistent with the decisions in the three cases mentioned and in the Québec case *Papiers Gaspésia* 2006 QCCS 1460 (CanLII) and with the interpretation of s. 5.1(2) is that the actions of the directors toward persons who may be regarded as creditors, and may in this context include a shareholder, are based on a direct relationship when a director takes on an obligation to make a payment that would otherwise be the obligation of the company and promises to do so or is obliged to do so by legislation. In most cases this will be a post-filing obligation. In other words, a promise by a director directly to a creditor stakeholder that is made following a CCAA Initial Order may attract liability to the director and should not be released.

75 It would be inconsistent with the scheme of the CCAA to allow all claims in which shareholders claim oppression to proceed against directors for acts or omissions that they did in the name of the company prior to the Initial Order. There would be little if any incentive to directors to pursue restructuring if they were going to be so exposed. On the other hand, personal undertakings or obligations of directors made during the CCAA process should not easily be released.

76 To permit the kind of claims as the Proposed Plaintiffs would see them would create a priority to that class of unsecured creditors that properly should belong to the creditors as a group. No leave to continue the Class action was sought before the Sanction Order was granted and even on this motion no submission was put forward for the exercise of discretion under section 5.1(3).

77 None of the cases referred to in argument dealing with s. 5.1(2) squarely deals with the issue raised here -- that the section was intended to related to post-filing claims or personal undertakings of directors to creditors in connection with the proposed plan prior to filing.

78 The final argument on behalf of Class Plaintiffs is that to deny the claim of shareholders as against directors would only benefit their insurers, since the Class Plaintiffs have agreed to limit any recovery to the amount of the insurance. I fail to see how this advances the position of the Proposed Plaintiffs. No information was put before the Court about the particulars of the insurance. The Court has no information to know whether or not the insurers even know of this issue.

79 If the claim does not lie as against the directors in the first place under s. 5.1(2), the limitation of the claim as against the potentially available insurance does not advance the case of the class of Plaintiffs.

80 There would be little meaning left to s. 5.1 if all claims of negligence and wrongful conduct against directors for pre-filing activity could not be released and no need for the discretion provided

for in s. 5.1(3) for Court to override this compromise as not being fair or reasonable. As noted above in the passages from the *Century Services* case, the purpose of the CCAA and the discretion granted to the Court are to permit restructuring to work, not create new causes of action.

81 The concern of the Court, which necessitated the further inquiry, was that the language of the Sanction Order might imply on the part of the Applicant and directors who had knowledge of the particulars of the claim that the facts could give rise to a s. 5.1(2) claim. I am satisfied based on the further information provided that no such admission is to be implied.

82 The relief sought by the directors is therefore granted.

Underwriters

83 Underwriters acted on share and warrant offerings of Allen-Vanguard in September 2007 and certified a related prospectus. The Love Class Action was commenced in February 2010 and the proposed Representative Plaintiff claims damages against Underwriters under s. 130 of the *Securities Act (Ontario)* and also makes claims on the basis of negligence, unjust enrichment and waiver of tort.

84 Underwriters rely on the provisions of the releases granted by the Sanction Order and in particular the claims against the Applicant Company Allen-Vanguard. As well, Underwriters rely on the definition of "Equity Claims" in the Sanction Order and submit that because the provisions of the Order in paragraph 26(ii) bar certain claims against third parties who might claim contribution and indemnity against the restructured company, they should be entitled to the benefit of that provision.

85 The response of the proposed Class Plaintiffs in the Love litigation is that the claim against Underwriters is based on the negligence, fraud or wilful misconduct of Underwriters. It is submitted that Underwriters are not entitled to indemnity as against Allen-Vanguard for the several negligence of Underwriters, either at law or under s. 130 of the *Securities Act*.

86 The proposed Class Plaintiff submits that given the nature of the claim as against Underwriters, Underwriters would never have had a right to an indemnity for the claims asserted in the Love Action and therefore there were no such claims to be released.

87 It is submitted that Underwriters bargained any possible indemnity away by the terms of their contract with Allen-Vanguard in September 2007, and that even if they had the benefit of an indemnity, all that was required for the Plan's success was that Alan-Vanguard be protected from Underwriters, not that Mr. Love's claims against Underwriters be eliminated.

88 Counsel for the Plaintiff in the Love Action also urges that Underwriters did not have the right of indemnity as at the time of the Initial Order, and the Sanction Order bars any indemnity that they might otherwise have had and there is nothing in the language of either Order to preclude the claim of the Class Plaintiff against Underwriters limited to Underwriters' negligence.

89 Finally, it is submitted that since Underwriters did not "bring anything to the table" in respect of the restructuring, there is no basis on which the Court should vary the Sanction Order to now provide the indemnity that the Order fails to provide.

90 In the alternative, the Class Plaintiffs suggest that the Sanction Order be clarified, if necessary, to clearly provide the right of the Class Plaintiff to proceed against Underwriters.

91 In my view, there is a distinction to be made between the claim as against the directors and that against Underwriters, since in the case as against the directors, the parties appear to have bargained that if the claim could be brought under s. 5.1(2), it could proceed. That consideration was known to the parties who negotiated and agreed on the form of the Sanction Order and that was the only claim not otherwise covered by the Release terms.

92 In the case of Underwriters, there was nothing to suggest that any discussion or negotiation took place with respect to specific protection for Underwriters or the allowance of a claim against Underwriters at the time that the Sanction Order was approved.

93 This is another reason why in my view s. 5.1(2) of the CCAA should be read narrowly with respect to pre-filing claims or claims that relate to pre-filing activity.

94 The *Ontario Business Corporations Act*, R.S.O. 1990 c. B. 16 ("OBCA") contains a statutory process for that kind of action and remedy sought by the Class Plaintiffs in both actions. Section 246(1) reads as follows:

> **246.**(1) Subject to subsection (2), a complainant may apply to the court for leave to bring an action in the name and on behalf of a corporation or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate.

95 The Supreme Court of Canada dealt with the issue of collective shareholder claims versus claims that are those of the corporation itself in *Hercules Management Ltd. et al. v. Ernst & Young*, 1997 CanLII 345, [1997] 2 S.C.R. 165. The case involved a claim by shareholders of the corporation against its auditors for an alleged negligence in preparation of financial statements of the corporation. Paragraph 48 of the reasons refers to and adopts a statement of Farley J. in *Roman Corp. v Peat Marwick Thorne* (1992), 11 O.R. (3d) 248 (Gen. Div.) at p. 260.

> As a matter of law the only purpose for which shareholders receive an auditor's report is to provide the shareholders with information for the purpose of overseeing the management and affairs of the corporation and not for the purpose of guiding personal investment decisions or personal speculation with a view to profit.

96 The plaintiffs in *Hercules* asserted reliance on financial statements in monitoring the value of their equity and then due to auditors' negligence, they failed to extract it before the financial demise of the company.

97 The Supreme Court, in assessing the claim, referred at paragraph 59 to the rule in *Foss v. Harbottle*, 67 E.R. 189:

> 59. The rule in *Foss v. Harbottle* provides that individual shareholders have no cause of action in law for any wrongs done to the corporation and that if an action is to be brought in respect of such losses, it must be brought either by the corporation itself (through management) or by way of a derivative action. The legal rationale behind the rule was eloquently set out by the English Court of Appeal in *Pruden-*

tial Assurance Co. v. Newman Industries Ltd. (No. 2), [1982] 1 All E.R. 354, at p. 367, as follows:

> The rule [in *Foss v. Harbottle*] is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting. The law confers on him the right to ensure that the company observes the limitations of its memorandum of association and the right to ensure that other shareholders observe the rule, imposed on them by the articles of association. If it is right that the law has conferred or should in certain restricted circumstances confer further rights on a shareholder the scope and consequences of such further rights require careful consideration.

To these lucid comments, I would respectfully add that the rule is also sound from a policy perspective, inasmuch as it avoids the procedural hassle of a multiplicity of actions.

60. The manner in which the rule in *Foss v. Harbottle*, *supra*, operates with respect to the appellants' claims can thus be demonstrated. As I have already explained, the appellants allege that they were prevented from properly overseeing the management of the audited corporations because the respondents' audit reports painted a misleading picture of their financial state. They allege further that had they known the true situation, they would have intervened to avoid the eventuality of the corporations' going into receivership and the consequent loss of their equity. The difficulty with this submission, I have suggested, is that it fails to recognize that in supervising management, the shareholders must be seen to be acting as a body in respect of the corporation's interests rather than as individuals in respect of their own ends. In a manner of speaking, the shareholders assume what may be seen to be a "managerial role" when, as a collectivity, they oversee the activities of the directors and officers through resolutions adopted at shareholder meetings. In this capacity, they cannot properly be understood to be acting simply as individual holders of equity. Rather, their collective decisions are made in respect of the corporation itself. Any duty owed by auditors in respect of this aspect of the shareholders' functions, then, would be owed not to shareholders *qua* individuals, but rather to all shareholders as a group, acting in the interests of the corporation. And if the decisions taken by the collectivity of shareholders are in respect of the corporation's affairs, then the shareholders' reliance on negligently prepared audit reports in taking such decisions will result in a wrong to the corporation for which the shareholders cannot, as individuals, recover.

61. This line of reasoning finds support in Lord Bridge's comments in *Caparo*, [1980] 1 All E.R. 568, *supra*, at p. 580:

> The shareholders of a company have a collective interest in the company's proper management and in so far as a negligent failure of the auditor to report accurately on the state of the company's finances deprives the shareholders of the opportunity to exercise their powers in general meeting to call the directors to book and to ensure that errors in management are corrected, the shareholders ought to be entitled to a remedy. But in practice no problem arises in this regard since the interest of the shareholders in the proper management of the company's affairs is indistinguishable from the interest of the company itself and any loss suffered by the shareholders ... will be recouped by a claim against the auditor in the name of the company, not by individual shareholders. [Emphasis in Supreme Court decision.]

It is also reflected in the decision of Farley J. in *Roman I*, *supra*, the facts of which were similar to those of the case at bar. In that case, the plaintiff shareholders brought an action against the defendant auditors alleging, *inter alia*, that the defendant's audit reports were negligently prepared. That negligence, the shareholders contended, prevented them from properly overseeing management which, in turn, led to the winding up of the corporation and a loss to the shareholders of their equity therein. Farley J. discussed the rule in *Foss v. Harbottle* and concluded that it operated so as to preclude the shareholders from bringing personal actions based on an alleged inability to supervise the conduct of management.

62. One final point should be made here. Referring to the case of *Goldex Mines Ltd. v. Revill* (1974), 7 O.R. (2d) 216 (C.A.), the appellants submit that where a shareholder has been directly and individually harmed, that shareholder may have a personal cause of action even though the corporation may also have a separate and distinct cause of action. Nothing in the foregoing paragraphs should be understood to detract from this principle. In finding that claims in respect of losses stemming from an alleged inability to oversee or supervise management are really derivative and not personal in nature, I have found only that shareholders cannot raise individual claims in respect of a wrong done to the corporation. Indeed, this is the limit of the rule in *Foss v. Harbottle*. Where, however, a separate and distinct claim (say, in tort) can be raised with respect to a wrong done to a shareholder *qua* individual, a personal action may well lie, assuming that all the requisite elements of a cause of action can be made out.

98 The policy of limiting indeterminate liability as in *Hercules* is consistent with the basis for the limitation of claims under s. 5.1(2) as set out above. In my view the words of s. 5.1(2) do not create a cause of action that would otherwise not exist except by leave of the Court. It simply provides an exception to what otherwise could be included in a release.

99 The release terms contained in the Sanction Order would deprive Underwriters from any claims for contribution or indemnity to which they would otherwise be entitled at law from the Company and its directors and officers should the actions of the Class Plaintiffs proceed.

100 This is just one further reason to support not just what is required for a derivative action but also what is required to be taken into consideration before the Court issues a Sanction Order in this case in effect on consent.

101 As noted above, what has come to be known as a "liquidating" CCAA application can provide problems not just for the parties but the Court itself. The presumption behind the timing of the Application in this case was that if not granted quickly, bankruptcy would have ensued with the inevitable loss of jobs, assets and creditor claims.

102 The Class Plaintiffs are taken to have known of the CCAA proposal as early as September 2009 and could have sought leave to commence a derivative action prior to or during the CCAA process. No such step was taken.

103 I am satisfied that it is appropriate in the circumstances to stay the claims as against Underwriters in negligence and misrepresentation.

104 The Claim against Underwriters also alleges fraud. If the only claim were in fraud and full particulars of alleged fraud were contained in the pleading, the claim might survive since the wording of the Release does not extend to fraud.

105 Apart from fraud, claims in negligence against Underwriters are caught by the terms of the Release. Arguably, the claims are those of the Company that are specifically released.

Variation of the Sanction Order

106 As noted above in reference to the decision in *Canadian Red Cross*, a Sanction Order in addition to being an Order of the Court and subject to the normal rules for variation thereof, represents an agreed contract between the creditors of an insolvent corporation.

107 The Class Plaintiffs in the Laneville action did not seek to lift the stay at the time of the Initial Order. The Class Plaintiff accepted the Release provisions which extend to Underwriters when the Sanctioned Order was granted.

108 Underwriters were released by the terms of the Sanction Order, and the Order, which was not appealed, represents a final determination of the rights of shareholders as against Underwriters.

109 As was mentioned above, in respect of the suggestion of variation of the Sanction Order to permit the claim as against the directors, I conclude that it is not appropriate to vary a Sanction Order after the fact. The reliance that parties place on the finality of a Sanction Order is such that it would only be in extraordinary circumstances of a clear mistake, operative misrepresentation or fraud that would permit variation without re-opening the whole process.

110 In *Extreme Retail (Canada) Inc. v. Bank of Montréal*, [2007] O.J. No. 3304 (Ont. S.J.) [Commercial List], Stinson J. held at paragraph 21 that an Approval and Vesting Order was a final determination of the rights of parties represented in that proceeding. Morawetz J. adopted those comments in *Royal Bank Body Blue Inc.*, [2008] O.J. No. 1628, 2008 CanLII 19227 [Ont. S.C.], to the same effect at paragraphs 19 and 20. In my view the same principle applies to a Sanction Order.

111 I see nothing in the requests of either Underwriters or the Class Plaintiffs that would be appropriate to permit variation of the Sanction Order as each of them have proposed.

112 Should the Class Plaintiff in the Laneville action seek to pursue a claim against Underwriters limited alone in fraud, the action should be permitted to proceed subject to the Plaintiff persuading a judge that such a limited claim should be certified.

Conclusion

113 For the above reasons the motion by the directors will succeed to enjoin the claims as against them in both the Love and Laneville actions. The motion of Underwriters to strike is granted, and motions for variation of the Sanction Order of both Underwriters and the Class Plaintiffs are dismissed. Counsel may make written submissions on the issue of costs.

C.L. CAMPBELL J.

cp/e/qlrxg/qlvxw/qlbdp/qlced/qlhcs

TAB 2

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., Metealfe & 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.

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.

Leave to Appeal

4 Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of argument we encouraged counsel to combine their submissions on both matters.

5 The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and -- given the expedited time-table -- the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as *Re Cineplex Odeon Corp.* (2001), 24 C.B.R. (4th) 21 (Ont. C.A.), and *Re Country Style Food Services* (2002), 158 O.A.C. 30, are met. I would grant leave to appeal.

Appeal

6 For the reasons that follow, however, I would dismiss the appeal.

B. FACTS

The Parties

7 The appellants are holders of ABCP Notes who oppose the Plan. They do so principally on the basis that it requires them to grant releases to third party financial institutions against whom they say they have claims for relief arising out of their purchase of ABCP Notes. Amongst them are an airline, a tour operator, a mining company, a wireless provider, a pharmaceuticals retailer, and several holding companies and energy companies.

8 Each of the appellants has large sums invested in ABCP -- in some cases, hundreds of millions of dollars. Nonetheless, the collective holdings of the appellants -- slightly over $1 billion -- represent only a small fraction of the more than $32 billion of ABCP involved in the restructuring.

9 The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies, and some smaller holders of ABCP product. They participated in the market in a number of different ways.

The ABCP Market

10 Asset Backed Commercial Paper is a sophisticated and hitherto well-accepted financial instrument. It is primarily a form of short-term investment -- usually 30 to 90 days -- typically with a low interest yield only slightly better than that available through other short-term paper from a government or bank. It is said to be "asset backed" because the cash that is used to purchase an ABCP Note is converted into a portfolio of financial assets or other asset interests that in turn provide security for the repayment of the notes.

11 ABCP was often presented by those selling it as a safe investment, somewhat like a guaranteed investment certificate.

12 The Canadian market for ABCP is significant and administratively complex. As of August 2007, investors had placed over $116 billion in Canadian ABCP. Investors range from individual pensioners to large institutional bodies. On the selling and distribution end, numerous players are involved, including chartered banks, investment houses and other financial institutions. Some of these players participated in multiple ways. The Plan in this proceeding relates to approximately $32 billion of non-bank sponsored ABCP the restructuring of which is considered essential to the preservation of the Canadian ABCP market.

13 As I understand it, prior to August 2007 when it was frozen, the ABCP market worked as follows.

14 Various corporations (the "Sponsors") would arrange for entities they control ("Conduits") to make ABCP Notes available to be sold to investors through "Dealers" (banks and other investment dealers). Typically, ABCP was issued by series and sometimes by classes within a series.

15 The cash from the purchase of the ABCP Notes was used to purchase assets which were held by trustees of the Conduits ("Issuer Trustees") and which stood as security for repayment of the notes. Financial institutions that sold or provided the Conduits with the assets that secured the ABCP are known as "Asset Providers". To help ensure that investors would be able to redeem their notes, "Liquidity Providers" agreed to provide funds that could be drawn upon to meet the demands of maturing ABCP Notes in certain circumstances. Most Asset Providers were also Liquidity Providers. Many of these banks and financial institutions were also holders of ABCP Notes ("Noteholders"). The Asset and Liquidity Providers held first charges on the assets.

16 When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The Liquidity Crisis

17 The types of assets and asset interests acquired to "back" the ABCP Notes are varied and complex. They were generally long-term assets such as residential mortgages, credit card receivables, auto loans, cash collateralized debt obligations and derivative investments such as credit default swaps. Their particular characteristics do not matter for the purpose of this appeal, but they shared a common feature that proved to be the Achilles heel of the ABCP market: because of their long-term nature there was an inherent timing mismatch between the cash they generated and the cash needed to repay maturing ABCP Notes.

18 When uncertainty began to spread through the ABCP marketplace in the summer of 2007, investors stopped buying the ABCP product and existing Noteholders ceased to roll over their maturing notes. There was no cash to redeem those notes. Although calls were made on the Liquidity Providers for payment, most of the Liquidity Providers declined to fund the redemption of the notes, arguing that the conditions for liquidity funding had not been met in the circumstances. Hence the "liquidity crisis" in the ABCP market.

19 The crisis was fuelled largely by a lack of transparency in the ABCP scheme. Investors could not tell what assets were backing their notes -- partly because the ABCP Notes were often sold before or at the same time as the assets backing them were acquired; partly because of the sheer complexity of certain of the underlying assets; and partly because of assertions of confidentiality by those involved with the assets. As fears arising from the spreading U.S. sub-prime mortgage crisis mushroomed, investors became increasingly concerned that their ABCP Notes may be supported by those crumbling assets. For the reasons outlined above, however, they were unable to redeem their maturing ABCP Notes.

The Montreal Protocol

20 The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze -- the result of a standstill arrangement orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement -- known as the Montréal Protocol -- the parties committed to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

21 The work of implementing the restructuring fell to the Pan-Canadian Investors Committee, an applicant in the proceeding and respondent in the appeal. The Committee is composed of 17 financial and investment institutions, including chartered banks, credit unions, a pension board, a Crown corporation, and a university board of governors. All 17 members are themselves Noteholders; three of them also participated in the ABCP market in other capacities as well. Between them, they hold about two thirds of the $32 billion of ABCP sought to be restructured in these proceedings.

22 Mr. Crawford was named the Committee's chair. He thus had a unique vantage point on the work of the Committee and the restructuring process as a whole. His lengthy affidavit strongly informed the application judge's understanding of the factual context, and our own. He was not cross-examined and his evidence is unchallenged.

23 Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible, and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the other applicants sought CCAA protection for the ABCP debtors and the approval of a Plan that had

been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian ABCP market.

The Plan

a) Plan Overview

24 Although the ABCP market involves many different players and kinds of assets, each with their own challenges, the committee opted for a single plan. In Mr. Crawford's words, "all of the ABCP suffers from common problems that are best addressed by a common solution." The Plan the Committee developed is highly complex and involves many parties. In its essence, the Plan would convert the Noteholders' paper -- which has been frozen and therefore effectively worthless for many months -- into new, long-term notes that would trade freely, but with a discounted face value. The hope is that a strong secondary market for the notes will emerge in the long run.

25 The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

26 Under the Plan, the vast majority of the assets underlying ABCP would be pooled into two master asset vehicles (MAV1 and MAV2). The pooling is designed to increase the collateral available and thus make the notes more secure.

27 The Plan does not apply to investors holding less than $1 million of notes. However, certain Dealers have agreed to buy the ABCP of those of their customers holding less than the $1-million threshold, and to extend financial assistance to these customers. Principal among these Dealers are National Bank and Canaccord, two of the respondent financial institutions the appellants most object to releasing. The application judge found that these developments appeared to be designed to secure votes in favour of the Plan by various Noteholders, and were apparently successful in doing so. If the Plan is approved, they also provide considerable relief to the many small investors who find themselves unwittingly caught in the ABCP collapse.

b) The Releases

28 This appeal focuses on one specific aspect of the Plan: the comprehensive series of releases of third parties provided for in Article 10.

29 The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers, and other market participants -- in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" -- from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest, and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

30 The application judge found that, in general, the claims for damages include the face value of the Notes, plus interest and additional penalties and damages.

31 The releases, in effect, are part of a *quid pro quo*. Generally speaking, they are designed to compensate various participants in the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets, and provide below-cost financing for margin funding facilities that are designed to make the notes more secure;
b) Sponsors -- who in addition have cooperated with the Investors' Committee throughout the process, including by sharing certain proprietary information -- give up their existing contracts;
c) The Canadian banks provide below-cost financing for the margin funding facility and,
d) Other parties make other contributions under the Plan.

32 According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation."

The CCAA Proceedings to Date

33 On March 17, 2008 the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 25th. The vote was overwhelmingly in support of the Plan -- 96% of the Noteholders voted in favour. At the instance of certain Noteholders, and as requested by the application judge (who has supervised the proceedings from the outset), the Monitor broke down the voting results according to those Noteholders who had worked on or with the Investors' Committee to develop the Plan and those Noteholders who had not. Recalculated on this basis the results remained firmly in favour of the proposed Plan -- 99% of those connected with the development of the Plan voted positively, as did 80% of those Noteholders who had not been involved in its formulation.

34 The vote thus provided the Plan with the "double majority" approval -- a majority of creditors representing two-thirds in value of the claims -- required under s. 6 of the CCAA.

35 Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 and 13. On May 16, the application judge issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

36 The result of this renegotiation was a "fraud carve-out" -- an amendment to the Plan excluding certain fraud claims from the Plan's releases. The carve-out did not encompass all possible claims of fraud, however. It was limited in three key respects. First, it applied only to claims against ABCP

Dealers. Secondly, it applied only to cases involving an express fraudulent misrepresentation made with the intention to induce purchase and in circumstances where the person making the representation knew it to be false. Thirdly, the carve-out limited available damages to the value of the notes, minus any funds distributed as part of the Plan. The appellants argue vigorously that such a limited release respecting fraud claims is unacceptable and should not have been sanctioned by the application judge.

37 A second sanction hearing -- this time involving the amended Plan (with the fraud carve-out) -- was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis both that he had jurisdiction to sanction a Plan calling for third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

38 The appellants attack both of these determinations.

C. LAW AND ANALYSIS

39 There are two principal questions for determination on this appeal:

1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its directors?
2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it?

(1) Legal Authority for the Releases

40 The standard of review on this first issue -- whether, as a matter of law, a CCAA plan may contain third-party releases -- is correctness.

41 The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company.[1] The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

a) on a proper interpretation, the CCAA does not permit such releases;
b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;
c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the *Constitution Act*, 1867;
d) the releases are invalid under Quebec rules of public order; and because
e) the prevailing jurisprudence supports these conclusions.

42 I would not give effect to any of these submissions.

Interpretation, "Gap Filling" and Inherent Jurisdiction

43 On a proper interpretation, in my view, the CCAA permits the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of (a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on all creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entrée to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

44 The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: *Canadian Red Cross Society (Re)* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.). As Farley J. noted in *Re Dylex Ltd.* (1995), 31 C.B.R. (3d) 106 at 111 (Ont. Gen. Div.), "[t]he history of CCAA law has been an evolution of judicial interpretation."

45 Much has been said, however, about the "evolution of judicial interpretation" and there is some controversy over both the source and scope of that authority. Is the source of the court's authority statutory, discerned solely through application of the principles of statutory interpretation, for example? Or does it rest in the court's ability to "fill in the gaps" in legislation? Or in the court's inherent jurisdiction?

46 These issues have recently been canvassed by the Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters,"[2] and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools -- statutory interpretation, gap-filling, discretion and inherent jurisdiction -- it is not necessary in my view to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

47 The Supreme Court of Canada has affirmed generally -- and in the insolvency context particularly -- that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21, quoting E.A. Driedger, *Construction of Statutes*, 2nd ed.

(Toronto: Butterworths, 1983); *Bell Expressvu Ltd. Partnership v. R.*, [2002] 2 S.C.R. 559 at para. 26.

48 More broadly, I believe that the proper approach to the judicial interpretation and application of statutes -- particularly those like the CCAA that are skeletal in nature -- is succinctly and accurately summarized by Jackson and Sarra in their recent article, *supra*, at p. 56:

> The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in *Québec* as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

49 I adopt these principles.

50 The remedial purpose of the CCAA -- as its title affirms -- is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1990), 4 C.B.R. (3d) 311 at 318 (B.C.C.A.), Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

> Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

51 The CCAA was enacted in 1933 and was necessary -- as the then Secretary of State noted in introducing the Bill on First Reading -- "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, *House of Commons Debates (Hansard)* (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its

creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, *Elan Corp. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (C.A.), *per* Doherty J.A. in dissent; *Re Skydome Corp.* (1998), 16 C.B.R. (4th) 125 (Ont. Gen. Div.); *Re Anvil Range Mining Corp.* (1998), 3 C.B.R. (4th) 93 (Ont. Gen. Div.).

52 In this respect, I agree with the following statement of Doherty J.A. in *Elan, supra,* at pp. 306-307:

> ... [T]he Act was designed to serve a "broad constituency of investors, creditors and employees".[3] Because of that "broad constituency" the court must, when considering applications brought under the Act, *have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.* [Emphasis added.]

Application of the Principles of Interpretation

53 An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the application judge pointed out, the restructuring underpins the financial viability of the Canadian ABCP market itself.

54 The appellants argue that the application judge erred in taking this approach and in treating the Plan and the proceedings as an attempt to restructure a financial market (the ABCP market) rather than simply the affairs between the debtor corporations who caused the ABCP Notes to be issued and their creditors. The Act is designed, they say, only to effect reorganizations between a corporate debtor and its creditors and not to attempt to restructure entire marketplaces.

55 This perspective is flawed in at least two respects, however, in my opinion. First, it reflects a view of the purpose and objects of the CCAA that is too narrow. Secondly, it overlooks the reality of the ABCP marketplace and the context of the restructuring in question here. It may be true that, in their capacity as ABCP *Dealers*, the releasee financial institutions are "third-parties" to the restructuring in the sense that they are not creditors of the debtor corporations. However, in their capacities as *Asset Providers* and *Liquidity Providers*, they are not only creditors but they are prior secured creditors to the Noteholders. Furthermore -- as the application judge found -- in these latter capacities they are making significant contributions to the restructuring by "foregoing immediate rights to assets and ... providing real and tangible input for the preservation and enhancement of the Notes" (para. 76). In this context, therefore, the application judge's remark at para. 50 that the restructuring "involves the commitment and participation of all parties" in the ABCP market makes sense, as do his earlier comments at paras. 48-49:

> Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.
>
> In these circumstances, *it is unduly technical to classify the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as*

> *being those of third party creditors*, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring. [Emphasis added.]

56 The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper ..." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor and creditors. His focus was on *the effect* of the restructuring, a perfectly permissible perspective, given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal."

57 I agree. I see no error on the part of the application judge in approaching the fairness assessment or the interpretation issue with these considerations in mind. They provide the context in which the purpose, objects and scheme of the CCAA are to be considered.

The Statutory Wording

58 Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in:

a) the skeletal nature of the CCAA;
b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in
c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".

Therein lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring.

59 Sections 4 and 6 of the CCAA state:

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
> 6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4

> and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (*a*) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (*b*) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Compromise or Arrangement

60 While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada*, loose-leaf, 3rd ed., vol. 4 (Toronto: Thomson Carswell) at 10A-12.2, N para. 10. It has been said to be "a very wide and indefinite [word]": *Re Refund of Dues under Timber Regulations*, [1935] A.C. 184 at 197 (P.C.), affirming S.C.C. [1933] S.C.R. 616. See also, *Re Guardian Assur. Co.*, [1917] 1 Ch. 431 at 448, 450; *Re T&N Ltd. and Others (No. 3)*, [2007] 1 All E.R. 851 (Ch.).

61 The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement." I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.

62 A proposal under the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3 (the "BIA") is a contract: *Employers' Liability Assurance Corp. Ltd. v. Ideal Petroleum* (1959) Ltd. [1978] 1 S.C.R. 230 at 239; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688 at para. 11 (C.A.). In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes, and therefore is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See *Re Air Canada* (2004), 2 C.B.R. (5th) 4 at para. 6 (Ont. S.C.J.); *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 at 518 (Gen. Div.).

63 There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan -- in-

cluding the provision for releases -- becomes binding on all creditors (including the dissenting minority).

64 *Re T&N Ltd. and Others, supra,* is instructive in this regard. It is a rare example of a court focussing on and examining the meaning and breadth of the term "arrangement". T&N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies applied for protection under s. 425 of the U.K. *Companies Act 1985*, a provision virtually identical to the scheme of the CCAA -- including the concepts of compromise or arrangement.[4]

65 T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the "EL claimants") would assert their claims. In return, T&N's former employees and dependants (the "EL claimants") agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

66 Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The Court rejected this argument. Richards J. adopted previous jurisprudence -- cited earlier in these reasons -- to the effect that the word "arrangement" has a very broad meaning and that, 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 all 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] and 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 con-

tractual 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.
>
> 54 In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the *CCAA* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of *The 2000 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize

> officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. [Footnote omitted.]

85 Once again, this statement must be assessed in context. Whether Justice Farley had the authority in the earlier Algoma CCAA proceedings to sanction a plan that included third party releases was not under consideration at all. What the Court was determining in *NBD Bank* was whether the release extended by its terms to protect a third party. In fact, on its face, it does not appear to do so. Justice Rosenberg concluded only that not allowing Mr. Melville to rely upon the release did not subvert the purpose of the CCAA. As the application judge here observed, "there is little factual similarity in *NBD* to the facts now before the Court" (para. 71). Contrary to the facts of this case, in *NBD Bank* the creditors had not agreed to grant a release to officers; they had not voted on such a release and the court had not assessed the fairness and reasonableness of such a release as a term of a complex arrangement involving significant contributions by the beneficiaries of the release -- as is the situation here. Thus, *NBD Bank* is of little assistance in determining whether the court has authority to sanction a plan that calls for third party releases.

86 The appellants also rely upon the decision of this Court in *Stelco I*. There, the Court was dealing with the scope of the CCAA in connection with a dispute over what were called the "Turnover Payments". Under an inter-creditor agreement one group of creditors had subordinated their rights to another group and agreed to hold in trust and "turn over" any proceeds received from Stelco until the senior group was paid in full. On a disputed classification motion, the Subordinated Debt Holders argued that they should be in a separate class from the Senior Debt Holders. Farley J. refused to make such an order in the court below, stating:

> [Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves *and not directly involving the company*. [Citations omitted; emphasis added.]
>
> See *Re Stelco Inc.* (2005), 15 C.B.R. (5th) 297 (Ont. S.C.J.) at para. 7.

87 This Court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the Court were quite different from those raised on this appeal.

88 Indeed, the Stelco plan, as sanctioned, included third party releases (albeit uncontested ones). This Court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and therefore that they were entitled to a separate civil action to determine their rights under the agreement: *Re Stelco Inc.*, (2006), 21 C.B.R. (5th) 157 (Ont. C.A.) ("*Stelco II*"). The Court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The Court said (para. 11):

> In [*Stelco I*] -- the classification case -- the court observed that it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company ... *[H]owever, the present case is not simply an inter-creditor dispute that does not involve the debtor company; it is a dispute that is inextricably connected to the restructuring process*. [Emphasis added.]

89 The approach I would take to the disposition of this appeal is consistent with that view. As I have noted, the third party releases here are very closely connected to the ABCP restructuring process.

90 Some of the appellants -- particularly those represented by Mr. Woods -- rely heavily upon the decision of the Quebec Court of Appeal in *Michaud v. Steinberg, supra*. They say that it is determinative of the release issue. In *Steinberg*, the Court held that the CCAA, as worded at the time, did not permit the release of directors of the debtor corporation and that third-party releases were not within the purview of the Act. Deschamps J.A. (as she then was) said (paras. 42, 54 and 58 -- English translation):

> [42] Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.
>
> ...
>
> [54] The Act offers the respondent a way to arrive at a compromise with is 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.
>
> ...
>
> [58] The [CCAA] 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 [that is, including the releases of the directors].

91 Justices Vallerand and Delisle, in separate judgments, agreed. Justice Vallerand summarized his view of the consequences of extending the scope of the CCAA to third party releases in this fashion (para. 7):

> In short, the Act will have become the Companies' *and Their Officers and Employees* Creditors Arrangement Act -- an awful mess -- and likely not attain its purpose, which is to enable the company to survive in the face of *its* creditors and through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of operation, contrary to its purposes and, for this reason, is to be banned.

92 Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature -- they released directors from all claims, including those that were altogether unrelated to their corporate duties with the debtor company -- rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para. 90 he said:

> The CCAA is drafted in general terms. It does not specify, among other things, what must be understood by "compromise or arrangement". However, it may be inferred from the purpose of this [A]ct that these terms *encompass all that should enable the person who has recourse to it to fully dispose of his debts*, both those that exist on the date when he has recourse to the statute and *those contingent on the insolvency in which he finds himself* ... [Emphasis added.]

93 The decision of the Court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency in which he finds himself," however. On occasion such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in *Steinberg*, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analysing the Act -- an approach inconsistent with the jurisprudence referred to above.

94 Finally, the majority in *Steinberg* seems to have proceeded on the basis that the CCAA cannot interfere with civil or property rights under Quebec law. Mr. Woods advanced this argument before this Court in his factum, but did not press it in oral argument. Indeed, he conceded that if the Act encompasses the authority to sanction a plan containing third-party releases -- as I have concluded it does -- the provisions of the CCAA, as valid federal insolvency legislation, are paramount over provincial legislation. I shall return to the constitutional issues raised by the appellants later in these reasons.

95 Accordingly, to the extent *Steinberg* stands for the proposition that the court does not have authority under the CCAA to sanction a plan that incorporates third-party releases, I do not believe it to be a correct statement of the law and I respectfully decline to follow it. The modern approach to interpretation of the Act in accordance with its nature and purpose militates against a narrow interpretation and towards one that facilitates and encourages compromises and arrangements. Had the majority in *Steinberg* considered the broad nature of the terms "compromise" and "arrangement" and the jurisprudence I have referred to above, they might well have come to a different conclusion.

The 1997 Amendments

96 *Steinberg* led to amendments to the CCAA, however. In 1997, s. 5.1 was added, dealing specifically with releases pertaining to directors of the debtor company. It states:

> 5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> Exception
>
> (2) A provision for the compromise of claims against directors may not include claims that
>
> (*a*) relate to contractual rights of one or more creditors; or
>
> (*b*) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> Powers of court
>
> (3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.
>
> Resignation or removal of directors
>
> (4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.
>
> 1997, c. 12, s. 122.

97 Perhaps the appellants' strongest argument is that these amendments confirm a prior lack of authority in the court to sanction a plan including third party releases. If the power existed, why would Parliament feel it necessary to add an amendment specifically permitting such releases (subject to the exceptions indicated) in favour of directors? *Expressio unius est exclusio alterius*, is the Latin maxim sometimes relied on to articulate the principle of interpretation implied in that question: to express or include one thing implies the exclusion of the other.

98 The maxim is not helpful in these circumstances, however. The reality is that there *may* be another explanation why Parliament acted as it did. As one commentator has noted:[8]

> Far from being a rule, [the maxim *expressio unius*] is not even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes its does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore there is not even a mild presumption

here. Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.

99 As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in *Steinberg*. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring, rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden and Morawetz, vol. 1, *supra*, at 2-144, Es.11A; *Le Royal Penfield Inc. (Syndic de)*, [2003] R.J.Q. 2157 at paras. 44-46 (C.S.).

100 Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The Deprivation of Proprietary Rights

101 Mr. Shapray very effectively led the appellants' argument that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights -- including the right to bring an action -- in the absence of a clear indication of legislative intention to that effect: *Halsbury's Laws of England*, 4th ed. reissue, vol. 44 (1) (London: Butterworths, 1995) at paras. 1438, 1464 and 1467; Driedger, 2nd ed., *supra,* at 183; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Markham: Butterworths, 2002) at 399. I accept the importance of this principle. For the reasons I have explained, however, I am satisfied that Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself. I would therefore not give effect to the appellants' submissions in this regard.

The Division of Powers and Paramountcy

102 Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the *Constitution Act, 1867*, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the *Civil Code of Quebec*.

103 I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: *Reference re: Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659. As the Supreme Court confirmed in that case (p. 661), citing Viscount Cave L.C. in *Royal Bank of Canada v. Larue* [1928] A.C. 187, "the exclusive legislative au-

thority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament." Chief Justice Duff elaborated:

> Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

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 all 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

121 For the foregoing reasons, I would grant leave to appeal from the decision of Justice Campbell, but dismiss the appeal.

R.A. BLAIR J.A.
J.I. LASKIN J.A.:-- I agree.
E.A. CRONK J.A.:-- I agree.

* * * * *

SCHEDULE "A" - CONDUITS

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

* * * * *

SCHEDULE "B" - APPLICANTS

ATB Financial

Caisse de Dépôt et Placement du Québec

Canaccord Capital Corporation

Canada Post Corporation

Credit Union Central of Alberta Limited

Credit Union Central of British Columbia

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank Financial Inc./National Bank of Canada

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

* * * * *

SCHEDULE "A" - COUNSEL

1) Benjamin Zarnett and Frederick L. Myers for the Pan-Canadian Investors Committee.
2) Aubrey E. Kauffman and Stuart Brotman for 4446372 Canada Inc. and 6932819 Canada Inc.
3) Peter F.C. Howard and Samaneh Hosseini for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG.
4) Kenneth T. Rosenberg, Lily Harmer and Max Starnino for Jura Energy Corporation and Redcorp Ventures Ltd.
5) Craig J. Hill and Sam P. Rappos for the Monitors (ABCP Appeals).
6) Jeffrey C. Carhart and Joseph Marin for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor.
7) Mario J. Forte for Caisse de Dépôt et Placement du Québec.
8) John B. Laskin for National Bank Financial Inc. and National Bank of Canada.
9) Thomas McRae and Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al).
10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.
11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank.

12) Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees.
13) Usman Sheikh for Coventree Capital Inc.
14) Allan Sternberg and Sam R. Sasso for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.
15) Neil C. Saxe for Dominion Bond Rating Service.
16) James A. Woods, Sebastien Richemont and Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP.
17) Scott A. Turner for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.
18) R. Graham Phoenix for 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., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

cp/e/ln/qlkxl/qllkb/qlltl/qlrxg/qlhcs/qlcas/qlhcs/qlhcs

1 Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.

2 Justice Georgina R. Jackson and Dr. Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., *Annual Review of Insolvency Law, 2007* (Vancouver: Thomson Carswell, 2007).

3 Citing Gibbs J.A. in *Chef Ready Foods, supra,* at pp. 319-320.

4 The Legislative Debates at the time the CCAA was introduced in Parliament in April 1933 make it clear that the CCAA is patterned after the predecessor provisions of s. 425 of the *Companies Act 1985* (U.K.): see *House of Commons Debates (Hansard), supra.*

5 See *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 192; *Ontario Business Corporations Act,* R.S.O. 1990, c. B.16, s. 182.

6 A majority in number representing two-thirds in value of the creditors (s. 6).

7 *Steinberg* was originally reported in French: [1993] R.J.Q. 1684 (C.A.). All paragraph references to *Steinberg* in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055.

8 Reed Dickerson, *The Interpretation and Application of Statutes* (1975) at pp. 234-235, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at 621.

Case Name:

Jean Coutu Group (PJC) Inc. v. Metcalfe & Mansfield Alternative Investments II Corp.

Jean Coutu Group (PJC) Inc. et al.
v.
Metcalfe & Mansfield Alternative Investments II Corp. and Other Trustees of Asset Backed Commercial Paper Conduits Listed in Schedule "A" to this application et al.

[2008] S.C.C.A. No. 337

[2008] C.S.C.R. no 337

File No.: 32765

Supreme Court of Canada

Record created: September 2, 2008.
Record updated: September 19, 2008.

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Status:

Application for leave to appeal dismissed without costs (without reasons) September 19, 2008.

Catchwords:

Bankruptcy and insolvency law -- Legislation -- Interpretation -- Inclusion of third party releases in plan of compromise and arrangement -- Plan dealt with liquidity crisis threatening Canadian market in asset backed commercial paper -- Plan sanctioned by court -- Whether Plan should not have been sanctioned -- Companies' Creditors Arrangement Act, ss. 4, 6.

Case Summary:

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 Cana-

dian 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 Respondent Pan-Canadian Investors Committee was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that formed the subject matter of these proceedings.

The Plan was sanctioned by Campbell J. on June 5, 2008.

Certain creditors who opposed the Plan appealed Campbell J.'s sanction order. The issue raised was whether 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. Those creditors also argued that, if the answer to that question is yes, the application judge erred in holding that this Plan, with its particular releases, was fair and reasonable and therefore erred in sanctioning it under the Companies' Creditors Arrangement Act ("CCAA").

The Court of Appeal, however, held that 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 application judge's jurisdiction and authority to sanction the Plan in this case, including the contested third-party releases contained in it. The Plan was fair and reasonable in all the circumstances.

Counsel:

James A. Woods (Woods & Partners), for Jean Coutu Group (PJC) Inc., Services hypothécaires La Patrimoniale inc., Tecsys Inc., Petrifond Foundation Company Limited, Petrifond Foundation Midwest Limited and VibroSystM Inc., Domtar Inc., Domtar Pulp and Paper Products Inc., Société générale de financement du Québec, Jazz Air LP, Giro Inc./Le Groupe en informatique et recherche opérationelle, R.G.R. Sportswear Inc., 131519 Canada Inc.

Kenneth Rosenberg (Paliare, Roland, Rosenberg, Rothstein, LLP), for Jura Energy Corporation.

Howard Shapray, Q.C. (Shapray, Cramer & Associates), for Ivanhoe Mines Ltd.

Scott A. Turner (Burns, Fitzpatrick, Rogers & Schwartz LLP), for Webtech Wireless Inc.and Wynn Capital Corporation Inc.

Allan Sternberg (Ricketts, Harris LLP), for Hy Bloom Inc. and Cardacian Mortgage Services, Inc.

Peter T. Linder, Q.C. (Peacock Linder & Halt), for Sabre Energy Ltd.

Benjamin Zarnett (Goodmans LLP), for Investors Represented on the Pan-Canadian Investors Committee for Third-Party Structured Asset-Backed Commercial Paper Listed in Schedule "B" hereto.

Graham Phoenix (Fasken Martineau DuMoulin LLP), for 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., Metcalfe & Mansfield Alternative Investments II Corp. and Other Trustees of Asset Backed Commercial Paper Conduits Listed in Schedule "A" hereto.

Aubrey E. Kauffman (Fasken Martineau DuMoulin LLP), for 4446372 Canada Inc., 6932819 Canada Inc., Trustees of the Conduits listed in Schedule "A" Hereto.

Peter F.C. Howard (Stikeman Elliott LLP), for Bank of America N.A., Citibank N.A., Citibank Canada in its capacity as a Credit Derivative Swap Counterparty and not in any other capacity, Deutsche Bank A.G., HSBC Bank Canada, HSBC Bank USA, National Association, Merrill Lynch International, Merrill Lynch Capital Services Inc., Swiss Re Financial Products Corporation, UBS AG.

Craig J. Hill (orden Ladner Gervais LLP), for Ernst & Young Inc. in its capacity as Monitor pursuant to the Initial Order.

Jeffrey C. Carhart (Miller Thomson LLP), for Ad Hoc Committee of Noteholders.

Arthur O. Jacques (Sibley Righton LLP), for Ad Hoc Committee of Retail Noteholders.

Kevin McElcheran (McCarthy Tétrault LLP), for Bank of Montreal, Canadian Imperial Bank of Commerce, Royal Bank of Canada, Bank of Nova Scotia, Toronto-Dominion Bank.

Jeffrey S. Leon (Bnnett Jones LLP), for CIBC Mellon Trust Company, Computershare Trust Company of Canada, BNY Trust Company of Canada.

Chronology:

1. First application for leave to appeal [by Jean Coutu Group (PJC) Inc.];
Second application for leave to appeal [by Hy Bloom Inc. and Cardacian Mortgage Services, Inc.];
Third application for leave to appeal [by Sabre Energy Ltd.];
Fourth application for leave to appeal [by Ivanhoe Mines Ltd.];
Fifth application for leave to appeal [by Jura Energy Corporation];
Sixth application for leave to appeal [by Webtech Wireless Inc.and Wynn Capital Corporation Inc.]:

   FILED: September 2, 2008. S.C.C. Bulletin, 2008, p. 1260.
   SUBMITTED TO THE COURT: September 8, 2008. S.C.C. Bulletin, 2008, p. 1285.
   DISMISSED WITHOUT COSTS: September 19, 2008 (without reasons). S.C.C. Bulletin, 2008, p. 1330.
   Before: LeBel, Fish and Charron JJ.

   The motion to expedite the applications for leave to appeal brought by the Respondents on August 27, 2008, is granted. The applications for leave to appeal and other relief sought from the judgment of the Court of Appeal for Ontario, Number C48969 (M36489), 2008 ONCA 587, dated August 18, 2008, are dismissed without costs.

Procedural History:

Judgment at first instance: Plan sanctioned.
Ontario Superior Court of Justice, Campbell J., June 5, 2008.

Judgment on appeal: Appeal dismissed.
Court of Appeal for Ontario, Laskin, Cronk and Blair JJ.A., August 18, 2008.
Neutral citation: 2008 ONCA 587; [2008] O.J. No. 3164.

e/qlhbb

TAB 3

1998 CarswellOnt 1548, 20 C.P.C. (4th) 346

C

1998 CarswellOnt 1548, 20 C.P.C. (4th) 346

Attard v. Maple Leaf Foods Inc.

Frank Attard and Michael Svab and the Applicants named in the Schedule "A" to the Notice of Motion herein, Applicants and Maple Leaf Foods Inc. and Canada Trust Company, Respondents

Kip Connolly, Stan Henderson and Tim Hosford, on their own Behalf and on Behalf of all Members of the United Food and Commercial Workers International Union who are or were Members or Beneficiaries of the Maple Leaf Foods Inc. Employees Retirement Plan 100, Applicants and Maple Leaf Foods Inc., Respondent

Ontario Court of Justice, General Division [Commercial List]

Spence J.

Heard: April 6, 1998
Judgment: April 16, 1998
Docket: 98-BK-001240, RE-7264/96, B362/96

Counsel: *Paul B. Fox* and *Fernando Souza*, for the Applicants Frank Attard et al.

Daniel J. Shields and *R.V. Bauslaugh*, for the Respondent Maple Leaf.

John R. Evans, for the Applicants Kip Connolly et al.

Subject: Labour and Employment; Civil Practice and Procedure

Practice --- Parties — Representative or class actions — Procedural requirements

Union group made application to court to determine entitlement to pension surplus — Members of union brought application seeking order allowing them to be represented by chosen representative on entitlement application — Application was granted — Union member who would otherwise have standing in court does not lose right because of union membership — Union members would have had standing to come before court on entitlement issue — Union group and union members may have different interests and may choose different approaches to settlement and litigation strategy issues — Principles of judicial economy did not dictate that members would have to accept determination of union group on such matters.

Cases considered by *Spence J.*:

Dayco (Canada) Ltd. v. C.A.W., 14 Admin. L.R. (2d) 1, (sub nom. *Dayco (Canada) Ltd. v. CAW-Canada)*

[1993] 2 S.C.R. 230, (sub nom. *Dayco (Canada) Ltd. v. C.A.W.-Canada)* 102 D.L.R. (4th) 609, (sub nom. *Dayco v. C.A.W.)* 93 C.L.L.C. 14,032, 63 O.A.C. 1, 152 N.R. 1, 13 O.R. (3d) 164 (note) (S.C.C.) — applied

Pilon v. International Minerals & Chemical Corp. (Canada) (1996), 31 O.R. (3d) 210, 141 D.L.R. (4th) 72, 97 O.A.C. 286 (Ont. C.A.) — applied

Weber v. Ontario Hydro (1995), 95 C.L.L.C. 210-027, 12 C.C.E.L. (2d) 1, 24 C.C.L.T. (2d) 217, 30 Admin. L.R. (2d) 1, 24 O.R. (3d) 358 (note), 125 D.L.R. (4th) 583, 183 N.R. 241, 30 C.R.R. (2d) 1, 82 O.A.C. 321, [1995] 2 S.C.R. 929 (S.C.C.) — applied

Statutes considered:

Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A

Generally — referred to

Rules considered:

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

R. 10 — considered

APPLICATION for representation order on application for entitlement to pension surplus.

***Spence J.*:**

1 The Union Group seeks a representation order under Rule 10 with respect to the present application. The issue in the application concerns the entitlement to the surplus in the pension plan. The standing of the Union to seek such an order is based on its status in respect of the collective agreement with the respondent employer, Maple Leaf Foods Inc. which has maintained the pension plan. The present dispute is only at as to whether the representation order in favour of the Union should have the effect of excluding the Attard Group from having its own separate representative as well.

2 The Attard Group seeks only to have Mr. Attard represent those who have provided them with written authorizations to do so. It appears there are authorizations from around 600 plan members. This seems like a large enough number to satisfy the test in Rule 10, which refers to persons who cannot readily be served.

3 It is argued that the Union Group is the only proper representative because the issues on the application arise out of the Collective Agreement and the statutory regime for labour relations gives exclusive authority to the Union on behalf of the members in respect of such matters. That would be the case where the matter is to be dealt with pursuant to the grievance arbitration procedures under the *Ontario Labour Relations Act*. Here, however, the Union Group has made an application to the court to determine the entitlement to the pension surplus. It is not suggested that the entitlement issues to be decided involve or fall within the jurisdiction of the O.L.R.B. or that they involve the interpretation or application of the *Labour Relations Act*. The entitlement issues could be said to relate to the collective agreement in that the pension plan has apparently been the subject of collective bargaining. The pension plan has been in existence since about 1948 and the references in the affidavit material to collective bargaining do not refer to such bargaining occurring before the year 1972, so the plan may antedate the agreement. Of greater importance, there seems to be no contention that the surplus entitlement matters should be before the O.L.R.B. That is understandable, since it appears they involve issues of trust law which are subject to the jurisdiction of this court.

Counsel referred to the cases of *Dayco* (S.C.C. 1993); [*Dayco (Canada) Ltd. v. C.A.W.* (1993), 14 Admin. L.R. (2d) 1 (S.C.C.)] *Weber* (S.C.C. 1995) [*Weber v. Ontario Hydro* (1995), 95 C.L.L.C. 210-027 (S.C.C.)] and *Pilon* (Ont. C.A. 1996) [*Pilon v. International Minerals & Chemical Corp. (Canada)* (1996), 31 O.R. (3d) 210 (Ont. C.A.)]. In view of these cases, it is clear that a Union member may not come to court on a matter relating to the collective agreement where, because of that relationship to the collective agreement, the court has no jurisdiction to hear the matter. The situation in the present case is quite different. The Union Group itself has invoked the jurisdiction of the court on the very issue which the Attard Group also seeks to bring to court. There is no suggestion that the court lacks jurisdiction on the entitlement issue. I do not understand the cases to say that where the court's jurisdiction is properly invoked, a union member who would otherwise have standing loses that right because of union membership.

4 The members of the Attard Group apparently would have standing to come before the court on the entitlement issue. They have already commenced proceedings. They assert they are beneficiaries of the pension surplus. They should be able to advance that claim through their chosen representative unless there is some principle on which the Union Group should instead be recognized as their representative, against their wishes. It was submitted that there is a principle of judicial economy that should operate here. Such a principle warrants consolidating the two proceedings, that of the Union Group and the Attard Group, and that should be done. But no reason is evident why the Attard Group should be denied their own representative and as a related matter, counsel of their own choice. I note also (although I do not think this consideration is determinative) that the Attard Group seeks to dispute the contribution holidays taken by the company, and that issue is apparently not raised by the Union Group. It is quite possible that the Union Group and the Attard Group would have different interests and choose different approaches to settlement prospects and other litigation strategy issues. A principle of judicial economy does not dictate that the Attard Group should have to accept the determination of the Union Group on these matters.

5 For these reasons, an order should go that the Union Group is to be appointed the representative for all of the pension plan members other than the persons who have signed written authorizations in favour of the Attard Group proposal and Mr. Attard is to be appointed the representative for those persons.

6 The Trustee submitted that it is premature at this stage to order costs, since it is not yet clear whether there is any entitlement to call for any payment of surplus from the plan and the interests of plan members could therefore be adversely affected by any order for payment of costs out of the plan. The court was advised that the Union Group would not seek costs at this stage. Subject to written submissions from the Attard Group within 15 days, costs will be reserved to the court hearing the matter.

Application granted.

END OF DOCUMENT

TAB 4

1986 CarswellOnt 2124, 17 O.A.C. 127, 57 O.R. (2d) 77

1986 CarswellOnt 2124, 17 O.A.C. 127, 57 O.R. (2d) 77

Bruce (Township) v. Thornburn

The Corporation of the Township of Bruce, Plaintiff and Alex Thornburn, A. Ernest Greer, Kenneth B. MacLean, Gary McGillivary, Harry Schildroth, The Corporation of the Township of Kincardine, The Corporation of the Township of Huron, The Corporation of the Township of Greenock, The Corporation of the Township of Elderslie, The Corporation of the Village of Tiverton, The Corporation of the Village of Paisley, The Corporation of the Town of Port Elgin, The Corporation of the Town of Kincardine, The Corporation of the Township of Arran, The Corporation of of the Township of Brant and The Corporation of the Township of Saugeen as representing the inhabitants and ratepayers of the said municipalities and John Bryce, H. Winston Shoemaker, Hardie Young and Ernie Young as representing the unascertained class of persons who may be entitled to be recognized as "subscribers" of the Bruce Municipal Telephone System, Defendants

Ontario Superior Court of Justice (Divisional Court)

Southey, White, Bowlby

Heard: July 7-8, 1986
Judgment: September 5, 1986
Docket: 934/84

Counsel: *T. Kerzner, Q.C., R. D. Cheeseman,* for the appellants (the defendants Thornburn, Greer, MacLean, McGillivray and Schildroth)

S. N. Lederman, Q.C., for the respondents, Bryce, Shoemaker, Hardie Young and Ernie Young, (added defendants)

B. H. Kellock, Q.C., for the respondent (plaintiff), Township of Bruce

L. D. Ryder, for the respondent (defendant), Town of Port Elgin

Subject: Civil Practice and Procedure

Civil practice and procedure --- Parties — Representative or class proceedings not under class proceedings legislation — Defendant authorized by court to defend — Adding or substituting defendants.

Civil practice and procedure --- Costs — Particular orders as to costs — General principles.

Telephone system restricting admission of subseribers in 1975 -- Subscribers subsequently deciding to sell system -- Landowners excluded by 1975 restrictions claiming right to be considered subscribers -- Added as parties by High

Court Judge to represent "unascertained class of persons" possibly entitled to be recognized as subscribers -- Plaintiff's appeal allowed -- Class too broad for representation order -- Possibility of conflict of interest with other members of group.

Telephone system freezing subscribers in 1975 -- Subscribers subsequently deciding to sell system -- Landowner excluded by 1975 restrictions elaiming right to be considered subscribers -- Added as representative parties -- Costs ordered to be paid regardless of outcome by plaintiff -- Plaintiff's appeal allowed -- Subscribers similar neither to trustees nor to shareholders in derivative action -- No ground for making exception to rule of costs following cause -- Order as to costs to be reserved for trial Judge.

Cases considered by *Southey J.*:

Beddoe, Re (1893), [1893] 1 Ch. 547, 62 L.J. Ch. 233 (Eng. Ch. Div.) — distinguished

Hamilton-Wentworth (Regional Municipality) v. Hamilton-Wentworth Save the Valley Committee Inc. (1985), 51 O.R. (2d) 23, 15 Admin. L.R. 86, 2 C.P.C. (2d) 117, 19 D.L.R. (4th) 356, 11 O.A.C. 8, 17 O.M.B.R. 411, 1985 CarswellOnt 386 (Ont. Div. Ct.) — followed

Turner v. Mailhot (1985), 50 O.R. (2d) 561, 28 B.L.R. 222, 1985 CarswellOnt 136 (Ont. H.C.) — considered

Wallersteiner v. Moir (No. 2) (1975), [1975] 1 All E.R. 849, [1975] 1 Q.B. 373, [1975] 2 W.L.R. 389, 119 Sol. Jo. 97 (Eng. C.A.) — considered

Statutes considered:

Business Corporations Act, 1982, S.O. 1982, c. 4

s. 246(d) — referred to

Courts of Justice Act, 1984, S.O. 1984, c. 11

s. 141(1) — considered

Telephone Act, R.S.O. 1980, c. 496

Generally — considered

s. 1(i) "subsccriber" — referred to

s. 47(1) — referred to

s. 47(3) — referred to

s. 47(5)(b) — referred to

s. 47(6) — considered

Rules considered:

1986 CarswellOnt 2124, 17 O.A.C. 127, 57 O.R. (2d) 77

Rules of Civil Procedure, O. Reg. 560/84

R. 10.01 — considered

R. 57.01(2) — considered

Southey J.:

1 This is an appeal from an Order of The Honourable Judge McKay, dated December 12, 1985, sitting as a local judge of the High Court of Justice for Ontario at Walkerton, in which he added the respondents John Bryce, H. Winston Shoemaker, Hardie Young and Ernie Young (hereinafter collectively called the "Bryce group"), as defendants in this action to represent "the unascertained class of persons who may be entitled to be recognized as 'subscribers' of the Bruce Municipal Telephone System". The local judge also ordered that the added defendants should have their reasonable incurred and future costs of this action on a solicitor and a client basis to be paid by the Bruce Municipal Telephone System upon final judgment in this action.

2 The action was brought by the Township of Bruce for a declaration identifying the "subscribers" of the Bruce Municipal Telephone System (the "BMTS" or the "System"), under the Ontario *Telephone Act*, or declaring that the subscribers of the BMTS cannot be ascertained. The issues on the appeal are:

1. Whether the local judge was right in adding anyone to represent the class of persons defined by him; and

2. Whether the local judge was right in ordering that the reasonable incurred and future costs of the Bryce group should be paid by the BMTS upon final judgment in the action, regardless of the outcome.

3 The BMTS was established in 1911 by the Township of Bruce under the *Telephone Act*. The Township was acting as the "initiating municipality" under the Act in response to a petition of local residents who undertook financial responsibility for the cost of establishing, operating and maintaining the System, and were the initial subscribers of the System. As provided in the Act, ownership of the System is vested in the Township in trust for the benefit of subscribers, but the System is under the control and management of commissioners elected by the subscribers. The appellants, Thornburn, Ernest Greer, MacLean, McGillivray and Schildroth are the present commissioners. They were appointed under an earlier order by the local judge made on September 14, 1984, to represent all persons presently recognized by the commissioners as subscribers of the BMTS.

4 The BMTS has grown, particularly since the construction of a nuclear generating station in the area, and there are now more than 9,000 telephone users in the System. These users reside not only in the Township of Bruce, but in the other defendant municipalities. The number of persons recognized as subscribers by the present commissioners is only 714, due in part to steps taken by the then commissioners to freeze the number of subscribers in 1975, and later to revise the criteria for identifying subscribers. The plaintiff alleges that these steps were taken without any statutory authority.

5 The significance of being recognized as a subscriber has been enhanced by the decision of the subscribers to sell the System for about $10,000,000.00. That sale has been approved by the Ontario Telephone Service Commission, as required by s. 103 of the *Telephone Act*, but with the direction that the proceeds be held in trust until there has been a determination of those entitled to share in it. An application for leave to apply to a single judge of the High Court for judicial review of the decision of the Ontario Telephone Service Commission approving the sale was dismissed by Craig J. on February 8, 1985, but with the term that consummation of the sale of the System be stayed until the Divisional Court has heard the application for judicial review.

6 The proceeds of the sale fall to be distributed in accordance with s. 47(5)(b) of the Act, which reads as follows:

> (5) The proceeds of the sale or other disposition not required for the purposes mentioned in subsection (3) shall,
>
> . . . . .
>
> (b) in the case of a sale or other disposition of the whole of the system, belong to the subscribers and be distributed among them in such manner and on such basis, having regard to their separate interests, as the Commission directs.

7 Section 47(3) provides for the proceeds to be used first for the payment of debts. The BMTS has accumulated about $2,000,000.00 in cash. If the 714 persons presently recognized as subscribers are the only persons who qualify as subscribers of the System, each subscriber will receive almost $17,000.00 from the sale.

8 Section 47(6) will apply if the Township of Bruce cannot determine who the subscribers are. That subsection reads as follows:

> (6) Where from absence or loss of records or other cause the council of the initiating municipality is unable to ascertain who the subscribers are and is therefore unable to obtain their approval to a sale or other disposition of the whole or part of the system, the council, with the approval of the Commission upon proof of the fact and upon proof that the assets of the system and the proceeds of the sale or other disposition of the whole or part of the system will be sufficient to meet any outstanding debenture debt and other indebtedness and liabilities incurred in respect of the system, may authorize the sale or other disposition notwithstanding the absence of such approval, and the proceeds of the sale or other disposition not required for the purposes mentioned in subsection (2) shall,
>
> (a) in the case of a sale or other disposition of part only of the system, belong to the system and be applied and used according to the directions of the council of the municipality or the commissioners, as the case may be; and
>
> (b) in the case of a sale or other disposition of the whole of the system, be held, applied, used, distributed and disposed of in accordance with the directions of the council or the commissioners, as the case may be, and the approval of the Commission.

9 Section 47(1) provides for the sale of the System to be authorized by by-law of the initiating municipality, in this case, the plaintiffs. Such by-law has not been passed for the reasons stated as follows in paragraph 12 of the statement of claim:

> 12. The criteria established from time to time by the Defendant Commissioners and their predecessors to determine the persons to be recognized as subscribers do not comply with the provisions of the Telephone Act and accordingly, the Plaintiff is not in a position to enact a By-law to implement a sale and is not in a position to determine the persons entitled to share in the proceeds of any such sale.

The relief sought is declaratory, as follows:

> 13. The Plaintiff therefore claims:

(a) a declaration identifying the subscribers of the System in accordance with the Telephone Act, R.S.O. 1980, Chapter 496; or

(b) a declaration that the subscribers of the System cannot be ascertained and that the Plaintiff is accordingly unable to obtain their approval to a sale or other disposition of the System.

10 The issue as to the identification of subscribers entitled to vote on the proposed sale, and to participate in the distribution of the proceeds thereof, depends upon the interpretation of the somewhat complicated definition of "subscriber" contained in s. 1(i) of the Act, and then on the determination of the facts relevant to the claims of various persons that they should be recognized as subscribers under the interpretation found by the court to be correct. The plaintiff, as trustee for all subscribers, is required to maintain an even hand between the various classes of persons claiming to be recognized as subscribers. In the first representation order made on September 14, 1984, the local judge authorized the plaintiff to bring the action on behalf of, or for the benefit of, the inhabitants and ratepayers of the Township of Bruce. He also ordered that the defendants Thornburn, Greer, MacLean, McGillivray, and Schildroth as commissioners of the System, be appointed to defend on behalf of, or for the benefit of, all persons presently recognized by such commissioners as subscribers of the System, subject to any other order this court may hereafter make should it appear that there is any conflict or potential conflict among said subscribers. The defendant municipalities were appointed to defend on behalf of the inhabitants and ratepayers of the respective municipalities, save the subscribers, subject to any order this court may hereafter make should it appear that there is any conflict or potential conflict among the said inhabitants and ratepayers.

11 The defendant municipalities have taken a passive role in the litigation. The only one of them represented on the appeal to this court was the Town of Elgin, which supported the order under appeal. It is believed that there were originally ten Port Elgin properties that were subscriber properties. Counsel for the Town submitted that his client found itself in a position of conflict in attempting to represent the potential interests of the original ten subscribers, the interests of those persons in the Town who might qualify as potential subscribers and the persons in the Town who might not qualify as potential subscribers. He also submitted that the Town does not have the funds to advance aggressively the conflicting interests of its inhabitants, and that the matter of the telephone system is a complex one little understood by the inhabitants and subject to media and political pressures which make it difficult for elected municipal officials to deal with it.

12 The legal expenses of the appellants (the commissioners) are being paid by the BMTS.

13 The members of the Bryce group are well-regarded landowners, each of whom has received telephone service from the BMTS for many years, personally, or through his ancestors or his predecessors in title, but who have been refused recognition as subscribers by the commissioners of the BMTS.

14 The following definition of "subscriber" is found in s. 1(i) of the *Telephone Act*:

(i) "subscriber", in respect of a municipal telephone system, means a landowner who has signed a petition to the council of a municipality praying for the establishment or extension of a telephone system that is afterwards established or extended pursuant to the petition or upon whose property an annual rate is or may be levied and collected for the purpose of paying the cost of establishing and maintaining the system or the extension or any reconstruction, replacement or alteration of the system or any part thereof, and also means a person who, being a subscriber as defined above, has fully paid all annual rates in respect of the establishment of the system or of its extension and the cost of maintenance during the period for which debentures have been issued to pay the cost of the establishment or extension and who continues thereafter to take telephone service from the system on the basis of paying such charges therefor as are approved.

15 The affidavit filed in support of the application by the Bryce group to be added in a representative capacity

refers to an admission of one of the present commissioners as follows:

> ...prior to the adoption of a resolution in 1975 that the BMTS would sign on no new subscribers, a person who purchased property in the Serviced Area, received telephone service from the BMTS and requested that he be listed as a subscriber would be added to the BMTS' list of subscribers...

16 The guidelines adopted in 1975 for the determination of subscriber rights imposed a number of restrictions. They read as follows:

> (1) Subscriber rights may not be transferred from one property to another.
>
> (2) When a property is severed the subscriber rights go with the larger section.
>
> (3) If there is no dwelling left in which to instal a telephone the subscriber may either have a fictitious number and continue to pay multi-party rates, or, secure a release.
>
> (5) If a subscriber property is subdivided the developer must get a release of subscriber rights.

17 When the subscriber list was revised in 1981, only people who should have been on the subscriber list prior to the 1975 resolution were eligible to be added to the list of subscribers.

18 There is evidence that the proposed sale has made the controversy as to what persons qualify as subscribers of the BMTS, a matter of great public interest in the area serviced by the BMTS. The undertaking of the Bryce group, as contained in the affidavit of John Bryce, was in the following terms:

> 14. I hereby undertake to diligently represent, with the assistance of Ernie Young, H. Winston Shoemaker and Hardie Young, the interests of the potential subscribers to the BMTS in the event this Honourable Court sees fit to appoint representatives with an indemnity as to costs from the BMTS. If appointed by this Honourable Court I propose to publicize our role in this action and hold a series of public meeting to obtain the views of the people served by the BMTS and to obtain information that they may have relevant to the issues in this action.

19 The application of the Bryce group to be added as defendants in a representative capacity was conditional upon the court ordering them to be entitled to recover their costs on a solicitor and client basis, regardless of the ultimate determination of the action. The affidavit of John Bryce contained the following statement:

> 12. I verily believe that unless this Honourable Court grants an indemnity as to costs as a condition of any representation order it may be disposed to making no individual or group of individuals in the area served by the BMTS will be willing to act as representatives of the potential subscribers of the BMTS because the large legal costs necessarily incurred to vigorously advance this position are more than such a group will accept responsibility for.

20 The local judge gave full and careful reasons for his order granting the application. He said he had no problem in finding that the Bryce group should be added as party defendants to represent the interests of unknown and unascertained subscribers, but that the more difficult question was whether he had jurisdiction at this point in the proceedings to award costs.

21 The local judge then examined the law relating to the proposed order for the payment by the BMTS of the future costs of the Bryce group on a solicitor and client basis regardless of the outcome of the action, and concluded:

> ...In my judgment, the principle to be applied to the case at bar is analogous as to that which the Court applied in RE BEDDOE [1893] 1 Ch. 547, which concerned the costs incurred by a trustee in an action respecting the trust estate. In the case at bar, the action does not relate to the trust estate, but, the dealing with the "trust estate" by trustees who may in law not qualify as trustees and without the concurrence of the known or unascertained Subscribers who would become trustees.
>
> Having considered the combination of facts in this case and particularly the freeze by the then Subscribers in 1975 to any additional persons qualifying as Subscribers; the redefining of Subscriber qualifications August 12th, 1975; the revision of the Subscriber list in January, 1981 in accordance with the criteria determined by the then Subscribers, I can find nothing in the the TELEPHONE ACT which authorizes the Commissioners to take such action.
>
> For these Reasons I direct that John Bryce, Ernie Young, H. Winston Shoemaker and Hardie Young, be added as defendants to represent the unascertained class of persons who may be entitled to be recognized as "Subscribers" of the Bruce Municipal Telephone System. The added defendants shall have their reasonable incurred aud future costs of this action on a solicitor and client basis to be paid by the Bruce Municipal Telephone System upon final judgment in this action.

22 With great respect to the local judge, I have concluded that his order cannot stand for two reasons.

23 First, the class of persons which the Bryce group has been appointed to represent is not, in my view, an appropriate one for a representation order under Rule 10.01. The class is described as "the unascertained class of persons who may be entitled to be recognized as 'subscribers' of the Bruce Municipal Telephone System". No attempt was made to describe the essential characteristics of the members of the Bryce group which give them the claim to subscriber status which they assert, and to limit the class being represented by them to persons having the same characteristics. It is as though the court appointed someone in a wills case to represent all persons claiming to be entitled under the will, instead of appointed persons to represent those claimants having a common basis for their claims for entitlement. For example, a person might be appointed to represent all persons claiming as third cousins.

24 It is difficult to see how the Bryce group can avoid serious conflicts of interests, if they are to represent all possible claimants. The fewer the persons who are ultimately recognized as subscribers, the larger will be the share of each subscriber in the proceeds of the sale. Without in any way questioning the good faith of the members of the Bryce group, it is my view that they should not be put in a position where they are required to advance claims for subscriber status which it is in their interests to see defeated. Nor should they be left in a position where they must advance all claims brought to their attention, regardless of merit, or alternatively, to make decisions as to which claims should be prosecuted in the action and which are so unworthy that they should not occupy the time of the court or counsel.

25 The class to be represented should be described in terms such that all members of it will succeed if the Bryce group succeeds. Persons whose claims rest on a basis different from those of the Bryce group should be in a different class with different representation.

26 Secondly, it is my respectful opinion that the local judge erred in concluding from the authorities that this was a case in which he had power to provide in advance for the payment of solicitor and client costs that had not yet been incurred, regardless of the outcome of the proceedings. The learned judge quoted extensively from the reasons for judgment of the Divisional Court in *Hamilton-Wentworth (Regional Municipality) v. Hamilton-Wentworth Save the Valley Committee Inc.* (1985), 51 O.R. (2d) 23 (Ont. Div. Ct.) ("*Save the Valley*"), in which it was held that the power to award costs may not be used to provide intervenor funding in order to ensure effective opposition, but concluded that this case was analogous to a trustee case, which was found by the Divisional Court to be one of the exceptions to the general rule.

27 *Save the Valley* involved an application to quash an order for intervenor funding made by a joint board which had statutory power to award the costs of a proceeding before it, to order by whom and to whom costs are to be paid, and to fix the amount of the costs or direct that they be taxed. The Divisional Court held that the joint board had no special powers with respect to costs beyond those traditionally exercised by courts. John Holland J., delivering the judgment of the court, defined the normal legal meaning of costs as follows, at p. 32:

> The characteristics of costs, developed over many years are:
>
> (1) They are an award to be made in favour of a successful or deserving litigant, payable by the loser.
>
> (2) Of necessity, the award must await the conclusion of the proceeding, as success or entitlement cannot be determined before that time.
>
> (3) They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding.
>
> (4) They are not payable for the purpose of assuring participation in the proceedings.

28 This exposition must be modified by Rule 57.01(2) which provides as follows:

> (2) The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case.

29 John Holland J. then went on to discuss a number of special cases where an award of costs has been made without regard to one or some of the characteristics he had listed. The only one of these exceptions that might be relevant in this case is Trustee cases, as to which John Holland J. said:

> **(B) Trustee cases**
>
> These cases recognize that the trustee, in litigious proceedings, is entitled to be indemnified from a common fund as to costs incurred without regard to the result when acting not on his own but in preservation of trust property or in a derivative position.

30 The local judge, in the passage quoted above, decided that the case at bar fell within the exception of Trustee cases, because it was analagous to the case of *Beddoe, Re*, [1893] 1 Ch. 547 (Eng. Ch. Div.), which was referred to in the authorities on which John Holland J. relied in connection with this exception. *Beddoe, Re* was a case in which a trustee who unreasonably defended an action against him in respect of trust property was held not to be entitled to retain out of the trust estate the costs of the action beyond the amount which he would have incurred by applying for leave to defend it. The judges of the Court of Appeal were of the view that if the trustee had applied to the court before defending for directions as to whether he should have defended the action, no judge would have authorized him to defend. He would, however, have been entitled to indemnification out of the trust estate for the costs of the motion for directions.

31 I am unable to understand how the position of subscribers, present or potential, in the present case, can be likened to that of trustees. Each present subscriber stands to realize a substantial personal benefit if the proposed sale of the BMTS is completed. The same is true of each member of the Bryce group, if it is held that they should be recognized as subscribers, and of any other presently unrecognized persons who are similarly successful. All have personal pecuniary interests in being held to be subscribers. Their position is analogous to that of beneficiaries or

cestuis que trust; they are not like trustees, who act for the protection of the trust property, or for the benefit of the beneficiaries, without prospect of personal gain. This case is not like a trustee case, and, in my judgment, the analogy by the local judge to *Beddoe, Re* was inappropriate.

32 Nor are the persons claiming to be subscribers asserting claims analogous to those of shareholders bringing a derivative action. Such an action is brought to enforce the rights of the corporation. If the action is successful, it is the corporation which benefits. In this case, the persons claiming to be subscribers are seeking to enforce alleged personal, individual rights. Such claims are not in respect of derivative rights, and would be analagous to those asserted in an action to determine who are the shareholders of a corporation, rather than those asserted in a derivative action in which a shareholder sues in respect of a wrong done to the corporation.

33 In my judgment, this case does not fall within the Trustee cases, or any of the other exceptions referred to in the decision of the Divisional Court in *Save the Valley*. It is my opinion that *Save the Valley* constitutes binding authority against the award of costs made by the local judge in this case.

34 It was submitted by Mr. Lederman that *Save the Valley* did not close the list of possible exceptions to the general rule respecting costs. Even if that were so, I can see no valid ground for attempting to establish another class of exceptions to cover the situation that has arisen in this case. One of the purposes of the general rule respecting costs is to discourage claims that have no reasonable chance of success. There is no reason why that factor should be prevented from exercising its beneficial influence in this case.

35 As I implied in connection with the first point, the order of the local judge might be construed as giving the Bryce group a free hand, or perhaps impose a duty upon them, to advance all claims brought to their attention, regardless of merit. Even if the class to be represented is restricted to persons who have claims on the same grounds as those of the Bryce group, I am not persuaded that such claims should occupy the time of the court, if no person or group has enough confidence in their merit to submit to the normal risks respecting costs. At probably more than $10,000.00 per subscriber, the rewards of winning would not be trifling. Even if the representatives were unsuccessful on the merits, they might well be awarded party and party costs as court appointed representatives, unless their claims turned out to be without any merit.

36 Section 141(1) of the *Courts of Justice Act* deals with the jurisdiction to award costs as folows:

> **Costs**
>
> **141.-(1)** Subject to the provisions of and Act or rules of court, the costs of an incidental to a proceeding or a step in a proceeding are in the discretion of the court and the court may determine by whom and to what extent the costs shall be paid.

37 In *Beddoe, Re* , *supra*, at p. 554, Lindley L.J. considered a similar provision in the English Rules. He quoted the relevant words:

> Subject to the provisions of the Act and these rules, costs of and incident to all proceedings in the Supreme Court shall be in the discretion of the Court or Judge.

He continued with the question:

> What Court or Judge? I apprehend the meaning of the rule is quite obvious, that in every proceeeding in the Court the costs of that proceeding are in the discretion of the Judge who has to deal with it - who has to try it. He knows the facts of the case he knows the conduct of the parties and the nature of the controversy, and the costs of every proceeding are, therefore, placed in the discretion of the Judge who tries the proceeding. It does

> not mean that the costs in a proceeding are to be in the discretion of the Court of Judge before whom these costs may incidentally come, upon an application to have them borne by some fund or some person not before the Court in the proceedings in which they have been incurred - that is not the meaning of the rule. Although costs are costs when they are incurred, the moment you come to ask that they shall be borne as expenses by a particular fund, or by persons not parties to the proceedings in which they were incurred, they become, not costs, but charges and expenses, and when once you get them into the category of charges and expenses this rule and this enactment do not apply to them.

38 The court now has express statutory powers under s. 246(d) of the *Business Corporations Act*, 1982, (Ont.) c. 4, to make an order at any time that the corporation pay the reasonable legal fees and other costs incurred by the claimant to whom leave has been given to commence a derivative action. (See *Turner v. Mailhot* (1985), 50 O.R. (2d) 561 (Ont. H.C.)). In *Wallersteiner v. Moir (No. 2)*, [1975] 1 All E.R. 849 (Eng. C.A.), the Court of Appeal held that similar relief could be given to the plaintiff in a derivative action in England in the absence of any stautory provision therefor. As stated above, this is not a derivative action, or analogous thereto. In my judgment, neither of the two cases just mentioned provide authority for making an order in this case that would remove from the trial judge the normal responsibility for determining the disposition of costs.

39 For the foregoing reasons, an order will go allowing the appeal and setting aside the order of the local judge. The disposition of costs in this court and below will be reserved to the trial judge.

40 The plaintiff, as trustee for all subscribers, shall be at liberty, if so advised, to move for approval of the further steps, if any, which it may consider should be taken to determine what classes of persons claim to be subscribers. No doubt the plaintiff would be entitled to be indemnified out of the funds of the BMTS for the costs of such motion and of any steps proposed and approved by the court.

41 The representation order of September 14, 1984, shall remain in force, and any persons seeking orders to represent classes of persons claiming to be recognized as subscribers shall be at liberty to bring the appropriate motions. The definition of any class to be represented, and the provision for costs should be in accordance with these reasons.

***White*:**

42 I agree.

***Bowlby*:**

43 I agree.

END OF DOCUMENT

TAB 5

Indexed as:

Canada Post Corp. v. Lépine

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

[2009] 1 S.C.R. 549

[2009] 1 R.C.S. 549

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

[2009] A.C.S. no 16

2009 SCC 16

File No.: 32299.

Supreme Court of Canada

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

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

(58 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Catchwords:

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

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

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

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

[page550]

Summary:

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

Held: The appeal should be dismissed.

In applying the doctrine of *forum non conveniens*, the Court of Appeal added an irrelevant factor to its analysis of the foreign court's jurisdiction. Although the application of this doctrine finds support, at first glance, in the very broad wording of the reference in art. 3164 *C.C.Q.* to Title Three on the international jurisdiction of Quebec authorities, such an interpretation disregards the main principle underlying the legal framework for the recognition and enforcement of foreign judgments

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

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

The Quebec courts were also precluded from recognizing the Ontario judgment on the basis of *lis pendens* pursuant to art. 3155(4) *C.C.Q.* The interpretation to the effect that a class action exists only as of its filing date, after it has been authorized, is consistent neither with the wording of art. 3155(4) nor with the way that provision is applied in the context of a class action. The application for authorization to institute a class action is a form of judicial proceeding between parties for the [page552] purpose of determining whether a class action will in fact take place. In the instant case, the three identities were present at the stage of this application. The basic facts in support of both proceedings were the same for Quebec residents, the object was the same and the legal identity of the parties was established. [paras. 51-55]

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Masson, [1993] R.J.Q. 69; *Hotte v. Servier Canada Inc.*, [1999] R.J.Q. 2598; *Roberge v. Bolduc*, [1991] 1 S.C.R. 374.

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History and Disposition:

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

Counsel:

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

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

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

No one appeared for the intervener Cybersurf Corp.

English version of the judgment of the Court delivered by

LeBEL J.:--

I. Introduction

A. *Nature of the Appeal*

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

B. *Origin of the Case*

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

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

undertook to refund the purchase price of the CD-ROM to Canadian consumers who returned the CD-ROM to it.

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

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

6 In the meantime, in Ontario in early July 2003, the parties to the Ontario and British Columbia proceedings entered into a settlement agreement with the appellant based on the offer they had accepted. The agreement created two classes of claimants. The first was limited to British Columbia residents. For the purposes of the Ontario proceeding, the second class included residents of every province of Canada except British Columbia, as it no longer excluded Quebec residents despite the fact that the respondent, Michel Lépine, was proceeding with his application for authorization to institute a class action in Quebec and had rejected the proposed settlement. To give effect to the settlement, the Ontario application for certification was amended on November 19, 2003 to include Quebec residents in the class.

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

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

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

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

...

3. THIS COURT ORDERS AND ADJUDGES that, as set out in the Settlement Agreement, the group of persons who are members of the Ontario Class be:

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

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

...

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

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

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

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

II. Judicial History

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

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

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

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

III. Analysis

A. *Issues*

(1) Nature of the Issues

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

[page560]

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

(2) The Parties' Positions

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

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

[page561]

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

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

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

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

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

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

> **3155.** A Québec authority recognizes and, where applicable, declares enforceable any decision rendered outside Québec except in the following cases:
>
> (1) the authority of the country where the decision was rendered had no jurisdiction under the provisions of this Title;
>
> (2) the decision is subject to ordinary remedy or is not final or enforceable at the place where it was rendered;
>
> (3) the decision was rendered in contravention of the fundamental principles of procedure;
>
> (4) a dispute between the same parties, based on the same facts and having the same object has given rise to a decision rendered in Québec, whether it has acquired the authority of a final judgment (*res judicata*) or not, or is pending before a Québec authority, in first instance, or has been decided in a third country and the decision meets the necessary conditions for recognition in Québec;
>
> (5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations;
>
> (6) the decision enforces obligations arising from the taxation laws of a foreign country.

23 Article 3158 limits the scope of a Quebec court's power to review a foreign decision. The court must confine itself to considering whether the requirements for recognizing the decision have

been met. It cannot review the merits of the case or retry the case. Article 3158 expressly prohibits this:

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

[page563]

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

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

> **3164.** The jurisdiction of foreign authorities is established in accordance with the rules on jurisdiction applicable to Québec authorities under Title Three of this Book, to the extent that the dispute is substantially connected with the country whose authority is seised of the case.

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

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

[page564]

(2) the defendant possessed an establishment in the country where the decision was rendered and the dispute relates to its activities in that country;

(3) a prejudice was suffered in the country where the decision was rendered and it resulted from a fault which was committed in that country or from an injurious act which took place in that country;

(4) the obligations arising from a contract were to be performed in that country;

(5) the parties have submitted to the foreign authority disputes which have arisen or which may arise between them in respect of a specific legal relationship; however, renunciation by a consumer or a worker of the jurisdiction of the authority of his place of domicile may not be set up against him;

(6) the defendant has recognized the jurisdiction of the foreign authority.

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

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

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

29 Thus, according to the theory, the possibility of applying the doctrine of *forum non conveniens*, when considering a motion for judicial recognition of a foreign or external judgment, supplements the provisions on establishment of the foreign court's jurisdiction by enabling the Quebec authority to more effectively ensure compliance with the basic requirement under art. 3164

C.C.Q. of a substantial connection between the dispute and the country whose authority is seised of the case. Moreover, this interpretation means that, when considering whether a foreign court has jurisdiction over an action of a patrimonial nature, the Quebec authority will not limit itself to determining whether the application for recognition corresponds to one of the situations provided for in art. 3168 *C.C.Q.* The Quebec court can also consider how the foreign authority should have applied the doctrine of *forum non conveniens* to decide whether or not to decline jurisdiction.

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

> [TRANSLATION] It must first be noted that the jurisdiction of Quebec authorities that is extended to foreign authorities is logically determined not only through specific connecting principles, *but also through the general provisions* such as those on *forum non conveniens, forum conveniens* and exclusive jurisdiction. In referring to the Quebec rules on jurisdiction, art. 3164 C.C.Q. does not limit them to the specific rules (arts. 3141 to 3154 C.C.Q.) and therefore refers implicitly to arts. 3134 to 3140 C.C.Q. as well. The latter provisions considerably alter the specific rules on jurisdiction [page566] in Quebec by giving the courts a broad discretion. It should therefore be accepted that foreign authorities can have the same freedom to exclude heads of jurisdiction that the Quebec courts would have excluded. As Professor Glenn points out:
>
> > The foreign authority's jurisdiction is assessed not broadly, in light of the connections accepted under the various heads of jurisdiction, but in light of the specific circumstances of each case. The question is whether the Quebec authority would have agreed to exercise its jurisdiction in such circumstances. The mirror principle becomes the principle of a "little mirror" that reflects the specific circumstances of the case in light of the general provisions.
>
> (Emphasis in original.)

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

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

32 However, some Quebec authors reject the application of *forum non conveniens* in the recognition of foreign or external judgments. They would limit the effect of the reference to Title Three in art. 3164 by excluding *forum non conveniens* from [page567] it. For example, in a study on the rules for recognizing and enforcing foreign or external judgments in Quebec, Professor Geneviève Saumier is highly critical of the application of this doctrine ("The Recognition of Foreign Judgments in Quebec -- The Mirror Crack'd?" (2002), 81 *Can. Bar Rev.* 677). According to her, this interpretation of art. 3164 *C.C.Q.* is not justified despite the very general language used in drafting that provision. In her opinion, to apply the doctrine of *forum non conveniens* when considering an application for recognition confuses the establishment of the foreign court's jurisdiction as such with the exercise of that jurisdiction (pp. 691-92). Thus the literal interpretation of art. 3164 *C.C.Q.* cannot be reconciled with the general principle in art. 3155 *C.C.Q.* that a foreign or external judgment should be recognized once the originating court has been shown to have jurisdiction in the strict sense, and it is inconsistent with the fact that this principle remains the cornerstone of the system of recognition of foreign judgments established by the *Civil Code of Québec*. The addition of a mechanism based on the discretion of the court to which the application has been made, one that depends in all cases on the existence of a specific factual context, is inconsistent with this principle (pp. 693-94).

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

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

34 In my view, these reservations about extending the application of the doctrine of *forum non conveniens* to the recognition of foreign or external judgments in Quebec are justified. I do not deny that the application of this doctrine finds support, at first glance, in the very broad wording of the reference to Title Three in art. 3164 *C.C.Q.* However, such an interpretation disregards the main principle underlying the legal framework for the recognition and enforcement of foreign or external

judgments set out in the *Civil Code of Québec*. Enforcement by the Quebec court depends on whether the foreign court had jurisdiction, not on how that jurisdiction was exercised, apart from the exceptions provided for in the *Civil Code of Québec*. To apply *forum non conveniens* in this context would be to overlook the basic distinction between the establishment of jurisdiction as such and the exercise of jurisdiction. In this respect, I believe that it will be helpful to repeat the quotation of the first paragraph of art. 3155 of the *Civil Code of Québec*, which sets out the following exception to the obligation to recognize a foreign decision:

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

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

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

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

37 It would accordingly have been sufficient had the Quebec authorities asked whether the Ontario Superior Court of Justice had jurisdiction, in the strict sense, over the dispute. If it did, their next step would have been to determine whether the respondent, Mr. Lépine, had established that

there were other obstacles to the recognition of the Ontario judgment, as indeed the Quebec Court of Appeal found that he had.

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

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

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

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

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

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

42 A class action takes place outside the framework of the traditional duel between a single plaintiff and a single defendant. In many class proceedings, the representative acts on behalf of a very large class. The decision that is made not only affects the representative and the defendants, but may also affect all claimants in the classes covered by the action. For this reason, adequate information is necessary to satisfy the requirement that individual rights be safeguarded in a class proceeding. The notice procedure is indispensable in that it informs members about how the judgment authorizing the class action or certifying the class proceeding affects them, about the rights -- in particular the possibility of opting out of the class action -- they have under the judgment, and sometimes, as here, about a settlement in the case. In the instant case, the question raised by the respondent relates not to the Ontario statute but to the way it was applied by the Ontario Superior Court of Justice in a case in which that court knew that a parallel proceeding was under [page572] way in Quebec. Were the notices provided for in the Ontario court's judgment

therefore consistent, in the context in which they were published, with the fundamental principles of procedure applicable to class actions?

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

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

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45 The clarity of the notice to members was particularly important in a context in which, to the knowledge of all those involved, parallel class proceedings had been commenced in Quebec and in Ontario. The notice published in Quebec pursuant to the Ontario judgment did not take this particular circumstance into account. Those who prepared it did not concern themselves with the situation resulting from the existence of a parallel class proceeding in Quebec and the publication of a notice pursuant to the Quebec Superior Court's judgment authorizing the class action. The notice made it look like the Ontario proceeding was the only one. Nor, even though Quebec residents were also a group under the Quebec class action, did the notice clearly state that the settlement applied to them. In this regard, the Quebec Superior Court carefully described the problems that had resulted from the procedure adopted to give effect to the Ontario court's judgment certifying the class proceeding in the context in which that procedure was conducted. Thus, on February 21, 2004, the designated representative in the Quebec class action published a notice of the authorization to institute a class action on behalf of a group that was limited to Quebec residents. The notice indicated that the members could request exclusion on or before April 21, 2004. In the Ontario class proceeding, the notice published on April 7, 2004, that is, shortly before the expiry of the time limit for requesting exclusion from the Quebec action, stated that a settlement had been reached in class proceedings commenced in Ontario and British Columbia but did not mention that the settlement also applied to Quebec residents. The way the notice was written was likely to confuse its intended

recipients, as Rayle J.A. of the Quebec Court of Appeal correctly noted in her opinion (see para. 73).

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

F. *Lis Pendens*

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

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

> **3137.** On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same object is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority.

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

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

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

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

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53 However, the appellant argues that, in any event, the Quebec courts did not even have to consider the question of *lis pendens*. According to art. 3155(4), *lis pendens* is relevant only if the Quebec proceeding predates the foreign action. The Corporation submits that the Quebec proceeding commenced no earlier than the date the Quebec Superior Court authorized the class action, that is, December 23, 2003. In support of this argument, the appellant relies, *inter alia*, on *Thompson v. Masson*, [1993] R.J.Q. 69, in which the Quebec Court of Appeal stressed that a class action does not commence until it is filed, that is, after the judgment authorizing the class action. Before that time, there is only an authorization proceeding whose purpose is to screen applications. In the instant case, according to the appellant, the Ontario proceeding predated the Quebec action because it was certified one day before the class action was authorized in Quebec.

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

55 At that stage, the three identities were present. The basic facts in support of both proceedings were [page577] the same for Quebec residents, namely the purchase and discontinuation of an

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

G. *National Classes and Parallel Class Actions*

56 In addition to its conclusions of law, the Quebec Court of Appeal seems to have had reservations or concerns about the creation of classes of claimants from two or more provinces. We need not consider this question in detail. However, the need to form such national classes does seem to arise occasionally. The formation of a national class can lead to the delicate problem of creating subclasses within it and determining what legal system will apply to them. In the context of such proceedings, the court hearing an application also has a duty to ensure that the conduct of the proceeding, the choice of remedies and the enforcement of the judgment effectively take account of each group's specific interests, and it must order them to ensure that clear information is provided.

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

IV. Conclusion

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

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Solicitors for the respondent: Unterberg, Labelle, Lebeau, Montréal.

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

cp/e/qlll1s

TAB 6

Indexed as:

Canadian Airlines Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended;
AND IN THE MATTER OF the Business Corporations Act (Alberta) S.A. 1981, c. B-15, as amended, Section 185
AND IN THE MATTER OF Canadian Airlines Corporation and Canadian Airlines International Ltd.

[2000] A.J. No. 771

2000 ABQB 442

[2000] 10 W.W.R. 269

84 Alta. L.R. (3d) 9

265 A.R. 201

9 B.L.R. (3d) 41

20 C.B.R. (4th) 1

98 A.C.W.S. (3d) 334

Action No. 0001-05071

Alberta Court of Queen's Bench
Judicial District of Calgary

Paperny J.

Heard: June 5 - 19, 2000.
Judgment: filed June 27, 2000.

(185 paras.)

Counsel:

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L.R. Duncan, Q.C. and G. McCue, for Neil Baker, Michael Salter, Hal Metheral and Roger Midiaty.
F.R. Foran, Q.C. and P.T. McCarthy, Q.C., for the Monitor, PwC.
G.B. Morawetz, R.J. Chadwick and A. McConnell, for the Senior Secured Noteholders and the Bank of Nova Scotia Trust Company.
C.J. Shaw, Q.C., for the unionized employees.
T. Mallett and C. Feasby, for Amex Bank of Canada.
E.W. Halt, for J. Stephens Allan, Claims Officer.
M. Hollins, for Pacific Costal Airlines.
P. Pastewka, for JHHD Aircraft Leasing No. 1 and No. 2.
J. Thom, for the Royal Bank of Canada.
J. Medhurst-Tivadar, for Canada Customs and Revenue Agency.
R. Wilkins, Q.C., for the Calgary and Edmonton Airport Authority.

REASONS FOR DECISION

PAPERNY J.:--

I. INTRODUCTION

1 After a decade of searching for a permanent solution to its ongoing, significant financial problems, Canadian Airlines Corporation ("CAC") and Canadian Airlines International Ltd. ("CAIL") seek the court's sanction to a plan of arrangement filed under the Companies' Creditors Arrangement Act ("CCAA") and sponsored by its historic rival, Air Canada Corporation ("Air Canada"). To Canadian, this represents its last choice and its only chance for survival. To Air Canada, it is an opportunity to lead the restructuring of the Canadian airline industry, an exercise many suggest is long overdue. To over 16,000 employees of Canadian, it means continued employment. Canadian Airlines will operate as a separate entity and continue to provide domestic and international air service to Canadians. Tickets of the flying public will be honoured and their frequent flyer points maintained. Long term business relationships with trade creditors and suppliers will continue.

2 The proposed restructuring comes at a cost. Secured and unsecured creditors are being asked to accept significant compromises and shareholders of CAC are being asked to accept that their shares have no value. Certain unsecured creditors oppose the plan, alleging it is oppressive and unfair. They assert that Air Canada has appropriated the key assets of Canadian to itself. Minority shareholders of CAC, on the other hand, argue that Air Canada's financial support to Canadian, before and during this restructuring process, has increased the value of Canadian and in turn their shares. These two positions are irreconcilable, but do reflect the perception by some that this plan asks them to sacrifice too much.

3 Canadian has asked this court to sanction its plan under s. 6 of the CCAA. The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all the stakeholders.

Faced with an insolvent organization, its role is to look forward and ask: does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.

II. BACKGROUND

Canadian Airlines and its Subsidiaries

4 CAC and CAIL are corporations incorporated or continued under the Business Corporations Act of Alberta, S.A. 1981, c. B-15 ("ABCA"). 82% of CAC's shares are held by 853350 Alberta Ltd.("853350") and the remaining 18% are held publicly. CAC, directly or indirectly, owns the majority of voting shares in and controls the other Petitioner, CAIL and these shares represent CAC's principal asset. CAIL owns or has an interest in a number of other corporations directly engaged in the airline industry or other businesses related to the airline industry, including Canadian Regional Airlines Limited ("CRAL"). Where the context requires, I will refer to CAC and CAIL jointly as "Canadian" in these reasons.

5 In the past fifteen years, CAIL has grown from a regional carrier operating under the name Pacific Western Airlines ("PWA") to one of Canada's two major airlines. By mid-1986, Canadian Pacific Air Lines Limited ("CP Air"), had acquired the regional carriers Nordair Inc. ("Nordair") and Eastern Provincial Airways ("Eastern"). In February, 1987, PWA completed its purchase of CP Air from Canadian Pacific Limited. PWA then merged the four predecessor carriers (CP Air, Eastern, Nordair, and PWA) to form one airline, "Canadian Airlines International Ltd.", which was launched in April, 1987.

6 By April, 1989, CAIL had acquired substantially all of the common shares of Wardair Inc. and completed the integration of CAIL and Wardair Inc. in 1990.

7 CAIL and its subsidiaries provide international and domestic scheduled and charter air transportation for passengers and cargo. CAIL provides scheduled services to approximately 30 destinations in 11 countries. Its subsidiary, Canadian Regional Airlines (1998) Ltd. ("CRAL 98") provides scheduled services to approximately 35 destinations in Canada and the United States. Through code share agreements and marketing alliances with leading carriers, CAIL and its subsidiaries provide service to approximately 225 destinations worldwide. CAIL is also engaged in charter and cargo services and the provision of services to third parties, including aircraft overhaul and maintenance, passenger and cargo handling, flight simulator and equipment rentals, employee training programs and the sale of Canadian Plus frequent flyer points. As at December 31, 1999, CAIL operated approximately 79 aircraft.

8 CAIL directly and indirectly employs over 16,000 persons, substantially all of whom are located in Canada. The balance of the employees are located in the United States, Europe, Asia, Australia, South America and Mexico. Approximately 88% of the active employees of CAIL are subject to collective bargaining agreements.

Events Leading up to the CCAA Proceedings

9 Canadian's financial difficulties significantly predate these proceedings.

10 In the early 1990s, Canadian experienced significant losses from operations and deteriorating liquidity. It completed a financial restructuring in 1994 (the "1994 Restructuring") which involved

employees contributing $200,000,000 in new equity in return for receipt of entitlements to common shares. In addition, Aurora Airline Investments, Inc. ("Aurora"), a subsidiary of AMR Corporation ("AMR"), subscribed for $246,000,000 in preferred shares of CAIL. Other AMR subsidiaries entered into comprehensive services and marketing arrangements with CAIL. The governments of Canada, British Columbia and Alberta provided an aggregate of $120,000,000 in loan guarantees. Senior creditors, junior creditors and shareholders of CAC and CAIL and its subsidiaries converted approximately $712,000,000 of obligations into common shares of CAC or convertible notes issued jointly by CAC and CAIL and/or received warrants entitling the holder to purchase common shares.

11 In the latter half of 1994, Canadian built on the improved balance sheet provided by the 1994 Restructuring, focussing on strict cost controls, capacity management and aircraft utilization. The initial results were encouraging. However, a number of factors including higher than expected fuel costs, rising interest rates, decline of the Canadian dollar, a strike by pilots of Time Air and the temporary grounding of Inter-Canadien's ATR-42 fleet undermined this improved operational performance. In 1995, in response to additional capacity added by emerging charter carriers and Air Canada on key transcontinental routes, CAIL added additional aircraft to its fleet in an effort to regain market share. However, the addition of capacity coincided with the slow-down in the Canadian economy leading to traffic levels that were significantly below expectations. Additionally, key international routes of CAIL failed to produce anticipated results. The cumulative losses of CAIL from 1994 to 1999 totalled $771 million and from January 31, 1995 to August 12, 1999, the day prior to the issuance by the Government of Canada of an Order under Section 47 of the Canada Transportation Act (relaxing certain rules under the Competition Act to facilitate a restructuring of the airline industry and described further below), the trading price of Canadian's common shares declined from $7.90 to $1.55.

12 Canadian's losses incurred since the 1994 Restructuring severely eroded its liquidity position. In 1996, Canadian faced an environment where the domestic air travel market saw increased capacity and aggressive price competition by two new discount carriers based in western Canada. While Canadian's traffic and load factor increased indicating a positive response to Canadian's post-restructuring business plan, yields declined. Attempts by Canadian to reduce domestic capacity were offset by additional capacity being introduced by the new discount carriers and Air Canada.

13 The continued lack of sufficient funds from operations made it evident by late fall of 1996 that Canadian needed to take action to avoid a cash shortfall in the spring of 1997. In November 1996, Canadian announced an operational restructuring plan (the "1996 Restructuring") aimed at returning Canadian to profitability and subsequently implemented a payment deferral plan which involved a temporary moratorium on payments to certain lenders and aircraft operating lessors to provide a cash bridge until the benefits of the operational restructuring were fully implemented. Canadian was able successfully to obtain the support of its lenders and operating lessors such that the moratorium and payment deferral plan was able to proceed on a consensual basis without the requirement for any court proceedings.

14 The objective of the 1996 Restructuring was to transform Canadian into a sustainable entity by focussing on controllable factors which targeted earnings improvements over four years. Three major initiatives were adopted: network enhancements, wage concessions as supplemented by fuel tax reductions/rebates, and overhead cost reductions.

15 The benefits of the 1996 Restructuring were reflected in Canadian's 1997 financial results when Canadian and its subsidiaries reported a consolidated net income of $5.4 million, the best results in 9 years.

16 In early 1998, building on its 1997 results, Canadian took advantage of a strong market for U.S. public debt financing in the first half of 1998 by issuing U.S. $175,000,000 of senior secured notes in April, 1998 ("Senior Secured Notes") and U.S. $100,000,000 of unsecured notes in August, 1998 ("Unsecured Notes").

17 The benefits of the 1996 Restructuring continued in 1998 but were not sufficient to offset a number of new factors which had a significant negative impact on financial performance, particularly in the fourth quarter. Canadian's eroded capital base gave it limited capacity to withstand negative effects on traffic and revenue. These factors included lower than expected operating revenues resulting from a continued weakness of the Asian economies, vigorous competition in Canadian's key western Canada and the western U.S. transborder markets, significant price discounting in most domestic markets following a labour disruption at Air Canada and CAIL's temporary loss of the ability to code-share with American Airlines on certain transborder flights due to a pilot dispute at American Airlines. Canadian also had increased operating expenses primarily due to the deterioration of the value of the Canadian dollar and additional airport and navigational fees imposed by NAV Canada which were not recoverable by Canadian through fare increases because of competitive pressures. This resulted in Canadian and its subsidiaries reporting a consolidated loss of $137.6 million for 1998.

18 As a result of these continuing weak financial results, Canadian undertook a number of additional strategic initiatives including entering the oneworldTM Alliance, the introduction of its new "Proud Wings" corporate image, a restructuring of CAIL 's Vancouver hub, the sale and leaseback of certain aircraft, expanded code sharing arrangements and the implementation of a service charge in an effort to recover a portion of the costs relating to NAV Canada fees.

19 Beginning in late 1998 and continuing into 1999, Canadian tried to access equity markets to strengthen its balance sheet. In January, 1999, the Board of Directors of CAC determined that while Canadian needed to obtain additional equity capital, an equity infusion alone would not address the fundamental structural problems in the domestic air transportation market.

20 Canadian believes that its financial performance was and is reflective of structural problems in the Canadian airline industry, most significantly, over capacity in the domestic air transportation market. It is the view of Canadian and Air Canada that Canada's relatively small population and the geographic distribution of that population is unable to support the overlapping networks of two full service national carriers. As described further below, the Government of Canada has recognized this fundamental problem and has been instrumental in attempts to develop a solution.

Initial Discussions with Air Canada

21 Accordingly, in January, 1999, CAC's Board of Directors directed management to explore all strategic alternatives available to Canadian, including discussions regarding a possible merger or other transaction involving Air Canada.

22 Canadian had discussions with Air Canada in early 1999. AMR also participated in those discussions. While several alternative merger transactions were considered in the course of these discussions, Canadian, AMR and Air Canada were unable to reach agreement.

23 Following the termination of merger discussions between Canadian and Air Canada, senior management of Canadian, at the direction of the Board and with the support of AMR, renewed its efforts to secure financial partners with the objective of obtaining either an equity investment and support for an eventual merger with Air Canada or immediate financial support for a merger with Air Canada.

Offer by Onex

24 In early May, the discussions with Air Canada having failed, Canadian focussed its efforts on discussions with Onex Corporation ("Onex") and AMR concerning the basis upon which a merger of Canadian and Air Canada could be accomplished.

25 On August 23, 1999, Canadian entered into an Arrangement Agreement with Onex, AMR and Airline Industry Revitalization Co. Inc. ("AirCo") (a company owned jointly by Onex and AMR and controlled by Onex). The Arrangement Agreement set out the terms of a Plan of Arrangement providing for the purchase by AirCo of all of the outstanding common and non-voting shares of CAC. The Arrangement Agreement was conditional upon, among other things, the successful completion of a simultaneous offer by AirCo for all of the voting and non-voting shares of Air Canada. On August 24, 1999, AirCo announced its offers to purchase the shares of both CAC and Air Canada and to subsequently merge the operations of the two airlines to create one international carrier in Canada.

26 On or about September 20, 1999 the Board of Directors of Air Canada recommended against the AirCo offer. On or about October 19, 1999, Air Canada announced its own proposal to its shareholders to repurchase shares of Air Canada. Air Canada's announcement also indicated Air Canada's intention to make a bid for CAC and to proceed to complete a merger with Canadian subject to a restructuring of Canadian's debt.

27 There were several rounds of offers and counter-offers between AirCo and Air Canada. On November 5, 1999, the Quebec Superior Court ruled that the AirCo offer for Air Canada violated the provisions of the Air Canada Public Participation Act. AirCo immediately withdrew its offers. At that time, Air Canada indicated its intention to proceed with its offer for CAC.

28 Following the withdrawal of the AirCo offer to purchase CAC, and notwithstanding Air Canada's stated intention to proceed with its offer, there was a renewed uncertainty about Canadian's future which adversely affected operations. As described further below, Canadian lost significant forward bookings which further reduced the company's remaining liquidity.

Offer by 853350

29 On November 11, 1999, 853350 (a corporation financed by Air Canada and owned as to 10% by Air Canada) made a formal offer for all of the common and non-voting shares of CAC. Air Canada indicated that the involvement of 853350 in the take-over bid was necessary in order to protect Air Canada from the potential adverse effects of a restructuring of Canadian's debt and that Air Canada would only complete a merger with Canadian after the completion of a debt restructuring transaction. The offer by 853350 was conditional upon, among other things, a satisfactory resolution of AMR's claims in respect of Canadian and a satisfactory resolution of certain regulatory issues arising from the announcement made on October 26, 1999 by the Government of Canada regarding its intentions to alter the regime governing the airline industry.

30 As noted above, AMR and its subsidiaries and affiliates had certain agreements with Canadian arising from AMR's investment (through its wholly owned subsidiary, Aurora Airline Investments, Inc.) in CAIL during the 1994 Restructuring. In particular, the Services Agreement by which AMR and its subsidiaries and affiliates provided certain reservations, scheduling and other airline related services to Canadian provided for a termination fee of approximately $500 million (as at December 31, 1999) while the terms governing the preferred shares issued to Aurora provided for exchange rights which were only retractable by Canadian upon payment of a redemption fee in excess of $500 million (as at December 31, 1999). Unless such provisions were amended or waived, it was practically impossible for Canadian to complete a merger with Air Canada since the cost of proceeding without AMR's consent was simply too high.

31 Canadian had continued its efforts to seek out all possible solutions to its structural problems following the withdrawal of the AirCo offer on November 5, 1999. While AMR indicated its willingness to provide a measure of support by allowing a deferral of some of the fees payable to AMR under the Services Agreement, Canadian was unable to find any investor willing to provide the liquidity necessary to keep Canadian operating while alternative solutions were sought.

32 After 853350 made its offer, 853350 and Air Canada entered into discussions with AMR regarding the purchase by 853350 of AMR's shareholding in CAIL as well as other matters regarding code sharing agreements and various services provided to Canadian by AMR and its subsidiaries and affiliates. The parties reached an agreement on November 22, 1999 pursuant to which AMR agreed to reduce its potential damages claim for termination of the Services Agreement by approximately 88%.

33 On December 4, 1999, CAC's Board recommended acceptance of 853350's offer to its shareholders and on December 21, 1999, two days before the offer closed, 853350 received approval for the offer from the Competition Bureau as well as clarification from the Government of Canada on the proposed regulatory framework for the Canadian airline industry.

34 As noted above, Canadian's financial condition deteriorated further after the collapse of the AirCo Arrangement transaction. In particular:

a) the doubts which were publicly raised as to Canadian's ability to survive made Canadian's efforts to secure additional financing through various sale-leaseback transactions more difficult;
b) sales for future air travel were down by approximately 10% compared to 1998;
c) CAIL's liquidity position, which stood at approximately $84 million (consolidated cash and available credit) as at September 30, 1999, reached a critical point in late December, 1999 when it was about to go negative.

35 In late December, 1999, Air Canada agreed to enter into certain transactions designed to ensure that Canadian would have enough liquidity to continue operating until the scheduled completion of the 853350 take-over bid on January 4, 2000. Air Canada agreed to purchase rights to the Toronto-Tokyo route for $25 million and to a sale-leaseback arrangement involving certain unencumbered aircraft and a flight simulator for total proceeds of approximately $20 million. These transactions gave Canadian sufficient liquidity to continue operations through the holiday period.

36 If Air Canada had not provided the approximate $45 million injection in December 1999, Canadian would likely have had to file for bankruptcy and cease all operations before the end of the holiday travel season.

37 On January 4, 2000, with all conditions of its offer having been satisfied or waived, 853350 purchased approximately 82% of the outstanding shares of CAC. On January 5, 1999, 853350 completed the purchase of the preferred shares of CAIL owned by Aurora. In connection with that acquisition, Canadian agreed to certain amendments to the Services Agreement reducing the amounts payable to AMR in the event of a termination of such agreement and, in addition, the unanimous shareholders agreement which gave AMR the right to require Canadian to purchase the CAIL preferred shares under certain circumstances was terminated. These arrangements had the effect of substantially reducing the obstacles to a restructuring of Canadian's debt and lease obligations and also significantly reduced the claims that AMR would be entitled to advance in such a restructuring.

38 Despite the $45 million provided by Air Canada, Canadian's liquidity position remained poor. With January being a traditionally slow month in the airline industry, further bridge financing was required in order to ensure that Canadian would be able to operate while a debt restructuring transaction was being negotiated with creditors. Air Canada negotiated an arrangement with the Royal Bank of Canada ("Royal Bank") to purchase a participation interest in the operating credit facility made available to Canadian. As a result of this agreement, Royal Bank agreed to extend Canadian's operating credit facility from $70 million to $120 million in January, 2000 and then to $145 million in March, 2000. Canadian agreed to supplement the assignment of accounts receivable security originally securing Royal's $70 million facility with a further Security Agreement securing certain unencumbered assets of Canadian in consideration for this increased credit availability. Without the support of Air Canada or another financially sound entity, this increase in credit would not have been possible.

39 Air Canada has stated publicly that it ultimately wishes to merge the operations of Canadian and Air Canada, subject to Canadian completing a financial restructuring so as to permit Air Canada to complete the acquisition on a financially sound basis. This pre-condition has been emphasized by Air Canada since the fall of 1999.

40 Prior to the acquisition of majority control of CAC by 853350, Canadian's management, Board of Directors and financial advisors had considered every possible alternative for restoring Canadian to a sound financial footing. Based upon Canadian's extensive efforts over the past year in particular, but also the efforts since 1992 described above, Canadian came to the conclusion that it must complete a debt restructuring to permit the completion of a full merger between Canadian and Air Canada.

41 On February 1, 2000, Canadian announced a moratorium on payments to lessors and lenders. As a result of this moratorium Canadian defaulted on the payments due under its various credit facilities and aircraft leases. Absent the assistance provided by this moratorium, in addition to Air Canada's support, Canadian would not have had sufficient liquidity to continue operating until the completion of a debt restructuring.

42 Following implementation of the moratorium, Canadian with Air Canada embarked on efforts to restructure significant obligations by consent. The further damage to public confidence which a

CCAA filing could produce required Canadian to secure a substantial measure of creditor support in advance of any public filing for court protection.

43 Before the Petitioners started these CCAA proceedings, Air Canada, CAIL and lessors of 59 aircraft in its fleet had reached agreement in principle on the restructuring plan.

44 Canadian and Air Canada have also been able to reach agreement with the remaining affected secured creditors, being the holders of the U.S. $175 million Senior Secured Notes, due 2005, (the "Senior Secured Noteholders") and with several major unsecured creditors in addition to AMR, such as Loyalty Management Group Canada Inc.

45 On March 24, 2000, faced with threatened proceedings by secured creditors, Canadian petitioned under the CCAA and obtained a stay of proceedings and related interim relief by Order of the Honourable Chief Justice Moore on that same date. Pursuant to that Order, PricewaterhouseCoopers, Inc. was appointed as the Monitor, and companion proceedings in the United States were authorized to be commenced.

46 Since that time, due to the assistance of Air Canada, Canadian has been able to complete the restructuring of the remaining financial obligations governing all aircraft to be retained by Canadian for future operations. These arrangements were approved by this Honourable Court in its Orders dated April 14, 2000 and May 10, 2000, as described in further detail below under the heading "The Restructuring Plan".

47 On April 7, 2000, this court granted an Order giving directions with respect to the filing of the plan, the calling and holding of meetings of affected creditors and related matters.

48 On April 25, 2000 in accordance with the said Order, Canadian filed and served the plan (in its original form) and the related notices and materials.

49 The plan was amended, in accordance with its terms, on several occasions, the form of Plan voted upon at the Creditors' Meetings on May 26, 2000 having been filed and served on May 25, 2000 (the "Plan").

The Restructuring Plan

50 The Plan has three principal aims described by Canadian:

(a) provide near term liquidity so that Canadian can sustain operations;
(b) allow for the return of aircraft not required by Canadian; and
(c) permanently adjust Canadian's debt structure and lease facilities to reflect the current market for asset values and carrying costs in return for Air Canada providing a guarantee of the restructured obligations.

51 The proposed treatment of stakeholders is as follows:

1. Unaffected Secured Creditors- Royal Bank, CAIL's operating lender, is an unaffected creditor with respect to its operating credit facility. Royal Bank holds security over CAIL's accounts receivable and most of CAIL's operating assets not specifically secured by aircraft financiers or the Senior Secured Noteholders. As noted above, arrangements entered into between Air Canada and Royal Bank have provided CAIL with liquidity necessary for it to continue operations since January 2000.

Also unaffected by the Plan are those aircraft lessors, conditional vendors and secured creditors holding security over CAIL's aircraft who have entered into agreements with CAIL and/or Air Canada with respect to the restructuring of CAIL's obligations. A number of such agreements, which were initially contained in the form of letters of intent ("LOIs"), were entered into prior to the commencement of the CCAA proceedings, while a total of 17 LOIs were completed after that date. In its Second and Fourth Reports the Monitor reported to the court on these agreements. The LOIs entered into after the proceedings commenced were reviewed and approved by the court on April 14, 2000 and May 10, 2000.

The basis of the LOIs with aircraft lessors was that the operating lease rates were reduced to fair market lease rates or less, and the obligations of CAIL under the leases were either assumed or guaranteed by Air Canada. Where the aircraft was subject to conditional sale agreements or other secured indebtedness, the value of the secured debt was reduced to the fair market value of the aircraft, and the interest rate payable was reduced to current market rates reflecting Air Canada's credit. CAIL's obligations under those agreements have also been assumed or guaranteed by Air Canada. The claims of these creditors for reduced principal and interest amounts, or reduced lease payments, are Affected Unsecured Claims under the Plan. In a number of cases these claims have been assigned to Air Canada and Air Canada disclosed that it would vote those claims in favour of the Plan.

2. Affected Secured Creditors- The Affected Secured Creditors under the Plan are the Senior Secured Noteholders with a claim in the amount of US$175,000,000. The Senior Secured Noteholders are secured by a diverse package of Canadian's assets, including its inventory of aircraft spare parts, ground equipment, spare engines, flight simulators, leasehold interests at Toronto, Vancouver and Calgary airports, the shares in CRAL 98 and a $53 million note payable by CRAL to CAIL.

   The Plan offers the Senior Secured Noteholders payment of 97 cents on the dollar. The deficiency is included in the Affected Unsecured Creditor class and the Senior Secured Noteholders advised the court they would be voting the deficiency in favour of the Plan.

3. Unaffected Unsecured Creditors-In the circular accompanying the November 11, 1999 853350 offer it was stated that:

   > The Offeror intends to conduct the Debt Restructuring in such a manner as to seek to ensure that the unionized employees of Canadian, the suppliers of new credit (including trade credit) and the members of the flying public are left unaffected.

The Offeror is of the view that the pursuit of these three principles is essential in order to ensure that the long term value of Canadian is preserved.

Canadian's employees, customers and suppliers of goods and services are unaffected by the CCAA Order and Plan.

Also unaffected are parties to those contracts or agreements with Canadian which are not being terminated by Canadian pursuant to the terms of the March 24, 2000 Order.

4. Affected Unsecured Creditors- CAIL has identified unsecured creditors who do not fall into the above three groups and listed these as Affected Unsecured Creditors under the Plan. They are offered 14 cents on the dollar on their claims. Air Canada would fund this payment.

The Affected Unsecured Creditors fall into the following categories:

a. Claims of holders of or related to the Unsecured Notes (the "Unsecured Noteholders");
b. Claims in respect of certain outstanding or threatened litigation involving Canadian;
c. Claims arising from the termination, breach or repudiation of certain contracts, leases or agreements to which Canadian is a party other than aircraft financing or lease arrangements;
d. Claims in respect of deficiencies arising from the termination or re-negotiation of aircraft financing or lease arrangements;
e. Claims of tax authorities against Canadian; and
f. Claims in respect of the under-secured or unsecured portion of amounts due to the Senior Secured Noteholders.

52 There are over $700 million of proven unsecured claims. Some unsecured creditors have disputed the amounts of their claims for distribution purposes. These are in the process of determination by the court-appointed Claims Officer and subject to further appeal to the court. If the Claims Officer were to allow all of the disputed claims in full and this were confirmed by the court, the aggregate of unsecured claims would be approximately $1.059 million.

53 The Monitor has concluded that if the Plan is not approved and implemented, Canadian will not be able to continue as a going concern and in that event, the only foreseeable alternative would be a liquidation of Canadian's assets by a receiver and/or a trustee in bankruptcy. Under the Plan, Canadian's obligations to parties essential to ongoing operations, including employees, customers, travel agents, fuel, maintenance and equipment suppliers, and airport authorities are in most cases to be treated as unaffected and paid in full. In the event of a liquidation, those parties would not, in most cases, be paid in full and, except for specific lien rights and statutory priorities, would rank as ordinary unsecured creditors. The Monitor estimates that the additional unsecured claims which would arise if Canadian were to cease operations as a going concern and be forced into liquidation would be in excess of $1.1 billion.

54 In connection with its assessment of the Plan, the Monitor performed a liquidation analysis of CAIL as at March 31, 2000 in order to estimate the amounts that might be recovered by CAIL's creditors and shareholders in the event of disposition of CAIL's assets by a receiver or trustee. The Monitor concluded that a liquidation would result in a shortfall to certain secured creditors, including the Senior Secured Noteholders, a recovery by ordinary unsecured creditors of between one cent and three cents on the dollar, and no recovery by shareholders.

55 There are two vociferous opponents of the Plan, Resurgence Asset Management LLC ("Resurgence") who acts on behalf of its and/or its affiliate client accounts and four shareholders of CAC. Resurgence is incorporated pursuant to the laws of New York, U.S.A. and has its head office in White Plains, New York. It conducts an investment business specializing in high yield distressed debt. Through a series of purchases of the Unsecured Notes commencing in April 1999, Resurgence clients hold $58,200,000 of the face value of or 58.2% of the notes issued. Resurgence purchased 7.9 million units in April 1999. From November 3, 1999 to December 9, 1999 it purchased an additional 20,850,000 units. From January 4, 2000 to February 3, 2000 Resurgence purchased an additional 29,450,000 units.

56 Resurgence seeks declarations that: the actions of Canadian, Air Canada and 853350 constitute an amalgamation, consolidation or merger with or into Air Canada or a conveyance or transfer of all or substantially all of Canadian's assets to Air Canada; that any plan of arrangement involving Canadian will not affect Resurgence and directing the repurchase of their notes pursuant to the provisions of their trust indenture and that the actions of Canadian, Air Canada and 853350 are oppressive and unfairly prejudicial to it pursuant to section 234 of the Business Corporations Act.

57 Four shareholders of CAC also oppose the plan. Neil Baker, a Toronto resident, acquired 132,500 common shares at a cost of $83,475.00 on or about May 5, 2000. Mr. Baker sought to commence proceedings to "remedy an injustice to the minority holders of the common shares". Roger Midiaty, Michael Salter and Hal Metheral are individual shareholders who were added as parties at their request during the proceedings. Mr. Midiaty resides in Calgary, Alberta and holds 827 CAC shares which he has held since 1994. Mr. Metheral is also a Calgary resident and holds approximately 14,900 CAC shares in his RRSP and has held them since approximately 1994 or 1995. Mr. Salter is a resident of Scottsdale, Arizona and is the beneficial owner of 250 shares of CAC and is a joint beneficial owner of 250 shares with his wife. These shareholders will be referred in the Decision throughout as the "Minority Shareholders".

58 The Minority Shareholders oppose the portion of the Plan that relates to the reorganization of CAIL, pursuant to section 185 of the Alberta Business Corporations Act ("ABCA"). They characterize the transaction as a cancellation of issued shares unauthorized by section 167 of the ABCA or alternatively is a violation of section 183 of the ABCA. They submit the application for the order of reorganization should be denied as being unlawful, unfair and not supported by the evidence.

III. ANALYSIS

59 Section 6 of the CCAA provides that:

> 6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by

proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

60 Prior to sanctioning a plan under the CCAA, the court must be satisfied in regard to each of the following criteria:

(1) there must be compliance with all statutory requirements;
(2) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and
(3) the plan must be fair and reasonable.

61 A leading articulation of this three-part test appears in Re Northland Properties Ltd. (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.) at 182-3, aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.) and has been regularly followed, see for example Re Sammi Atlas Inc. (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.) at 172 and Re T. Eaton Co., [1999] O.J. No. 5322 (Ont. Sup. Ct.) at paragraph 7. Each of these criteria are reviewed in turn below.

1. Statutory Requirements

62 Some of the matters that may be considered by the court on an application for approval of a plan of compromise and arrangement include:

(a) the applicant comes within the definition of "debtor company" in section 2 of the CCAA;
(b) the applicant or affiliated debtor companies have total claims within the meaning of section 12 of the CCAA in excess of $5,000,000;
(c) the notice calling the meeting was sent in accordance with the order of the court;
(d) the creditors were properly classified;
(e) the meetings of creditors were properly constituted;
(f) the voting was properly carried out; and
(g) the plan was approved by the requisite double majority or majorities.

63 I find that the Petitioners have complied with all applicable statutory requirements. Specifically:

(a) CAC and CAIL are insolvent and thus each is a "debtor company" within the meaning of section 2 of the CCAA. This was established in the affidavit evidence of Douglas Carty, Senior Vice President and Chief Financial Officer of

Canadian, and so declared in the March 24, 2000 Order in these proceedings and confirmed in the testimony given by Mr. Carty at this hearing.

(b) CAC and CAIL have total claims that would be claims provable in bankruptcy within the meaning of section 12 of the CCAA in excess of $5,000,000.

(c) In accordance with the April 7, 2000 Order of this court, a Notice of Meeting and a disclosure statement (which included copies of the Plan and the March 24th and April 7th Orders of this court) were sent to the Affected Creditors, the directors and officers of the Petitioners, the Monitor and persons who had served a Notice of Appearance, on April 25, 2000.

(d) As confirmed by the May 12, 2000 ruling of this court (leave to appeal denied May 29, 2000), the creditors have been properly classified.

(e) Further, as detailed in the Monitor's Fifth Report to the Court and confirmed by the June 14, 2000 decision of this court in respect of a challenge by Resurgence Asset Management LLC ("Resurgence"), the meetings of creditors were properly constituted, the voting was properly carried out and the Plan was approved by the requisite double majorities in each class. The composition of the majority of the unsecured creditor class is addressed below under the heading "Fair and Reasonable".

2. Matters Unauthorized

64 This criterion has not been widely discussed in the reported cases. As recognized by Blair J. in Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.) and Farley J. in Cadillac Fairview (Re), [1995] O.J. No. 274, 53 A.C.W.S. (3d) 305 (Ont. Gen. Div.), within the CCAA process the court must rely on the reports of the Monitor as well as the parties in ensuring nothing contrary to the CCAA has occurred or is contemplated by the plan.

65 In this proceeding, the dissenting groups have raised two matters which in their view are unauthorized by the CCAA: firstly, the Minority Shareholders of CAC suggested the proposed share capital reorganization of CAIL is illegal under the ABCA and Ontario Securities Commission Policy 9.1, and as such cannot be authorized under the CCAA and secondly, certain unsecured creditors suggested that the form of release contained in the Plan goes beyond the scope of release permitted under the CCAA.

a. Legality of proposed share capital reorganization

66 Subsection 185(2) of the ABCA provides:

> (2) If a corporation is subject to an order for reorganization, its articles may be amended by the order to effect any change that might lawfully be made by an amendment under section 167.

67 Sections 6.1(2)(d) and (e) and Schedule "D" of the Plan contemplate that:

a. All CAIL common shares held by CAC will be converted into a single retractable share, which will then be retracted by CAIL for $1.00; and

b. All CAIL preferred shares held by 853350 will be converted into CAIL common shares.

68 The Articles of Reorganization in Schedule "D" to the Plan provide for the following amendments to CAIL's Articles of Incorporation to effect the proposed reorganization:

(a) consolidating all of the issued and outstanding common shares into one common share;
(b) redesignating the existing common shares as "Retractable Shares" and changing the rights, privileges, restrictions and conditions attaching to the Retractable Shares so that the Retractable Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital;
(c) cancelling the Non-Voting Shares in the capital of the corporation, none of which are currently issued and outstanding, so that the corporation is no longer authorized to issue Non-Voting Shares;
(d) changing all of the issued and outstanding Class B Preferred Shares of the corporation into Class A Preferred Shares, on the basis of one (1) Class A Preferred Share for each one (1) Class B Preferred Share presently issued and outstanding;
(e) redesignating the existing Class A Preferred Shares as "Common Shares" and changing the rights, privileges, restrictions and conditions attaching to the Common Shares so that the Common Shares shall have attached thereto the rights, privileges, restrictions and conditions as set out in the Schedule of Share Capital; and
(f) cancelling the Class B Preferred Shares in the capital of the corporation, none of which are issued and outstanding after the change in paragraph (d) above, so that the corporation is no longer authorized to issue Class B Preferred Shares;

Section 167 of the ABCA

69 Reorganizations under section 185 of the ABCA are subject to two preconditions:

a. The corporation must be "subject to an order for re-organization"; and
b. The proposed amendments must otherwise be permitted under section 167 of the ABCA.

70 The parties agreed that an order of this court sanctioning the Plan would satisfy the first condition.

71 The relevant portions of section 167 provide as follows:

> 167(1) Subject to sections 170 and 171, the articles of a corporation may by special resolution be amended to
>
> (e) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued,
> (f) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series into the same or a different number of shares of other classes or series,

(g.1) cancel a class or series of shares where there are no issued or outstanding shares of that class or series,

72 Each change in the proposed CAIL Articles of Reorganization corresponds to changes permitted under s. 167(1) of the ABCA, as follows:

Proposed Amendment in Schedule "D"	Subsection 167(1), ABCA
(a) - consolidation of Common Shares	167(1)(f)
(b) - change of designation and rights	167(1)(e)
(c) - cancellation	167(1)(g.1)
(d) - change in shares	167(1)(f)
(e) - change of designation and rights	167(1)(e)
(f) - cancellation	167(1)(g.1)

73 The Minority Shareholders suggested that the proposed reorganization effectively cancels their shares in CAC. As the above review of the proposed reorganization demonstrates, that is not the case. Rather, the shares of CAIL are being consolidated, altered and then retracted, as permitted under section 167 of the ABCA. I find the proposed reorganization of CAIL's share capital under the Plan does not violate section 167.

74 In R. Dickerson et al, Proposals for a New Business Corporation Law for Canada, Vol.1: Commentary (the "Dickerson Report") regarding the then proposed Canada Business Corporations Act, the identical section to section 185 is described as having been inserted with the object of enabling the "court to effect any necessary amendment of the articles of the corporation in order to achieve the objective of the reorganization without having to comply with the formalities of the Draft Act, particularly shareholder approval of the proposed amendment".

75 The architects of the business corporation act model which the ABCA follows, expressly contemplated reorganizations in which the insolvent corporation would eliminate the interest of common shareholders. The example given in the Dickerson Report of a reorganization is very similar to that proposed in the Plan:

> For example, the reorganization of an insolvent corporation may require the following steps: first, reduction or even elimination of the interest of the common shareholders; second, relegation of the preferred shareholders to the status of common shareholders; and third, relegation of the secured debenture holders to the status of either unsecured Noteholders or preferred shareholders.

76 The rationale for allowing such a reorganization appears plain; the corporation is insolvent, which means that on liquidation the shareholders would get nothing. In those circumstances, as described further below under the heading "Fair and Reasonable", there is nothing unfair or unreasonable in the court effecting changes in such situations without shareholder approval. Indeed, it would be unfair to the creditors and other stakeholders to permit the shareholders (whose interest has the lowest priority) to have any ability to block a reorganization.

77 The Petitioners were unable to provide any case law addressing the use of section 185 as proposed under the Plan. They relied upon the decisions of Royal Oak Mines Inc., [1999] O.J. No. 4848 and Re T Eaton Co., supra in which Farley J.of the Ontario Superior Court of Justice emphasized that shareholders are at the bottom of the hierarchy of interests in liquidation or liquidation related scenarios.

78 Section 185 provides for amendment to articles by court order. I see no requirement in that section for a meeting or vote of shareholders of CAIL, quite apart from shareholders of CAC. Further, dissent and appraisal rights are expressly removed in subsection (7). To require a meeting and vote of shareholders and to grant dissent and appraisal rights in circumstances of insolvency would frustrate the object of section 185 as described in the Dickerson Report.

79 In the circumstances of this case, where the majority shareholder holds 82% of the shares, the requirement of a special resolution is meaningless. To require a vote suggests the shares have value. They do not. The formalities of the ABCA serve no useful purpose other than to frustrate the reorganization to the detriment of all stakeholders, contrary to the CCAA.

Section 183 of the ABCA

80 The Minority Shareholders argued in the alternative that if the proposed share reorganization of CAIL were not a cancellation of their shares in CAC and therefore allowed under section 167 of the ABCA, it constituted a "sale, lease, or exchange of substantially all the property" of CAC and thus required the approval of CAC shareholders pursuant to section 183 of the ABCA. The Minority Shareholders suggested that the common shares in CAIL were substantially all of the assets of CAC and that all of those shares were being "exchanged" for $1.00.

81 I disagree with this creative characterization. The proposed transaction is a reorganization as contemplated by section 185 of the ABCA. As recognized in Savage v. Amoco Acquisition Company Ltd, [1988] A.J. No. 68 (Q.B.), aff'd, 68 C.B.R. (3d) 154 (Alta. C.A.), the fact that the same end might be achieved under another section does not exclude the section to be relied on. A statute may well offer several alternatives to achieve a similar end.

Ontario Securities Commission Policy 9.1

82 The Minority Shareholders also submitted the proposed reorganization constitutes a "related party transaction" under Policy 9.1 of the Ontario Securities Commission. Under the Policy, transactions are subject to disclosure, minority approval and formal valuation requirements which have not been followed here. The Minority Shareholders suggested that the Petitioners were therefore in breach of the Policy unless and until such time as the court is advised of the relevant requirements of the Policy and grants its approval as provided by the Policy.

83 These shareholders asserted that in the absence of evidence of the going concern value of CAIL so as to determine whether that value exceeds the rights of the Preferred Shares of CAIL, the Court should not waive compliance with the Policy.

84 To the extent that this reorganization can be considered a "related party transaction", I have found, for the reasons discussed below under the heading "Fair and Reasonable", that the Plan, including the proposed reorganization, is fair and reasonable and accordingly I would waive the requirements of Policy 9.1.

b. Release

85 Resurgence argued that the release of directors and other third parties contained in the Plan does not comply with the provisions of the CCAA.

86 The release is contained in section 6.2(2)(ii) of the Plan and states as follows:

> As of the Effective Date, each of the Affected Creditors will be deemed to forever release, waive and discharge all claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action and liabilities...that are based in whole or in part on any act, omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to the Applicants and Subsidiaries, the CCAA Proceedings, or the Plan against:(i) The Applicants and Subsidiaries; (ii) The Directors, Officers and employees of the Applicants or Subsidiaries in each case as of the date of filing (and in addition, those who became Officers and/or Directors thereafter but prior to the Effective Date); (iii) The former Directors, Officers and employees of the Applicants or Subsidiaries, or (iv) the respective current and former professionals of the entities in subclauses (1) to (3) of this s. 6.2(2) (including, for greater certainty, the Monitor, its counsel and its current Officers and Directors, and current and former Officers, Directors, employees, shareholders and professionals of the released parties) acting in such capacity.

87 Prior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company. In 1997, section 5.1 was added to the CCAA. Section 5.1 states:

> 5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> (2) A provision for the compromise of claims against directors may not include claims that:
>
> (a) relate to contractual rights of one or more creditors; or
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> (3) The Court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

88 Resurgence argued that the form of release does not comply with section 5.1 of the CCAA insofar as it applies to individuals beyond directors and to a broad spectrum of claims beyond obligations of the Petitioners for which their directors are "by law liable". Resurgence submitted

that the addition of section 5.1 to the CCAA constituted an exception to a long standing principle and urged the court to therefore interpret s. 5.1 cautiously, if not narrowly. Resurgence relied on Barrette v. Crabtree Estate, [1993], 1 S.C.R. 1027 at 1044 and Bruce Agra Foods Limited v. Proposal of Everfresh Beverages Inc. (Receiver of) (1996), 45 C.B.R. (3d) 169 (Ont. Gen. Div.) at para. 5 in this regard.

89 With respect to Resurgence's complaint regarding the breadth of the claims covered by the release, the Petitioners asserted that the release is not intended to override section 5.1(2). Canadian suggested this can be expressly incorporated into the form of release by adding the words "excluding the claims excepted by s. 5.1(2) of the CCAA" immediately prior to subsection (iii) and clarifying the language in Section 5.1 of the Plan. Canadian also acknowledged, in response to a concern raised by Canada Customs and Revenue Agency, that in accordance with s. 5.1(1) of the CCAA, directors of CAC and CAIL could only be released from liability arising before March 24, 2000, the date these proceedings commenced. Canadian suggested this was also addressed in the proposed amendment. Canadian did not address the propriety of including individuals in addition to directors in the form of release.

90 In my view it is appropriate to amend the proposed release to expressly comply with section 5.1(2) of the CCAA and to clarify Section 5.1 of the Plan as Canadian suggested in its brief. The additional language suggested by Canadian to achieve this result shall be included in the form of order. Canada Customs and Revenue Agency is apparently satisfied with the Petitioners' acknowledgement that claims against directors can only be released to the date of commencement of proceedings under the CCAA, having appeared at this hearing to strongly support the sanctioning of the Plan, so I will not address this concern further.

91 Resurgence argued that its claims fell within the categories of excepted claims in section 5.1(2) of the CCAA and accordingly, its concern in this regard is removed by this amendment. Unsecured creditors JHHD Aircraft Leasing No. 1 and No. 2 suggested there may be possible wrongdoing in the acts of the directors during the restructuring process which should not be immune from scrutiny and in my view this complaint would also be caught by the exception captured in the amendment.

92 While it is true that section 5.2 of the CCAA does not authorize a release of claims against third parties other than directors, it does not prohibit such releases either. The amended terms of the release will not prevent claims from which the CCAA expressly prohibits release. Aside from the complaints of Resurgence, which by their own submissions are addressed in the amendment I have directed, and the complaints of JHHD Aircraft Leasing No. 1 and No. 2, which would also be addressed in the amendment, the terms of the release have been accepted by the requisite majority of creditors and I am loathe to further disturb the terms of the Plan, with one exception.

93 Amex Bank of Canada submitted that the form of release appeared overly broad and might compromise unaffected claims of affected creditors. For further clarification, Amex Bank of Canada's potential claim for defamation is unaffected by the Plan and I am prepared to order Section 6.2(2)(ii) be amended to reflect this specific exception.

3. Fair and Reasonable

94 In determining whether to sanction a plan of arrangement under the CCAA, the court is guided by two fundamental concepts: "fairness" and "reasonableness". While these concepts are always at

the heart of the court's exercise of its discretion, their meanings are necessarily shaped by the unique circumstances of each case, within the context of the Act and accordingly can be difficult to distill and challenging to apply. Blair J. described these concepts in Olympia and York Dev. Ltd. v. Royal Trust Co., supra, at page 9:

> "Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the Companies' Creditors Arrangement Act. Fairness is the quintessential expression of the court's equitable jurisdiction - although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation which make its exercise an exercise in equity - and "reasonableness" is what lends objectivity to the process.

95 The legislation, while conferring broad discretion on the court, offers little guidance. However, the court is assisted in the exercise of its discretion by the purpose of the CCAA: to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and, in many instances, a much broader constituency of affected persons. Parliament has recognized that reorganization, if commercially feasible, is in most cases preferable, economically and socially, to liquidation: Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., [1989] 2 W.W.R. 566 at 574 (Alta.Q.B.); Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, [1989] 3 W.W.R. 363 at 368 (B.C.C.A.).

96 The sanction of the court of a creditor-approved plan is not to be considered as a rubber stamp process. Although the majority vote that brings the plan to a sanction hearing plays a significant role in the court's assessment, the court will consider other matters as are appropriate in light of its discretion. In the unique circumstances of this case, it is appropriate to consider a number of additional matters:

a. The composition of the unsecured vote;
b. What creditors would receive on liquidation or bankruptcy as compared to the Plan;
c. Alternatives available to the Plan and bankruptcy;
d. Oppression;
e. Unfairness to Shareholders of CAC; and
f. The public interest.

a. Composition of the unsecured vote

97 As noted above, an important measure of whether a plan is fair and reasonable is the parties' approval and the degree to which it has been given. Creditor support creates an inference that the plan is fair and reasonable because the assenting creditors believe that their interests are treated equitably under the plan. Moreover, it creates an inference that the arrangement is economically feasible and therefore reasonable because the creditors are in a better position then the courts to gauge business risk. As stated by Blair J. at page 11 of Olympia & York Developments Ltd., supra:

> As other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspect of the Plan or descending into the negotiating arena or substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment

of the participants. The parties themselves know best what is in their interests in those areas.

98 However, given the manner of voting under the CCAA, the court must be cognizant of the treatment of minorities within a class: see for example Quintette Coal Ltd., (1992) 13 C.B.R. (3d) 146 (B.C.S.C) and Re Alabama, New Orleans, Texas and Pacific Junction Railway Co. (1890) 60 L.J. Ch. 221 (C.A.). The court can address this by ensuring creditors' claims are properly classified. As well, it is sometimes appropriate to tabulate the vote of a particular class so the results can be assessed from a fairness perspective. In this case, the classification was challenged by Resurgence and I dismissed that application. The vote was also tabulated in this case and the results demonstrate that the votes of Air Canada and the Senior Secured Noteholders, who voted their deficiency in the unsecured class, were decisive.

99 The results of the unsecured vote, as reported by the Monitor, are:

1. For the resolution to approve the Plan: 73 votes (65% in number) representing $494,762,304 in claims (76% in value);
2. Against the resolution: 39 votes (35% in number) representing $156,360,363 in claims (24% in value); and
3. Abstentions: 15 representing $968,036 in value.

100 The voting results as reported by the Monitor were challenged by Resurgence. That application was dismissed.

101 The members of each class that vote in favour of a plan must do so in good faith and the majority within a class must act without coercion in their conduct toward the minority. When asked to assess fairness of an approved plan, the court will not countenance secret agreements to vote in favour of a plan secured by advantages to the creditor: see for example, Hochberger v. Rittenberg (1916), 36 D.L.R. 450 (S.C.C.)

102 In Northland Properties Ltd. (Re) (1988), 73 C.B.R. (N.S.) 175 at 192-3 (B.C.S.C) aff'd 73 C.B.R. (N.S.) 195 (B.C.C.A.), dissenting priority mortgagees argued the plan violated the principle of equality due to an agreement between the debtor company and another priority mortgagee which essentially amounted to a preference in exchange for voting in favour of the plan. Trainor J. found that the agreement was freely disclosed and commercially reasonable and went on to approve the plan, using the three part test. The British Columbia Court of Appeal upheld this result and in commenting on the minority complaint McEachern J.A. stated at page 206:

> In my view, the obvious benefits of settling rights and keeping the enterprise together as a going concern far outweigh the deprivation of the appellants' wholly illusory rights. In this connection, the learned chambers judge said at p.29:
>
> > I turn to the question of the right to hold the property after an order absolute and whether or not this is a denial of something of that significance that it should affect these proceedings. There is in the material before me some evidence of values. There are the principles to which I have referred, as well as to the rights of majorities and the rights of minorities.

> Certainly, those minority rights are there, but it would seem to me that in view of the overall plan, in view of the speculative nature of holding property in the light of appraisals which have been given as to value, that this right is something which should be subsumed to the benefit of the majority.

103 Resurgence submitted that Air Canada manipulated the indebtedness of CAIL to assure itself of an affirmative vote. I disagree. I previously ruled on the validity of the deficiency when approving the LOIs and found the deficiency to be valid. I found there was consideration for the assignment of the deficiency claims of the various aircraft financiers to Air Canada, namely the provision of an Air Canada guarantee which would otherwise not have been available until plan sanction. The Monitor reviewed the calculations of the deficiencies and determined they were calculated in a reasonable manner. As such, the court approved those transactions. If the deficiency had instead remained with the aircraft financiers, it is reasonable to assume those claims would have been voted in favour of the plan. Further, it would have been entirely appropriate under the circumstances for the aircraft financiers to have retained the deficiency and agreed to vote in favour of the Plan, with the same result to Resurgence. That the financiers did not choose this method was explained by the testimony of Mr. Carty and Robert Peterson, Chief Financial Officer for Air Canada; quite simply it amounted to a desire on behalf of these creditors to shift the "deal risk" associated with the Plan to Air Canada. The agreement reached with the Senior Secured Noteholders was also disclosed and the challenge by Resurgence regarding their vote in the unsecured class was dismissed. There is nothing inappropriate in the voting of the deficiency claims of Air Canada or the Senior Secured Noteholders in the unsecured class. There is no evidence of secret vote buying such as discussed in Northland Properties Ltd. (Re).

104 If the Plan is approved, Air Canada stands to profit in its operation. I do not accept that the deficiency claims were devised to dominate the vote of the unsecured creditor class, however, Air Canada, as funder of the Plan is more motivated than Resurgence to support it. This divergence of views on its own does not amount to bad faith on the part of Air Canada. Resurgence submitted that only the Unsecured Noteholders received 14 cents on the dollar. That is not accurate, as demonstrated by the list of affected unsecured creditors included earlier in these Reasons. The Senior Secured Noteholders did receive other consideration under the Plan, but to suggest they were differently motivated suggests that those creditors did not ascribe any value to their unsecured claims. There is no evidence to support this submission.

105 The good faith of Resurgence in its vote must also be considered. Resurgence acquired a substantial amount of its claim after the failure of the Onex bid, when it was aware that Canadian's financial condition was rapidly deteriorating. Thereafter, Resurgence continued to purchase a substantial amount of this highly distressed debt. While Mr. Symington maintained that he bought because he thought the bonds were a good investment, he also acknowledged that one basis for purchasing was the hope of obtaining a blocking position sufficient to veto a plan in the proposed debt restructuring. This was an obvious ploy for leverage with the Plan proponents

106 The authorities which address minority creditors' complaints speak of "substantial injustice" (Keddy Motor Inns Ltd. (Re) (1992) 13 C.B.R. (3d) 245 (N.S.C.A.), "confiscation" of rights (Campeau Corp. (Re) (1992), 10 C.B.R. (3d) 104 (Ont. Ct. (Gen.Div.); Skydome Corp. (Re), [1999] O.J. No. 1261, 87 A.C.W.S (3d) 421 (Ont. Ct. Gen. Div.)) and majorities "feasting upon" the rights of the minority (Quintette Coal Ltd. (Re), (1992), 13 C.B.R.(3d) 146 (B.C.S.C.). Although it cannot

be disputed that the group of Unsecured Noteholders represented by Resurgence are being asked to accept a significant reduction of their claims, as are all of the affected unsecured creditors, I do not see a "substantial injustice", nor view their rights as having been "confiscated" or "feasted upon" by being required to succumb to the wishes of the majority in their class. No bad faith has been demonstrated in this case. Rather, the treatment of Resurgence, along with all other affected unsecured creditors, represents a reasonable balancing of interests. While the court is directed to consider whether there is an injustice being worked within a class, it must also determine whether there is an injustice with respect the stakeholders as a whole. Even if a plan might at first blush appear to have that effect, when viewed in relation to all other parties, it may nonetheless be considered appropriate and be approved: Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.)and Northland Properties (Re), supra at 9.

107 Further, to the extent that greater or discrete motivation to support a Plan may be seen as a conflict, the Court should take this same approach and look at the creditors as a whole and to the objecting creditors specifically and determine if their rights are compromised in an attempt to balance interests and have the pain of compromise borne equally.

108 Resurgence represents 58.2% of the Unsecured Noteholders or $96 million in claims. The total claim of the Unsecured Noteholders ranges from $146 million to $161 million. The affected unsecured class, excluding aircraft financing, tax claims, the noteholders and claims under $50,000, ranges from $116.3 million to $449.7 million depending on the resolutions of certain claims by the Claims Officer. Resurgence represents between 15.7% - 35% of that portion of the class.

109 The total affected unsecured claims, excluding tax claims, but including aircraft financing and noteholder claims including the unsecured portion of the Senior Secured Notes, ranges from $673 million to $1,007 million. Resurgence represents between 9.5% - 14.3% of the total affected unsecured creditor pool. These percentages indicate that at its very highest in a class excluding Air Canada's assigned claims and Senior Secured's deficiency, Resurgence would only represent a maximum of 35% of the class. In the larger class of affected unsecured it is significantly less. Viewed in relation to the class as a whole, there is no injustice being worked against Resurgence.

110 The thrust of the Resurgence submissions suggests a mistaken belief that they will get more than 14 cents on liquidation. This is not borne out by the evidence and is not reasonable in the context of the overall Plan.

b. Receipts on liquidation or bankruptcy

111 As noted above, the Monitor prepared and circulated a report on the Plan which contained a summary of a liquidation analysis outlining the Monitor's projected realizations upon a liquidation of CAIL ("Liquidation Analysis").

112 The Liquidation Analysis was based on: (1) the draft unaudited financial statements of Canadian at March 31, 2000; (2) the distress values reported in independent appraisals of aircraft and aircraft related assets obtained by CAIL in January, 2000; (3) a review of CAIL's aircraft leasing and financing documents; and (4) discussions with CAIL Management.

113 Prior to and during the application for sanction, the Monitor responded to various requests for information by parties involved. In particular, the Monitor provided a copy of the Liquidation Analysis to those who requested it. Certain of the parties involved requested the opportunity to

question the Monitor further, particularly in respect to the Liquidation Analysis and this court directed a process for the posing of those questions.

114 While there were numerous questions to which the Monitor was asked to respond, there were several areas in which Resurgence and the Minority Shareholders took particular issue: pension plan surplus, CRAL, international routes and tax pools. The dissenting groups asserted that these assets represented overlooked value to the company on a liquidation basis or on a going concern basis.

Pension Plan Surplus

115 The Monitor did not attribute any value to pension plan surplus when it prepared the Liquidation Analysis, for the following reasons:

1) The summaries of the solvency surplus/deficit positions indicated a cumulative net deficit position for the seven registered plans, after consideration of contingent liabilities;
2) The possibility, based on the previous splitting out of the seven plans from a single plan in 1988, that the plans could be held to be consolidated for financial purposes, which would remove any potential solvency surplus since the total estimated contingent liabilities exceeded the total estimated solvency surplus;
3) The actual calculations were prepared by CAIL's actuaries and actuaries representing the unions could conclude liabilities were greater; and
4) CAIL did not have a legal opinion confirming that surpluses belonged to CAIL.

116 The Monitor concluded that the entitlement question would most probably have to be settled by negotiation and/or litigation by the parties. For those reasons, the Monitor took a conservative view and did not attribute an asset value to pension plans in the Liquidation Analysis. The Monitor also did not include in the Liquidation Analysis any amount in respect of the claim that could be made by members of the plan where there is an apparent deficit after deducting contingent liabilities.

117 The issues in connection with possible pension surplus are: (1) the true amount of any of the available surplus; and (2) the entitlement of Canadian to any such amount.

118 It is acknowledged that surplus prior to termination can be accessed through employer contribution holidays, which Canadian has taken to the full extent permitted. However, there is no basis that has been established for any surplus being available to be withdrawn from an ongoing pension plan. On a pension plan termination, the amount available as a solvency surplus would first have to be further reduced by various amounts to determine whether there was in fact any true surplus available for distribution. Such reductions include contingent benefits payable in accordance with the provisions of each respective pension plan, any extraordinary plan wind up cost, the amounts of any contribution holidays taken which have not been reflected, and any litigation costs.

119 Counsel for all of Canadian's unionized employees confirmed on the record that the respective union representatives can be expected to dispute all of these calculations as well as to dispute entitlement.

120 There is a suggestion that there might be a total of $40 million of surplus remaining from all pension plans after such reductions are taken into account. Apart from the issue of entitlement, this assumes that the plans can be treated separately, that a surplus could in fact be realized on

liquidation and that the Towers Perrin calculations are not challenged. With total pension plan assets of over $2 billion, a surplus of $40 million could quickly disappear with relatively minor changes in the market value of the securities held or calculation of liabilities. In the circumstances, given all the variables, I find that the existence of any surplus is doubtful at best and I am satisfied that the Monitor's Liquidation Analysis ascribing it zero value is reasonable in this circumstances.

CRAL

121 The Monitor's liquidation analysis as at March 31, 2000 of CRAL determined that in a distress situation, after payments were made to its creditors, there would be a deficiency of approximately $30 million to pay Canadian Regional's unsecured creditors, which include a claim of approximately $56.5 million due to Canadian. In arriving at this conclusion, the Monitor reviewed internally prepared unaudited financial statements of CRAL as of March 31, 2000, the Houlihan Lokey Howard and Zukin, distress valuation dated January 21, 2000 and the Simat Helliesen and Eichner valuation of selected CAIL assets dated January 31, 2000 for certain aircraft related materials and engines, rotables and spares. The Avitas Inc., and Avmark Inc. reports were used for the distress values on CRAL's aircraft and the CRAL aircraft lease documentation. The Monitor also performed its own analysis of CRAL's liquidation value, which involved analysis of the reports provided and details of its analysis were outlined in the Liquidation Analysis.

122 For the purpose of the Liquidation Analysis, the Monitor did not consider other airlines as comparable for evaluation purposes, as the Monitor's valuation was performed on a distressed sale basis. The Monitor further assumed that without CAIL's national and international network to feed traffic into and a source of standby financing, and considering the inevitable negative publicity which a failure of CAIL would produce, CRAL would immediately stop operations as well.

123 Mr. Peterson testified that CRAL was worth $260 million to Air Canada, based on Air Canada being a special buyer who could integrate CRAL, on a going concern basis, into its network. The Liquidation Analysis assumed the windup of each of CRAL and CAIL, a completely different scenario.

124 There is no evidence that there was a potential purchaser for CRAL who would be prepared to acquire CRAL or the operations of CRAL 98 for any significant sum or at all. CRAL has value to CAIL, and in turn, could provide value to Air Canada, but this value is attributable to its ability to feed traffic to and take traffic from the national and international service operated by CAIL. In my view, the Monitor was aware of these features and properly considered these factors in assessing the value of CRAL on a liquidation of CAIL.

125 If CAIL were to cease operations, the evidence is clear that CRAL would be obliged to do so as well immediately. The travelling public, shippers, trade suppliers, and others would make no distinction between CAIL and CRAL and there would be no going concern for Air Canada to acquire.

International Routes

126 The Monitor ascribed no value to Canadian's international routes in the Liquidation Analysis. In discussions with CAIL management and experts available in its aviation group, the Monitor was advised that international routes are unassignable licenses and not property rights. They do not appear as assets in CAIL's financials. Mr. Carty and Mr. Peterson explained that routes and slots are not treated as assets by airlines, but rather as rights in the control of the Government of Canada. In

the event of bankruptcy/receivership of CAIL, CAIL's trustee/receiver could not sell them and accordingly they are of no value to CAIL.

127 Evidence was led that on June 23, 1999 Air Canada made an offer to purchase CAIL's international routes for $400 million cash plus $125 million for aircraft spares and inventory, along with the assumption of certain debt and lease obligations for the aircraft required for the international routes. CAIL evaluated the Air Canada offer and concluded that the proposed purchase price was insufficient to permit it to continue carrying on business in the absence of its international routes. Mr. Carty testified that something in the range of $2 billion would be required.

128 CAIL was in desperate need of cash in mid December, 1999. CAIL agreed to sell its Toronto - Tokyo route for $25 million. The evidence, however, indicated that the price for the Toronto - Tokyo route was not derived from a valuation, but rather was what CAIL asked for, based on its then-current cash flow requirements. Air Canada and CAIL obtained Government approval for the transfer on December 21, 2000.

129 Resurgence complained that despite this evidence of offers for purchase and actual sales of international routes and other evidence of sales of slots, the Monitor did not include Canadian's international routes in the Liquidation Analysis and only attributed a total of $66 million for all intangibles of Canadian. There is some evidence that slots at some foreign airports may be bought or sold in some fashion. However, there is insufficient evidence to attribute any value to other slots which CAIL has at foreign airports. It would appear given the regulation of the airline industry, in particular, the Aeronautics Act and the Canada Transportation Act, that international routes for a Canadian air carrier only have full value to the extent of federal government support for the transfer or sale, and its preparedness to allow the then-current license holder to sell rather than act unilaterally to change the designation. The federal government was prepared to allow CAIL to sell its Toronto - Tokyo route to Air Canada in light of CAIL's severe financial difficulty and the certainty of cessation of operations during the Christmas holiday season in the absence of such a sale.

130 Further, statements made by CAIL in mid-1999 as to the value of its international routes and operations in response to an offer by Air Canada, reflected the amount CAIL needed to sustain liquidity without its international routes and was not a representation of market value of what could realistically be obtained from an arms length purchaser. The Monitor concluded on its investigation that CAIL's Narida and Heathrow slots had a realizable value of $66 million, which it included in the Liquidation Analysis. I find that this conclusion is supportable and that the Monitor properly concluded that there were no other rights which ought to have been assigned value.

Tax Pools

131 There are four tax pools identified by Resurgence and the Minority Shareholders that are material: capital losses at the CAC level, undepreciated capital cost pools, operating losses incurred by Canadian and potential for losses to be reinstated upon repayment of fuel tax rebates by CAIL.

Capital Loss Pools

132 The capital loss pools at CAC will not be available to Air Canada since CAC is to be left out of the corporate reorganization and will be severed from CAIL. Those capital losses can essentially only be used to absorb a portion of the debt forgiveness liability associated with the restructuring.

CAC, who has virtually all of its senior debt compromised in the plan, receives compensation for this small advantage, which cost them nothing.

Undepreciated capital cost ("UCC")

133 There is no benefit to Air Canada in the pools of UCC unless it were established that the UCC pools are in excess of the fair market value of the relevant assets, since Air Canada could create the same pools by simply buying the assets on a liquidation at fair market value. Mr. Peterson understood this pool of UCC to be approximately $700 million. There is no evidence that the UCC pool, however, could be considered to be a source of benefit. There is no evidence that this amount is any greater than fair market value.

Operating Losses

134 The third tax pool complained of is the operating losses. The debt forgiven as a result of the Plan will erase any operating losses from prior years to the extent of such forgiven debt.

Fuel tax rebates

135 The fourth tax pool relates to the fuel tax rebates system taken advantage of by CAIL in past years. The evidence is that on a consolidated basis the total potential amount of this pool is $297 million. According to Mr. Carty's testimony, CAIL has not been taxable in his ten years as Chief Financial Officer. The losses which it has generated for tax purposes have been sold on a 10 - 1 basis to the government in order to receive rebates of excise tax paid for fuel. The losses can be restored retroactively if the rebates are repaid, but the losses can only be carried forward for a maximum of seven years. The evidence of Mr. Peterson indicates that Air Canada has no plan to use those alleged losses and in order for them to be useful to Air Canada, Air Canada would have to complete a legal merger with CAIL, which is not provided for in the plan and is not contemplated by Air Canada until some uncertain future date. In my view, the Monitor's conclusion that there was no value to any tax pools in the Liquidation Analysis is sound.

136 Those opposed to the Plan have raised the spectre that there may be value unaccounted for in this liquidation analysis or otherwise. Given the findings above, this is merely speculation and is unsupported by any concrete evidence.

c. Alternatives to the Plan

137 When presented with a plan, affected stakeholders must weigh their options in the light of commercial reality. Those options are typically liquidation measured against the plan proposed. If not put forward, a hope for a different or more favourable plan is not an option and no basis upon which to assess fairness. On a purposive approach to the CCAA, what is fair and reasonable must be assessed against the effect of the Plan on the creditors and their various claims, in the context of their response to the plan. Stakeholders are expected to decide their fate based on realistic, commercially viable alternatives (generally seen as the prime motivating factor in any business decision) and not on speculative desires or hope for the future. As Farley J. stated in Re T. Eaton Co., [1999] O.J. No. 4216 (Ont. Sup. Ct.) at paragraph 6:

> One has to be cognizant of the function of a balancing of their prejudices. Positions must be realistically assessed and weighed, all in the light of what an

> alternative to a successful plan would be. Wishes are not a firm foundation on which to build a plan; nor are ransom demands.

138 The evidence is overwhelming that all other options have been exhausted and have resulted in failure. The concern of those opposed suggests that there is a better plan that Air Canada can put forward. I note that significant enhancements were made to the plan during the process. In any case, this is the Plan that has been voted on. The evidence makes it clear that there is not another plan forthcoming. As noted by Farley J. in T. Eaton Co, supra, "no one presented an alternative plan for the interested parties to vote on" (para. 8).

d. Oppression

Oppression and the CCAA

139 Resurgence and the Minority Shareholders originally claimed that the Plan proponents, CAC and CAIL and the Plan supporters 853350 and Air Canada had oppressed, unfairly disregarded or unfairly prejudiced their interests, under Section 234 of the ABCA. The Minority Shareholders (for reasons that will appear obvious) have abandoned that position.

140 Section 234 gives the court wide discretion to remedy corporate conduct that is unfair. As remedial legislation, it attempts to balance the interests of shareholders, creditors and management to ensure adequate investor protection and maximum management flexibility. The Act requires the court to judge the conduct of the company and the majority in the context of equity and fairness: First Edmonton Place Ltd. v. 315888 Alberta Ltd., (1988) 40 B.L.R.28 (Alta. Q.B.). Equity and fairness are measured against or considered in the context of the rights, interests or reasonable expectations of the complainants: Re Diligenti v. RWMD Operations Kelowna (1976), 1 B.C.L.R. 36 (S.C).

141 The starting point in any determination of oppression requires an understanding as to what the rights, interests, and reasonable expectations are and what the damaging or detrimental effect is on them. MacDonald J. stated in First Edmonton Place, supra at 57:

> In deciding what is unfair, the history and nature of the corporation, the essential nature of the relationship between the corporation and the creditor, the type of rights affected in general commercial practice should all be material. More concretely, the test of unfair prejudice or unfair disregard should encompass the following considerations: The protection of the underlying expectation of a creditor in the arrangement with the corporation, the extent to which the acts complained of were unforeseeable where the creditor could not reasonably have protected itself from such acts and the detriment to the interests of the creditor.

142 While expectations vary considerably with the size, structure, and value of the corporation, all expectations must be reasonably and objectively assessed: Pente Investment Management Ltd. v. Schneider Corp. (1998), 42 O.R. (3d) 177 (C.A.).

143 Where a company is insolvent, only the creditors maintain a meaningful stake in its assets. Through the mechanism of liquidation or insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder. The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims

are not being paid in full. It is through the lens of insolvency that the court must consider whether the acts of the company are in fact oppressive, unfairly prejudicial or unfairly disregarded. CCAA proceedings have recognized that shareholders may not have "a true interest to be protected" because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company: Re Royal Oak Mines Ltd., supra, para. 4., Re Cadillac Fairview, [1995] O.J. 707 (Ont. Sup. Ct), and Re T. Eaton Company, supra.

144 To avail itself of the protection of the CCAA, a company must be insolvent. The CCAA considers the hierarchy of interests and assesses fairness and reasonableness in that context. The court's mandate not to sanction a plan in the absence of fairness necessitates the determination as to whether the complaints of dissenting creditors and shareholders are legitimate, bearing in mind the company's financial state. The articulated purpose of the Act and the jurisprudence interpreting it, "widens the lens" to balance a broader range of interests that includes creditors and shareholders and beyond to the company, the employees and the public, and tests the fairness of the plan with reference to its impact on all of the constituents.

145 It is through the lens of insolvency legislation that the rights and interests of both shareholders and creditors must be considered. The reduction or elimination of rights of both groups is a function of the insolvency and not of oppressive conduct in the operation of the CCAA. The antithesis of oppression is fairness, the guiding test for judicial sanction. If a plan unfairly disregards or is unfairly prejudicial it will not be approved. However, the court retains the power to compromise or prejudice rights to effect a broader purpose, the restructuring of an insolvent company, provided that the plan does so in a fair manner.

Oppression allegations by Resurgence

146 Resurgence alleges that it has been oppressed or had its rights disregarded because the Petitioners and Air Canada disregarded the specific provisions of their trust indenture, that Air Canada and 853350 dealt with other creditors outside of the CCAA, refusing to negotiate with Resurgence and that they are generally being treated inequitably under the Plan.

147 The trust indenture under which the Unsecured Notes were issued required that upon a "change of control", 101% of the principal owing thereunder, plus interest would be immediately due and payable. Resurgence alleges that Air Canada, through 853350, caused CAC and CAIL to purposely fail to honour this term. Canadian acknowledges that the trust indenture was breached. On February 1, 2000, Canadian announced a moratorium on payments to lessors and lenders, including the Unsecured Noteholders. As a result of this moratorium, Canadian defaulted on the payments due under its various credit facilities and aircraft leases.

148 The moratorium was not directed solely at the Unsecured Noteholders. It had the same impact on other creditors, secured and unsecured. Canadian, as a result of the moratorium, breached other contractual relationships with various creditors. The breach of contract is not sufficient to found a claim for oppression in this case. Given Canadian's insolvency, which Resurgence recognized, it cannot be said that there was a reasonable expectation that it would be paid in full under the terms of the trust indenture, particularly when Canadian had ceased making payments to other creditors as well.

149 It is asserted that because the Plan proponents engaged in a restructuring of Canadian's debt before the filing under the CCAA, that its use of the Act for only a small group of creditors, which includes Resurgence is somehow oppressive.

150 At the outset, it cannot be overlooked that the CCAA does not require that a compromise be proposed to all creditors of an insolvent company. The CCAA is a flexible, remedial statute which recognizes the unique circumstances that lead to and away from insolvency.

151 Next, Air Canada made it clear beginning in the fall of 1999 that Canadian would have to complete a financial restructuring so as to permit Air Canada to acquire CAIL on a financially sound basis and as a wholly owned subsidiary. Following the implementation of the moratorium, absent which Canadian could not have continued to operate, Canadian and Air Canada commenced efforts to restructure significant obligations by consent. They perceived that further damage to public confidence that a CCAA filing could produce, required Canadian to secure a substantial measure of creditor support in advance of any public filing for court protection. Before the Petitioners started the CCAA proceedings on March 24, 2000, Air Canada, CAIL and lessors of 59 aircraft in its fleet had reached agreement in principle on the restructuring plan.

152 The purpose of the CCAA is to create an environment for negotiations and compromise. Often it is the stay of proceedings that creates the necessary stability for that process to unfold. Negotiations with certain key creditors in advance of the CCAA filing, rather than being oppressive or conspiratorial, are to be encouraged as a matter of principle if their impact is to provide a firm foundation for a restructuring. Certainly in this case, they were of critical importance, staving off liquidation, preserving cash flow and allowing the Plan to proceed. Rather than being detrimental or prejudicial to the interests of the other stakeholders, including Resurgence, it was beneficial to Canadian and all of its stakeholders.

153 Resurgence complained that certain transfers of assets to Air Canada and its actions in consolidating the operations of the two entities prior to the initiation of the CCAA proceedings were unfairly prejudicial to it.

154 The evidence demonstrates that the sales of the Toronto - Tokyo route, the Dash 8s and the simulators were at the suggestion of Canadian, who was in desperate need of operating cash. Air Canada paid what Canadian asked, based on its cash flow requirements. The evidence established that absent the injection of cash at that critical juncture, Canadian would have ceased operations. It is for that reason that the Government of Canada willingly provided the approval for the transfer on December 21, 2000.

155 Similarly, the renegotiation of CAIL's aircraft leases to reflect market rates supported by Air Canada covenant or guarantee has been previously dealt with by this court and found to have been in the best interest of Canadian, not to its detriment. The evidence establishes that the financial support and corporate integration that has been provided by Air Canada was not only in Canadian's best interest, but its only option for survival. The suggestion that the renegotiations of these leases, various sales and the operational realignment represents an assumption of a benefit by Air Canada to the detriment of Canadian is not supported by the evidence.

156 I find the transactions predating the CCAA proceedings, were in fact Canadian's life blood in ensuring some degree of liquidity and stability within which to conduct an orderly restructuring of its debt. There was no detriment to Canadian or to its creditors, including its unsecured creditors. That Air Canada and Canadian were so successful in negotiating agreements with their major creditors, including aircraft financiers, without resorting to a stay under the CCAA underscores the serious distress Canadian was in and its lenders recognition of the viability of the proposed Plan.

157 Resurgence complained that other significant groups held negotiations with Canadian. The evidence indicates that a meeting was held with Mr. Symington, Managing Director of Resurgence, in Toronto in March 2000. It was made clear to Resurgence that the pool of unsecured creditors would be somewhere between $500 and $700 million and that Resurgence would be included within that class. To the extent that the versions of this meeting differ, I prefer and accept the evidence of Mr. Carty. Resurgence wished to play a significant role in the debt restructuring and indicated it was prepared to utilize the litigation process to achieve a satisfactory result for itself. It is therefore understandable that no further negotiations took place. Nevertheless, the original offer to affected unsecured creditors has been enhanced since the filing of the plan on April 25, 2000. The enhancements to unsecured claims involved the removal of the cap on the unsecured pool and an increase from 12 to 14 cents on the dollar.

158 The findings of the Commissioner of Competition establishes beyond doubt that absent the financial support provided by Air Canada, Canadian would have failed in December 1999. I am unable to find on the evidence that Resurgence has been oppressed. The complaint that Air Canada has plundered Canadian and robbed it of its assets is not supported but contradicted by the evidence. As described above, the alternative is liquidation and in that event the Unsecured Noteholders would receive between one and three cents on the dollar. The Monitor's conclusions in this regard are supportable and I accept them.

e. Unfairness to Shareholders

159 The Minority Shareholders essentially complained that they were being unfairly stripped of their only asset in CAC - the shares of CAIL. They suggested they were being squeezed out by the new CAC majority shareholder 853350, without any compensation or any vote. When the reorganization is completed as contemplated by the Plan , their shares will remain in CAC but CAC will be a bare shell.

160 They further submitted that Air Canada's cash infusion, the covenants and guarantees it has offered to aircraft financiers, and the operational changes (including integration of schedules, "quick win" strategies, and code sharing) have all added significant value to CAIL to the benefit of its stakeholders, including the Minority Shareholders. They argued that they should be entitled to continue to participate into the future and that such an expectation is legitimate and consistent with the statements and actions of Air Canada in regard to integration. By acting to realign the airlines before a corporate reorganization, the Minority Shareholders asserted that Air Canada has created the expectation that it is prepared to consolidate the airlines with the participation of a minority. The Minority Shareholders take no position with respect to the debt restructuring under the CCAA, but ask the court to sever the corporate reorganization provisions contained in the Plan.

161 Finally, they asserted that CAIL has increased in value due to Air Canada's financial contributions and operational changes and that accordingly, before authorizing the transfer of the CAIL shares to 853350, the current holders of the CAIL Preferred Shares, the court must have evidence before it to justify a transfer of 100% of the equity of CAIL to the Preferred Shares.

162 That CAC will have its shareholding in CAIL extinguished and emerge a bare shell is acknowledged. However, the evidence makes it abundantly clear that those shares, CAC's "only asset", have no value. That the Minority Shareholders are content to have the debt restructuring proceed suggests by implication that they do not dispute the insolvency of both Petitioners, CAC and CAIL.

163 The Minority Shareholders base their expectation to remain as shareholders on the actions of Air Canada in acquiring only 82% of the CAC shares before integrating certain of the airlines' operations. Mr. Baker (who purchased after the Plan was filed with the Court and almost six months after the take over bid by Air Canada) suggested that the contents of the bid circular misrepresented Air Canada's future intentions to its shareholders. The two dollar price offered and paid per share in the bid must be viewed somewhat skeptically and in the context in which the bid arose. It does not support the speculative view that some shareholders hold, that somehow, despite insolvency, their shares have some value on a going concern basis. In any event, any claim for misrepresentation that Minority Shareholders might have arising from the take over bid circular against Air Canada or 853350 , if any, is unaffected by the Plan and may be pursued after the stay is lifted.

164 In considering Resurgence's claim of oppression I have already found that the financial support of Air Canada during this restructuring period has benefited Canadian and its stakeholders. Air Canada's financial support and the integration of the two airlines has been critical to keeping Canadian afloat. The evidence makes it abundantly clear that without this support Canadian would have ceased operations. However it has not transformed CAIL or CAC into solvent companies.

165 The Minority Shareholders raise concerns about assets that are ascribed limited or no value in the Monitor's report as does Resurgence (although to support an opposite proposition). Considerable argument was directed to the future operational savings and profitability forecasted for Air Canada, its subsidiaries and CAIL and its subsidiaries. Mr. Peterson estimated it to be in the order of $650 to $800 million on an annual basis, commencing in 2001. The Minority Shareholders point to the tax pools of a restructured company that they submit will be of great value once CAIL becomes profitable as anticipated. They point to a pension surplus that at the very least has value by virtue of the contribution holidays that it affords. They also look to the value of the compromised claims of the restructuring itself which they submit are in the order of $449 million. They submit these cumulative benefits add value, currently or at least realizable in the future. In sharp contrast to the Resurgence position that these acts constitute oppressive behaviour, the Minority Shareholders view them as enhancing the value of their shares. They go so far as to suggest that there may well be a current going concern value of the CAC shares that has been conveniently ignored or unquantified and that the Petitioners must put evidence before the court as to what that value is.

166 These arguments overlook several important facts, the most significant being that CAC and CAIL are insolvent and will remain insolvent until the debt restructuring is fully implemented. These companies are not just technically or temporarily insolvent, they are massively insolvent. Air Canada will have invested upward of $3 billion to complete the restructuring, while the Minority Shareholders have contributed nothing. Further, it was a fundamental condition of Air Canada's support of this Plan that it become the sole owner of CAIL. It has been suggested by some that Air Canada's share purchase at two dollars per share in December 1999 was unfairly prejudicial to CAC and CAIL's creditors. Objectively, any expectation by Minority Shareholders that they should be able to participate in a restructured CAIL is not reasonable.

167 The Minority Shareholders asserted the plan is unfair because the effect of the reorganization is to extinguish the common shares of CAIL held by CAC and to convert the voting and non-voting Preferred Shares of CAIL into common shares of CAIL. They submit there is no expert valuation or other evidence to justify the transfer of CAIL's equity to the Preferred Shares. There is no equity in the CAIL shares to transfer. The year end financials show CAIL's shareholder equity at a deficit of $790 million. The Preferred Shares have a liquidation preference of $347 million. There is no

evidence to suggest that Air Canada's interim support has rendered either of these companies solvent, it has simply permitted operations to continue. In fact, the unaudited consolidated financial statements of CAC for the quarter ended March 31, 2000 show total shareholders equity went from a deficit of $790 million to a deficit of $1.214 million, an erosion of $424 million.

168 The Minority Shareholders' submission attempts to compare and contrast the rights and expectations of the CAIL preferred shares as against the CAC common shares. This is not a meaningful exercise; the Petitioners are not submitting that the Preferred Shares have value and the evidence demonstrates unequivocally that they do not. The Preferred Shares are merely being utilized as a corporate vehicle to allow CAIL to become a wholly owned subsidiary of Air Canada. For example, the same result could have been achieved by issuing new shares rather than changing the designation of 853350's Preferred Shares in CAIL.

169 The Minority Shareholders have asked the court to sever the reorganization from the debt restructuring, to permit them to participate in whatever future benefit might be derived from the restructured CAIL. However, a fundamental condition of this Plan and the expressed intention of Air Canada on numerous occasions is that CAIL become a wholly owned subsidiary. To suggest the court ought to sever this reorganization from the debt restructuring fails to account for the fact that it is not two plans but an integral part of a single plan. To accede to this request would create an injustice to creditors whose claims are being seriously compromised, and doom the entire Plan to failure. Quite simply, the Plan's funder will not support a severed plan.

170 Finally, the future profits to be derived by Air Canada are not a relevant consideration. While the object of any plan under the CCAA is to create a viable emerging entity, the germane issue is what a prospective purchaser is prepared to pay in the circumstances. Here, we have the one and only offer on the table, Canadian's last and only chance. The evidence demonstrates this offer is preferable to those who have a remaining interest to a liquidation. Where secured creditors have compromised their claims and unsecured creditors are accepting 14 cents on the dollar in a potential pool of unsecured claims totalling possibly in excess of $1 billion, it is not unfair that shareholders receive nothing.

e. The Public Interest

171 In this case, the court cannot limit its assessment of fairness to how the Plan affects the direct participants. The business of the Petitioners as a national and international airline employing over 16,000 people must be taken into account.

172 In his often cited article, Reorganizations Under the Companies' Creditors Arrangement Act (1947), 25 Can.Bar R.ev. 587 at 593 Stanley Edwards stated:

> Another reason which is usually operative in favour of reorganization is the interest of the public in the continuation of the enterprise, particularly if the company supplies commodities or services that are necessary or desirable to large numbers of consumers, or if it employs large numbers of workers who would be thrown out of employment by its liquidation. This public interest may be reflected in the decisions of the creditors and shareholders of the company and is undoubtedly a factor which a court would wish to consider in deciding whether to sanction an arrangement under the C.C.A.A.

173 In Re Repap British Columbia Inc. (1998), 1 C.B.R. (4th) 49 (B.C.S.C.) the court noted that the fairness of the plan must be measured against the overall economic and business environment and against the interests of the citizens of British Columbia who are affected as "shareholders" of the company, and creditors, of suppliers, employees and competitors of the company. The court approved the plan even though it was unable to conclude that it was necessarily fair and reasonable. In Re Quintette Coal Ltd., supra, Thackray J. acknowledged the significance of the coal mine to the British Columbia economy, its importance to the people who lived and worked in the region and to the employees of the company and their families. Other cases in which the court considered the public interest in determining whether to sanction a plan under the CCAA include Canadian Red Cross Society (Re), (1998),5 C.B.R. (4th) 299 (Ont. Gen. Div.) and Algoma Steel Corp. v. Royal Bank of Canada (Trustee of), [1992] O.J. No. 795 (Ont. Gen. Div.)

174 The economic and social impacts of a plan are important and legitimate considerations. Even in insolvency, companies are more than just assets and liabilities. The fate of a company is inextricably tied to those who depend on it in various ways. It is difficult to imagine a case where the economic and social impacts of a liquidation could be more catastrophic. It would undoubtedly be felt by Canadian air travellers across the country. The effect would not be a mere ripple, but more akin to a tidal wave from coast to coast that would result in chaos to the Canadian transportation system.

175 More than sixteen thousand unionized employees of CAIL and CRAL appeared through counsel. The unions and their membership strongly support the Plan. The unions represented included the Airline Pilots Association International, the International Association of Machinists and Aerospace Workers, Transportation District 104, Canadian Union of Public Employees, and the Canadian Auto Workers Union. They represent pilots, ground workers and cabin personnel. The unions submit that it is essential that the employee protections arising from the current restructuring of Canadian not be jeopardized by a bankruptcy, receivership or other liquidation. Liquidation would be devastating to the employees and also to the local and national economies. The unions emphasize that the Plan safeguards the employment and job dignity protection negotiated by the unions for their members. Further, the court was reminded that the unions and their members have played a key role over the last fifteen years or more in working with Canadian and responsible governments to ensure that Canadian survived and jobs were maintained.

176 The Calgary and Edmonton Airport authorities, which are not for profit corporations, also supported the Plan. CAIL's obligations to the airport authorities are not being compromised under the Plan. However, in a liquidation scenario, the airport authorities submitted that a liquidation would have severe financial consequences to them and have potential for severe disruption in the operation of the airports.

177 The representations of the Government of Canada are also compelling. Approximately one year ago, CAIL approached the Transport Department to inquire as to what solution could be found to salvage their ailing company. The Government saw fit to issue an order in council, pursuant to section 47 of the Transportation Act, which allowed an opportunity for CAIL to approach other entities to see if a permanent solution could be found. A standing committee in the House of Commons reviewed a framework for the restructuring of the airline industry, recommendations were made and undertakings were given by Air Canada. The Government was driven by a mandate to protect consumers and promote competition. It submitted that the Plan is a major component of the industry restructuring. Bill C-26, which addresses the restructuring of the industry, has passed

through the House of Commons and is presently before the Senate. The Competition Bureau has accepted that Air Canada has the only offer on the table and has worked very closely with the parties to ensure that the interests of consumers, employees, small carriers, and smaller communities will be protected.

178 In summary, in assessing whether a plan is fair and reasonable, courts have emphasized that perfection is not required: see for example Wandlyn Inns Ltd. (Re) (1992), 15 C.B.R. (3d) 316 (N.BQ.B), Quintette Coal, supra and Repap, supra. Rather, various rights and remedies must be sacrificed to varying degrees to result in a reasonable, viable compromise for all concerned. The court is required to view the "big picture" of the plan and assess its impact as a whole. I return to Algoma Steel v. Royal Bank of Canada., supra at 9 in which Farley J. endorsed this approach:

> What might appear on the surface to be unfair to one party when viewed in relation to all other parties may be considered to be quite appropriate.

179 Fairness and reasonableness are not abstract notions, but must be measured against the available commercial alternatives. The triggering of the statute, namely insolvency, recognizes a fundamental flaw within the company. In these imperfect circumstances there can never be a perfect plan, but rather only one that is supportable. As stated in Re Sammi Atlas Inc., (1998), 3 C.B.R. (4th) 171 at 173 (Ont. Sup. Ct.) at 173:

> A plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment.

180 I find that in all the circumstances, the Plan is fair and reasonable.

IV. CONCLUSION

181 The Plan has obtained the support of many affected creditors, including virtually all aircraft financiers, holders of executory contracts, AMR, Loyalty Group and the Senior Secured Noteholders.

182 Use of these proceedings has avoided triggering more than $1.2 billion of incremental claims. These include claims of passengers with pre-paid tickets, employees, landlords and other parties with ongoing executory contracts, trade creditors and suppliers.

183 This Plan represents a solid chance for the continued existence of Canadian. It preserves CAIL as a business entity. It maintains over 16,000 jobs. Suppliers and trade creditors are kept whole. It protects consumers and preserves the integrity of our national transportation system while we move towards a new regulatory framework. The extensive efforts by Canadian and Air Canada, the compromises made by stakeholders both within and without the proceedings and the commitment of the Government of Canada inspire confidence in a positive result.

184 I agree with the opposing parties that the Plan is not perfect, but it is neither illegal nor oppressive. Beyond its fair and reasonable balancing of interests, the Plan is a result of bona fide efforts by all concerned and indeed is the only alternative to bankruptcy as ten years of struggle and creative attempts at restructuring by Canadian clearly demonstrate. This Plan is one step toward a

new era of airline profitability that hopefully will protect consumers by promoting affordable and accessible air travel to all Canadians.

185 The Plan deserves the sanction of this court and it is hereby granted. The application pursuant to section 185 of the ABCA is granted. The application for declarations sought by Resurgence are dismissed. The application of the Minority Shareholders is dismissed.

PAPERNY J.

cp/i/qljpn/qlhcs

Indexed as:

Resurgence Asset Management LLC v. Canadian Airlines Corp.

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended;
AND IN THE MATTER OF the Business Corporations Act (Alberta) S.A. 1981, c. B-15, as amended, Section 185;
AND IN THE MATTER OF Canadian Airlines Corporation and Canadian Airlines International Ltd.
Between
Resurgence Asset Management LLC, applicant, and Canadian Airlines Corporation and Canadian Airlines International Ltd., respondents

[2000] A.J. No. 1028

2000 ABCA 238

[2000] 10 W.W.R. 314

84 Alta. L.R. (3d) 52

266 A.R. 131

9 B.L.R. (3d) 86

20 C.B.R. (4th) 46

99 A.C.W.S. (3d) 533

2000 CarswellAlta 919

Docket: 00-08901

Alberta Court of Appeal
Calgary, Alberta

Wittmann J.A.
(In Chambers)

Heard: August 3, 2000.
Judgment: filed August 29, 2000.

(57 paras.)

Application for leave to appeal from the order of Paperny J. Dated June 27, 2000.

Counsel:

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H.M. Kay, Q.C., A.L. Friend, Q.C. and L.A. Goldbach, for the respondents.
S.F. Dunphy, for Air Canada.
F.R. Foran, Q.C., for the monitor, Pricewaterhouse Coopers.

MEMORANDUM OF DECISION NO. 2

WITTMANN J.:--

INTRODUCTION

1 This is an application by Resurgence Asset Management LLC ("Resurgence") for leave to appeal the order of Paperny, J., dated June 27, 2000, pursuant to proceedings under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended, ("CCAA"). The order sanctioned a plan of compromise and arrangement ("the Plan") proposed by Canadian Airlines Corporation ("CAC") and Canadian Airlines International Ltd. ("CAIL") (together, "Canadian") and dismissed an application by Resurgence for a declaration that Resurgence was an unaffected creditor under the Plan.

BACKGROUND

2 Resurgence was the holder of 58.2 per cent of $100,000,000.00 (U.S.) of the unsecured notes issued by CAC.

3 CAC was a publicly traded Alberta corporation which, prior to the June 27 order of Paperny, J., owned 100 per cent of the common shares of CAIL, the operating company of Canadian Airlines.

4 Air Canada is a publicly traded Canadian corporation. Air Canada owned 10 per cent of the shares of 853350 Alberta Ltd. ("853350"), which prior to the June 27 order of Paperny, J., owned all the preferred shares of CAIL.

5 As described in detail by the learned chambers judge in her reasons, Canadian had been searching for a decade for a solution to its ongoing, significant financial difficulties. By December 1999, it was on the brink of bankruptcy. In a series of transactions including 853350's acquisition of the preferred shares of CAIL, Air Canada infused capital into Canadian and assisted in debt restructuring.

6 Canadian came to the conclusion that it must conclude its debt restructuring to permit the completion of a full merger between Canadian and Air Canada. On February 1, 2000, to secure liquidity to continue operating until debt restructuring was achieved, Canadian announced a moratorium on

payments to lessors and lenders. CAIL, Air Canada and lessors of 59 aircraft reached an agreement in principle on a restructuring plan. They also reached agreement with other secured creditors and several major unsecured creditors with respect to restructuring.

7 Canadian still faced threats of proceedings by secured creditors. It commenced proceedings under the CCAA on March 24, 2000. Pricewaterhouse Coopers Inc. was appointed as Monitor by court order.

8 Arrangements with various aircraft lessors, lenders and conditional vendors which would benefit Canadian by reducing rates and other terms were approved by court orders dated April 14, 2000 and May 10, 2000.

9 On April 25, 2000, in accordance with the March 24 court order, Canadian filed the Plan which was described as having three principal objectives:

(a) To provide near term liquidity so that Canadian can sustain operations;
(b) To allow for the return of aircraft not required by Canadian; and
(c) To permanently adjust Canadian's debt structure and lease facilities to reflect the current market for asset value and carrying costs in return for Air Canada providing a guarantee of the restructured obligations.

10 The Plan generally provided for stakeholders by category as follows:

(a) Affected unsecured creditors, which included unsecured noteholders, aircraft claimants, executory contract claimants, tax claimants and various litigation claimants, would receive 12 cents per dollar (later changed to 14 cents per dollar) of approved claims;
(b) Affected secured creditors, the senior secured noteholders, would receive 97 per cent of the principal amount of their claim plus interest and costs in respect of their secured claim, and a deficiency claim as unsecured creditors for the remainder;
(c) Unaffected unsecured creditors, which included Canadian's employees, customers and suppliers of goods and services, would be unaffected by the Plan;
(d) Unaffected secured creditor, the Royal Bank, CAIL's operating lender, would not be affected by the Plan.

11 The Plan also proposed share capital reorganization by having all CAIL common shares held by CAC converted into a single retractable share, which would then be retracted by CAIL for $1.00, and all CAIL preferred shares held by 853350 converted into CAIL common shares. The Plan provided for amendments to CAIL's articles of incorporation to effect the proposed reorganization.

12 On May 26, 2000, in accordance with the orders and directions of the court, two classes of creditors, the senior secured noteholders and the affected unsecured creditors voted on the Plan as amended. Both classes approved the Plan by the majorities required by ss. 4 and 5 of the CCAA.

13 On May 29, 2000, by notice of motion, Canadian sought court sanction of the Plan under s. 6 of the CCAA and an order for reorganization pursuant to s. 185 of the Business Corporations Act (Alberta), S.A. 1981, c. B-15 as amended ("ABCA"). Resurgence was among those who opposed the Plan. Its application, along with that of four shareholders of CAC, was ordered to be tried during a hearing to consider the fairness and reasonableness of the Plan ("the fairness hearing").

14 Resurgence sought declarations that the actions of Canadian, Air Canada and 853350 constitute an amalgamation, consolidation or merger with or into Air Canada or a conveyance or transfer of all or substantially all of Canadian's assets to Air Canada; that any plan of arrangement involving Canadian will not affect Resurgence and directing the repurchase of their notes pursuant to provisions of their trust indenture and that the actions of Canadian, Air Canada and 853350 were oppressive and unfairly prejudicial to it pursuant to s. 234 of the ABCA.

15 The fairness hearing lasted two weeks during which viva voce evidence of six witnesses was heard, including testimony of the chief financial officers of Canadian and Air Canada. Submissions by counsel were made on behalf of the federal government, the Calgary and Edmonton airport authorities, unions representing employees of Canadian and various creditors of Canadian. The court also received two special reports from the Monitor.

16 As part of assessing the fairness of the Plan, the learned chambers judge received a liquidation analysis of CAIL, prepared by the Monitor, in order to estimate the amounts that might be recovered by CAIL's creditors and shareholders in the event that CAIL's assets were disposed of by a receiver or trustee. The Monitor concluded that liquidation would result in a shortfall to certain secured creditors, that recovery by unsecured creditors would be between one and three cents on the dollar, and that there would be no recovery by shareholders.

17 The learned chambers judge stated that she agreed with the parties opposing the Plan that it was not perfect, but it was neither illegal, nor oppressive, and therefore, dismissed the requested declarations and relief sought by Resurgence. Further, she held that the Plan was the only alternative to bankruptcy as ten years of struggle and failed creative attempts at restructuring clearly demonstrated. She ruled that the Plan was fair and reasonable and deserving of the sanction of the court. She granted the order sanctioning the Plan, and the application pursuant to s. 185 of the ABCA to reorganize the corporation.

LEAVE TO APPEAL UNDER THE CCAA

18 The CCAA provides for appeals to this Court as follows:

> 13. Except in the Yukon Territory, any person dissatisfied with an order or a decision made under this Act may appeal therefrom on obtaining leave of the judge appealed from or of the court or a judge or the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

19 As set out in Resurgence Asset Management LLC v. Canadian Airlines Corporation, 2000 ABCA 149 (Online: Alberta Courts)("Resurgence No. 1"), a decision on a leave application sought earlier in this action, and as conceded by all the parties to this application, the criterion to be applied in an application for leave to appeal is that there must be serious and arguable grounds that are of real and significant interest to the parties. This criterion subsumes four factors to be considered by the court:

> (1) whether the point on appeal is of significance to the practice;
> (2) whether the point raised is of significance to the action itself;
> (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
> (4) whether the appeal will unduly hinder the progress of the action.

20 The respondents argue that apart from the test for leave, mootness is an additional overriding factor in the present case which is dispositive against the granting of leave to appeal.

MOOTNESS

21 In Galcor Hotel Managers Ltd. v. Imperial Financial Services Ltd. (1993), 81 B.C.L.R. (2) 142 (C.A.), an order authorizing the distribution of substantially all the assets of a limited partnership had been fully performed. The appellants appealed, seeking to have the order vacated. The appellants had unsuccessfully applied for a stay of the order. In deciding whether to allow the appeal to be presented, Gibbs, J.A., for the court, said there was no merit, substance or prospective benefit that could accrue to the appellants, and that the appeal was therefore moot.

22 In Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342, Sopinka, J. for the court, held that where there is no longer a live controversy or concrete dispute, an appeal is moot.

23 No stay of the June 27 order was obtained or even sought. In reliance on that order, most of the transactions contemplated by the Plan have been completed. According to the Affidavit of Paul Brotto, sworn July 6, 2000, filed July 7, 2000, the following occurred:

> 5. The transactions contemplated by the Plan have been completed in reliance upon the Sanction Order. The completion of the transactions has involved, among other things, the following steps:
>
> (a) Effective July 4, 2000, all of the depreciable property of CAIL was transferred to a wholly-owned subsidiary of CAIL and leased back from such subsidiary by CAIL;
> (b) Articles of Reorganization of CAIL, being Schedule "D" to the Plan (which is Exhibit "A" to the Sanction Order), were filed and a Certificate of Amendment and Registration of Restated Articles was issued by the Registrar of Corporations pursuant to the Sanction Order, and in accordance with sections 185 and 255 of the Business Corporations Act (Alberta) (the "Certificate") on July 5, 2000. Pursuant to the Articles of Reorganization, the common shares of CAIL formerly held by CAC were converted to retractable preferred shares and the same were retracted. All preferred shares of CAIL held by 853350 Alberta Ltd. ("853350") were converted into CAIL common shares;
> (c) The "Section 80.04 Agreement" referred to in the Plan between CAIL and CAC, pursuant to which certain forgiveness of debt obligations under s. 80 of the Income Tax Act were transferred from CAIL to CAC, has been entered into as of July 5, 2000;
> (d) Payment of $185,973,411 (US funds) has been made to the Trustee on behalf of all holders of Senior Secured Notes as provided for in the Plan and 853350 has acquired the Amended Secured Intercompany Note; and
> (e) Payments have been made to Affected Unsecured Creditors holding Unsecured Proven Claims and further payments will be made upon the resolution of disputed claims by the Claims officer; and

(f) It is expected that payment will be made within several days of the date of this Affidavit to the Trustee, on behalf of the Unsecured Notes, in the amount 14 percent of approximately $160,000,000.

24 In Norcan Oils Ltd. v. Fogler, [1965] S.C.R. 36, it was held that the Alberta Supreme Court Appellate Division could not set aside or revoke a certificate of amalgamation after the registrar of companies had issued the certificate in accordance with a valid court order and the corporations legislation. A notice appealing the order had been served but no stay had been obtained. Absent express legislative authority to reverse the process once the certificate had been issued, the majority of the Supreme Court of Canada held the amalgamation could not be unwound and therefore, an appellate court ought not to make an order which could have no effect.

25 Courts following Norcan have recognized that any right to appeal will be lost if a party does not obtain a stay of the filing of an amalgamation approval order: Re Universal Explorations Ltd. and Petrol Oil & Gas Company Limited (1982), 35 A.R. 71 (Q.B.) and Re Gibbex Mines Ltd. et al., [1975] 2 W.W.R. 10 (B.C.S.C.).

26 Norcan applies to bind this Court in the present action where CAIL's articles of reorganization were filed with the Registrar of Corporations on July 5, 2000 and pursuant to the provisions of the ABCA, a certificate amending the articles was issued. The certificate cannot now be rescinded. There is no provision in the ABCA for reversing a reorganization.

27 The respondents point out that there are other irreversible changes which have occurred since the date of the June 27, 2000 order. They include changes in share structure, changes in management personnel, implementation of a restructuring plan that included a repayment agreement with its principal lender and other creditors and payments to third parties. [Affidavit of Paul Brotto, paras. 6, 7, 8, 9, 10, 11, 12.]

28 The applicant relies on Re Blue Range Resource Corp. (1999), 244 A.R. 103, (C.A.), to argue that leave to appeal can be granted after a CCAA plan has been implemented. In that case, as noted by Fruman, J.A. at 106, a plan was in place and an appeal of the issues which were before her would not unduly hinder the progress of restructuring.

29 In this case, however, the proposed appeal by Resurgence would interfere with the restructuring since the remedies it seeks requires that the Plan be set aside. One proposed ground of appeal attacks the fairness and reasonableness of the Plan itself when the Plan has been almost fully implemented. It cannot be said that the proposed appeal would not unduly hinder the progress of restructuring.

30 If the proposed appeal were allowed, this Court cannot rewrite the Plan; nor could it remit the matter back to the CCAA supervising judge for such purpose. It must either uphold or set aside the approval of the Plan granted by the court below. In effect, if Resurgence succeeded on appeal, the Plan would be vacated. However, that remedy is no longer possible, at minimum, because the certificate issued by the Registrar cannot be revoked. As stated in Norcan, an appellate court cannot order a remedy which could have no effect. This Court cannot order that the Plan be undone in its entirety.

31 Similarly, the other ground of Resurgence's proposed appeal, oppression under s. 234 of the ABCA, cannot be allowed since that remedy must be granted within the context of the CCAA proceedings. As recognized by the learned chambers judge, allegations of oppression were considered

in the test for fairness when seeking judicial sanction of the Plan. As she discussed at paragraphs 140-145 of her reasons, the starting point in any determination of oppression under the ABCA requires an understanding of the rights, interests and reasonable expectations which must be objectively assessed. In this action, the rights, interests and reasonable expectations of both shareholders and creditors must be considered through the lens of CCAA insolvency legislation. The complaints of Resurgence, that its rights under its trust indenture have been ignored or eliminated, are to be seen as the function of the insolvency, and not of oppressive conduct. As a consequence, even if Resurgence were to successfully appeal on the ground of oppression, the remedy would not be to give effect to the terms of the trust indenture. This Court could only hold that the fairness test for the court's sanction was not met and therefore, the approval of the Plan should be set aside. Again, as explained above, reversing the Plan is no longer possible.

32 The applicant was unable to point to any issue where this Court could grant a remedy and yet leave the Plan unaffected. It proposed on appeal to seek a declaration that it be declared an unaffected unsecured creditor. That is not a ground of appeal but is rather a remedy. As the respondents argued, the designation of Resurgence as an affected unsecured creditor was part of the Plan. To declare it an unaffected unsecured creditor requires vacating the Plan. On every ground proposed by the applicant, it appears that the response of this Court can only be to either uphold or set aside the approval of the court below. Setting aside the approval is no longer possible since essential elements of the Plan have been implemented and are now irreversible. Thus, the applicant cannot be granted the remedy it seeks. No prospective benefit can accrue to the applicant even if it succeeded on appeal. The appeal, therefore, is moot.

DISCRETION TO HEAR MOOT APPEALS

33 Even if an appeal could provide no benefit to the applicants, should leave be granted?

34 In Borowski, supra, Sopinka, J. described the doctrine of mootness at 353. He said that, as an aspect of a general policy or practice, a court may decline to decide a case which raises merely a hypothetical or abstract questions and will apply the doctrine when the decision of the court will have no practical effect of resolving some controversy affecting the rights of parties.

35 After discussing the principles involved in deciding whether an issue was moot, Sopinka, J. continued at 358 to describe the second stage of the analysis by examining the basis upon which a court should exercise its discretion either to hear or decline to hear a moot appeal. He examined three underlying factors in the rationale for the exercise of discretion in departing from the usual practice. The first is the requirement of an adversarial context which helps guarantee that issues are well and fully argued when resolving legal disputes. He suggested the presence of collateral consequences may provide the necessary adversarial context. Second is the concern for judicial economy which requires that special circumstances exist in a case to make it worthwhile to apply scare judicial resources to resolve it. Third is the need for the court to demonstrate a measure of awareness of its proper law-making function as the adjudicative branch in the political framework. Judgments in the absence of a dispute may be viewed as intruding into the role of the legislative branch. He concluded at 363:

> In exercising its discretion in an appeal which is moot, the court should consider the extent to which each of the three basic rationalia for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The

presence of one or two of the factors may be overborne by the absence of the third and vice versa.

36 The third factor underlying the rationale does not apply in this case. As for the first criterion, the circumstances of this case do not reveal any collateral consequences, although, it may be assumed that the necessary adversarial context could be present. However, there are no special circumstances making it worthwhile for this Court to ration scarce judicial resources to the resolution of this dispute. This outweighs the other two factors in concluding that the mootness doctrine should be enforced.

37 On the ground of mootness, leave to appeal should not be granted.

38 I am supported in this conclusion by similar cases before the British Columbia Court of Appeal, Sparling v. Northwest Digital Ltd. (1991), 47 C.P.C. (2d) 124 and Galcor, supra.

39 In Sparling, a company sought to restructure its financial basis and called a special meeting of shareholders. A court order permitted the voting of certain shares at the shareholders' meeting. A director sought to appeal that order. On the basis of the initial order, the meeting was held, the shares were voted and some significant changes to the company occurred as a result. Hollinrake, J.A. for the court described these as substantial changes which are irreversible. He found that the appeal was moot because there was no longer a live controversy. After considering Borowski, he also concluded that the court should not exercise its discretion to depart from the usual practice of declining to hear moot appeals.

40 In Galcor, as stated earlier, an order authorizing the distribution of certain monies to limited partners was appealed. A stay was sought but the application was dismissed. An injunction to restrain the distribution of monies was also sought and refused. The monies were distributed. The B.C. Court of Appeal held there was no merit, no substance and no prospective benefit to the appellants nor could they find any merit in the argument that there would be a collateral advantage if the appeal were heard and allowed. None of the criteria in Borowski were of assistance as there was no issue of public importance and no precedent value to other cases. Gibbs, J.A. was of the opinion it would not be prudent to use judicial time to hear a moot case as the rationing of scarce judicial resources was of importance and concern to the court.

APPLICATION OF THE CRITERIA FOR LEAVE

41 In any event, consideration of the usual factors in granting leave to appeal does not result in the granting of leave.

42 In particular, the applicant has not established prima facie meritorious grounds. The issue in the proposed appeal must be whether the learned chambers judge erred in determining that the Plan was fair and reasonable. As discussed in Resurgence No. 1, regard must be given to the standard of review this Court would apply on appeal when considering a leave application. The applicant has been unable to point to an error on a question of law, or an overriding and palpable error in the findings of fact, or an error in the learned chambers judge's exercise of discretion.

43 Resurgence submits that serious and arguable grounds surround the following issues: (a) Should Resurgence be treated as an unaffected creditor under the Plan? and (b) Should the Plan have been sanctioned under s. 6 of the CCAA? The applicant cannot show that either issue is based on an appealable error.

44 On the second issue, the main argument of the applicant is that the learned chambers judge failed to appreciate that the vote in favour of the Plan was not fair. At bottom, most of the submissions Resurgence made on this issue are directed at the learned chambers judge's conclusion that shareholders and creditors of Canadian would not be better off in bankruptcy than under the Plan. To appeal this conclusion, based on the findings of fact and exercise of discretion, Resurgence must establish that it has a prima facie meritorious argument that the learned chambers judge's error was overriding and palpable, or created an unreasonable result. This, it has not done.

45 Resurgence also argues that the acceptance of the valuations given by the Monitor to certain assets, in particular, Canadian Regional Airlines Limited ("CRAL"), the pension surplus and the international routes was in error. The Monitor did not attribute value to these assets when it prepared the liquidation analysis. Resurgence argued that the learned chambers judge erred when she held that the Monitor was justified in making these omissions.

46 Resurgence argued that CRAL was worth as much as $260 million to Air Canada. The Monitor valued CRAL on a distressed sale basis. It assumed that without CAIL's national and international network to feed traffic and considering the negative publicity which the failure of CAIL would cause, CRAL would immediately stop operations.

47 The learned chambers judge found that there was no evidence of a potential purchaser for CRAL. She held that CRAL had a value to CAIL and could provide value of Air Canada, but this was attributable to CRAL's ability to feed traffic to and take traffic from the national and international service of CAIL. She held that the Monitor properly considered these factors. The $260 million dollar value was based on CRAL as a going concern which was a completely different scenario than a liquidation analysis. She accepted the liquidation analysis on the basis that if CAIL were to cease operations, CRAL would be obliged to do so as well and that would leave no going concern for Air Canada to acquire.

48 CRAL may have some value, but even assuming that, Resurgence has not shown that it has a prima facie meritorious argument that the learned chambers judge committed an overriding and palpable error in finding that the Monitor was justified in concluding CRAL would not have any value assuming a windup of CAIL. She found that there was no evidence of a market for CRAL as a going concern. Her preference for the liquidation analysis was a proper exercise of her discretion and cannot be said to have been unreasonable.

49 Resurgence also argued that the pension plan surplus must be given value and included in the liquidation analysis because the surplus may revert to the company depending upon the terms of the plan. There was some evidence that in the two pension plans, with assets over $2 billion, there may be a surplus of $40 million. The Monitor attributed no value because of concerns about contingent liabilities which made the true amount of any available surplus indefinite and also because of the uncertainty of the entitlement of Canadian to any such amount.

50 The learned chambers judge found that no basis had been established for any surplus being available to be withdrawn from an ongoing pension plan. She also found that the evidence showed the potential for significant contingencies. Upon termination of the plan, further reductions for contingent benefits payable in accordance with the plans, any wind up costs, contribution holidays and litigation costs would affect a determination of whether there was a true surplus. The evidence before the learned chambers judge included that of the unionized employees who expected to dispute all the calculations of the pension plan surplus and the entitlement to the surplus. The learned

chambers judge observed also that the surplus could quickly disappear with relatively minor changes in the market value of the securities held or in the calculation of liabilities. She concluded that given all variables, the existence of any surplus was doubtful at best and held that ascribing a zero value was reasonable in the circumstances.

51 In addition to the evidence upon which the learned chambers judge based her conclusion, she is also supported by the case law which demonstrates that even if a pension surplus existed and was accessible, entitlement is a complex question: Schmidt v. Air Products of Canada Ltd., [1994] 2 S.C.R. 611 (S.C.C.).

52 Resurgence argued that the international routes of Canadian should have been treated as valuable assets. The Monitor took the position that the international routes were unassignable licences in control of the Government of Canada and not property rights to be treated as assets by the airlines. Resurgence argues that the Monitor's conclusion was wrong because there was evidence that the international routes had value. In December 1999, CAIL sold its Toronto - Tokyo route to Air Canada for $25 million. Resurgence also pointed to statements made by Canadian's former president and CEO in mid-1999 that the value of its international routes was $2 billion. It further noted that in the United States, where the government similarly grants licences to airlines for international routes, many are bought and sold.

53 The learned chambers judge found the evidence indicated that the $25 million paid for the Toronto-Tokyo route was not an amount derived from a valuation but was the amount CAIL needed for its cash flow requirements at the time of the transaction in order to survive. She found that the statements that CAIL's international routes were worth $2 billion reflected the amount CAIL needed to sustain liquidity without its international routes and was not the market value of what could realistically be obtained from an arm's length purchaser. She found there was no evidence of the existence of an arm's length purchaser. As the respondents pointed out, the Canadian market cannot be compared to the United States. Here in Canada, there is no other airline which would purchase international routes, except Air Canada. Air Canada argued that it is pure speculation to suggest it would have paid for the routes when it could have obtained the routes in any event if Canadian went into liquidation.

54 Even accepting Resurgence's argument that those assets should have been given some value, the applicant has not established a prima facie meritorious argument that the learned chambers judge was unreasonable to have accepted the valuations based on a liquidation analysis rather than a market value or going concern analysis nor that she lacked any evidence upon which to base her conclusions. She found that the evidence was overwhelming that all other options had been exhausted and have resulted in failure. As described above, she had evidence upon which to accept the Monitor's valuations of the disputed assets. It is not the role of this Court to review the evidence and substitute its opinion for that of the learned chambers judge. She properly exercised her discretion and she had evidence upon which to support her conclusions. The applicant, therefore, has not established that its appeal is prima facie meritorious.

55 On the first issue, Resurgence argues that it should be an unaffected creditor to pursue its oppression remedy. As discussed above, the oppression remedy cannot be considered outside the context of the CCAA proceedings. The learned chambers judge concluded that the complaints of Resurgence were the result of the insolvency of Canadian and not from any oppressive conduct. The applicant has not established any prima facie error committed by the learned chambers judge in reaching that conclusion.

56 Thus, were this appeal not moot, leave would not be granted as the applicant has not met the threshold for leave to appeal.

CONCLUSION

57 The application for leave to appeal is dismissed because it is moot, and in any event, no serious and arguable grounds have been established upon which to found the basis for granting leave.

WITTMANN J.A.

cp/i/qljpn/qlcal

TAB 7

2009 CarswellOnt 9398,

C

2009 CarswellOnt 9398

Canwest Global Communications Corp., Re

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

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

Ontario Superior Court of Justice [Commercial List]

Pepall J.

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

Counsel: Lyndon Barnes, Shawn Irving, for Applicants

Alan Merskey, for Special Committee of the Board of Directors

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

Benjamin Zarnett, for Ad Hoc Committee of Noteholders

Hilary Clarke, for Bank of Nova Scotia

Steve Weisz, for CIT Business Credit Canada Inc.

Hugh O'Reilly, Amanda Darrach, for CHCH Retirees

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

Deborah McPhail, for FSCO

Subject: Civil Practice and Procedure; Insolvency

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

Statutes considered:

2009 CarswellOnt 9398,

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

s. 11 — referred to

Rules considered:

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

R. 10 — referred to

***Pepall J.*:**

Relief Requested

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

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

Brief Outline of Facts

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

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

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

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

4 That said, certain former employees are affected by the CMI Entities' discontinuance or proposed discontinuance of employee related obligations and it is intended that they be assisted by the granting of the order requested by the CMI Entities. Approximately 81 former non-unionized employees have been advised that the CMI Entities propose to cease making all post-employment and post-retirement benefit payments in relation to claims incurred after

November 13,2009. There are also 2 out of IS beneficiaries of the Canwest Global Communications Corp. and Related Companies Retirement Compensation Arrangement Plan who will not have received the entire present value of their entitlement under that plan.

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

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

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

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

9 CEP represents 1000 bargaining unit employees employed by the Applicants. It intends to facilitate and advance the claims of both its current members and its former members (but not including the CH Employees). CEP states that as a result of the current economic crisis, it has had to incur significant costs in representing its current and former members in CCAA proceedings. This is particularly so given the union's strong presence in the forestry and media industries and the degree to which they have been inpacted by the state of the economy. CEP states mat the costs have been substantial and have adversely affected its financial position. CEP states that its ability to provide effective representation in these proceedings is dependent on receipt of funding. In the past 6 months, CEP has spent about $250,000 on legal costs in connection with different CCAA proceedings. Furthermore, former members do not pay union dues and their representation, although part of the union's internal mandate, creates costs that are outside CEP's cost structure. In addition, over the past 12 months, CEP has lost approximately 12,000 members due to economic conditions. This obviously has a negative impact on union revenues. Faced with these conditions, CEP seeks funding.

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

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

Issues

12 The issues to consider are:

(a) Should the representatives and Cavalluzzo LLP be appointed to represent the interests of the Retirees and

should Cavalluzzo LLP be provided with funding for such representation?

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

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

Discussion

(a) Cavalluzzo LLP

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

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

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

(b) CEP and CaleyWray

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

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

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

resent CEP's current and former members (but not including the CH Employees).

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

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

(c) Claims Bar Extension

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

Conclusion

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

***Pepall J.*:**

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

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

END OF DOCUMENT

TAB 8

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

C

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

Canwest Publishing Inc./Publications Canwest Inc., Re

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

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

Ontario Superior Court of Justice [Commercial List]

Pepall J.

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

Counsel: Lyndon Barnes, Alex Cobb for Canwest LP Entities

Maria Konyukhova for Monitor, FTI Consulting Canada Inc.

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

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

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

Anthony F. Dale for CAW-Canada

Deborah McPhail for Financial Services Commission of Ontario

Subject: Insolvency; Civil Practice and Procedure

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

In January 2010 LP Entities obtained order pursuant to Companies' Creditors Arrangement Act staying all proceedings and claims against them — Order permitted, but did not require, payments to employees and pension plans — There were approximately 45 non-unionized employees who were still owed termination and severance payments,

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

Statutes considered:

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

Generally — referred to

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

Generally — referred to

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

***Pepall J.*:**

Reasons for Decision

Relief Requested

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

2 On February 22, 2010, I granted an order on consent of the LP Entities authorizing the Communications, Energy and Paperworker's Union of Canada ("CEP") to continue to represent its current members and to represent former members of bargaining units represented by the union including pensioners, retirees, deferred vested partici-

pants and surviving spouses and dependants employed or formerly employed by the LP Entities. That order only extended to unionized members or former members. The within motion focused on non-unionized former employees and retirees although Ms. Payne for the moving parties indicated that the moving parties would be content to include other non-unionized employees as well. There is no overlap between the order granted to CEP and the order requested by the Salaried Employees and Retirees.

Facts

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

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

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

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

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

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

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

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

8 All four proposed Representatives have claims against the LP Entities that are representative of the claims that would be advanced by former employees, namely pension benefits and compensation for involuntary terminations.

In addition to the claims against the LP Entities, the proposed Representatives may have claims against the directors of the LP Entities that are currently impacted by the CCAA proceedings.

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

10 Funding by the LP Entities in respect of the representation requested would violate the Support Agreement dated January 8, 2010 between the LP Entities and the LP Administrative Agent. Specifically, section 5.1(j) of the Support Agreement states:

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

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

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

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

Issues

14 The issues on this motion are as follows:

(1) Should the Representatives be appointed?

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

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

Positions of Parties

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

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

17 Furthermore, the LP Entities oppose the funding request. The fees will deplete the resources of the Estate without any possible corresponding benefit and the Support Agreement with the LP Secured Lenders does not au-

thorize any such payment.

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

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

Discussion

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

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

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

22 The evidence before me consists of affidavits from three of the four proposed Representatives and a partner with the Nelligan O'Brien Payne LLP law firm, the Monitor's Third Report, and a compendium containing an affidavit of an investment manager for noteholders filed on an earlier occasion in these CCAA proceedings. This evidence addresses most of the aforementioned factors.

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

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

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

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

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

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

Motion granted.

END OF DOCUMENT

TAB 9

2001 CarswellOnt 3227, 55 O.R. (3d) 747, 14 C.P.C. (5th) 374

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2001 CarswellOnt 3227, 55 O.R. (3d) 747, 14 C.P.C. (5th) 374

Cheung v. Kings Land Developments Inc.

Bernard K. Cheung and Ben Wing Pun Mok, Plaintiffs and Kings Land Developments Inc., Henry Lam, Linda Lam, Jeffrey P. Beber, Levitt, Beber, Eddie Lee, Re/Max T.S. Realty Inc. and Living Realty Inc., Defendants

Ontario Superior Court of Justice

Cumming J.

Heard: July 18, 2001
Judgment: September 12, 2001[FN*]
Docket: 00-CV-195955

Proceedings: refused leave to appeal 2002 CarswellOnt 270 (Ont. Div. Ct.)

Counsel: *Keith M. Landy* , *S.S. Marr* , for Plaintiffs Bernard K. Cheung, Ben Wing Pun Mok

Richard Quance , for Plaintiffs in actions #97-CV-138971, #97-CV-195954, #00-CV-195957

Morton Adelson , for Plaintiffs in action #5092/98, 53723/97

Benjamin Glustein , for Defendants, Henry Lam, Linda Lam, Kings Land Developments Inc.

W.A. Kelly, Q.C. , for Defendants, Jeffrey Beber, Levitt, Beber

Michael K. Walter , for Defendant, Living Realty Inc.

No one for Defendants, Eddie Lee, Re/Max T.S. Realty

Subject: Civil Practice and Procedure

Practice --- Parties — Representative or class proceedings under class proceedings legislation — Certification — Plaintiff's class proceeding — Identifiable class

Deposits were paid by 273 purchasers for units in condominium project to be constructed in Ontario — According to estimate, 10 purchasers resided in Hong Kong — Project was never built — Developer reportedly did not have sufficient funds to develop project — Some 137 purchasers were named plaintiffs in six actions for return of depos-

its and for punitive and general damages against developer and realty company — Plaintiff brought motion for certification of class proceeding — Motion granted — Identifiable class of persons existed, being all purchasers of units in condominium project sold by developer, that would be represented by proposed representative plaintiffs in class proceeding — Class could include 10 residents of Hong Kong who were purchasers — Ontario had jurisdiction with respect to proceeding — All purchasers had same claims against defendants — Non-residents could be plaintiffs in Ontario courts — Hong Kong residents would receive notification and have right to opt out — In event that plaintiff class was ultimately successful, then Hong Kong purchasers who had not opted out should benefit from judgment like all other class members.

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

Deposits were paid by 273 purchasers for units in condominium project to be constructed in Ontario — Project was never built — Developer reportedly did not have sufficient funds to develop project — Some 137 purchasers were named plaintiffs in six actions for return of deposits and for punitive and general damages against developer and realty company — Purchasers lost deposits ranging from $17,000 to $116,000, with majority losing deposits between $20,000 and $40,000 — Plaintiff brought motion for certification of class proceeding — Motion granted — Given expense of litigation, it was improbable that all purchasers would be able to pursue their claims individually — Given commonality of issues, judicial economy was advanced by class proceeding — Evidence required with respect to claims was common for all purchasers and required little or no evidence from any purchaser — Counsel for representative plaintiffs would be able to seek evidence to establish common issues to benefit of all purchasers, including those who would not otherwise have sufficient funds to pursue individual action — Counsel for developer would be able to respond to any allegations and evidence concerning common issues in one proceeding, providing expedient forum to resolve issues for both plaintiffs and defendants — For defendants to separately defend each action which might arise as result of failure of project would be cost prohibitive — Class Proceedings Act, S.O. 1992, c. 6.

Cases considered by *Cumming J.* :

Lau v. Bayview Landmark Inc., 1999 CarswellOnt 3442, 40 C.P.C. (4th) 301 (Ont. S.C.J.) — referred to

Statutes considered:

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

Generally — referred to

s. 5(1) — considered

s. 5(1)(a) — considered

s. 5(1)(b) — referred to

s. 5(1)(c) — referred to

s. 5(1)(d) — referred to

s. 5(1)(e) — referred to

s. 8(1) — referred to

s. 9 — referred to

s. 10 — referred to

s. 11(1)(c) — referred to

s. 12 — referred to

s. 14 — referred to

s. 15(2) — referred to

s. 15(3) — referred to

s. 17 — referred to

s. 24 — referred to

s. 25 — referred to

s. 26 — referred to

s. 31(2) — referred to

Rules considered:

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

R. 6.01 — referred to

R. 21.01(1((b) — referred to

MOTION by plaintiff for certification of class proceeding.

***Cumming J.*:**

The Motion

1 The plaintiff in this court action (00-CV-195955CM) brings a motion for certification of the class proceeding under the *Class Proceedings Act, 1992* , 1992 S.O.c. 6 ("*CPA* "). This action was originally constituted as an individual action. As discussed below, there is now a Fresh as Amended Statement of Claim reconstituting the action as a class proceeding.

Background

2 There are six civil actions brought against the same defendants, Kings Land Development Inc. ("Kings"), Henry Lam and Linda Lam (the "Lams") (these three defendants are collectively referred to as the "Kings Land defendants"), Jeffrey P. Beber, his firm Levitt, Beber and Living Realty Inc. with respect to the failure of a commercial condominium project called "The World Centre" (the "project") in Richmond Hill. Kings was the developer/vendor of the estimated 251 units in the project. The proposed representative plaintiffs purchased units in the project. There are some 273 purchasers of units as putative class members. An estimated 10 of the purchasers reside in Hong Kong. Some 137 of the total 273 purchasers are named plaintiffs in the six civil actions. About 136 purchasers of 125 units have not commenced individual court actions.

3 The project was to be constructed on property at the north-east corner of Bayview Avenue and Major MacKenzie Drive, being part of Lot 21, Concession 2, East of Yonge Street, in the Town of Richmond Hill, in the Regional Municipality of York (the "property").

4 The Lams were officers and directors, and the sole shareholders of Kings. The defendant Levitt, Beber is the law firm that held the deposit funds made in respect of the agreements of purchase and sale. The defendant Jeffrey P. Beber is a principal of the law firm and was the solicitor acting for the vendor, Kings. The law firm at all material times was trustee for the deposit monies. (The defendant law firm and Mr. Beber are collectively referred to as the "Beber defendants".)

5 The defendant Living Realty Inc. ("Living Realty") carries on the business of a real estate broker, and marketed the units in the project on behalf of Kings as the exclusive listing real estate broker. The defendants Eddie Lee and Re/Max T.S.Realty Inc. were the agents retained on behalf of the proposed representative plaintiff, Mr. Cheung. (These two defendants are not parties in any of the other actions.)

6 Kings did not provide occupancy. The project was never built. Kings reportedly did not have sufficient funds to develop the project. In each case, the plaintiffs seek the return of their deposits and punitive and general damages.

7 Orders have been made with respect to the individual actions under rule 6.01 of the *Rules of Civil Procedure* , R.R.O. 1990, Reg. 194 as amended (the "rules") for a common documentary discovery, examinations for discovery, pre-trial conferences and that the actions ultimately be tried together.

8 The five remaining individual civil actions are #97-CV138971, #97-CV-195954, and #00-CV-195957 (all commenced in Toronto) and #5092/98 and #53723/97 (both commenced in Newmarket). The counsel for the plaintiffs in #97-CV-138971, #97-CV-195954 and #00-CV-195957 advises that he does not oppose the motion for certification. Counsel for the plaintiffs in #5092/98 and #53723/97, however, opposes the motion.

9 Given the multitude of actions, the Kings Land defendants brought a motion to compel certification of #97-CV-138971 as a class proceeding (being an action with many individual plaintiffs). The plaintiff, Mr. Cheung, then moved to certify his individual action in #00-CV-195957 as a class proceeding. This required extensive amendments to the statement of claim which have now been done with a Fresh as Amended Statement of Claim. Accordingly, an order, not opposed, is to be issued allowing such amendments *nunc pro tunc* .

10 This class action is unusual in its development in that it originated in the first instance simply as an individual action by Mr. Cheung. My impression from the history of alleged events is that there are not any limitation of action issues that arise in respect of any putative class member. However, in fairness to the defendants, the *nunc pro tunc* order allowing the Fresh as Amended Statement of Claim is made without prejudice to any limitation of actions defences that may be raised against any individual class members.

11 The Kings Land defendants consent to certification. As stated above, counsel for the plaintiffs in #5092/98 and #5373/97 opposes this motion for certification.

12 If certified, the class will include all purchasers except for those who may opt out. There is an absolute right to opt out under s. 9 of the *CPA* . For any purchasers who opt out who are already plaintiffs in existing individual actions, those actions will, of course, continue to move forward. The individual actions in which plaintiffs do not opt out will be stayed.

13 It is up to informed putative class members to decide whether or not they remain in a certified class proceeding or opt out. Class members, other than the representative plaintiffs, are not responsible for an adverse costs award with respect to a determination of the common issues: s. 31(2) of the *CPA* . The proposed class counsel is seeking certification on the basis of a contingency agreement. Thus, class counsel will receive payment of their fees and disbursements only if the plaintiffs are successful.

14 In the event any of the individual actions remain alive then the existing order under rule 6.01 that all actions be tried at one time, will continue to apply.

15 Winkler J. granted certification in another class proceeding dealing with the failure of another like project involving the same defendants and identical agreements for the sale and purchase of units. See *Lau v. Bayview Landmark Inc.*, [1999] O.J. No. 4060 (Ont. S.C.J.) . [*Bayview Landmarks*].

Analysis

16 The two proposed representative plaintiffs entered into agreements of purchase and sale with Kings and paid deposits.

17 The agreements provided that the deposits would be paid in trust to the vendor's solicitors, Levitt, Beber, to be credited on account of the purchase. The agreements provided that if the premises were not completed by the stipulated occupancy date, March 3, 1997, that such date could be extended up to March 3, 2000.

18 As the project was never built, the purchasers demanded the return of their deposits. The purchasers were told their monies, allegedly totaling $10,894,104.00, had been paid out to cover costs of Kings, including the fees of Living Realty and Levitt, Beber.

19 The plaintiffs claim that Kings is in breach of contract. The plaintiffs claim that all of the defendants (except for the defendants Eddie Lee and Re/Max Realty Inc.) committed a breach of the express trust allegedly established for the benefit of the putative class members with respect to their monies held on deposit toward the purchase price. The purchasers claim that the terms of the trust did not permit the funds on deposit to be applied to the acquisition price of the property and the related expenses. The plaintiffs also claim that the defendant Living Realty is liable for negligent misrepresentation. The plaintiffs also allege that the defendants Mr. and Mrs. Lam misappropriated the monies and are liable for fraud, and that the Beber defendants knew or ought to have known that the deposits would be improperly spent.

20 There are five mandatory criteria for the certification of a class action under s. 5 (1) of the *CPA* .

Section 5(1)(a)

21 Section 5(1)(a) requires that the statement of claim meet the threshold test of disclosing a cause of action. The test for meeting the s. 5(1)(a) test is the same as seen in a rule 21.01(1)(b) motion. All allegations of facts in the pleading, unless patently ridiculous or incapable of proof, must be accepted as proved; the novelty of the cause of action will not militate against the plaintiff; the statement of claim is to be read liberally, with a view to accommo-

dating any inadequacies in the form of the allegations due to drafting deficiencies; and finally, to succeed, a defendant must establish that it is plain and obvious there is not a reasonable cause of action.

22 The claims by all purchasers are the same against all defendants except for the defendants Eddie Lee and RE/Max T.S. Realty Inc. The claim against those two defendants pertains only to the plaintiff Cheung. This claim may well fall away if the plaintiff is successful against the other defendauts. Even if unsuccessful against the other defendants, Mr. Cheung may then determine that he does not wish to proceed against the defendants Eddie Lee and RE/Max T.S. Realty. Accordingly, the action against these two defendants should be stayed without prejudice until the class proceeding has been determined in respect of the other defendants. There is agreement of counsel for all other parties with this interim disposition of the action with respect to these two defendants. (My references to "defendants" hereafter does not include Eddie Lee and RE/Max)

23 The plaintiffs allege they entered into agreements of purchase and sale as a result of representations made to them by the Kings Land defendants and Living Realty that Kings was the owner of the property, that the necessary approvals had been obtained for the development of the proposed project, and that the project would be comprised of a 460,000 square foot retail mall containing certain stores. There is common ground that occupancy was to be made available by no later than March 3, 2000.

24 The plaintiffs allege that the defendant Beber received deposit monies under the purchase and sale agreements and wrongfully or negligently released the deposit monies in breach of trust and contract to the Lams and Kings. The plaintiffs say that the Lams and Kings wrongfully directed the release of the deposit funds and unlawfully disbursed and benefited from the deposit funds. The plaintiffs say they are entitled to the return of their deposit monies and to damages.

25 The plaintiffs found their claim in allegations of breach of trust (in respect of all defendants), breach of contract (in respect of Kings) fraud (in respect of the defendants Mr. and Mrs. Lam), knowingly assisting in a dishonest and fraudulent plan designed to deprive the class members of the deposits (in respect of the Beber defendants) and negligent misrepresentation (in respect of Living Realty).

26 In my view, and I so find, the criterion of s. 5(1)(a) is met. Indeed, the defendants do not oppose this finding.

Section 5(1)(b)

27 There is an identifiable class of persons, being all purchasers of units in the condominium project sold by Kings, that would be represented by the proposed representative plaintiffs in the class proceeding.

28 Counsel for Living Realty submits that the class cannot include the 10 residents of Hong Kong who were purchasers. I disagree.

29 Ontario has jurisdiction with respect to this proceeding. All purchasers have the same claims against the defendants. Non-residents can be plaintiffs in Ontario courts. The Hong Kong residents would receive notification and have the right to opt out. In the event the plaintiff class is ultimately successful, then the Hong Kong purchasers who have not opted out should benefit from the judgment like all other class members. If the plaintiff class is ultimately not successful then (if the Hong Kong class members brought an action in Hong Kong) the Hong Kong courts should recognize the Ontario judgment on the principle of comity.

30 In my view, and I so find, the non-resident purchasers are properly to be included in the class.

Section 5(1)(c)

31 There is common ground that each of the agreements of purchase and sale signed by the purchasers of units contained identical terms, with the possible exception, as alleged by the defendant Living Realty, that some agreements contained a caution with respect to the status of requisite municipal approvals. Hence, each purchaser was subject to the same terms applying to the use of funds held in trust and in respect of the aborted "Final Occupancy Date" of March 3, 2000. There is common ground that the vendor did not own the property when the agreements to purchase were signed.

32 The resolution of the claims for breach of trust against Kings and the Lams requires little evidence from the purchasers, as they could not have been involved in the alleged breach of trust.

33 The record establishes that Living Realty conducted some three or four group sales presentations in Toronto, involving hundreds of prospective purchasers, and another presentation in Hong Kong. Scale models and sales brochures were employed in these sale presentations. At least 39 individual real estate agents employed by Living Realty completed sales of units. The statement of claim alleges that Living Realty placed advertisements in local Chinese language newspapers which misrepresented the state of development of the project.

34 The following formulation of the common issues is not opposed by the defendants.

Breach of Contract

1. Did Kings breach the agreements of purchase and sale ("agreements") and are the deposits contractually required to be repaid to the class members?

Breach of Trust

2. Are the Beber and Kings Land defendants liable to the members of the class on the following grounds:

(i) breach of trust simpliciter;

(ii) as a constructive trustee for the trust funds and thereafter taking action inconsistent with that obligation;

(iii) by being in knowing receipt of trust funds;

(iv) by knowingly assisting in a dishonest and fraudulent plan designed to deprive the class of the deposits?

3. Is Living Realty liable to the members of the class on the following grounds:

(i) as a constructive trustee for the trust funds and thereafter taking action inconsistent with that obligation;

(ii) by knowingly assisting in a dishonest and fraudulent plan designed to deprive the class of the deposits?

Negligence

4. Do the Kings Land defendants, the Beber defendants and Living Realty owe the class members a duty of care based on the nature of the relationship between these defendants and the class?

5. Were the Beber defendants, as trustees, negligent in the release of the deposits?

6. Were the Kings Land defendants and Living Realty negligent in the representations made to the class members, or in failing to disclose material information to the class members before they signed the agreements?

Fraud and Piercing the Corporate Veil

7. Do the actions of the Lams and Kings constitute fraud, deceit, and a basis for piercing the corporate veil?

Punitive, Exemplary and Aggravated Damages

8. Should there be an award of punitive, exemplary or aggravated damages against the defendants or any one or more of them?

Section 5(1)(d)

35 A class proceeding must be the preferable procedure for the resolution of the common issues. In my view, the policy goals underlying the *CPA* , being access to justice, judicial economy and modification of wrongful behaviour, are all supported by certification. The record establishes that purchasers lost deposits ranging from $17,000 to $116,000, with the majority losing deposits between $20,000 to $40,000. Given the expense of litigation, it is improbable that all these purchasers would be able to pursue their claims individually. Given the commonality of the issues, judicial economy is advanced by a class proceeding. If the allegations are established, the policy objective of general deterrence of wrongful behaviour modification will be advanced.

36 A determination of the common issues will significantly advance the progress of the litigation, even if individual issues remain to be resolved.

37 The evidence required with respect to the breach of trust and breach of contract claims is common for all purchasers and requires little or no evidence from any purchaser. The evidence as to the use of deposit funds and whether such use was contrary to the terms of the trust, and whether there was any personal benefit by the Lams through the receipt and misappropriation of trust funds will largely not come from the purchasers. This evidence would be identical in any action brought with respect to the project.

38 As noted above, each purchaser has lost deposits ranging from $17,000 to $116,000. The majority of the purchasers having lost between $20,000 to $40,000. A class action would be beneficial to them in that the costs of pursuing such an action may exceed the damages they have suffered.

39 In each of the additional actions which may be filed over the course of the next few years the limitation period perhaps runs from the failure to complete the building by the occupancy date of March 3, 2000; pleadings, examinations for discovery, and trials would all be required. These elements would impose significant costs on individual purchasers. The existing order under rule 6.01 with respect to the individual actions tends to meet, in part, the objectives of access to justice and judicial economy that underlie a class proceeding. However, there may well be more individual actions at a later date.

40 Counsel for the representative plaintiffs will be able to seek the evidence to establish the common issues to

the benefit of all purchasers, including those who would not otherwise have sufficient funds to pursue an individual action.

41 Counsel for the Kings Land defendants will be able to respond to any allegations and evidence concerning the common issues in one proceeding, providing an expedient forum to resolve the issues for both the plaintiffs and the defendants and avoiding any possible unfairness for purchasers and defendants.

42 It would be cost prohibitive for the defendants to separately defend each action which may arise as a result of the failure of the project. If there are further individual actions at a later date the defendants might be required to attend additional, separate examinations for discovery, pre-trial conferences, bring requisite motions if necessary, and attend further trials, all of which would address the common issues raised above.

43 In the event of more than one trial, the courts would be required to consider the evidence in each case and arrive at a conclusion as to the terms of the trust, breach of the trust, whether the Lams wrongfully received trust funds or participated in a dishonest and fraudulent scheme, and the appropriateness of punitive damages. These common issues will require determinations of credibility, which raise the significant risk of a multiplicity of proceedings and inconsistent judgments.

44 Scarce judicial resources would be better utilized, and judicial economies would be effected, by determining all of the common issues in one proceeding. Further, if any one or more of the defendants are found liable on the allegations of breach of trust, there may be no need for the plaintiffs to proceed against the defendant Living Realty with respect to the allegation of negligent misrepresentation.

45 While precise monetary damages need to be calculated on an individual basis, the methodology for calculating the damages represented by the loss of the deposits allegedly caused by some or all of the defendants' conduct may be able to be determined on a class-wide basis, without examining the plaintiffs.

46 Certification of the issues against the defendants would assist the parties in attempting to resolve the issues raised in the litigation. It would be impractical for the defendants to consider settling litigation with one set of plaintiffs when there may be numerous additional individual actions at a later date raising the same issues.

47 It is recognized that there may well be significant individual issues that must be resolved at some later point. This action involves many complexities. The *CPA* provides flexibility to deal with such eventualities as may be necessary: see ss. 10, 11(1)(c), 12, 14, 15(2), (3), 24, 25 and 26. A class action is the preferable procedure for resolution of the common issues and will significantly advance the progress of the litigation.

Section 5(1)(e)

48 The proposed representative plaintiffs are Bernard K. Cheung and Ben Wing Pun Mok. In my view, the proposed representative plaintiffs would fairly and adequately represent the interests of the class, have produced a plan for the class 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 neither has, on the common issues for the class, an interest in conflict with the interests of other class members.

Disposition

49 For the reasons given, this action is to be certified as a class proceeding. An order is to issue in accordance with these Reasons for Decision and in compliance with s. 8(1) of the *CPA* .

50 Notice to class members as required by s. 17 of the *CPA* shall be done by prepaid mail to each putative class member and by advertisements in Chinese language newspapers in Toronto and Hong Kong. The opt out date is 60 days from the mailing and last advertisement date, whichever is later. Costs of the notice are to be borne by the Kings Land defendants on a joint and several basis.

51 Class counsel are to prepare an order and form of notice to class members in accordance with these Reasons for Decision. I may be spoken to if there is not agreement between counsel as to the form and content of the order or as to the content of the notice and the precise manner of giving notice.

Motion granted.

FN* Leave to appeal refused 2002 CarswellOnt 270 (Ont. Div. Ct.).

END OF DOCUMENT

TAB 10

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

74 O.R. (3d) 321

[2005] O.J. No. 506

Dockets: C41264, C41289 and C41361

Court of Appeal for Ontario,

Sharpe, Armstrong and Blair JJ.A.

February 16, 2005

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

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

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

Held, the appeal should be dismissed.

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

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

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

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

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

Other cases referred to

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

Thomson Corp. (1999), 43 O.R. (3d) 161, [1999] O.J. No. 280, 171 D.L.R. (4th) 171, 85 C.P.R. (3d) 1, 30 C.P.C. (4th) 182 (Gen. Div.), supp. reasons (1999), 43 O.R. (3d) 389, [1999] O.J. No. 908, 43 C.P.C. (4th) 166 (Gen. Div.); Shaw v. BCE Inc., [2004] O.J. No. 3109, 49 B.L.R. (3d) 1, 189 O.A.C. 9, affg [2004] O.J. No. 5481, O.T.C. 28, 42 B.L.R. (3d) 107 (S.C.J.); Tolofson v. Jensen, [1994] 3 S.C.R. 1022, [1994] S.C.J. No. 110, 100 B.C.L.R. (2d) 1, 120 D.L.R. (4th) 289, 175 N.R. 161, [1995] 1 W.W.R. 609, 22 C.C.L.T. (2d) 173, 32 C.P.C. (3d) 141, 7 M.V.R. (3d) 202; Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd., [2003] O.J. No. 868, 223 D.L.R. (4th) 445, 23 C.P.R. (4th) 454, 30 C.P.C. (5th) 107 (C.A.), affg [2002] O.J. No. 1400, 212 D.L.R. (4th) 563, 18 C.P.R. (4th) 267, 20 C.P.C. (5th) 65 (Div. Ct.), affg [2001] O.J. No. 237, 11 C.P.R. (4th) 230, 6 C.P.C. (5th) 245 (S.C.J.); Webb v. K-Mart Canada Ltd. (1999), 45 O.R. (3d) 389, [1999] O.J. No. 2268, 45 C.C.E.L. (2d) 165, 99 C.L.L.C. 210-038, 36 C.P.C. (4th) 99 (S.C.J.), supp. reasons (1999), 45 O.R. (3d) 425, [1999] O.J. No. 3285, 46 C.C.E.L. (2d) 293, 43 C.P.C. (4th) 26 (S.C.J.); Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63, 94 Alta. L.R. (2d) 1, 201 D.L.R. (4th) 385, 272 N.R. 135, [2002] 1 W.W.R. 1, 2001 SCC 46, 8 C.P.C. (5th) 1 (sub nom. Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere); Wilson v. Servier Canada Inc. (2000), 50 O.R. (3d) 219, [2000] O.J. No. 3392, 49 C.P.C. (4th) 233, 24 C.P.C. (5th) 175 (S.C.J.); [page324] Wilson v. Servier Canada Inc., [2002] O.J. No. 3856, 220 D.L.R. (4th) 191, 23 C.P.C. (5th) 1 (C.A.), quashing (2002), 59 O.R. (3d) 656, [2002] O.J. No. 2032, 213 D.L.R. (4th) 751 (S.C.J.)

Statutes referred to

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

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

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

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

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

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

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

Authorities referred to

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

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

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

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

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

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

Glenn Zakaib, for Simon Marketing Inc.

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

The judgment of the court was delivered by

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

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

Facts

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

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

4. Settlement discussions in the Boland action were conducted from October 2001 and culminated in a settlement agreement between the plaintiffs and McDonald's on April 19, 2002.
5. The settlement agreement provided that the parties would apply to the Circuit Court of Cook County, Illinois for preliminary certification of the proceedings as a class action and for preliminary approval of the settlement as "fair, reasonable and adequate to the class and to members of the public". Further orders were to be requested to approve the terms of a notice to class members -- and the manner in which it was to be disseminated -- to provide class members with an opportunity to opt out of the class and the settlement by a date to be specified and to make the settlement -- and the releases to be provided to McDonald's and its subsidiaries -- binding on those who did not do so. The terms of the releases were broad. They covered all claims -- referred to in the settlement agreement as "Released Claims" -- relating to McDonald's promotional games under common law or statute, and specifically for breach of the consumer protection laws of any jurisdiction, contract, unjust enrichmen fraud, negligent misrepresentation, breach of fiduciary duty, strict liability and unfair or deceptive trade practices. The Released Claims would have covered each of the claims subsequently pleaded in the Parsons and Currie actions even though not all of the material facts on which they were [page326] based had been pleaded in Boland. The original Complaint was amended to extend the class to persons who had participated, or attempted to participate, in promotional games sponsored by McDonald's since 1979.
6. On May 8, 2002, the application for the above orders was heard by Judge Stephen Schiller in Chicago and, on June 6, 2002, he granted the preliminary relief requested with some modifications to the proposed notice to class members. August 28, 2002 was designated as the final date for members to opt out and a final fairness hearing was to be held on September 17, 2002.
7. The manner in which notice was to be given to customers in Canada was specifically addressed at the preliminary hearing on May 8, 2002, and the order of the court provided for the approved form of notice to be published in each of three French-language newspapers in Quebec on July 15, 2002 and in Maclean's magazine on July 15 and July 22 as well as in two US publications that had circulation in Canada.
8. Jacobson had pleaded guilty to the criminal charges and, at the trial of his alleged conspirators, he gave evidence on August 19, 2002 that McDonald's had instructed Simon Marketing Inc. that the "random" selection of winners of "high value" prizes was to be manipulated to ensure that no such prizes would be awarded to contestants in Canada. No such allegation had been -- or was ever -- made in the Boland action.
9. After a US attorney had notified the firm of Paliare Roland in Toronto, the firm placed information about the US proceedings on its website and was subsequently contacted by the plaintiff, Preston Parsons. The Parsons action was commenced by statement of claim on September 13, 2002. As I

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

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

Judicial proceedings

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

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

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

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

Issues

[8] The following issues arise on this appeal.

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

Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

Appeal dismissed.

TAB 11

2010 CarswellOnt 6412, 2010 ONSC 418

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2010 CarswellOnt 6412, 2010 ONSC 418

Davies v. Clarington (Municipality)

BONNIE DAVIES (Plaintiff) and THE CORPORATION OF THE MUNICIPALITY OF CLARINGTON, VIA RAIL CANADA INC., CANADIAN NATIONAL RAILWAY COMPANY, TIMOTHY GARNHAM, THE BLM GROUP INC., APACHE SPECIALIZED EQUIPMENT INC., APACHE TRANSPORTATION SERVICES INC., BLUE CIRCLE CANADA INC., ONTARIO HYDRO SERVICES COMPANY (Defendants)

Ontario Superior Court of Justice

P.D. Lauwers J.

Heard: January 14-15, 2010
Judgment: September 2, 2010
Docket: CV-00-1075-00CP

Counsel: D. Fulton for Christopher Zuber

R. Winsor for Defendant, Corporation of the Municipality of Clarington

J. Campion, D. Merner for Defendant, VIA Rail Canada Inc., Canadian National Railway

B. Sunohara for Defendant, BLM Group Inc.

J. Regan, A. Sciacca for Defendants, Apache Specialized Equipment Inc., Apache Transportations Services Inc.

J. Agostino for Defendant, Ontario Hydro Services Company

Subject: Civil Practice and Procedure

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Conduct of class proceeding — Applications or motions

Plaintiff was passenger on train that was derailed in accident — Plaintiff was thrown into wall of coach and struck his head, suffering compression injury to cervical spine — Class action was brought by representative plaintiff and plaintiff opted in as class member — Claims of certain class members were settled including claim of representative plaintiff — Plaintiff brought motion to amend claim to increase damages in claim from $10 million to $50 million — Motion granted — Any motions were required to be brought by representative plaintiff — Representative plaintiff had no further interest in action — Most expeditious way to deal with situation was to give leave to plaintiff to bring motion in respect of his own claim only — Li-

ability had only been determined with respect to one defendant — Plaintiff could continne against other defendants — Certification order and settlement order both contemplated individual assessment of damage claims — Change in amount of claim would not have materially changed strategy of defendants and there was no prejudice related to litigation strategy — Defendants had not demonstrated prejndice and plaintiff was granted leave to amend claim to increase amount claimed.

Cases considered by *P.D. Lauwers J.*:

Apotex Inc. v. Wellcome Foundation Ltd. (2009), 2009 CarswellNat 350, 2009 FC 117, 2009 CF 117, 2009 CarswellNat 4487, 343 F.T.R. 41 (Eng.) (F.C.) — considered

Barker v. Furlotte (1985), 12 O.A.C. 76, 1985 CarswellOnt 974 (Ont. Div. Ct.) — considered

Beals v. Saldanha (2001), 10 C.P.C. (5th) 191, 202 D.L.R. (4th) 630, 148 O.A.C. 1, 54 O.R. (3d) 641, 2001 CarswellOnt 2286 (Ont. C.A.) — followed

Dabbs v. Sun Life Assurance Co. of Canada (1998), 40 O.R. (3d) 429, 22 C.P.C. (4th) 381, 5 C.C.L.I. (3d) 18, [1998] I.L.R. I-3575, 1998 CarswellOnt 2758 (Ont. Gen. Div.) — referred to

Dabbs v. Sun Life Assurance Co. of Canada (1998), 165 D.L.R. (4th) 482, 113 O.A.C. 307, 7 C.C.L.I. (3d) 38, 27 C.P.C. (4th) 243, 1998 CarswellOnt 3539, [1999] I.L.R. I-3629, 41 O.R. (3d) 97 (Ont. C.A.) — followed

Davies v. Clarington (Municipality) (2006), 2006 CarswellOnt 2020, 266 D.L.R. (4th) 375 (Ont. S.C.J.) — referred to

Family Delicatessen Ltd. v. London (City) (2006), 2006 CarswellOnt 1021 (Ont. C.A.) — considered

Haikola v. Arasenau (1996), 1996 CarswellOnt 259, 46 C.P.C. (3d) 292, 27 O.R. (3d) 576 (Ont. C.A.) — considered

Hall v. Hogarth (2000), 2000 CarswellOnt 713 (Ont. Master) — referred to

Hill v. Church of Scientology of Toronto (1992), 7 O.R. (3d) 489, 1992 CarswellOnt 1076 (Ont. Gen. Div.) — considered

Iroquois Falls Power Corp. v. Jacobs Canada Inc. (2009), 2009 CarswellOnt 3617, 2009 ONCA 517, 80 C.L.R. (3d) 1, 71 C.P.C. (6th) 9, 75 C.C.L.I. (4th) 1 (Ont. C.A.) — followed

King's Gate Developments Inc. v. Drake (1994), 23 C.P.C. (3d) 137, (sub nom. *Kings Gate Developments Inc. v. Colangelo*) 17 O.R. (3d) 841, 1994 CarswellOnt 483, (sub nom. *Kings Gate Developments Inc. v. Colangelo*) 70 O.A.C. 140 (Ont. C.A.) — referred to

Mazzuca v. Silvercreek Pharmacy Ltd. (2001), 2001 CarswellOnt 4133, 207 D.L.R. (4th) 492, 152 O.A.C. 201, 56 O.R. (3d) 768, 15 C.P.C. (5th) 235 (Ont. C.A.) — referred to

National Trust Co. v. Furbacher (October 12, 1994), Doc. 93-CQ-41889, B-152/94 (Ont. Gen. Div. [Commercial List]) — considered

Shuker v. Gagne (2007), 2007 CarswellOnt 1510, 47 C.C.L.I. (4th) 156 (Ont. S.C.J.) — considered

370866 Ontario Ltd. v. Chizy (1987), 1987 CarswellOnt 835, 57 O.R. (2d) 587, 34 D.L.R. (4th) 404 (Ont. H.C.) — con-

sidered

Statutes considered:

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

Generally — referred to

s. 9 — considered

s. 11 — considered

s. 12 — considered

s. 25 — considered

s. 25(1)(a) — considered

s. 25(2) — considered

s. 25(3) — considered

s. 29(2) — referred to

s. 35 — considered

Rules considered:

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

Generally — referred to

R. 26.01 — considered

MOTION by plaintiff to amend statement of claim in class action to increase damages claim.

***P.D. Lauwers J.*:**

1 Class member Christopher Zuber moves for leave to amend the Fresh Statement of Claim in this class action to increase the amount claimed from $10 million to $50 million.

Factual Context

2 Mr. Zuber was a passenger on an east-bound VIA train that was derailed in an accident on November 23, 1999. It struck the remnants of a 65-foot tractor trailer owned by Apache Specialized Equipment Inc. or Apache Transportation Services Inc. and operated by Timothy Garnham, which was stuck on a railway crossing. The crossing links the lands to the south of the rail corridor, owned by Blue Circle Canada Inc., and the lands to the north, owned by Hydro One Networks Inc. Symons Road proceeds north from the railway corridor and is owned and maintained by the Municipality of Clarington. The

continuation of the roadway south of the railway corridor is owned and maintained by Blue Circle.

3 Mr. Zuber was thrown forward into the wall of the coach. He struck his head and was rendered unconscious, suffering a compression injury to his cervical spine. The details of his injuries are set out in various medical reports provided to the defendants.

Procedural History

4 A Statement of Claim was issued by Bonnie Davies against The Corporation of the Municipality of Clarington under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, on March 8, 2000. She also issued a Statement of Claim against the defendants other than Clarington on March 9, 2000. Each of these actions claimed $10 million in compensatory damages and $1 million in punitive, aggravated and/or exemplary damages. They were consolidated and certified as a class proceeding on August 30, 2000, by order of MacKinnon J. A Fresh Statement of Claim was issued pursuant to the order on September 5, 2000 and claimed $10 million in compensatory damages and $1 million in punitive, aggravated and/or exemplary damages.

5 MacKinnon J.'s certification order appointed Bonnie Davies as the plaintiff and appointed Michael F. Head of Walker Head as class counsel. The class included all passengers on the VIA train. The order permitted any class member to opt out of the class proceeding by providing the required notice within 90 days of the sending of the specific notice to Class Members. There were 101 passengers who were notified of this proceeding pursuant to the Certification Order. Seventeen delivered "opt out" coupons and were not heard from again. Mr. Zuber did not opt out and has been a Class Member throughout.

6 Mr. Zuber's lawyer, Jeffrey Strype, issued a Statement of Claim on November 23, 2001, well after the opt-out period, seeking compensatory damages of $1 million and punitive, aggravated and/or exemplary damages of $100,000. Mr. Zuber discontinued this action on November 4, 2002 after discussions with the defendants.

7 Parallel to the class proceeding, VIA and CN commenced a separate action on November 15, 2001 against Timothy Garnham, The BLM Group Inc., Apache Specialized Equipment Inc., Apache Transportation Services Inc., Hydro One Networks Inc., and Blue Circle Canada Inc. for property damage as a result of damages to the trains and rail lines; the defendants in the VIA action brought cross-claims, counterclaims and third-party claims to include Clarington in the VIA action.

8 The Davies class action and the VIA action were tried together by J. Ferguson J. over 11 weeks between April 2005, and June 2005. The class was represented by class counsel, Mr. Head. The trial was to determine liability issues only.

9 After the evidence was heard by Ferguson J. and before argument, mid-trial conferences were held and the defendants in the class action were able to resolve the contribution issue for all of them except Blue Circle. By September 15, 2005, the co-defendants had concluded a cost sharing agreement that included an apportionment of liability for the payment of settlement funds to Class Members on the following basis:

(a) Garnham, Apache Transportation Services Inc., Apache Specialized Equipment Inc., (49.83 %)

(b) CNR (33.84 %)

(c) Clarington (9.165 %)

(d) Hydro (7.165 %)

I have not been provided with a copy of the cost sharing agreement.

10 I am advised that under the agreement all the defendants, except Blue Circle, agreed to the following:

(a) The quantum of the claims of Via Rail Canada Inc. and Canadian National Railway;

(b) The proportionate share of liability of the settling defendants for the claims of Via and CNR and the claims of the Class Members;

(c) The law firm of Regan, Kram, Desjardins LLP was appointed to negotiate and attempt to resolve the claims of the Class Members with Class counsel, subject to court approval;

(d) Regan, Kram, Desjardins LLP was retained by the defendants to argue the unresolved issue of the liability of Blue Circle before Ferguson J.

11 The argument on Blue Circle's liability was heard on November 14-17, 2005. On April 5, 2006, Ferguson J. dismissed the action against Blue Circle, which accordingly had no obligation to compensate either the members of the class or its co-defendants. Her decision is reported at (2006), 266 D.L.R. (4th) 375 (Ont. S.C.J.).

12 In total, there were 84 Class Members. They were divided into two groups, the first being those whose only claim was for the trauma of being involved in the accident, and the second being those who claimed that they suffered more significant injury. All but 10 of the Class Members did not suffer any notable injuries. The first group's claims were for trauma and were settled for $3,000 each. The claims of eight of the remaining 10 Class Members were settled in the following amounts.

Class Member	**Settlement Amount**
Bonnie Davis	$ 75,000.00
Wendy Craig	$5,000.00
Daphne Singwall	$25,000.00
Melanie Kerr	$6,500.00
Carly Kovendi	$5,000.00
Scott McKibbon	$7,500.00
Maureen McGinn	$5,000.00
Heather Worsfold	$25,000.00
Total	**$ 154,000.00**

13 By Order dated September 13, 2006, Ferguson J. set December 13, 2006 as the date for the fairness hearing and referred Mr. Zuber's claim for damages to Regional Senior Justice Shaughnessy for case management.

14 The Minutes of Settlement between the Plaintiff and the Defendants other than Blue Circle were signed on October 11, 2006. Ferguson J. signed the order approving the settlement on December 13, 2006; there were then two remaining claims; Anne Pritchard's claim was settled for $50,000 on May 25, 2007, leaving only Mr. Zuber's claim.

15 Ferguson J.'s order of December 13, 2006 provides:

> 1. THIS COURT ORDERS that the terms of the Minutes of Settlement entered between the Plaintiff and the Defendants, The Corporation of the Municipality of Clarington, Via Rail Canada Inc., Canadian National Railway Company, Timothy Garnham, The BLM Group Inc., Apache Specialized Equipment Inc., Apache Transportation Services Inc., and Ontario One Networks Inc. (the "Settling Defendants") and all appendices attached to the Minutes of Settlement (the "Minutes of Settlement") are fair, reasonable, adequate and in the best interests of the Class Members.

2. THIS COURT ORDERS that in accordance with sub-section 29(2) of the Class Proceedings Act, 1992 the Minutes of Settlement entered into between the parties, except Blue Circle Canada Inc. dated October 26th, 2006 be and are hereby incorporated by reference into this Order and are hereby approved and binding upon the Class Members who have not opted out of the Class and upon the defendants, except Blue Circle Canada Inc.

3. THIS COURT ORDERS that the Minutes of Settlement be implemented in accordance with their terms.

8. THIS COURT ORDERS that, upon settlement or adjudication (and the resolution of any appeals taken there from) of the claims of individual Class Members Christopher Zuber and Anne Pritchard the Settling Defendants shall deduct from the proceeds otherwise to be paid to these two individual Class Members 20% of his or her claim (to the maximum of $4,000.00 in the case of Anne Pritchard and to a maximum of $10,000.00 in the case of Christopher Zuber) and pay that sum to Walker, head as contribution to its fees and disbursements approved herein.

9. THIS COURT ORDERS that this action be otherwise dismissed against the defendants, without costs and with prejudice.

10. THIS COURT ORDERS that the settlement of the Class Members' claims as contemplated and approved by this Order does not compromise the claims of Class Members Christopher Zuber and Anne Pritchard.

16 The Minutes of Settlement, incorporated by reference into the approval order, provide:

13. The Released Parties do not admit any liability of obligation whatsoever to the Releasing Parties and such liability and obligation are in fact denied.

Settlement not an Admission of Liability

17. Neither these Minutes of Settlements nor any steps taken to carry out these Minutes of Settlement may be construed as, or may be used as, an admission by or against the Released Parties, or of the truth of any allegations or of liability of the Released Parties or as a waiver of any applicable legal rights or benefit other than expressly stated in these Minutes of Settlement. Likewise, these Minutes of Settlement may not be construed as, or used as an admission by or against the Class Members or as a waiver of any applicable legal right or benefit of the Class Members other than as expressly stated in the Minutes of Settlement.

17 Mr. Zuber produced a first affidavit of documents on August 10, 2006, which lacked any documentation related to his economic claims. His examination for discovery was started on August 11, 2006, and continued much later on April 4 and 10, 2008. An updated Affidavit of Documents was provided on November 17, 2009. During a Case Conference on that day the defendants advised that they would resist Mr. Zuber's request to amend the Statement of Claim to increase the damages claim from $10 million to $50 million, leading to this motion.

Analysis

18 This motion obliges me to consider three issues:

1. Mr. Zuber's status to bring the motion;

2. The extent to which Mr. Zuber is bound by the class proceeding to date;

3. Whether the amendment should be permitted under Rule 26.01 of the *Rules of Civil Procedure.*

I address each of these issues in turn.

Issue One: Mr. Zuber's Status to Bring the Motion

19 Under the *Class Proceedings Act*, any motions are required to be brought by the representative plaintiff, Bonnie Davies, using class counsel, Mr. Head.

20 Ms. Davies has no further interest in this action. The only class member with a remaining interest is Mr. Zuber himself. Mr. Strype has been counsel for Mr. Zuber throughout. In his affidavit in support of this motion sworn December 10, 2009, Mr. Strype states:

> In order to amend the Statement of Claim herein, and with the approval of Class counsel, I served a Notice of Change of Solicitor in the Class Proceeding on all counsel on December 3, 2009. One of the issues to be resolved is whether Mr. Strype can become Class counsel in this way and at this stage of the proceeding.

21 Section 11 of the *Class Proceedings Act* would appear to apply in this situation:

> 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.
>
> (2) The court may give judgment in respect of the common issues and separate judgments in respect of any other issue.

22 Section 12 provides:

> 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.

23 Section 25 provides:

> 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;...

24 This is precisely what happened when Ferguson J. in her Order dated September 13, 2006, stated at paragraph 5:

> [5] This Court orders that the issue of the claim for damages by Class Member Christopher Zuber, be referred to Re-

> gional Senior Justice Shaughnessy for Case Management on a date to be fixed by the trial coordinator at Newmarket.

Shaughnessy J. has been case managing the matter since and this motion before me is a step in that process.

25 Subsections 25(2) and (3) of the *Class Proceedings Act* provide:

> (2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity.
>
> (3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,
>
> (a) dispense with any procedural step that it considers unnecessary; and,
>
> (b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.

26 Mr. Fulton argues:

> Given the uniqueness of this case, that being no guidance in the law on how a Class Member (not a representative plaintiff) can amend a class proceeding, a choice of serving a filing a Notice of Change in solicitors in hindsight was not the appropriate procedure. However, the Class Member must be able to amend the pleadings both out of a fairness and also in keeping with the goals of the Class Proceeding Act...We agree with Mr. Winsor that the Court may provide directions under Section 25 of the Act regarding the appropriate procedures to follow to determine individual issues and I submit that the Court under this section may set out the procedure to follow when a Class Member wishes to amend the class claim.

27 Mr. Winsor was not quite that accommodating. He said: "A Class Member may seek an order substituting himself for the current personal representative Bonnie Davies. If successful such person may move to amend the pleading. However, Mr. Zuber has not done so." Mr. Winsor here was speaking of the formal process for changing class counsel and the class representative. Mr. Campion supports him in the argument that this would only be done by amending the existing certification order. The process to do so would, in my opinion, be unwieldy and unnecessary at this stage of the proceeding.

28 It seems to me, giving reasonable effect to sections 11and 12, and the instructions in Section 25(3) of the *Class Proceedings Act*, that the most expeditious way to deal with this situation so that the parties can get to the heart of the matter is to give Mr. Zuber leave to bring this motion to amend the pleading in respect of his own claim only, *nunc pro tunc*, and I do so.

29 I do not mean to suggest that such a procedure would always be appropriate in a class action when it comes to the determination of individual claims. The determination of the fairest and most expeditious process is fact and context driven. I do not challenge in any way the decision of the Court of Appeal in *Dabbs v. Sun Life Assurance Co. of Canada*, 41 O.R. (3d) 97, [1998] O.J. No. 3622 (Ont. C.A.) per O'Connor A.C.J.O. at paras. 6, 7 and 19. I next discuss the extent to which Mr. Zuber is bound by the class proceedings to date.

Issue Two: To What Extent is Mr. Zuber Bound by the Class Proceedings to Date?

30 Mr. Fulton argues the position asserted by Mr. Strype in his supporting Affidavit:

> Liability is not in issue as the Class Action has been finalized with liability being determined against the defendants, save for Blue Circle Canada Inc. The balance of the litigation is to solely determine the quantum of damages arising from Mr. Zuber's personal injuries. (para. 2)
>
> There cannot be any prejudice to my client amending the Class proceeding in any event, because it was a term of the dismissal of Mr. Zuber's personal claim (in 2002) that it was on a without prejudice basis that Mr. Zuber was free, if he chose not to participate in the class proceeding at any time, to re-instate Mr. Zuber's personal action. In my opinion, that preserved my client's rights to start a fresh action in which my client could claim damages for any amount...(para. 14)
>
> Mr. Zuber is at liberty to commence a fresh action seeking damages for $50 million. However, Mr. Zuber has decided to operate within the existing frame of the class proceeding...(para. 15)

31 Mr. Fulton submits that it was a term of the discontinuance of Mr. Zuber's personal action in 2002 that it was on a "without prejudice" basis, and argues that Mr. Zuber was free, if he chose not to participate in the class proceeding at any time, to reinstate his personal action. This flows, he says, from the words of a letter from Brian J.E. Brock, then counsel for Blue Circle:

> Mr. Strype's action should be dismissed without costs and without prejudice to him re-instating that action at some future time if he chooses to do so and follows the appropriate procedures. Might I suggest to you at this stage his client to be included in the Class, because he did not opt out.
>
> However, it is certainly possible within the framework of the Class Proceedings Act, for any individual to seek the permission of the court to opt out at some later state. To do so, however, you need the court's fiat. Whatever those rights might be, Mr. Strype and his client should be deemed to have retained those, even though they brought this action.

This statement formed the basis of the discontinuance of Mr. Zuber's personal claim since it was accepted by the co-defendants.

32 Mr. Fulton argues that Mr. Brock's letter should be read as providing that Mr. Zuber had, by private agreement among the parties, effectively contracted out of section 9 of the *Class Proceedings Act* (the opt-out provision). This is objectionable in principle, given the policy thrust of the Act. But I also find that this interpretation of Mr. Brock's words is wrong. Mr. Brock was simply pointing out the rights of the parties under the *Class Proceedings Act*, which might permit Mr. Zuber to opt out at some later state, with the court's permission, and which might permit him to later start his own action in whatever amount.

33 But choices have consequences. Mr. Zuber did not opt out within the time period provided in the certification order. He neither sought nor obtained a provision in the minutes of settlement or the approval order permitting him to opt out later. His failure to take these steps leaves him bound by the class proceeding as he finds it; he is not free to start a new action and insist on another liability trial.

34 Contrary to Mr. Strype's assertion, it is not true that liability has been determined, as Ferguson J.'s order approving the settlement and the minutes of settlement make plain. Ferguson J. heard the evidence and has not rendered a decision on the liability of defendants other than Blue Circle. Consequently, since Mr. Zuber clearly intends to continue against the other defendants, then they may properly reconvene the trial before Ferguson J. and argue liability taking the trial record as it is; the decision determining liability is still open. The defendants may, of course, instead agree with Mr. Zuber to waive the determination of the liability issue by Ferguson J. That is, however, what it means "to operate within the existing frame of the class proceeding," in Mr. Strype's words.

35 I am supported in this conclusion by the court's approach in *Dabbs*, *supra*. The approved settlement agreement spe-

cifically permitted class members to opt out of the settlement and sue on their own behalf for whatever claim they wished to assert at a number of different times; see 40 O.R. (3d) 429, [1998] O.J. No. 2811 (Ont. Gen. Div.), per Sharpe J. This figured importantly in the Court of Appeal's decision, *supra*, at para. 20, to refuse a dissident's motion for leave to appeal. A similar degree of flexibility does not, however, exist in Ferguson J.'s approval order.

Issue Three: Should the Amendment be Permitted?

36 The major issue is whether Mr. Zuber should be given leave to amend the Statement of Claim to increase the amount claimed from $10 to $50 million.

37 Section 35 of the *Class Proceedings Act* simply states that the Rules of Court apply to class proceedings. Rule 26.01 of the Rules of Civil Procedure obliges the court to approve the amendment:

> On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

38 There are numerous supporting precedents in ordinary personal injury cases such as this one. The burden of showing prejudice lies with the party opposing the amendment: *Barker v. Furlotte*, [1985] O.J. No. 1517, 12 O.A.C. 76 (Ont. Div. Ct.). There is much case law supporting the right of a party to amend a pleading to increase the amount claimed prior to trial, during trial or even after a decision is made by a judge or a jury after a trial: *370866 Ontario Ltd. v. Chizy*, [1987] O.J. No. 2244, 57 O.R. (2d) 587 (Ont. H.C.) [claim amended from $10,000 to $100,000]; *Hill v. Church of Scientology of Toronto*, [1992] O.J. No. 451, 7 O.R. (3d) 489 (Ont. Gen. Div.) [claim amended to match jury award from $400,000 for general damages and $400,000 for aggravated damages to $300,000 for general damages, $500,000 for aggravated damages and $800,000 for punitive damages]; *Haikola v. Arasenau*, [1996] O.J. No. 231, 27 O.R. (3d) 576 (Ont. C.A.) [claim amended from $200,000 to $1,650,000]; [*Hall v. Hogarth*] [2000] O.J. No. 778 (Ont. Master); *Beals v. Saldanha*, [2001] O.J. No. 2586, 54 O.R. (3d) 641 (Ont. C.A.) at paras. 98 - 99; *Apotex Inc. v. Wellcome Foundation Ltd.*, [2009] F.C.J. No. 177 (F.C.).

39 The plaintiff argues that it is appropriate to permit the increase in the amount of damages where his injuries turn out to be more severe than contemplated at the commencement of the action and where no prejudice can be shown: *Shuker v. Gagne*, [2007] O.J. No. 941 (Ont. S.C.J.).

Is There Prejudice?

40 The defendants say that there is prejudice here arising out of a number of elements.

Litigation Strategy

41 First, they point to the litigation strategy decisions they made, particularly in reaching the cost sharing agreement by which they apportioned responsibility for paying settlements, and in agreeing to the minutes of settlement. The defendants rely on *Family Delicatessen Ltd. v. London (City)*, [2006] O.J. No. 669 (Ont. C.A.). The Court refused leave to amend the Statement of Claim to allege new causes of action:

> 6 The appellants could have brought the motion to amend their claim at any time after the outset of these proceedings. They chose not to do so despite repeated requests from the City that they either bring a motion to amend or agree to a dismissal of the action against the City. There is no justification for the inordinate delay in bringing the motion to amend the statement of claim. While delay is not in and of itself a basis for refusing an amendment, there must come a point where the delay is so long and the justification so inadequate that some prejudice to the defendants will be presumed absent a demonstration by the party seeking the amendment that there is in fact no prejudice despite the lengthy and unexplained delay.

> 7 We agree with counsel for the City that there would be some prejudice to the City had the amendment been allowed. The City had participated in the proceedings for some six years on the basis that it was a nominal defendant. Its participation in the lawsuit was minimal and it took a cooperative stance with the other parties. Were the proposed amendment to be allowed, the City would be in a very different position with serious allegations of misrepresentation being brought against it. Its litigation strategy may well have been entirely different. It, of course, cannot undo what has already been done in this proceeding. While it is true that the prejudice to the City flowing from the proposed dramatic change in the course of this litigation could be addressed in part by appropriate orders concerning added discoveries and related matters, we are satisfied that the City could not be put in the position it would have been to meet these allegations had they been made in a tunely fashion.

42 For VIA Rail and CNR, Mr. Campion submits that the amount claimed in a Statement of Claim means something. It signals to the parties the range of risk within which they are operating. The fact that Mr. Zuber is bringing this motion is an acknowledgement that the prayer for relief damages set at $10 million limits his claim.

43 Accordingly, within the structure of the class proceeding, Mr. Campion submits that Mr. Zuber ought to have come to the fairness hearing before Ferguson J. on December 13, 2006 and voiced his concern about the limit on damages set by the Statement of Claim. If the representative plaintiff, Bonnie Davies, and class counsel, Mr. Head, had then sought an amendment to increase the amount claimed from $10 million to $50 million, the defendants would have recognized their exposure. The alternative, Mr. Campion submits, was for Mr. Zuber to have requested permission to opt out and to commence a new action for the higher amount. Mr. Zuber did neither and permitted the defendants to carry on with their settlement not knowing his intentions. Mr. Zuber, in effect, waited in the weeds and should not be rewarded for his conduct.

44 In her affidavit, Carole Mackaay, general counsel and corporate secretary of VIA, sets out the elements of prejudice:

(a) It [VIA] participated in a lengthy trial at which its liability was always an issue and not admitted;

(b) it proceeded to trial on the basis of a Trial Record in which the Prayer for Relief was never amended;

(c) it participated in two mid-trials after 11 weeks of evidence in which the liability of the Defendants was in focus;

(d) Zuber at no point prior to the trial attempted to opt out of the class action and thus was considered one of the claimants within the class and the global amount of the Prayer for Relief;

(e) VIA Rail decided to contribute by assessing its risk, which included the maximum potential exposure to all Defendants of $10 million as pleaded, and on the basis that any settlement would lead to finality;

(f) VIA Rail's contribution was fixed and settled on that basis and cannot now be altered by changing the Prayer for Relief in the class proceeding, which was $10 million or less, including the Zuber claim;

(g) costs or an adjournment cannot compensate VIA Rail for the prejudice;

(h) there was no indication at the mid-trial conferences that [VIA Rail] would be facing a multi-million-dollar claim for one party, but rather claims within modest range of damages and thus was able to make an economic assessment of its position;

(i) Mr. Zuber's claim was made at $1 million as part of his Statement of Claim, which would have exposed VIA Rail to approximately $330,000 at the maximum; and

(j) by April 2005, when the trial started, which was almost six years after the accident date, Mr. Zuber had presented no evidence for economic loss assessments that would indicate an amount greater than $1 million;

45 Mr. Agostino submits that the legal position of Hydro One is not substantively different from that of Blue Circle as the landowner on the other side of the rail corridor, against which the action was dismissed. Hydro One did not consider that it was liable but decided, on an economic basis, to participate in the settlement expecting the financial outlay to be modest. Karin McDonald, the risk manager of Hydro One, swears that:

> (e) Hydro One decided to contribute by assessing its risk which included the maximum potential exposure, namely $10,000,000 as pleaded and which would give finality to the lawsuit;
>
> (f) Hydro One's contribution percent is fixed, settled and cannot be undone and was based on the upside $10,000,000 global amount in the prayer for relief, which included the Zuber claim;
>
> (g) had Zuber's claim at $50,000,000 been part of the consideration at the time of settlement, Hydro One would have fought liability as Blue Circle did and could have reasonably succeeded as its position is not dissimilar to Blue Circle's, which did succeed in getting the claim dismissed.

46 The elements paid for in the settlement included $204,000 for the nine class members with more serious damages, and trauma damages for all the passengers in the amount of $252,000 for a total of $456,000, of which Hydro One's share was about $32,000. If the damages had reached $10 million as pleaded, Hydro One's share would have been $716,500. This is contrasted with the $50 million claim. If Mr. Zuber is successful, Mr. Agostino calculates the additional amount to be paid by Hydro One at $3,582,500. In short, Hydro One would have never agreed to the settlement of the class proceeding with such exposure. He submits that Hydro One's share, as a result of the approved settlement, is now "fixed and irreversible" and this is a prejudice that cannot be overcome.

47 The affidavit sworn by Dieter Fischer, senior claims examiner, Frank Cowan Company, the risk manager for the Municipality of Clarington states:

> At the time that Clarington agreed to this percentage I believed that Clarington should not and would not be found liable but that there was a chance that there would be a small finding of liability against Clarington. I also believed at the time that the total of the class' claims, including costs, was likely to be in the approximate area of $750,000.00. There was also a property damage claim by CN and Via Rail totalling approximately $5,800,000.00. I recognized that the claim in this action alleged substantially more damages and that on the basis of the amount claimed in the pleading the maximum share of the injury claims to be paid by Clarington would be no more than $916,500. However I did not view the latter exposure as probable. Based upon these beliefs I agreed to authorize settlement on the basis that liability was apportioned as against Clarington to be no more than 9.165%. (This could have been reduced in the event that Blue Circle, which refused to contribute anything, was ultimately found liable by the trial judge.)

48 There is an unusual twist in the prejudice argument in this case arising from the fact that the enforceability of the cost sharing agreement among the defendants is apparently in issue. In support of this argument, Mr. Campion took the position that had Mr. Zuber's request for an amendment been successfully entertained by Ferguson J. at the fairness hearing, VIA Rail and CNR would not have been bound by the September, 2005 settlement agreement. He also takes the position that the cost sharing agreement entered into among the defendants would not be binding if the amendment sought by Mr. Zuber is granted. By contrast, Mr. Winsor takes the position that had Mr. Zuber appeared at the fairness hearing before Ferguson J. and successfully argued that the settlement could only be approved if the amount in the Statement of Claim were increased to $50 million, Clarington would not have been free to oppose the approval of the settlement. Mr. Regan agrees with Mr. Winsor and submits that the cost sharing agreement is binding on his client and the other defendants who signed it, even if the motion to amend is allowed.

49 This is a hard argument to assess, especially since the parties did not give me a copy of the cost sharing agreement, which leads me to wonder how serious their dispute is. Any dispute among the defendants about the enforceability of the cost sharing agreement is a matter for another lawsuit. It also seems premature since the actual award of damages to Mr. Zuber has not been made and might well not exceed $10 million.

50 The point made by Laskin J.A. in *Iroquois Falls Power Corp. v. Jacobs Canada Inc.*, [2009] O.J. No. 2642 (Ont. C.A.) at paras. 20-21 applies here:

> [20] However, to defeat a motion to amend, the party resisting the amendment must show that the non-compensable prejudice it relies on "would result" from the amendment. It must establish a link between the non-compensable prejudice and the amendment. It must show that the prejudice arises from the amendment.
>
> [21] This necessary link is missing in this case. That is because the non-compensable items of prejudice found by the motion judge already existed at or immediately after the time that the original statement of claim was issued.

51 The elements of prejudice alleged by Ms. Mackaay of VIA, for example, "already existed at or immediately after the time that the original statement of claim;" the steps she sets out were necessary in any event. I have some difficulty with the proposition that the change in the amount claimed would have materially changed the strategy of the defendants.

52 The Court of Appeal said in *Beals v. Saldanha*, *supra*, at paras. 98, 99:

> 98 Specific pleading rules cannot be confused with the rules of natural justice, and a particular pleading rule cannot be viewed in isolation. While rule 25.06(9) requires that damage claims specify "the amount claimed for each claimant in respect of each claim", the wide powers of amendment found in rule 26.01 demonstrate that the failure to comply with rule 25.06(9) does not mean that a defendant has been denied the opportunity to know the extent of its jeopardy or the case it has to meet. Under rule 26.01, a court can refuse to make amendments, including amendments increasing the amount of the damages claimed, only where the defendant can demonstrate on the balance of probabilities that the amendment would cause prejudice that could not be compensated for by costs or adjournment. The mere fact that an amendment substantially increases the quantum of the plaintiff's damages claim and therefore the defendant's potential liability is not a basis upon which to deny the amendment. The amending power in rule 26.01 has been invoked to substantially increase the quantum of damages claimed after judgment is granted, and even on appeal: see *Hill v. Church of Scientology of Toronto* (1992), 7 O.R. (3d) 489 at 496 (Gen. Div.), aff'd. without reference to this point (1994), 114 D.L.R. (4th) 1 (Ont. C.A.), aff'd. without reference to this point (1995), 126 D.L.R. (4th) 129 (S.C.C.).
>
> 99 The approach dictated by rule 26.01 to motions that seek to amend pleadings to substantially increase the damages claimed no matter when in the proceeding that motion is brought, is inconsistent with the argument that knowledge of the amount claimed by the plaintiff at the time the defendant is called upon to reply to the statement of claim is essential to the defendant's ability to know the extent of its jeopardy and to make an informed decision as to how to respond to the claim. If knowledge of the amount claimed was essential to the defendant's ability to effectively respond to the claim, motions to significantly increase the amount of the claim as late as the appellate stage would be rejected out of hand. Rule 26.01 takes the opposite approach. It requires the court to make those amendments unless the defendant can show prejudice that cannot be cured by costs or an adjournment.

53 At $10 million or $50 million, this case was a major undertaking for the defendants and was treated that way. The liability trial before Ferguson J. took 11 weeks and was well attended by representatives of the defendants. And it is, as I held above, still open to the defendants to pursue the liability issue in respect of Mr. Zuber if they so choose. While they economized on the Blue Circle liability determination and the damages phase by deputing Mr. Regan as common counsel, their decision to do so can be revisited for Mr. Zuber's case.

54 The certification order and the settlement order both contemplate the individual assessment of damage claims. The general damages claim involving Mr. Znber has been active from the outset and it has always included a loss of income claim. The class action was settled in October 2006, with defence counsel being fully aware of the existence of Mr. Zuber's claim. The order of December 13, 2006, approving the settlement specifically provides that the "settlement of the Class Members' claims as contemplated and approved by this order does not compromise the claims of Class Members Christopher Zuber and Anne Pritchard." In short, there is no "link" between the amendment and the elements of prejudice alleged by the defendants, as Laskin J.A. required in *Iroquois Falls Power Corp., supra.* I find no prejudice related to "litigation strategy".

Document Destruction

55 The defendants argue that there is prejudice in this case because Mr. Zuber admits that he destroyed a number of documents that would support (or contradict, on the defendants' view) his claim to damages for loss of income. The defendants argue that they are prejudiced by the absence of these documents in cross-examining Mr. Zuber. There is no doubt that the destruction of documents is ordinarily a relevant consideration: *King's Gate Developments Inc. v. Drake*, [1994] O.J. No. 633, 17 O.R. (3d) 841 (Ont. C.A.) at para. 5; *Iroquois Falls Power Corp. v. Jacobs Canada Inc.*, *supra*, at para. 28; *Mazzuca v. Silvercreek Pharmacy Ltd.* (2001), 56 O.R. (3d) 768 (Ont. C.A.) at para. 65.

56 The fact that Mr. Zuber destroyed documents may make it difficult for him to prove his case but there is no "link" between the request for an amendment and the prejudice in the manner required by *Iroquois Falls Power Corp. v. Jacobs Canada Inc., supra.* I am not persuaded that I should refuse the amendment on this ground.

Abuse of Process

57 The defendants also assert that an amendment should be refused under Rule 26.01, on the basis that it is being sought for an improper purpose and is an abuse of process. They invoke the reasoning of Farley J. in *National Trust Co. v. Furbacher*, [1994] O.J. No. 2385 (Ont. Gen. Div. [Commercial List]). The amendments there sought to more than double the amount of damages claimed, to add two parties as plaintiffs and 44 parties as defendants and to expand the number of causes of action. In paragraph 7, Farley J. said:

> Then we have Slade L.J.'s concerns at p. 424 of *Spritebrand, supra* [*C. Evans & Sons Ltd. v. Spritebrand Ltd. and another*, [1985] 2 All E.R. 415 (C.A.)] about proceedings which are "demonstrably a mere tactical move" such as "to put unfair pressure on the [other side] to settle". It is inappropriate to join parties for the sole purpose of obtaining discovery from them: see *MacRae v. Lecompte*, The Queen in Right of Ontario (Third Party) (1983), 32 C.P.C. 78 (Ont. H.C.J.) at pp. 86-7. As well, it is improper to make an excessive or grossly exaggerated claim for damages: see *Shaw v. The Queen*, [1980] 2 F.C. 608 (T.D.) at p. 620 where Walsh J. stated:
>
> > Counsel defended the amount of this claim by stating that since a Court cannot judge ultra petita it is always necessary to make a sufficient demand to cover any possible claim. I am of the view however that the making of excessive and grossly exaggerated claims is an abuse of the process of the Court, as they tend to indicate a far greater jeopardy for a defendant than the facts justify, with the result that a great deal more will be spent in many cases on legal proceedings than the total amount which could possibly be recovered even if the action succeeded. Such claims are prevalent especially in actions brought before juries in the United States but in my view should be discouraged and only realistic amount should be claimed.
>
> I regret to say that the inference which I draw from these amended pleadings is that they are an abuse of process. No explanation was given in the supporting affidavit as to why the amendments were being sought.

58 It is notable, however, that *National Trust* was a case in which the addition of parties was seen to be particularly abusive, not so much the increase in the amount claimed. Further, the explanation for an increase in this case is quite plain: Mr. Zuber's loss of income claim allegedly exceeds $10 million.

59 Mr. Regan says: "The Plaintiff recently provided an Affidavit, dated November 11, 2009, which includes some financial documentation. However, there is nothing in the financial documentation produced to-date which indicates that the Plaintiff's loss of income claim will exceed the prayer for relief of $10,000,000.00 in the Class Action, or the $1,000,000.00 claimed in the Individual Action." In other words, he implies that the amendment is intended to have an *in terrorem* effect on the defendants to press the settlement advantage, as deplored by Farley J. in *National Trust, supra.*

60 I have real trouble giving weight to this argument. This motion was argued by as accomplished and experienced an array of senior civil and personal injury counsel as might appear in any Superior Court in this province. They are well familiar with the range of personal injury awards and are well able to assess the risk of whether in a judge-alone trial that the award to Mr. Zuber would exceed $10 million. If it did it would be a record breaker.

61 Mr. Regan then adds: The following actions of the Plaintiff have been prejudicial to the defence of this action:

1. The late delivery of and failure to produce the Plaintiff's financial documents;

2. The failure to answer undertakings;

3. The failure to produce documents referred to in the Baker Tilly report;

4. The failure to produce supporting documentation for his tax returns;

5. The failure to produce confidential documents despite the endorsement of Justice Ferguson;

6. The failure to retain supporting documentation and relevant records, as the Plaintiff was required by Polish law to do;

7. The failure to secure and preserve his documents, despite retaining his own class counsel at the commencement of the class proceedings in 1999 and issuing his own individual claim in 2001.

62 These matters are, quite frankly, better the subject matter of a refusals and undertakings motion or a complaint to the trial judge, with the attendant sanctions, than an underpinning for an abuse of process argument.

63 The defendants have not made out prejudice related to the motion to amend. I therefore grant leave to Mr. Zuber to amend the statement of claim to increase the amount claimed to $50 million. This outcome would normally entitle Mr. Zuber to costs from the unsuccessful defendants. But I have in mind Carthy J.A.'s comment in *King's Gate Developments Inc. v. Drake, supra,* at para 8: "This is an exceptional rule, to the extent that it mandates amendments at any stage of the action, and is therefore open to being utilized unreasonably. That is certainly what has happened in this instance and, in the formulation of just terms, there should be no encouragement to others." In this instance it would be fairer to leave the costs to be awarded and assessed by the trial judge after the damages claim has been determined and its true merit made evident.

Motion granted.

END OF DOCUMENT

TAB 12

2011 CarswellOnt 77, 2011 ONSC 266, 10 C.P.C. (7th) 188

2011 CarswellOnt 77, 2011 ONSC 266, 10 C.P.C. (7th) 188

Durling v. Sunrise Propane Energy Group Inc.

PROCEEDING UNDER the Class Action Proceedings Act, 1992, S.O. 1992, C. 6

JAMES DURLING, JAN ANTHONY THOMAS, JOHN SANTORO, GIUSEPPINA SANTORO, ANNA MANCO, FRANCESCO MANCO and CESARE MANCO (Plaintiffs) and SUNRISE PROPANE ENERGY GROUP INC., 1367229 ONTARIO INC., 1186728 ONTARIO LIMITED, 1369630 ONTARIO INC., 1452049 ONTARIO INC., VALERY BELAHOV, SHAY (SEAN) BEN-MOSHE, LEONID BELAHOV, ARIE BELAHOV, 2094528 ONTARIO INC., HGT HOLDINGS LTD., TESKEY CONSTRUCTION CO. LTD. and TESKEY CONCRETE CO. LTD. and THE TECHNICAL STANDARDS AND SAFETY AUTHORITY (Defendants)

Ontario Superior Court of Justice

C. Horkins J.

Heard: December 13, 2010
Judgment: January 11, 2011
Docket: CV-08-363271-00CP

Counsel: Harvin D. Pitch, Ted Charney for Plaintiffs

Mirilyn R. Sharp for Defendants, Sunrise Propane Energy Group Inc., 136729 Ontario Inc., 1186728 Ontario Limited, Valery Belahov Shay (Sean) Ben-Moshe, Leonid Belahov, Arie Belahov

John Campion, Antonio Di Domenico for Defendants, 2094528 Ontario Inc. HGT Holdings Ltd., Teskey Construction Company Ltd., Teskey Concrete Co. Ltd.

Lisa La Horey for Defendant, Technical Standards & Safety Authority

Ward Branch for Defendant, 1452049 Ontario Inc.

Martin P. Forget for Plaintiffs in Vilarino action

Tom Hanrahan, David Zarek for Plaintiffs in ZTGH actions

Subject: Civil Practice and Procedure

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

fees and disbursements — General principles

Series of explosions occurred at S Ltd.'s propane facility — Plaintiffs brought proposed class proceeding seeking damages on behalf of putative class members who resided in or owned property near facility — Individual actions were commenced on behalf of certain individuals by their insurers — Plaintiffs brought motion for stay of individual actions pending certification hearing — S and T defendants consented to motion — Insurers opposed motion — Insurers filed affidavit stating that uninsured as well as subrogated claims were included in individual actions, and that individual plaintiffs had already decided to opt out of class action if certified — After investigation and cross-examination, class counsel determined that individual actions did not include claim for uninsured losses and named plaintiffs had not already decided to opt out of class if certified — Insurers agreed to stay individual actions — Motion proceeded on issue of costs — Costs awarded to class counsel in sum of $45,565.48, to T defendants in sum of $6,007.36, and to S defendants in sum of $6,409 — Costs to be shared equally among six insurers unless otherwise agreed — Motion was important to class counsel and defendants who consented to order — Conduct of insurers unnecessarily caused class counsel to incur significant costs — Costly exchange of affidavits, cross-examination on affidavits and related work could have been avoided. — Fact that costs would be shared by six insurers eliminated any chilling effect — Fees of class counsel reduced by 15 percent to reflect that some work might be used later in proceeding.

Cases considered by *C. Horkins J.*:

Abdulrahim v. Air France (2010), 2010 ONSC 5542, 2010 CarswellOnt 8324 (Ont. S.C.J.) — considered

Boucher v. Public Accountants Council (Ontario) (2004), 48 C.P.C. (5th) 56, 2004 CarswellOnt 2521, 188 O.A.C. 201, 71 O.R. (3d) 291 (Ont. C.A.) — followed

Cahoon v. Franks (1967), [1967] S.C.R. 455, 1967 CarswellAlta 48, 60 W.W.R. 684, 63 D.L.R. (2d) 274 (S.C.C.) — considered

Cheung v. Kings Land Developments Inc. (2001), 2001 CarswellOnt 3227, 55 O.R. (3d) 747, 14 C.P.C. (5th) 374 (Ont. S.C.J.) — considered

Mayer v. 1314312 Ontario Inc. (2002), 58 O.R. (3d) 226, 2002 CarswellOnt 417 (Ont. S.C.J.) — considered

Statutes considered:

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

Generally — referred to

s. 9 — considered

s. 13 — considered

s. 31(1) — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 131(1) — considered

Rules considered:

2011 CarswellOnt 77, 2011 ONSC 266, 10 C.P.C. (7th) 188

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

R. 49 — referred to

R. 57.01 — considered

R. 57.01(1) — considered

R. 57.01(1)(b) — considered

MOTION by plaintiffs in class proceeding for order staying individual actions.

***C. Horkins J.*:**

Introduction

1 The plaintiffs in this class proceeding bring a motion for an order staying individual actions (the Stay Motion). The relevant background follows.

2 On August 10, 2008, at approximately 4:00 a.m., a series of explosions occurred at the propane facility located at 54 and 62 Murray Road, Toronto, Ontario which operated under the names Sunrise Propane Industrial Gases and Sunrise Propane Industrial Cylinders.

3 Class proceedings were initiated immediately and ultimately on September 26, 2008, a comprehensive statement of claim was issued by the plaintiffs in this action for damages sustained as a result of the explosions (the "Class Action").

4 The Class Action claims damages based upon the torts of strict liability, nuisance and negligence on behalf of putative Class Members who resided in or owned property in an area located between Highway 400, Keele Street, Sheppard Avenue and Wilson Avenue in the City of Toronto.

5 Following the explosions, numerous individual actions were issued in addition to this Class Action. There are 54 identified individual actions. The stay of these individual actions was discussed at the September 16, 2010 case conference. December 1 and 2, 2010 were scheduled to hear necessary motions including the Stay Motion. Counsel who attended the case conference anticipated that the individual actions would be stayed on consent. Class counsel were in the process of collecting consents for a stay order.

6 On November 15, 2010, the plaintiffs filed their Stay Motion record with the court. The Notice of Motion requested a far reaching stay of the individual actions "until after resolution of the common issues trial (including all appeals) or until further order of this court."

7 A further case conference was held on November 30, 2010. Class counsel reported that on November 29, 2010, the plaintiffs in individual action CV-10-408251(the Vilarino action) advised that they were opposing the Stay Motion and requesting an adjournment of the December 1 motion date. The firm of Forget Mathews represents the plaintiffs in the Vilarino action. This action was commenced on August 6, 2010.

8 Concerns about the far reaching effect of the proposed stay order were discussed at the November 30 case conference. Whether the individual actions continued would obviously depend on the outcome of the certification motion. As a result, it was agreed that the stay, if issued, would be in effect until further order of the court. On November 30 2010, class counsel circulated to all counsel a copy of the revised draft stay order reflecting that the stay would be in effect until further order of

the court.

9 After the case conference concluded, the law firm of Zarek Taylor Grossman Hanrahan LLP (ZTGH firm) confirmed that their clients in 10 actions were opposing the Stay Motion and requesting an adjournment of the December 1 motion date. The ten actions are as follows: CV-09-384680; CV-09-384688; CV-09-384686; CV-09-384676; CV-09-384755; CV-10-408235; CV-10-408238; CV-10-408243; CV-10-408255; CV-10-408256 (the ZTGH actions).

10 The Vilarino and the ZTGH actions are subrogated claims that various insurers have commenced.

11 On December 1 2010, at the request of these opposing parties, the Stay Motion was adjourned to December 13, 2010.

12 Following the adjournment, the opposing parties served their motion materials. This prompted reply materials from the plaintiffs in the class action and cross-examinations on affidavits took place.

13 Late on Friday, December 10 2010, after considerable expense had been incurred, the individual plaintiffs in the ZTGH actions withdrew their objection to the Stay Motion. On Saturday, December 11 2010, the individual plaintiffs in the Vilarino action withdrew their objection to the Stay Motion.

14 It is now agreed that all individual actions will be stayed pending the outcome of the Certification hearing and pending further order of this court. The Certification hearing will proceed the week of October 24, 2011.

15 The Stay Motion proceeded on the issue of costs only. Counsel for the plaintiffs in the Vilarino and ZTGH actions take the position that no costs should be awarded on the Stay Motion.

16 Before turning to consider costs, it is helpful to review the relationship between a class proceeding and an individual action and the legal framework that governs costs.

Individual Actions and Class Proceedings

17 Class proceedings often exist alongside individual actions. One does not automatically preclude the other from proceeding.

18 Section 13 of the *Class Proceedings Act, 1992*, S.O. 1992, C. 6 permits the court, on its own initiative or ou a motion by a party or class member, to stay a proceeding related to a class proceeding before it. Typically, the individual actions are stayed pending the outcome of a certification hearing, but this is not mandated by the *Class Proceedings Act, 1992*.

19 If the class proceeding is certified, the individual plaintiff must decide whether to opt out or participate as a member of the certified class. There is an absolute right to opt out of a class under s. 9 of the *Class Proceedings Act, 1992*. Existiug case law suggests that individual plaintiffs who opt out of a certified class can move forward with their individual actions. However, the individual action commenced by a plaintiff who does not opt out, will be stayed: see *Cheung v. Kings Land Developments Inc.* (2001), 55 O.R. (3d) 747 (Ont. S.C.J.), at para. 12.

20 The *Class Proceedings Act, 1992* permits "freedom of choice by allowing those who do not wish to be bound by the outcome of the proceeding to opt out. Thus, the Class Proceedings Act clearly contemplates that there may be a multiplicity of proceedings arising from the same event or transaction": See *Abdulrahim v. Air France*, [2010] O.J. No. 4660 (Ont. S.C.J.) at para. 66.

Legal Framework

21 The source of judicial discretion to award costs is set out in s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 that states:

> 131(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

22 In addition to this general discretion, an award of costs is governed by Rule 49 (in the event of an offer to settle) and the factors set out in rule 57.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Rule 49 is not engaged on this motion.

23 Fixing an amount for costs is not driven solely by a mathematical calculation. The Court of Appeal made it clear in *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (Ont. C.A.) that the hours spent and the rates claimed by the successful party are only one consideration in determining a costs award. Ultimately, the judge must "step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable" (at paras. 24). This principle is now set out explicitly in rule 57.01(1)(b): the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed.

24 The Court of Appeal in *Boucher* spoke of the "chilling effect of a costs award of the magnitude of the award in this case" in determining whether the costs exceeded the fair and reasonable expectations of the losing party (at para. 37).

25 Finally, when costs are being considered in a class proceeding, s. 31 (1) of *Class Proceedings Act, 1992* states that 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." On this consent motion, s. 31(1) is not engaged.

Costs Requested

26 Partial indemnity costs are requested by three groups:

- the plaintiffs in the class proceeding,
- the defendants Sunrise Propane Energy Inc., 1367229 Ontario Inc., 1186728 Ontario Limited, 1369630 Ontario Inc, Valery Belahov, Shay (Sean) Ben-Moshe and Arie (Leon) Belahov (the "Sunrise defendants") and
- 2094528 Ontario Inc., HGT Holdings Ltd., Teskey Construction Company Limited and Teskey Concrete Co. Ltd. (the "Teskey defendants").

Each group submitted a Costs Outline.

The Plaintiffs' Costs

27 The plaintiffs request costs as follows:

Fees:	$41,802.00
HST on fees:	$5434.26
Disbursements:	$5414.66
Total:	$52,650.92

The fees represent the work of five lawyers, an articling student, a law clerk and a legal assistant. It covers 175.15 hours of work.

28 There is no doubt that the plaintiffs invested a considerable amount of time on their Stay Motion. Of the 175.15 hours of work all but 8.9 hours were incurred after the two groups of individual plaintiffs notified class counsel that they were objecting to the stay order. Was this a reasonable amount of time to invest in the circumstances? Did the objectors take an unreasonable position on the Stay Motion and therefore cause unnecessary fees to be incurred?

The Sunrise Defendants' Costs

29 The Sunrise defendants request costs as follows:

Fees:	$17,910.00
HST on fees:	$2,328.30
Disbursements:	$420.00
Total:	$20,658.30

The fees represent the work of two lawyers and 51 hours of work.

The Teskey Defendant' Costs

30 The Teskey defendants request costs as follows:

Fees:	$5,300.00
HST on fees:	$689.00
Disbursements:	$18.36
Total:	$6,007.36

The fees represent the work of two lawyers and 22 hours of work.

31 Before fixing an amount for costs, it is of assistance to review the activity that led to the plaintiffs in the Vilarino and ZTGH actions eventually consenting to the Stay Motion.

Steps Taken Prior to Consent

32 Although the court directed counsel to file a factum, one was not filed in the Vilarino action. As a result, the court cannot review a factum to understand why these plaintiffs were objecting to the Stay Motion. One responding affidavit from a lawyer in the Forget Mathews firm was filed. This brief affidavit confirms that the Vilarino action is a subrogated claim started by the Wawanesa Insurance Company (Wawanesa) in August 2010, in the names of numerous insureds. Wawanesa seeks recovery of approximately $1,600,000 paid to various insureds as a result of insured losses they sustained during the explosion. The damages claimed in this action are pecuniary in nature. Although the pleading states that the plaintiffs suffered damages as a result of the explosion, the particulars that are pleaded refer to pecuniary losses. There is no specific reference to non-pecuniary damages. The affidavit does not explain why Wawanesa was resisting the Stay Motion. There was no cross-examination on this affidavit.

33 Class counsel served the Stay Motion early in November, but received no response from Mr. Forget until the afternoon of November 20, 2010, when he faxed a letter simply stating that he had instructions to oppose the motion with no rea-

sons given. Class counsel tried but was unable to reach Mr. Forget to discuss his position. Class counsel were left in the dark as to why Mr. Forget's client was continuing to object to the Stay Motion.

34 According to Mr. Forget's submissions in court on December 13 2010, Wawanesa initially resisted the stay order because the plaintiffs were seeking a stay until completion of the individual common issue trials and any appeals arising therefrom. If this was the concern driving Wawanesa's decision to object to the stay motion, I would have expected their counsel to discuss the concern with class counsel. In any event, the draft stay order was amended at the case conference on November 30, 2010 to limit the far reaching effect of the initial request and a copy of the new draft was sent to Mr. Forget.

35 On Saturday December 12, 2010, when the Forget Mathews firm advised that they were no longer objecting to the stay order, no explanation for the change of position was given.

36 Similarly, when the ZTGH firm e-mailed class counsel on November 30, 2010 to advise that they were objecting to the stay motion, no reasons were given. Five of the ten actions issued by the ZTGH firm were commenced in August 2009. The other five were commenced in August 2010. The plaintiffs are the named insureds in the various insurance policies. These individual actions have not progressed beyond the pleadings stage. Service of the statements of claim issued in August 2010 has not been completed.

37 The ZTGH firm served two affidavits in support of their position: one from Rory Thain a manager at Economical Insurance Company ("Economical") and a second from MaryRose Ebos a lawyer at the ZTGH firm. Economical commenced four of the ten ZTGH actions. Although there is no affidavit evidence from the insurers who started the other ZTGH actions, the affidavits filed made representations about all of the ZTGH actions.

38 The affidavits of Mr. Thain and Ms. Ebos represented that:

- The Zarek firm issued ten actions seeking to recover amounts that five insurance companies paid to their insureds. The insurers are Economical, Coseco, Unifund, Intact and Belair.

- The Vilarino and ZTGH actions represent claims by seven insurance companies "on behalf of 188 homeowners and 39 commercial businesses".

- The plaintiffs in the ZTGH actions and the Vilarino action intend to opt out of the class action if certified.

- The insurers have "investigated, adjusted and paid" their insureds' claims. These claims include damage to buildings contents and expenses for alternative living accommodations. These damages are easily quantified and already documented.

- The estimated value of claims advanced in the eleven actions is $16 million. This includes subrogated claims, insureds' deductibles and uninsured losses.

- The insurers "will be carrying on these actions for the subrogated claims *plus any Insured's deductibles and any uninsured losses.*" [Emphasis added.] The insureds will not be charged legal fees.

- Counsel are considering a request that the individual claims be case managed.

- The "clients instructing Plaintiffs' counsel in the individual actions are large insurance companies with the knowledge and financial resources to ensure the individual actions are governed in a timely manner".

- The individual actions seek "tangible pecuniary damages" whereas the class action seeks "intangible, non-

pecuniary and difficult to quantify damages for personal injuries".

• The class action claims for "non-pecuniary damages will slow down the Class action process as compared to the progress of the individual actions and the expeditious resolution" of the "tangible pecuniary" individual claims.

• There is no need to delay litigation of the individual actions.

• These individual actions "primarily seek resolution of the liability issues". Therefore it makes sense that the individual actions "litigate the liability issues" and the class action abides by the result.

• There is no prejudice to the class action defendants since they can file one affidavit of documents and use it for all actions that they are defending.

39 When Class Counsel read these affidavits they were surprised to learn that the insurers were advancing the claims for both subrogated and uninsured losses and that all of the plaintiffs named in the actions intended to opt out of the class if certified. As Mr. Charney explained, Class Counsel believed that these affidavits shifted the "procedural terrain" and they were no longer dealing with a simple stay motion. Instead, the insurers were representing that they had control of the subrogated and uninsured claims, that they intended to proceed ahead with these claims without delay and all of the named plaintiffs would be opting out of the class if certified.

40 I pause to note that the representation in these affidavits that the insurers would be carrying on the actions for both insured and *"any uninsured"* claims seems to be at odds with the insurers desire not to be slowed down by the non-pecuniary claims of their insureds. If, as the affidavits stated, any uninsured claim was covered then this had to include the non-pecuniary claims as well.

41 Class counsel decided that they had to respond with additional affidavit evidence and cross-examine on the affidavits. The responding affidavit evidence in large part discusses the considerable work that has been undertaken by class counsel to advance the claims of the putative class members and reviews the liability and damage experts that have been retained. The affidavit evidence also refers to the case conference before Justice Cullity on April 21 2009, when directions were given including confirmation that the representative plaintiffs were advancing all claims including subrogation claims and, if certified, that class definition would include all claims of class members who did not opt out.

42 In the limited time available, class counsel decided to investigate the evidence that some putative class members had already decided to opt out of the Class Action if certified and that the individual actions advanced uninsured claims on their behalf.

43 As of December 2010, 890 households and 1531 individuals had registered with class counsel. This represented about 33% of the putative class member households. They reported claims for damage to their homes, injuries, loss of income. Class counsel contacted a sampling of the plaintiffs named in the ZTGH actions. Of the 22 households reached, no one was aware that the insurers had commenced actions on their behalf and no one had authorized the insurers to start the actions.

44 Individuals named in the action started by the Economical were particularly outraged to learn that an action had been commenced in their names because some of them reported that Economical had denied their claims.

45 When Rory Thain and MaryRose Ebos were cross-examined on December 6 2010, class counsel learned that representations in the Thain and Ebos affidavits about the ZTGH actions were not as stated. In particular, class counsel learned that:

• Economical has not contacted the insureds that they named as plaintiffs in the individual actions to ascertain if they

want Economical to include their uninsured losses in these individual actions.

• Economical recognizes that its insureds may have uninsured losses for pain and suffering, loss of income, medical expenses, diminution in the value of their property and claims in excess of the policy limits.

• The "personal" losses of the individual insureds are not included in the relief the Insurers are seeking in the ZTGH actions and there is no plan to include these "personal" claims in the ZTGH actions.

• Although Mr. Thain's affidavit states that the "all" of the "188 homeowners, 39 commercial businesses ... intend to opt out of the class if certified", Economical never asked the insureds who are named as plaintiffs if they intend to opt out as stated in his affidavit.

46 In summary, while the affidavits represented that the ZTGH actions covered insured *and uninsured losses* and that all plaintiffs named in these actions intended to opt out of the class action, cross-examinations revealed that this was not accurate. Interestingly, the factum that the ZTGH firm filed on December 8, 2010, continued to represent that the "insurance companies in the individual action will be carrying on [the actions] for the subrogated claims *plus each insured's deductibles and any uninsured losses.*" [Emphasis added.]

47 Class counsel's need to cross-examine on the Thain and Ebos affidavits was obvious given the surprising representations made in these affidavits. While cross-examination shed some light on the insurers' intentions, it also revealed a serious legal problem with allowing these individual actions to proceed. In particular, case law confirms that a plaintiff has a single cause of action for claims arising from a loss: See *Cahoon v. Franks*, [1967] S.C.R. 455 (S.C.C.); and *Mayer v. 1314312 Ontario Inc.*, [2002] O.J. No. 457 (Ont. S.C.J.). In this case the claims are either advanced within a certified class action or in an individual action, not both.

48 The day after the cross-examinations were completed, the plaintiffs in the ZTGH actions withdrew their objection to the Stay Motion and the plaintiffs in the Vilarino action did the same the next day. No explanation was given until counsel appeared in court to argue costs.

49 During the hearing of this motion counsel for the insurers in the ZTGH actions explained that their clients (the insurance companies) have already decided to opt out (assuming certification) and do not want to hold their claims in abeyance under a stay order pending the certification hearing. They want to move ahead immediately with their individual actions so that liability for the explosion can be decided quickly. They do not want resolution of the liability issue delayed by a class action.

50 Further, counsel for the insurers in the ZTGH and Vilarino actions submit that class counsel is responsible for the fees incurred and there should be no order requiring the insurers to pay costs. They explained the basis for their position as follows. Class Counsel's supplementary factum raised new grounds for the motion. New grounds should only be permitted in an amended Notice of Motion and one was not served. They have not had enough time to consider and respond to these new grounds. Rather than asking for an adjournment, the insurers decided to consent to the stay order and argue the issues raised in the supplementary factum later.

51 The new grounds counsel allegedly raised in this supplementary factum are:

• There can only be one action for a single cause of action; and

• The insured has the right to control the litigation until he is fully indemnified

Analysis

52 With this background, I return to the questions raised above. Was the amount of time incurred by class counsel reasonable in the circumstances? Did the objectors' actions cause unnecessary fees to be incurred?

53 First, I reject the notion that class counsel raised new grounds for the Stay Motion in the supplementary factum. This factum was responding to the evidence of Mr. Thaim and Ms. Ebos. It is this evidence that caused the above legal issues to surface. Class counsel was not asking this court to decide these issues on the Stay Motion. Rather, class counsel was properly putting the new evidence and legal issues before the court. It was important for the court to have this information when considering the Stay Motion.

54 I reject the suggestion of counsel for the insurers that they were surprised to see these legal issues develop and had no time to respond. The very evidence that they presented triggered the need to discuss these points in the supplementary factum. How could they not have realized in advance that their own evidence would bring these legal issues to the center of this motion?

55 They served affidavits that incorrectly left class counsel with the belief that all uninsured claims were included in the individual actions and that the plaintiffs named in the statements of claim had already decided to opt out of the class action if certified. The affidavits sent a clear message to class counsel: we are going ahead with these individual actions now and we intend to have liability decided in these individual actions.

56 While I am not suggesting that these affidavits were intentionally misleading, it is hard to understand how these affidavits were sworn when counsel and the insurers had never spoken to the named plaintiffs and did not intend to protect all uninsured losses. Whether this was a mistake or carelessness does not change the fact that these affidavits triggered significant legal expense.

57 By presenting this evidence, a flurry of unnecessary legal work was triggered. Eventually through investigation and cross-examination, class counsel came to realize (what the insurers and their counsel knew or ought to have known from the outset) that the individual actions did not include a claim for uninsured losses and the named plaintiffs had not already decided to opt out of the class if certified.

58 Since it is now clear that the ZTGH and Vilarino actions do not seek recovery of all uninsured losses, it follows that the insureds must rely on a second action to claim these losses. Counsel for the objectors never explained how two actions arising from the same explosion can co-exist in the face of authority from the Supreme Court of Canada stating that there can only be one proceeding.

59 As well, counsel for the objectors did not respond to the following passage quoted in class counsel's supplementary factum. This quote from Nicholas Legh-Jones, Q.C., Professor John Birds, David Owen, *McGillivary on Insurance Law*, 11th ed. (U.K.: Sweet & Maxwell, 2008) states that the insured, not the insurer, controls the litigation until the insured has been indemnified in full for all insured and uninsured losses:

> The assured is entitled to control any proceedings brought in his name until he has received complete indemnity, that is to say, if the insurer has not paid what is in fact a complete indemnity for all damage insured or uninsured arising from the same cause of action as the damage in respect of which payment has been paid, the assured remains *dominus litis* until he has recovered a complete indemnity and if he undertakes to prosecute his claim for the whole damage, the insurers cannot interfere. The assured must conduct the litigation with the proper regard for the insurer's interest and will be liable in damages for any misconduct for any abandonment of rights.

60 It was wholly unrealistic for the objectors to assume that in these circumstances the court was not going to stay the ZTGH and Vilarino actions pending the outcome of the certification hearing.

61 Counsel for the Teskey defendants remarked during argument that the Stay Motion was "out of control" and far too much time was being invested in what was a simple stay motion. I agree that too much time was invested in what should have been a simple stay motion, but the objectors' actions are to blame.

Rule 57.01 Factors

62 To decide on the amount of costs that should be awarded, the relevant factors under r. 57.01 must be considered.

63 The plaintiffs' costs outline confirms that the work was appropriately shared among lawyers with different levels of experience. The partial indemnity rates range from a low of $90 for a student to a high of $350 for senior counsel. These billing rates are similar to the partial indemnity rates used by the other parties requesting costs. This reinforces my view that the rates are reasonable.

64 Counsel for the objectors did not provide the court with any information about the costs they incurred. Often this is a useful tool to determine what an "unsuccessful party could reasonably expect to pay" for the costs that are being fixed.

65 The Stay Motion was important to class counsel and those defendants who consented to the order. Class counsel have invested considerable time and expense in moving the class action ahead and, in particular, dealing with liability and damage issues. It is clearly important to them that they not lose control of these issues with individual actions moving ahead. A stay order is beneficial to the defendants because it allows them to focus on the upcoming certification hearing and avoid (at least for now) having to defend individual actions as well.

66 I have already commented on the conduct of the objectors and how it unnecessarily caused class counsel to incur significant costs. In my view, this factor is significant in my decision to hold the objectors responsible for costs.

67 Another factor that I take into account is the fact that there are six insurance companies to share the burden of a cost award. While I do not see the cost award in this case having a "chilling effect", the fact that the costs will be shared by six insurers eliminates any chilling effect that one might say exists. The objectors knew or ought to have known the costs they were exposing themselves to and could have easily avoided such costs.

68 Counsel for the objectors submits that the legal issues raised on this Stay Motion will have to be decided at some point in the future and therefore the research work done by class counsel is not wasted. To a certain extent this is accurate, assuming the following occurs: the class proceeding is certified, the insurers in the ZTGH and Vilarino actions seek to lift the stay, the ZTGH and Vilarino actions do not claim uninsured damages and their insureds do not opt out of the class. If these events materialize then these legal issues will likely be considered on a motion to lift the stay.

69 However, the same analysis does not apply to the rest of the work done by class counsel. The objectors should have known that they had a problem and were not going to avoid a stay order. The costly exchange of affidavits, cross-examination on affidavits and related work could have been avoided.

70 Lastly, in arriving at an appropriate amount for costs, I must step back and consider what amount, in all the circumstances, is fair and reasonable.

Costs Awards

71 Taking all of these factors into consideration and stepping back to consider what is fair and reasonable, I make the following orders.

72 I reduce the fees of Class Counsel by 15%. This fairly reflects that some of the work may be of use later in this pro-

ceeding.

73 I fix the costs of class counsel at $35,531.70 plus HST of $4,619.12 and disbursements of $5,414.66. The total is $45,565.48. I order the six insurance companies to pay $45,565.48 within 30 days. The costs are to be shared equally between the six insurers unless they agree otherwise.

74 The Teskey defendants supported the Stay Motion. Junior counsel on the file attended the cross-examinations on the affidavits and did most of the work for their clients on this motion leading up to the hearing of the motion. Obtaining the stay pending certification was important to these defendants. They did not want to bear the expense of defending individual actions while proceeding with the certification hearing.

75 The partial indemnity costs of the Teskey defendants are fair and reasonable and I allow them. I fix the costs of the Teskey defendants at $5,300 plus HST of $689 plus disbursements of $18.36 for a total of $6,007.36. I order the six insurance companies to pay $6,007.36 within 30 days. The costs are to be shared equally between the six insurers unless they agree otherwise.

76 Lastly, there is the request of the Sunrise defendants for costs. Sunrise initially supported the Stay Motion. Counsel attended the cross-examinations on the affidavits, filed a factum and made submissions. In the factum they state a "stay may no longer make sense" and that they will support the most cost effective way of resolving all claims.

77 The objectors submit that no costs should be awarded to the Sunrise defendants since in effect they withdrew their support for the motion. It is perhaps more accurate to say that they are "sitting on the fence" waiting to see what happens.

78 I appreciate that they had an interest in this Stay Motion and had reason to attend the cross-examinations on the affidavits. However their role should not in the end be more costly than the role of the Teskey defendants. For this reason, I fix the costs of the Sunrise defendants at $5,300 plus HST of $689 and disbursements of $420 for a total of $6,409. I order the six insurance companies to pay $6,409 within 30 days. The costs are to be shared equally between the six insurers unless they agree otherwise.

Order accordingly.

END OF DOCUMENT

TAB 13

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 to investors -- Courts below erred by focusing on substantive outcome of Commission proceedings -- Motions judge erred in failing to consider that Commission lacked jurisdiction to decide liability and damages issues raised in action and that class members had no standing in Commission proceedings.

Securities regulation -- Securities commissions -- Investigations and examinations -- 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 to investors -- Courts below erred by focusing on substantive outcome of Commission proceedings -- Motions judge erred in failing to consider that Commission lacked jurisdiction to decide liability and damages issues raised in action and that class members had no standing in Commission proceedings.

Appeal by the defendants from an order of the Divisional Court allowing the respondents' appeal and granting certification of the proposed class action. The appellants were mutual fund managers. The respondent investors alleged that the appellants permitted market timing in certain mutual funds that they managed, causing long-term investors in the affected mutual funds to suffer losses in the value of their investments of several hundred million dollars. All of the appellants had been investigated by the Securities Commission and had entered into settlement agreements with the Commission requiring them to pay $205,600,000 to investors in the relevant mutual funds. The appellants argued that the Divisional Court erred in finding that the proposed class action was the preferable procedure. The motion judge found that the action did not satisfy the preferable procedure requirement because the completed Commission proceedings and settlement agreements fulfilled the judicial economy, access to justice and behaviour modification purposes of the Class Proceedings Act. The Divisional Court held that the Commission proceedings could not be the preferable procedure for recovering damages, because the action was for significant monetary damages beyond the amount that had been recovered through the Commission proceedings. The court was satisfied that the class action was the only viable procedure for recovering these substantial additional damages.

HELD: Appeal dismissed. The courts below erred by focusing on the substantive outcome of the Commission proceedings, which was not a relevant factor in the comparative analysis under s. 5(1)(d) of the Act. The courts ought instead to have considered the regulatory nature of the Commission's jurisdiction and its remedial powers, as well as the lack of participatory rights afforded to affected investors by the Commission proceedings. A consideration of these two particular characteristics compelled the conclusion that the Commission proceedings would not fulfill the Class Proceedings Act's goal of providing class members with access to justice in relation to their claims. The jurisdiction of the Commission under s. 127 of the Securities Act was protective and preventative, not compensatory. The remedial powers available to the Commission under s. 127

were thus insufficient to enable it to fully address the respondents' claims in the proposed class proceeding. The Commission proceedings did also not provide comparable rights of participation to the respondents as the procedural rights enshrined in the Class Proceedings Act or any participatory rights. The Commission proceedings could thus not constitute a preferable procedure to the proposed class action for purposes of the Class Proceedings Act.

Statutes, Regulations and Rules Cited:

<LEGISLATION/>
Class Proceedings Act, 1992, S.O. 1992, c. 6

s. 5(1)(d)

Securities Act, R.S.O. 1990, c. S.5, s. 127, s. 128

Appeal From:

On appeal from the order of the Divisional Court (Anne M. Molloy, Katherine E. Swinton and Thea P. Herman J.J.), dated January 31, 2011, with reasons reported at 2011 ONSC 292, 104 O.R. (3d) 615, allowing an appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated January 12, 2010, with reasons reported at 2010 ONSC 296, 89 C.P.C. (6th) 205.

Counsel:

Benjamin Zarnett, Jessica Kimmel and Melanie Ouanounou, for the appellant CI Mutual Funds Inc.

James D.G. Douglas, David Di Paolo and Heather Pessione, for the appellant AIC Limited.

Joel Rochon, Peter Jervis and Sakie Tambakos, for the respondents.

The judgment of the Court was delivered by

W.K. WINKLER C.J.O.:--

I. Introduction

1 This appeal raises the question whether a class action by investors against certain mutual fund managers is the preferable procedure for resolving the class members' claims. The statement of claim alleges that the five defendant mutual fund managers, including the two appellants, CI Mutual Funds Inc. ("CI") and AIC Limited ("AIC"),[1] permitted securities market conduct referred to as "market timing"[2] in certain mutual funds that they managed. Market timing is alleged to have caused long-term investors in the affected mutual funds to suffer losses in the value of their investments of several hundred million dollars.

2 Before the class action was started, the Ontario Securities Commission ("OSC") conducted a lengthy investigation into the practice of market timing in the mutual fund industry. The investigation led the OSC to bring enforcement proceedings against the five mutual fund managers who were named as defendants in the proposed class action. The enforcement proceedings concerned the same market timing conduct that the investors complain about in the present action.

3 All of the defendant fund managers entered into settlement agreements with the OSC staff. The terms of the settlements required the five defendants to pay $205.6 million to investors in the relevant mutual funds. For purposes of the OSC settlement agreements, the defendants admitted that: they entered into arrangements with third-party investors, who engaged in market timing; the market timing conduct had occurred; the market timers made profits that adversely affected investors in the relevant mutual funds; and the defendants earned commissions from their arrangements with the market timers. These factual admissions were made on the basis that they were "without prejudice" to the defendants in "any civil or other proceedings which may be brought".

4 Hearings were then held before a panel of the OSC for the purpose of deciding whether to approve the settlement agreements as being in the public interest pursuant to s. 127 of the *Securities Act*, R.S.O. 1990, c. S. 5. These hearings, which led to the approval of the settlements, were conducted *in camera.*

5 After the settlements were approved, the plaintiffs brought a motion for certification of a class action. The central contentious issue on the motion was whether the proposed class action met the preferable procedure criterion in s. 5(1)(d) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*"). The motion judge concluded that although the action otherwise satisfied the criteria for certification, it did not satisfy the preferable procedure requirement. This was because, in the motion judge's view, the completed OSC proceedings and settlement agreements fulfilled the judicial economy, access to justice and behaviour modification purposes of the *CPA*.

6 The Divisional Court disagreed. Writing for the court, Molloy J. held that the OSC proceedings could not be the preferable procedure for recovering damages because the investors' action was for significant monetary damages *beyond* the amount that had been recovered through the OSC proceedings. The court was satisfied that the class action was the only viable procedure for recovering these substantial additional damages. The court went on to grant the motion for certification on certain specified conditions.

7 The appellant mutual fund managers appeal, with leave of this court, from the Divisional Court's order granting certification of the class action. The appellants submit that the Divisional Court erred in concluding that the class action is a preferable procedure to the OSC proceedings.

8 I cannot accede to this submission. As will be explained further, in considering whether an alternative means of resolving the class members' claims is preferable to the mechanism of a class action, a court must examine the fundamental characteristics of the proposed alternative proceeding, such as the scope and nature of the jurisdiction and remedial powers of the alternative forum, the procedural safeguards that apply, and the accessibility of the alternative proceeding. The court must then compare these characteristics to those of a class proceeding in order to determine which is the preferable means of fulfilling the judicial economy, access to justice and behaviour modification purposes of the *CPA*. In a given case, certain characteristics will drive the preferability analysis more than others.

9 In this case, the OSC commenced investigatory and enforcement proceedings into the market timing conduct in question. The OSC staff reached agreements with the defendants to settle the proceedings, and those settlement agreements were then approved by the OSC. The investors did not participate in the proceedings before the OSC and, quite properly, the OSC in approving the settlements did not purport to settle the claims of the investors in a full and final manner. In the

circumstances, it would not have been empowered to do so. The essence of the OSC initiative was that of a parallel or complementary proceeding to any civil action brought by the investors.

10 In my view, the courts below erred by focusing on the substantive outcome of the OSC proceedings, which is not a relevant factor in the comparative analysis under s. 5(1)(d) of the *CPA*. The courts ought instead to have considered the regulatory nature of the OSC's jurisdiction and its remedial powers, as well as the lack of participatory rights afforded to affected investors by the OSC proceedings. A consideration of these two particular characteristics compels the conclusion that the OSC proceedings would not fulfill the *CPA* goal of providing class members with access to justice in relation to their claims. Thus, the OSC proceedings cannot constitute a preferable procedure to the proposed class action for purposes of the *CPA*. The Divisional Court came to the same conclusion, albeit for different reasons, and I would therefore dismiss the appeal.

II. Background

i) OSC Investigation and Enforcement Proceedings Concerning Market Timing

11 In November 2003, the OSC launched an investigation into the practice of market timing in the mutual fund industry. "Market timers" seek to take advantage of the fact that the value of mutual funds - unlike other traded securities - is calculated only once a day (at 4:00 p.m. EST). As a result of time zone differences, the prices of securities principally traded on foreign exchanges may be as much as 12-15 hours old at the time the daily mutual fund valuation is done. As a result, the daily value of a fund may be, for a short period of time, artificially low. Market timers purchase mutual funds they believe are undervalued for a short-term turnaround, unlike the vast majority of unit holders who invest in mutual funds as long-term investments.

12 Although market timing is not an illegal activity, the profit made by market timers is at the expense of long-term investors. Also, market timing activity in a fund impedes the efficient operation of the fund in a number of ways. The OSC, in launching its investigation, was concerned that some managers of mutual funds were not taking steps to control market timing and were therefore not acting in the best interests of the relevant mutual funds.

13 At the conclusion of its investigation, the OSC initiated enforcement proceedings against the five defendant mutual fund managers for failing to act in the public interest in relation to market timing activity in the affected funds. The OSC staff entered into settlement agreements with the defendant managers, pursuant to which the defendants agreed to pay a total of $205.6 million to their investors.

14 Two separate hearings were held before a panel of the OSC to consider whether to approve these settlement agreements as being in the public interest pursuant to s. 127 of the *Securities Act*. The OSC issued general public notices that the hearings were being held, but gave no direct notice to investors.[3]

15 The first hearing occurred on December 16, 2004, and involved CI, AIC, IG Investment Management Inc. and AGF Funds Inc. These four parties jointly requested that the matter proceed on an *in camera* basis. The Chair of the OSC agreed to this request, stating:

> We will now go *in camera*. So I would ask those persons in the hearing room who are not associated with any of the four parties, their counsel, or the two

> Commissions [the Ontario and the Manitoba Securities Commissions] or the MFDA [the Mutual Fund Dealers Association], please, leave.

16 A second hearing was held on March 3, 2005, to consider the settlement agreement between the OSC staff and Franklin Templeton Investments. It was also conducted *in camera*.

17 The OSC approved the settlement agreements with the five defendants. All of the agreements specified that the "agreement of facts" are "without prejudice" to the parties in "any civil or other proceedings which may be brought by any other person or agency."

ii) Class Proceedings Commenced Against the Defendants

18 Shortly after the settlements were approved, several investors in mutual funds managed by the defendants commenced a class action on behalf of investors in the funds. The amended statement of claim alleges that the defendants are liable to class members for breach of a fiduciary duty and/or breach of a duty of care owed to class members for failing to take appropriate steps to stop market timing in the affected funds. The plaintiffs seek declaratory and restitutionary relief, as well as general and special damages.

19 The plaintiffs allege that, by permitting the market timing to occur, the defendants failed to act in the best interests of the fund and all investors in the fund. They assert that market timing caused an annual loss in the value of the affected mutual funds of several hundred million dollars. In addition, they allege that market timing led to the imposition of increased transaction costs on long-term investors, as well as other transaction costs arising from inefficiencies caused by the market timing conduct. The plaintiffs further assert that the amount paid by the defendants to investors under the OSC settlement agreements falls well short of providing full reparation to investors and fails to account for management and transaction costs associated with market timing activity.

iii) Certification Motion

20 The plaintiffs' motion to certify the proposed action was heard in December 2009. They filed expert evidence on the motion in support of the assertion that the OSC settlements do not constitute full compensation to investors. According to this evidence, the settlement with CI represents only 1/7 of the actual loss of CI investors and the AIC settlement represents only 1/3 of the total harm to AIC investors.

21 The defendants' primary argument in opposing the certification motion was that the action does not satisfy the preferable procedure criterion in s. 5(1)(d) of the *CPA* because the completed OSC proceedings were the preferable procedure for resolving the investors' claims. Section 5(1)(d) states:

> 5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> ...
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues ...

22 The motion judge agreed with the defendants' position and refused to certify the action. He concluded that the other four criteria for certification in s. 5(1) were satisfied: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims raise common issues; and (e) there are appropriate representative plaintiffs who could produce a workable litigation plan. Nevertheless, the plaintiffs' failure to satisfy the preferable procedure criterion was fatal to the motion for certification.

iv) Appeal to the Divisional Court

23 The plaintiffs appealed the motion judge's decision to the Divisional Court. By the time the appeal was argued, three of the five defendants had entered into settlements of the class proceedings with the plaintiffs and only CI and AIC remained (and still remain) as defendants.

24 In reasons delivered on behalf of the court, Molloy J. allowed the plaintiffs' appeal and granted a certification order. The court concluded that the motion judge's analysis of the impact of the OSC settlements on the preferable procedure assessment was "fundamentally flawed" and held that the preferable procedure criterion was satisfied.

25 Given that this appeal turns on the preferable procedure issue, I now describe in more detail the reasons of the motion judge and the Divisional Court on this issue.

III. Reasons of the Courts Below

i) The Motion Judge's Preferable Procedure Analysis

26 The motion judge described, at paras. 195-200, the general principles regarding the preferable procedure criterion in s. 5(1)(d) of the *CPA*. He noted, citing *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 69, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 346, and *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 27, that the preferability inquiry is to be conducted through the lens of the three principal advantages of class actions: judicial economy, access to justice and behaviour modification.

27 As recognized by the motion judge, at paras. 221-22, there are two core elements of the preferable procedure inquiry: see *Hollick*, at para. 28; *Markson*, at para. 69. The first element is whether the class action would be a fair, efficient and manageable method for advancing the claim. The second element is whether a class action would be preferable to other reasonably available means of resolving the class members' claims. This question of preferability turns not only on whether a class action would be preferable to individual civil actions, but also on whether a class action would be preferable to "all reasonably available means of resolving the class members' claims": *Hollick*, at para. 31.

28 The motion judge concluded, at para. 210, that if the OSC proceedings had not taken place, a class action would have been the preferable procedure. And he observed, at para. 221, that even when the availability of the OSC proceedings is considered, a class action would meet the first element of the *Hollick* inquiry because it constitutes a fair, efficient and manageable method for resolving the claims of the class members. However, the motion judge went on to conclude that the proposed class action does not meet the second element of the *Hollick* inquiry because the action is not preferable to other reasonably available means of resolving the class members' claims. In his view, the OSC proceedings were the preferable procedure for resolving these claims.

29 In reaching this conclusion, the motion judge found that the OSC proceedings accomplished the *CPA* goals of behaviour modification, judicial economy and access to justice: see paras. 235-60. In his view, behaviour modification was achieved by penalizing the defendants for their failure to respond to the market timing conduct (para. 236); judicial economy was achieved by securing compensation for all investors in "an efficient, principled, and consistent way" (para. 238); and access to justice was accomplished because the OSC settlements included the same form of remedy sought by the class action (*i.e.*, monetary relief), and in reaching the settlements, the OSC staff took an adversarial stance towards the defendants in a manner akin to the role of class counsel, demanding concessions from the defendants and the payment of compensation for the investors (paras. 246-48).

30 The motion judge further observed, at para. 252, that the debate over whether the OSC proceedings were the preferable procedure could not be "converted into a settlement approval hearing" under the *CPA*. However, he was of the view that the criteria that a court applies when deciding whether to approve a negotiated settlement of a class action are relevant "when a court considers the issue of preferable procedure and the issues of behaviour modification, judicial economy and access to justice" (at para 252). After setting out the settlement approval criteria, the motion judge held, at para. 254, that, with one exception, the application of these criteria "favour the conclusion that the OSC proceeding was the preferable procedure."

31 Finally, before leaving the discussion of access to justice - which he saw as the definitive issue weighing against certification - the motion judge considered the plaintiffs' argument that the quality of the access to justice provided by the OSC proceedings was "in doubt because the OSC may have left the investors' money on the table" (para. 255). The motion judge refused to give effect to this argument and instead accepted the defendants' submission that, once the court is satisfied that the OSC's purpose was to obtain restitutionary compensation for the harm suffered by the investors and that the process to do so was adequate, the court should not "second-guess" the access to justice provided by the OSC proceedings (at paras. 256-57).

ii) The Divisional Court's Preferable Procedure Analysis

32 The Divisional Court allowed the plaintiffs' appeal from the motion judge's order refusing certification. In doing so, Molloy J. described three errors in the motion judge's preferable procedure analysis, at para. 33:

1) he failed to apply the low evidentiary burden on the plaintiffs at the certification stage;
2) he improperly found that the "completed OSC proceeding was a preferable proceeding for the remaining portion of the plaintiffs' claims going forward"; and
3) he erred in law by considering the criteria for approval of a settlement at the certification stage.

33 Molloy J. explained that the first two errors are closely related. On the one hand, the motion judge found that there was "some basis in fact" to support the investors' assertion that the OSC settlement only represented part of the total damages claimed by the investors. However, in Molloy J.'s view, the motion judge went on to disregard this finding in his analysis of the preferable procedure.

34 According to Molloy J., at para. 8, the plaintiffs' action "does not seek the recovery of the $205 million already paid; it seeks recovery of the damages not recovered through the OSC proceeding." In her opinion: "Unless it can be said that the plaintiffs have achieved full, or at the very least substantially full, recovery, they are entitled to maintain this action. There is no other viable alternative for recovering the shortfall after the OSC settlement".

35 Molloy J. went on to conclude, at para. 41, that the key point indicating that a class action is the preferable procedure is that "it is ... illogical to characterize the OSC proceeding as a preferable procedure for recovering that money which the OSC proceeding failed to recover in the first place. It is by definition not a preferable procedure in those circumstances."

36 Molloy J. held, at para. 47, that the motion judge further erred by applying the test for approval of a settlement in the context of a certification motion. She explained, at paras. 48-57, why these criteria should not be taken into account at the certification stage.

IV. Analysis

37 On appeal to this court, the appellants contend that the Divisional Court committed two errors:

1) the Divisional Court applied the incorrect standard of review to the motion judge's decision; and
2) the Divisional Court erred in its preferable procedure analysis.

38 I will first briefly deal with the standard of review issue and then turn to the issue of the preferable procedure analysis.

1) Standard of Review Applied by the Divisional Court

39 The appellants submit that the Divisional Court failed to accord the "special deference" owed to the motion judge's exercise of discretion in deciding that the preferable procedure requirement was not met, citing *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.), at para. 43, leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 1. As stated in their factum, the motion judge "was sensitive to the applicable legal principles to be brought to bear in the preferable procedure analysis."

40 I agree with the appellants that substantial deference must be accorded to motion judges in certification proceedings and that a reviewing court should only intervene with a motion judge's certification decision when the judge makes a palpable and overriding error of fact or otherwise errs in principle. This standard of review is well-established in the jurisprudence: see *Pearson*, at para. 43; *Cassano v. The Toronto-Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401, at para. 23, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 15; *Markson*, at para. 33; *Cloud v. Canada (A.G.)* (2004), 73 O.R. (3d) 401 (C.A.), at para. 39, leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 50.

41 In my view, however, the Divisional Court did not err in its application of the standard of review. The court identified, at para. 58, errors in principle in the motion judge's approach to the preferable procedure inquiry, which provided the basis for appellate intervention. Among the errors in principle identified by the Divisional Court were the motion judge's application of "the wrong test in his consideration of the preferable procedure test for certification" and the motion judge's

error in considering factors relevant to the approval of a settlement at the certification stage. Deference cannot shield errors in principle.

42 I agree with the Divisional Court's holding that the motion judge erred in principle in reaching the conclusion that the OSC proceedings provided the preferable procedure for resolving the class members' claims. However, as I will now discuss, my reasons for reaching this conclusion differ from those expressed by the Divisional Court.

2) The Preferable Procedure Inquiry

43 Turning to the merits of the Divisional Court's preferable procedure analysis, in my view, the error in principle that led to the motion judge's incorrect conclusion on preferability was more fundamental than his alleged failure to recognize that a substantial amount of the monetary damages claimed by investors went uncompensated in the completed OSC proceedings. The question whether the OSC settlements provided investors with all or substantially all of the monetary relief that they seek in the class action is not the proper focus of the preferable procedure inquiry.[4] In other words, the Divisional Court did not ask itself the right question.

44 The second element of the preferability inquiry described in *Hollick* requires a comparative analysis as to whether a class action would be preferable to other reasonably available means of resolving the class members' claims.[5] The preferability inquiry must necessarily take into account the central characteristics of the proposed alternative proceeding as a means of resolving the claims. This exercise includes, but is not limited to, considering the following characteristics of the alternative proceeding: the impartiality and independence of the forum; the scope and nature of the alternative forum's jurisdiction and remedial powers; the procedural safeguards that apply in the alternative proceeding, including the right to participate either in person or through counsel and the transparency of the decision-making process; and the accessibility of the alternative proceeding, including such factors as the costs associated with accessing the process and the convenience of doing so.

45 These characteristics must be considered in relation to the type of liability and damages issues raised by the class members' claims against the defendants in the putative class action and the manner in which they are addressed, if at all, in the alternative proceeding. The court must then compare these characteristics to those of a class proceeding through the lens of the goals of the *CPA*: judicial economy, access to justice and behaviour modification.

46 Not all of the characteristics outlined above will be material in a given case. Each case will of course turn on its own facts. The requisite comparative analysis in the instant case, however, reveals the following important differences between the OSC proceedings and the class proceeding, which support a conclusion that a class proceeding is preferable for resolving the class members' claims:

i) The jurisdiction of the OSC under s. 127 of the *Securities Act* is regulatory (*i.e.*, protective and preventative), not compensatory. Accordingly, the remedial powers available to the OSC under the section are insufficient to enable it to fully address the class members' claims in the proposed class proceeding.

ii) The OSC proceedings did not provide comparable rights of participation to the affected investors as the procedural rights enshrined in the *CPA*, or any participatory rights for that matter.

47 I will now elaborate on the significance of these distinctions, particularly in relation to the second element of the preferable procedure inquiry as described in *Hollick* (*i.e.*, whether a class action would be preferable to other reasonably available means of resolving the class members' claims). While I agree with the motion judge that the critical question in this regard is whether the OSC proceedings met the objective under the *CPA* of providing the proposed class members with access to justice, in my view, a comparative examination of the key characteristics of the OSC proceedings with the proposed class action reveals that the OSC proceedings did not provide class members with access to justice and thus cannot be the preferable procedure for resolving their claims.

1. The Essential Differences Between the OSC Proceedings and the Proposed Class Action

i) The Scope and Nature of the OSC's Jurisdiction and Remedial Powers

48 In arguing that the preferable procedure requirement was met, the plaintiffs provided evidence about the scope and purpose of the OSC's jurisdiction and remedial powers in the form of an affidavit from Professor Poonam Puri, an Associate Professor at Osgoode Hall Law School and Head of Research and Policy at the Capital Markets Institute of the Rotman School of Management. In her affidavit, Professor Puri explained:

> Public enforcement by securities regulators and criminal enforcement by criminal law authorities, as well as private enforcement by investors through private suits and class action proceedings all play an important role in ensuring that public company managers and mutual fund managers act in the best interests of shareholders and unit holders, respectively. None of these mechanisms is mutually exclusive. [Footnote omitted.]

49 Professor Puri's evidence outlined the essential purposes of the OSC enforcement proceedings as well as the role of private enforcement, including class action litigation, in regulating the behaviour of capital market participants such as the defendants. As Professor Puri explained in her affidavit, the OSC's regulatory jurisdiction over the defendants under s. 127 of the *Securities Act* was exercised in a different context and for a different purpose than the court's jurisdiction to adjudicate class actions and other civil claims concerning the defendants' conduct.

50 For ease of reference, s. 127 of the *Securities Act* provides in part as follows:

> 127. (1) The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders:
> 1. An order that the registration or recognition granted to a person or company under Ontario securities law be suspended or restricted for such period as is specified in the order or be terminated, or that terms and conditions be imposed on the registration or recognition.
> 2. An order that trading in any securities by or of a person or company or that trading in any derivatives by a person or company cease permanently or for such period as is specified in the order.
>
> ...

3. An order that any exemptions contained in Ontario securities law do not apply to a person or company permanently or for such period as is specified in the order.
4. An order that a market participant submit to a review of his, her or its practices and procedures and institute such changes as may be ordered by the Commission.

...

6. An order that a person or company be reprimanded.
7. An order that a person resign one or more positions that the person holds as a director or officer of an issuer.

...

8.4 An order that a person is prohibited from becoming or acting as a director or officer of an investment fund manager.

8.5 An order that a person or company is prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter.

9. If a person or company has not complied with Ontario securities law, an order requiring the person or company to pay an administrative penalty of not more than $1 million for each failure to comply.
10. If a person or company has not complied with Ontario securities law, an order requiring the person or company to disgorge to the Commission any amounts obtained as a result of the non-compliance.

(2) An order under this section may be subject to such terms and conditions as the Commission may impose.

...

(4) No order shall be made under this section without a hearing, subject to section 4 of the *Statutory Powers Procedure Act*.

51 The decision of the Supreme Court of Canada in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 S.C.R. 132, illustrates the distinction referred to by Professor Puri. In this decision, Iacobucci J. described the scope and purpose of the OSC's jurisdiction under s. 127 of the *Securities Act*. At para. 42, he cited with approval the following statement by Laskin J.A. in the decision under appeal: "The purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets". Iacobucci J. elaborated on the nature and extent of the OSC's jurisdiction under s. 127 as follows, at para. 45:

> In summary, pursuant to s. 127(1), the OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so. However, the discretion to act in the public interest is not unlimited. In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally. In addition,

> s. 127(1) is a regulatory provision. The sanctions under the section are preventive in nature and prospective in orientation. Therefore, s. 127 cannot be used merely to remedy *Securities Act* misconduct alleged to have caused harm or damages to private parties or individuals.

52 These passages from *Asbestos Minority Shareholders* make it clear that s. 127 is not intended to serve as a compensatory or remedial provision with respect to harm done to individual investors. Rather, this provision empowers the OSC to regulate capital markets in a way that protects investors and the efficiency of capital markets. For example, s. 127 permits the OSC to make orders to: cease trade; prohibit an individual from becoming an officer or director of a public company; issue reprimands; levy an administrative penalty of up to $1 million for each failure to comply with Ontario securities law; and make an order for disgorgement to the OSC of any amounts obtained as a result of non-compliance with Ontario securities law. Section 127 does not empower the OSC to make orders requiring a party to make compensation or restitution or to pay damages to affected individuals.

53 In contrast, s. 128 of the *Securities Act* allows the OSC to apply to a judge of the Superior Court to make a variety of orders, including orders requiring compensation or restitution to the aggrieved person or company, and requiring payment of general or punitive damages to any person or company. The OSC did not bring a s. 128 application in relation to the market timing conduct in issue here.

54 The OSC proceedings and the civil action in the form of the proposed class proceeding are intended as parallel, not mutually exclusive, proceedings. It is worth noting, for purposes of analogy, that a court may make an order under s. 128 (including an order for restitution or punitive damages) despite the existence of any order made by the OSC under s. 127.

55 Unlike enforcement proceedings under s. 127 of the *Securities Act*, the purpose of the proposed class proceeding is to obtain relief for investors - monetary or otherwise - who claim to have suffered losses from the defendants' impugned conduct. While the OSC in this case approved settlement agreements that included a compensatory element for investors arising from the same impugned conduct, such voluntary payments by the defendants cannot alter the regulatory purpose of the OSC proceedings for purposes of the preferability analysis under the *CPA*. The role of the OSC proceedings was not to assess the liability issues raised in the statement of claim, such as the alleged breaches by the defendants of a fiduciary duty or a duty of care owed to the investors, or to quantify the harm allegedly caused by such breaches.

56 The disparate purpose of the OSC proceedings and the proposed class action is emphasized by comments made by Commission counsel during the settlement approval hearing. In response to a request by the Chair of the OSC for an explanation of the basis upon which the settlement quantum was determined, counsel stated:

> We didn't include a formula for the calculation in the Settlement Agreement because there are different ways of determining the amount and different legitimate theories as to what the proper method of calculation would be. And it would be quite possible that the Respondents [the defendant mutual fund managers] would have chosen a different method that was also justified, or Staff could have chosen a different method that was also justified if this had been a contested proceeding. So the method that was used was the parties tried to relate

> it to the standard that would have been expected of the fund managers at the time of trading.

These comments by Commission counsel reflect that the OSC did not attempt to quantify the payment arrived at in the settlement agreements in a manner analogous to the way in which damages might be calculated in a civil action brought by investors.

57 This comment also demonstrates another important distinction between the OSC proceedings and the proposed class action. As discussed next, the procedure adopted by the OSC was characterized by the marked lack of access - both participatory and informational - that was provided to the investors.

ii) Lack of Participatory Rights of Investors in the OSC Proceedings

58 In contrast to the procedure underpinning a class proceeding, which is premised on facilitating transparency and participation on a class-wide basis, the OSC proceedings provided little to no basis for investor participation.

59 While a general notice of the settlement hearings was posted on the OSC's website, there was no attempt to notify the affected investors that the hearings were being held. Neither the investors nor their counsel attended the hearings or made submissions. Moreover, the substantive portions of the hearings took place *in camera* and were thus closed to anyone but counsel for the defendants and the relevant regulatory commissions.

60 Similarly, the procedure by which the settlements were arrived at did not facilitate investor participation. The amount of compensation that the defendants agreed to pay to the affected investors as a term of the settlement agreements was calculated without any opportunity for the investors to participate and without any details in the record of the OSC proceedings as to how this amount was calculated.

61 In contrast, the purpose of the procedural vehicle of the class action is to allow for the appointment of a representative plaintiff who shares a sufficient common interest with members of the class. The representative plaintiff conducts the litigation on behalf of class members under court supervision[6] and within the presumptive principle of an open court.

62 The observations about the accessibility of the OSC proceedings are not meant to suggest that the elements of confidentiality and lack of participation by the investors made the hearings and settlement agreements somehow inappropriate or nefarious. On the contrary, the point is that the OSC proceedings were not intended or designed to provide the investors with access to justice for purposes of adjudicating the claims advanced in the proposed class proceeding. In short, the investors were not, and were not intended to be, parties to the OSC process.

63 Indeed, it is worth repeating that the settlement agreements signed by the defendants expressly contemplated that they could face civil law suits in relation to the conduct that gave rise to the settlements. The OSC settlements simply resolved the proceedings taken by the OSC against the defendants. The settlements did not finally resolve the claims of the investors as against the defendants, nor did they purport to do so.

64 I will now explain how the courts below failed to consider these essential differences between the OSC proceedings and the class proceeding in the preferable procedure analysis.

2. Errors in the Preferable Procedure Analysis of the Courts Below

65 The motion judge's reasons, at paras. 57-69, for dismissing the plaintiffs' argument that they would be denied access to justice if the class proceeding were not certified reflect his failure to properly consider the defining characteristics of the OSC proceedings in his preferability analysis. The motion judge, at para. 60, dismissed the evidence and argument concerning the different and, indeed, complimentary purposes of the OSC regulatory proceedings and the proposed class proceeding as "largely irrelevant to the objective issues that I must decide". He classified this discussion as a debate about procedural fairness and gave three reasons for concluding that the issue of procedural fairness "is not material or is subsumed by the debate about access to justice":

1) The OSC proceedings did not bind the investors, who are free to commence a proposed class proceeding and seek its certification (para. 61).
2) The investors did not have the right to opt out of the OSC proceedings and they would have the right to opt out of class proceedings. Nevertheless, it is unlikely any member of the class would opt out, because a class proceeding would be the only viable means for them to exercise their private rights. Moreover, "it would be a pointless argument to suggest on behalf of the investors that a class proceeding provides procedural fairness and is the preferable procedure because one has the opportunity to opt out of it" (para. 62).
3) Procedural fairness considerations must include the fact that class members will not have their "day in court" in the conventional sense because it is only the representative plaintiff and class counsel who have a truly participatory role. The procedural fairness that justifies binding the class members to the outcome of the common issues trial or a negotiated settlement is only provided by proxy (para. 67).

66 These three factors - when properly analyzed - support, rather than militate against, a finding that a class action would be the preferable procedure for resolving the common issues raised by the class members' claims.

67 The fact that the OSC proceedings did not bind investors is a reflection of why it cannot be said that the investors have had access to justice. In the words of the motion judge, at para. 61: "the Defendants are not denying an investor's ability to seek private recourse through the court system." The only conclusion that could be drawn is that even the defendants contemplated the prospect of civil proceedings. The reasons for this are clear: no settlement on compensation was ever agreed to by the class members; nor was the matter of compensation adjudicated by any body of competent jurisdiction, such as might have the effect of limiting juridical recourse.

68 The motion judge's second reason also contains the recognition that a class action is the preferable procedure in light of the principle of access to justice. He observed that an individual action is not a viable process "given the small size of the individual claims and the difficulties of forensic proof" (para. 62). However, the motion judge concluded that because no one would want to opt out of the class action, the right to opt out is irrelevant to access to justice considerations.

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 order appointing a representative plaintiff to represent the absent class members. An OSC proceeding lacks this fundamental quality.

76 However, at para. 44, Molloy J. made the observation: "There may even be situations where it would be appropriate to consider the appropriateness of a class action in light of a prior settlement that resulted in substantial compensation for the plaintiffs, even if not reaching 100 cents on the dollar." In my view, this observation reflects the same error that the motion judge committed. In order to assess if a settlement reached through an alternative procedure resulted in "substantial compensation" to the plaintiffs, it would be necessary to consider some of the same criteria that a court takes into account in deciding whether to approve a settlement, such as the likelihood of recovery, the recommendation and experience of counsel, and the future expense, likely duration of the litigation and risk. Yet, as Molloy J. explained, these criteria should not be applied when deciding the issue of preferable procedure.

77 Moreover, because "substantial compensation" is a relative term, in order to determine if an amount was "substantial" it must be contextualized. This requires measuring the compensation awarded in the alternative forum against some other amount, such as the potential amount of damages available in the proposed class action lawsuit. However, at the certification stage, in most instances, no reliable yardstick is available because the amount recoverable in the proposed class proceeding would be as yet unknown. Put another way, the preferability analysis should not be reduced to an *ex post facto* assessment of the adequacy of the award arrived at through the alternative procedure.

78 An even more fundamental reason why the preferability analysis should not be conducted in this way is the fact that a certification motion is a procedural matter. It is not a determination of the merits of the dispute: see s. 5(5) of the *CPA*. An evaluation of the adequacy of a prior settlement as a basis for reaching a decision on preferability would require a determination that is tantamount to making a finding on the merits of the dispute. An evaluation of this sort would be a marked departure from the stipulation in *Hollick* that there need only be "some basis in fact" to ground the conclusion that a class proceeding is the preferable procedure. Indeed, as McLachlin C.J. stated in *Hollick* at para 16: "the certification stage is decidedly not meant to be a test of the merits of the action."

79 In my view, as stated above, the preferable procedure inquiry must instead focus on the underlying purpose and nature of the alternative proceeding as compared with the class proceeding.

The court must assess the capacity of the alternative procedure to adequately resolve the claims raised by the class members. The *CPA* mandates that this must be a procedural discussion. Hence the wording of the s. 5(1)(d), which provides "a class proceeding would be the preferable procedure for the resolution of the common issues".

V. Conclusion

80 In summary, the motion judge erred in principle by treating the negotiated payments that were made to investors in the OSC settlements as somehow eliminating the need to compare the purely regulatory function served by the OSC proceedings with the private remedial function to be played by the proposed class action. This fundamental error led the motion judge to wrongly dismiss as irrelevant important access to justice considerations, including that the OSC lacked the jurisdiction under its enabling provision of s. 127(1) of the *Securities Act* to decide the liability and damages issues raised in the private law action, as well as the consideration that the class members had no standing in the OSC proceedings and those proceedings were conducted behind closed doors.

81 Had the motion judge taken these considerations into account in his preferability analysis, it is clear from the balance of his reasons that he would have granted the order to certify the class action. As he said, at para. 273, "had the action been the preferable procedure, the appropriate thing to do would have been to certify the class action conditionally on the court approving a revised litigation plan."

82 Finally, I note that Molloy J. stated, at para. 58, that the motion judge "also erred by concluding that the test for preferable procedure could be met by a proceeding that had already been concluded. This was a fundamental error in principle." I do not agree with Molloy J. on this point as a general proposition.[1] It seems to me that the analysis of whether an alternative proceeding is preferable to a class proceeding will depend on a thorough consideration of the central characteristics of the alternative proceeding, rather than on whether the other proceeding has concluded, is pending or remains ongoing.

VI. Disposition

83 For these reasons, I would dismiss the appeal from the Divisional Court's order granting certification of the proposed class action, on the condition that the motion judge approves a revised litigation plan.

84 The parties may make written submissions on costs to be delivered within 10 days of the release of these reasons.

W.K. WINKLER C.J.O.
G.J. EPSTEIN J.A.:-- I agree.
G.I. PARDU J. (ad hoc):-- I agree.

cp/ln/e/qlacx/qljxr/qlmll/qlced/qlhcs/qlgpr/qlcas

1 As indicated in the reasons below, at para. 23, the three other defendants, IG Investment Management Ltd., Franklin Templeton Investments Corp. and AGF Funds Inc., entered into

settlements with the plaintiffs after the motion to certify the class action was denied at first instance.

2 Market timing, as discussed further, at para. 11, involves short-term trading of mutual fund securities to take advantage of short-term discrepancies between the "stale" values of securities in a mutual fund's portfolio and the current market value of the securities.

3 Four days' notice was given for the first hearing and three days' notice was given for the second hearing.

4 I will explain this specific point in more detail, at paras. 75-79.

5 McLachlin C.J. noted in *Hollick*, at para. 29, that s. 5(1)(d) of the *CPA* requires that a class action be the preferable procedure for "the resolution of the *common issues*" (emphasis added), rather than the preferable procedure for the resolution of the class members' claims. However, as she went on to explain, at para. 30, the question of preferability "must take into account the importance of the common issues in relation to the claims as a whole."

6 See *Fantl v. Transamerica Life Canada*, 2009 ONCA 377, 95 O.R. (3d) 767, at paras. 44-47.

7 As Molloy J. herself went on to note, at para. 59, she did "not wish to be taken as having ruled that the existence of a past settlement or a concluded proceeding relating to the same claims can never be taken into account at the certification stage."

TAB 14

Indexed as:

Garland v. Consumers' Gas Co.

Gordon Garland, appellant;
v.
Enbridge Gas Distribution Inc., previously known as Consumers' Gas Company Limited, respondent, and Attorney General of Canada, Attorney General for Saskatchewan, Toronto Hydro-Electric System Limited, Law Foundation of Ontario and Union Gas Limited, interveners.

[2004] 1 S.C.R. 629

[2004] S.C.J. No. 21

2004 SCC 25

File No.: 29052.

Supreme Court of Canada

Heard: October 9, 2003;
Judgment: April 22, 2004.

Present: Iacobucci, Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

(91 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Catchwords:

Restitution -- Unjust enrichment -- Late payment penalty -- Customers of regulated gas utility claiming restitution for unjust enrichment arising from late payment penalties levied by utility in excess of interest limit prescribed by s. 347 of Criminal Code -- Whether customers have claim for unjust enrichment -- Defences that can be mounted by utility to resist claim -- Whether other ancillary orders necessary.

Summary:

The respondent gas utility, whose rates and payment policies are governed by the Ontario Energy Board ("OEB"), bills its customers on a monthly basis, and each bill includes a due date for the payment of current charges. Customers who do not pay by the due date incur a late payment penalty ("LPP") calculated at five percent of the unpaid charges for that month. The LPP is a one-time penalty, and does not compound or increase over time. The appellant and his wife paid approximately $75 in LPP charges between 1983 and 1995. The appellant [page630] commenced a class action seeking restitution for unjust enrichment of LPP charges received by the respondent in violation of s. 347 of the *Criminal Code*. He also sought a preservation order. In a previous appeal to this Court, it was held that charging the LPPs amounted to charging a criminal rate of interest under s. 347 and the matter was remitted back to the trial court for further consideration. As the case raised no factual dispute, the parties brought cross-motions for summary judgment. The motions judge granted the respondent's motion for summary judgment, finding that the action was a collateral attack on the OEB's orders. The Court of Appeal disagreed, but dismissed the appellant's appeal on the grounds that his unjust enrichment claim could not be made out.

Held: The appeal should be allowed. The respondent is ordered to repay LPPs collected from the appellant in excess of the interest limit stipulated in s. 347 of the *Code* after the action was commenced in 1994 in an amount to be determined by the trial judge.

The test for unjust enrichment has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment. The proper approach to the juristic reason analysis is in two parts. The plaintiff must show that no juristic reason from an established category exists to deny recovery. The established categories include a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations. If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case. The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. Courts should have regard at this point to two factors: the reasonable expectations of the parties and public policy considerations.

Here, the appellant has a claim for restitution. The respondent received the monies represented by the LPPs and had that money available for use in the carrying on of its business. The transfer of those funds constitutes a benefit to the respondent. The parties are agreed that the second prong of the test has been satisfied. With respect to the third prong, the only possible juristic reason from an established category that could justify the enrichment [page631] in this case is the existence of the OEB orders creating the LPPs under the "disposition of law" category. The OEB orders, however, do not constitute a juristic reason for the enrichment because they are inoperative to the extent of their conflict with s. 347 of the *Criminal Code*. The appellant has thus made out a *prima facie* case for unjust enrichment.

The respondent's reliance on the orders is relevant when determining the reasonable expectations of the parties at the rebuttal stage of the juristic reason analysis even though it would not provide a defence if the respondent was charged under s. 347 of the *Code*. However, the overriding public policy consideration in this case is the fact that the LPPs were collected in contravention of the *Criminal Code*. As a matter of public policy, criminals should not be permitted to keep the proceeds of their crime. In weighing these considerations, the respondent's reliance on the inoperative OEB orders from 1981-1994, prior to the commencement of this action, provides a juristic reason for the

enrichment. After the action was commenced and the respondent was put on notice that there was a serious possibility its LPPs violated the *Criminal Code*, it was no longer reasonable to rely on the OEB rate orders to authorize the LPPs. Given that conclusion, it is only necessary to consider the respondent's defences for the period after 1994.

The respondent cannot avail itself of any defence. The change of position defence is not available to a defendant who is a wrongdoer. Since the respondent in this case was enriched by its own criminal misconduct, it should not be permitted to avail itself of the defence. Section 18 (now s. 25) of the *Ontario Energy Board Act* should be read down so as to exclude protection from civil liability damage arising out of *Criminal Code* violations. As a result, the defence does not apply in this case and it is not necessary to consider the constitutionality of the section.

This action does not constitute an impermissible collateral attack on the OEB's orders. The OEB does not have exclusive jurisdiction over this dispute, which is a private law matter under the competence of civil courts, nor does it have jurisdiction to order the remedy sought by the appellant. Moreover, the specific object of the action is not to invalidate or render inoperative the OEB's orders, but rather to recover money that was illegally [page632] collected by the respondent as a result of OEB orders. In order for the regulated industries defence to be available to the respondent, Parliament needed to have indicated, either expressly or by necessary implication, that s. 347 of the *Code* granted leeway to those acting pursuant to a valid provincial regulatory scheme. Section 347 does not contain any such indication.

The *de facto* doctrine does not apply in this case because it only attaches to government and its officials in order to protect and maintain the rule of law and the authority of government. An extension of the doctrine to a private corporation regulated by a government authority is not supported by the case law and does not further the doctrine's underlying purpose.

A preservation order is not appropriate in this case. The respondent has ceased to collect the LPPs at a criminal rate, so there would be no future LPPs to which a preservation order could attach. Even with respect to the LPPs paid between 1994 and the present, a preservation order should not be granted because it would serve no practical purpose, because the appellant has not satisfied the criteria in the Ontario *Rules of Civil Procedure*, and because *Amax* can be distinguished from this case. A declaration that the LPPs need not be paid would similarly serve no practical purpose and should not be made.

Cases Cited

Applied: Peter v. Beblow, [1993] 1 S.C.R. 980; explained: Pettkus v. Becker, [1980] 2 S.C.R. 834; Peel (Regional Municipality) v. Canada, [1992] 3 S.C.R. 762; referred to: Garland v. Consumers' Gas Co., [1998] 3 S.C.R. 112; Sprint Canada Inc. v. Bell Canada (1997), 79 C.P.R. (3d) 31; Ontario Hydro v. Kelly (1998), 39 O.R. (3d) 107; Mahar v. Rogers Cablesystems Ltd. (1995), 25 O.R. (3d) 690; Berardinelli v. Ontario Housing Corp., [1979] 1 S.C.R. 275; Sharwood & Co. v. Municipal Financial Corp. (2001), 53 O.R. (3d) 470; Rural Municipality of Storthoaks v. Mobil Oil Canada, Ltd., [1976] 2 S.C.R. 147; RBC Dominion Securities Inc. v. Dawson (1994), 111 D.L.R. (4th) 230; Rathwell v. Rathwell, [1978] 2 S.C.R. 436; Reference re Goods and Services Tax, [1992] 2 S.C.R. 445; Mack v. Canada (Attorney General) (2002), 60 O.R. (3d) 737; Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161; M & D Farm Ltd. v. Manitoba Agricultural Credit Corp., [1999] 2 S.C.R. 961; Transport North American Express Inc. v. New Solutions Financial Corp., [2004] 1 S.C.R. 249, [page633] 2004 SCC 7; Oldfield v. Transamerica Life Insurance Co. of Canada, [2002]

1 S.C.R. 742, 2002 SCC 22; Lipkin Gorman v. Karpnale Ltd., [1992] 4 All E.R. 512; Toronto (City) v. C.U.P.E., Local 79, [2003] 3 S.C.R. 77, 2003 SCC 63; Wilson v. The Queen, [1983] 2 S.C.R. 594; R. v. Litchfield, [1993] 4 S.C.R. 333; Attorney General of Canada v. Law Society of British Columbia, [1982] 2 S.C.R. 307; R. v. Jorgensen, [1995] 4 S.C.R. 55; Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721; Amax Potash Ltd. v. Government of Saskatchewan, [1977] 2 S.C.R. 576.

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Criminal Code, R.S.C. 1985, c. C-46, ss. 15, 347.

Municipal Franchises Act, R.S.O. 1990, c. M.55.

Ontario Energy Board Act, R.S.O. 1990, c. O.13, s. 18.

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B, s. 25.

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History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (2001), 57 O.R. (3d) 127, 208 D.L.R. (4th) 494, 152 O.A.C. 244, 19 B.L.R. (3d) 10, [2001] O.J. No. 4651 (QL), affirming a decision of the Superior Court of Justice (2000), 185 D.L.R. (4th) 536, [page634] [2000] O.J. No. 1354 (QL). Appeal allowed.

Counsel:

Michael McGowan, Barbara L. Grossman, Dorothy Fong and Christopher D. Woodbury, for the appellant.

Fred D. Cass, John D. McCamus and John J. Longo, for the respondent.

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Thomson Irvine, for the intervener the Attorney General for Saskatchewan.

Alan H. Mark and Kelly L. Friedman, for the intervener Toronto Hydro-Electric System Limited.

Mark M. Orkin, Q.C., for the intervener the Law Foundation of Ontario.

Patricia D. S. Jackson and M. Paul Michell, for the intervener Union Gas Limited.

The judgment of the Court was delivered by

1 **IACOBUCCI J.**:-- At issue in this appeal is a claim by customers of a regulated utility for restitution for unjust enrichment arising from late payment penalties levied by the utility in excess of the interest limit prescribed by s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46. More specifically, the issues raised include the necessary ingredients to a claim for unjust enrichment, the defences that can be mounted to resist the claim, and whether other ancillary orders are necessary.

2 For the reasons that follow, I am of the view to uphold the appellant's claim for unjust enrichment and therefore would allow the appeal.

I. Facts

3 The respondent Consumers' Gas Company Limited, now known as Enbridge Gas Distribution [page635] Inc., is a regulated utility which provides natural gas to commercial and residential customers throughout Ontario. Its rates and payment policies are governed by the Ontario Energy Board ("OEB" or "Board") pursuant to the *Ontario Energy Board Act*, R.S.O. 1990, c. O.13 ("*OEBA*"), and the *Municipal Franchises Act*, R.S.O. 1990, c. M.55. The respondent cannot sell gas or charge for gas-related services except in accordance with rate orders issued by the Board.

4 Consumers' Gas bills its customers on a monthly basis, and each bill includes a due date for the payment of current charges. Customers who do not pay by the due date incur a late payment penalty ("LPP") calculated at five percent of the unpaid charges for that month. The LPP is a one-time penalty, and does not compound or increase over time.

5 The LPP was implemented in 1975 following a series of rate hearings conducted by the OEB. In granting Consumers' Gas's application to impose the penalty, the Board noted that the primary purpose of the LPP is to encourage customers to pay their bills promptly, thereby reducing the cost to Consumers' Gas of carrying accounts receivable. The Board also held that such costs, along with any special collection costs arising from late payments, should be borne by the customers who cause them to be incurred, rather than by the customer base as a whole. In approving a flat penalty of five percent, the OEB rejected the alternative course of imposing a daily interest charge on overdue accounts. The Board reasoned that an interest charge would not provide sufficient incentive to pay by a named date, would give little weight to collection costs, and might seem overly complicated. The Board recognized that if a bill is paid very soon after the due date, the penalty would, if calculated as an interest charge, be a very high rate of interest. However, it noted that customers

could avoid such a charge by paying their bills on time, and that, in any event, in the case of the average [page636] bill the dollar amount of the penalty would not be very large.

6 The appellant Gordon Garland is a resident of Ontario and has been a Consumers' Gas customer since 1983. He and his wife paid approximately $75 in LPP charges between 1983 and 1995. In a class action on behalf of over 500,000 Consumers' Gas customers, Garland asserted that the LPPs violate s. 347 of the *Criminal Code*. That case also reached the Supreme Court of Canada, which held that charging the LPPs amounted to charging a criminal rate of interest under s. 347 and remitted the matter back to the trial court for further consideration (*Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112 ("*Garland No. 1*")). Both parties have now brought cross-motions for summary judgment.

7 The appellant now seeks restitution for unjust enrichment of LPP charges received by the respondent in violation of s. 347 of the *Code*. He also seeks a preservation order requiring Consumers' Gas to hold LPPs paid during the pendency of the litigation subject to possible repayment.

8 The motions judge granted the respondent's motion for summary judgment, finding that the action was a collateral attack on the OEB order. He dismissed the application for a preservation order. A majority of the Court of Appeal disagreed with the motions judge's reasons, but dismissed the appeal on the grounds that the appellant's unjust enrichment claim could not be made out.

II. Relevant Statutory Provisions

9 *Ontario Energy Board Act*, R.S.O. 1990, c. O.13

> **18.** An order of the Board is a good and sufficient defence to any proceeding brought or taken against any [page637] person in so far as the act or omission that is the subject of the proceeding is in accordance with the order.

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B

> **25.** An order of the Board is a good and sufficient defence to any proceeding brought or taken against any person in so far as the act or omission that is the subject of the proceeding is in accordance with the order.

Criminal Code, R.S.C. 1985, c. C-46

> **15.** No person shall be convicted of an offence in respect of an act or omission in obedience to the laws for the time being made and enforced by persons in *de facto* possession of the sovereign power in and over the place where the act or omission occurs.

> **347.** (1) Notwithstanding any Act of Parliament, every one who
>
> (*a*) enters into an agreement or arrangement to receive interest at a criminal rate, or
>
> (*b*) receives a payment or partial payment of interest at a criminal rate,

is guilty of

> (*c*) an indictable offence and is liable to imprisonment for a term not exceeding five years, or
>
> (*d*) an offence punishable on summary conviction and is liable to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding six months or to both.

III. Judicial History

A. *Ontario Superior Court of Justice* (2000), 185 D.L.R. (4th) 536

10 As this case raised no factual disputes, all parties agreed that summary judgment was the proper procedure on the motion. Winkler J. found that the appellant's claim could not succeed in law and that there was no serious issue to be tried. In so finding, he held that the "regulated industries defence" was not a complete defence to the claim. On his reading of the relevant case law, the dominant consideration was whether the express statutory [page638] language afforded a degree of flexibility to provincial regulators. Section 347 affords no such flexibility, so the defence is not available.

11 Nor, in Winkler J.'s view, did s. 15 of the *Criminal Code* act as a defence. Section 15 was a provision of very limited application, originally enacted to ensure that persons serving the Monarch *de facto* could not be tried for treason for remaining faithful to the unsuccessful claimant to the throne. While it could have a more contemporary application, it was limited on its face to actions or omissions occurring pursuant to the authority of a sovereign power. As the OEB was not a sovereign power, it did not apply.

12 Winkler J. found that the proposed action was a collateral attack on the OEB's orders. The *OEBA* indicated repeatedly that the OEB has exclusive control over matters within its jurisdiction. In addition, interested parties were welcome to participate in OEB hearings, and OEB orders were reviewable. The appellant did not avail himself of any of these opportunities, choosing instead to challenge the validity of the OEB orders in the courts. Winkler J. found that, unless attacked directly, OEB orders are valid and binding upon the respondent and its consumers. The OEB was not a party to the instant proceeding and its orders were not before the court. Winkler J. noted that the setting of rates is a balancing exercise, with LPPs being one factor under consideration. Applying *Sprint Canada Inc. v. Bell Canada* (1997), 79 C.P.R. (3d) 31 (Ont. Ct. (Gen. Div.)), *Ontario Hydro v. Kelly* (1998), 39 O.R. (3d) 107 (Gen. Div.), and *Mahar v. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690 (Gen. Div.), Winkler J. found that the instant action, although framed as a private dispute between two contractual parties, was in reality an impermissible collateral attack on the validity of OEB orders. It would be inappropriate for the court to determine matters that fall squarely within the OEB's jurisdiction. Moreover, this Court's decision in *Garland No. 1* with respect [page639] to s. 347 provided the OEB with ample legal guidance to deal with the matter.

13 In case he was incorrect in that finding, Winkler J. went on to find that s. 18 of the *OEBA* provided a complete defence to the proposed action. He held that s. 18 was constitutionally valid because it did not interfere with Parliament's jurisdiction over interest and the criminal law, or, to the extent that it did, the interference was incidental. Although the respondent did not strictly comply

with the OEB order in that it waived LPPs for some customers, this did not preclude the respondent from relying on s. 18.

14 In case that finding was also mistaken, Winkler J. went on to consider whether the appellant's claim for restitution was valid. The parties had conceded that the appellant had suffered a deprivation, and Winkler J. was satisfied that the respondent had received a benefit. However, he found that the OEB's rate order constituted a valid juristic reason for the respondent's enrichment.

15 Having reached those conclusions, Winkler J. declined to make a preservation order, as requested by the appellant, allowed the respondent's motion for summary judgment and dismissed the appellant's action. By endorsement, he ordered costs against the appellant.

B. *Ontario Court of Appeal* (2001), 208 D.L.R. (4th) 494

16 McMurtry C.J.O., for the majority, found that Winkler J. was incorrect in finding that there had been an impermissible collateral attack on a decision of the OEB because the appellant was not challenging the merits or legality of the OEB order or attempting to raise a matter already dealt with by the OEB. Rather, the proposed class action was based on the principles of unjust enrichment and raised issues over which the OEB had no [page640] jurisdiction. As such, the courts had jurisdiction over the proposed class action.

17 McMurtry C.J.O. further found that s. 25 of the 1998 *OEBA* (the equivalent provision to s. 18 of the 1990 *OEBA*) did not provide grounds to dismiss the appellant's action. He did not agree that the respondent's failure to comply strictly with the OEB orders made s. 25 inapplicable. Instead, he found that while s. 25 provides a defence to any proceedings in so far as the act or omission at issue is in accordance with the OEB order, legislative provisions restricting citizen's rights of action attract strict construction (*Berardinelli v. Ontario Housing Corp.*, [1979] 1 S.C.R. 275). The legislature could not reasonably be believed to have contemplated that an OEB order could mandate criminal conduct, and even wording as broad as that found in s. 25 could not provide a defence to an action for restitution arising from an OEB order authorizing criminal conduct. He noted that this decision was based on the principles of statutory interpretation, not on the federal paramountcy doctrine.

18 Section 15 of the *Criminal Code* did not provide the respondent with a defence, either. It was of limited application and is largely irrelevant in modern times. As for the "regulated industries defence", it did not apply because the case law did not indicate that a company operating in a regulatory industry could act directly contrary to the *Criminal Code*.

19 Nonetheless, McMurtry C.J.O. held that the appellant's unjust enrichment claim could not be made out. It had been conceded that the appellant suffered a deprivation, but McMurtry C.J.O. held that the appellant failed to establish the other two elements of the claim for unjust enrichment. While payment of money will normally be a benefit, McMurtry C.J.O. found that the payment of the late penalties in this case did not confer a benefit on the [page641] respondent. Taking the "straightforward economic approach" to the first two elements of unjust enrichment, as recommended in *Peter v. Beblow*, [1993] 1 S.C.R. 980, McMurtry C.J.O. noted that the OEB sets rates with a view to meeting the respondent's overall revenue requirements. If the revenue available from LPPs had been set lower, the other rates would have been set higher. Therefore, the receipt of the LPPs was not an enrichment capable of giving rise to a restitutionary claim.

20 In case that conclusion was wrong, McMurtry C.J.O. went on to find that there was a juristic reason for any presumed enrichment. Under this aspect of the test, moral and policy questions were open for consideration, and it was necessary to consider what was fair to both the plaintiff and the defendant. It was therefore necessary to consider the statutory regime within which the respondent operated. McMurtry C.J.O. noted that the respondent was required by statute to apply the LPPs; it had been ordered to collect them and they were taken into account when the OEB made its rate orders. He found that it would be contrary to the equities in this case to require the respondent to repay all the LPP charges collected since 1981. Such an order would affect all of the respondent's customers, including the vast majority who consistently pay on time.

21 The appellant argued that a preservation order was required even if his arguments on restitution were not successful because he could still be successful in arguing that the respondent could not enforce payment of the late penalties. As he had found no basis for ordering restitution, McMurtry C.J.O. saw no reason to make a preservation order. Moreover, the order requested would serve no practical purpose because it gave the respondent the right to spend the monies at stake. He dismissed the appeal and the appellant's action. In so doing, he agreed with the motions judge that the appellant's [page642] claims for declaratory and injunctive relief should not be granted.

22 As to costs, McMurtry C.J.O. found that there were several considerations that warranted overturning the order that the appellant pay the respondent's costs. First, the order required him to pay the costs of his successful appeal to the Supreme Court of Canada. Second, even though the respondent was ultimately successful, it failed on two of the defences it raised at the motions stage and three of the defences it raised at the Court of Appeal. Third, the proceedings raised novel issues. McMurtry C.J.O. found that each party should bear its own costs.

23 Borins J.A., writing in dissent, was of the opinion that the appeal should be allowed. He agreed with most of McMurtry C.J.O.'s reasons, but found that the plaintiff class was entitled to restitution. In his opinion, the motions judge's finding that the LPPs had enriched the respondent by causing it to have more money than it had before was supported by the evidence and the authorities. Absent material error, he held, it was not properly reviewable.

24 However, Borins J.A. found that the motions judge had erred in law in finding that there was a juristic reason for the enrichment. The motions judge had failed to consider the effect of the Supreme Court of Canada decision that the charges amount to interests at a criminal rate and that s. 347 of the *Criminal Code* prohibits the receipt of such interest. As a result of this decision, Borins J.A. felt that the rate orders ceased to have any legal effect and could not provide a juristic reason for the enrichment. A finding that the rate orders constituted a juristic reason for contravening s. 347 also allowed orders of a provincial regulatory authority to override federal criminal law and removed a substantial reason for compliance with s. 347. Thus, he held that allowing the respondent [page643] to retain the LPPs was contrary to the federal paramountcy doctrine.

25 According to Borins J.A., finding the OEB orders to constitute a juristic reason would also be contrary to the authorities which have applied s. 347 in the context of commercial obligations. This line of cases required consideration of when restitution should have been ordered and for what portion of the amount paid. Finally, it would allow the respondent to profit from its own wrongdoing.

26 Borins J.A. was not sympathetic to the respondent's claims that its change of position should allow it to keep the money it had collected in contravention of s. 347, even if it could have recovered the same amount of money on an altered rate structure. He also noted that, in his opinion, the

issue of recoverability should have been considered in the context of the class action, not on the basis of the representative plaintiff's claim for $75. Borins J.A. would have allowed the appeal, set aside the judgment dismissing the appellant's claim, granted partial summary judgment, and dismissed the respondent's motion for summary judgment. The appellant would have been required to proceed to trial with respect to damages. He would also have declared that the charging and receipt of LPPs by the respondent violates s. 347(1)(*b*) of the *Criminal Code* and that the LPPs need not be paid by the appellant, and would have ordered that the respondent repay the LPPs received from the appellant, as determined by the trial judge. He would also have ordered costs against the respondent.

27 It should be noted that on January 9, 2003, McLachlin C.J. stated the following constitutional question:

> Are s. 18 of the *Ontario Energy Board Act*, R.S.O. 1990, c. O.13, and s. 25 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, constitutionally inoperative [page644] by reason of the paramountcy of s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46?

As will be clear from the reasons below, I have found it unnecessary to answer the constitutional question.

IV. Issues

28 1. Does the appellant have a claim for restitution?

(a) Was the respondent enriched?
(b) Is there a juristic reason for the enrichment?

2. Can the respondent avail itself of any defence?

(a) Does the change of position defence apply?
(b) Does s. 18 (now s. 25) of the *OEBA* ("s. 18/25") shield the respondent from liability?
(c) Is the appellant engaging in a collateral attack on the orders of the Board?
(d) Does the "regulated industries" defence exonerate the respondent?
(e) Does the *de facto* doctrine exonerate the respondent?

3. Other orders sought by the appellant

(a) Should this Court make a preservation order?
(b) Should this Court make a declaration that the LPPs need not be paid?
(c) What order should this Court make as to costs?

[page645]

V. Analysis

29 My analysis will proceed as follows. First, I will assess the appellant's claim in unjust enrichment. Second, I will determine whether the respondent can avail itself of any defences to the appellant's claim. Finally, I will address the other orders sought by the appellant.

A. *Unjust Enrichment*

30 As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment (*Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 848; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 784). In this case, the parties are agreed that the second prong of the test has been satisfied. I will thus address the first and third prongs of the test in turn.

(a) Enrichment of the Defendant

31 In *Peel, supra*, at p. 790, McLachlin J. (as she then was) noted that the word "enrichment" connotes a tangible benefit which has been conferred on the defendant. This benefit, she writes, can be either a positive benefit, such as the payment of money, or a negative benefit, for example, sparing the defendant an expense which he or she would otherwise have incurred. In general, moral and policy arguments have not been considered under this head of the test. Rather, as McLachlin J. wrote in *Peter, supra*, at p. 990, "[t]his Court has consistently taken a straightforward economic approach to the first two elements of the test for unjust enrichment". Other considerations, she held, belong more appropriately under the third element -- absence of juristic reason.

32 In this case, the transactions at issue are payments of money by late payers to the respondent. It seems to me that, as such, under the "straightforward [page646] economic approach" to the benefit analysis, this element is satisfied. Winkler J. followed this approach and was satisfied that the respondent had received a benefit. "Simply stated", he wrote at para. 95, "as a result of each LPP received by Consumers' Gas, the company has more money than it had previously and accordingly is enriched."

33 The majority of the Court of Appeal for Ontario disagreed. McMurtry C.J.O. found that while payment of money would normally be a benefit, it was not in this case. He claimed to be applying the "straightforward economic approach" as recommended in *Peter, supra*, but accepted the respondent's argument that because of the rate structure of the OEB, the respondent had not actually been enriched. Because LPPs were part of a scheme designed to recover the respondent's overall revenue, any increase in LPPs was off-set by a corresponding decrease in regular rates. Thus McMurtry C.J.O. concluded, "[t]he enrichment that follows from the receipt of LPPs is passed on to all [Consumers' Gas] customers in the form of lower gas delivery rates" (para. 65). As a result, the real beneficiary of the scheme is not the respondent but is rather all of the respondent's customers.

34 In his dissent, Borins J.A. disagreed with this analysis. He would have held that where there is payment of money, there is little controversy over whether or not a benefit was received and since a payment of money was received in this case, a benefit was conferred on the respondent.

35 The respondent submits that it is not enough that the plaintiff has made a payment; rather, it must also be shown that the defendant is "in possession of a benefit". It argues that McMurtry C.J.O. had correctly held that the benefit had effectively been passed on to the respondent's custom-

ers, so the respondent could not be said to have retained the benefit. The appellant, on the other hand, maintains [page647] that the "straightforward economic approach" from *Peter, supra*, should be applied and any other moral or policy considerations should be considered at the juristic reason stage of the analysis.

36 I agree with the analysis of Borins J.A. on this point. The law on this question is relatively clear. Where money is transferred from plaintiff to defendant, there is an enrichment. Transfer of money so clearly confers a benefit that it is the main example used in the case law and by commentators of a transaction that meets the threshold for a benefit (see *Peel, supra*, at p. 790; *Sharwood & Co. v. Municipal Financial Corp.* (2001), 53 O.R. (3d) 470 (C.A.), at p. 478; P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (1990), at p. 38; Lord Goff and G. Jones, *The Law of Restitution* (6th ed. 2002), at p. 18). There simply is no doubt that Consumers' Gas received the monies represented by the LPPs and had that money available for use in the carrying on of its business. The availability of those funds constitutes a benefit to Consumers' Gas. We are not, at this stage, concerned with what happened to this benefit in the ongoing operation of the regulatory scheme.

37 While the respondent rightly points out that the language of "received and retained" has been used with respect to the benefit requirement (see, for example, *Peel, supra*, at p. 788), it does not make sense that it is a requirement that the benefit be retained permanently. The case law does, in fact, recognize that it might be unfair to award restitution in cases where the benefit was not retained, but it does so after the three steps for a claim in unjust enrichment have been made out by recognizing a "change of position" defence (see, for example, *Rural Municipality of Storthoaks v. Mobil Oil Canada, Ltd.*, [1976] 2 S.C.R. 147; *RBC Dominion Securities Inc. v. Dawson* (1994), 111 D.L.R. (4th) 230 (Nfld. C.A.)). Professor J. S. Ziegel, in his comment on the Ontario Court of Appeal decision in this case, "Criminal Usury, Class Actions and Unjust Enrichment in Canada" (2002), 18 *J. Cont. L.* 121, at p. 126, suggests that McMurtry C.J.O.'s reliance on the regulatory framework of the LPP [page648] in finding that a benefit was not conferred "was really a change of position defence". I agree with this assessment. Whether recovery should be barred because the benefit was passed on to the respondent's other customers ought to be considered under the change of position defence.

(b) Absence of Juristic Reason

(i) *General Principles*

38 In his original formulation of the test for unjust enrichment in *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, at p. 455 (adopted in *Pettkus, supra*, at p. 844), Dickson J. (as he then was) held in his minority reasons that for an action in unjust enrichment to succeed:

> ... the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason -- such as a contract or disposition of law -- for the enrichment.

39 Later formulations of the test by this Court have broadened the types of factors that can be considered in the context of the juristic reason analysis. In *Peter, supra*, at p. 990, McLachlin J. held that:

> It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are "unjust".

> ... The test is flexible, and the factors to be considered may vary with the situation before the court.

40 The "juristic reason" aspect of the test for unjust enrichment has been the subject of much academic commentary and criticism. Much of the discussion arises out of the difference between the ways in which the cause of action of unjust enrichment is conceptualized in Canada and in England. While both Canadian and English causes of action require an enrichment of the defendant and a [page649] corresponding deprivation of the plaintiff, the Canadian cause of action requires that there be "an absence of juristic reason for the enrichment", while English courts require "that the enrichment be unjust" (see discussion in L. Smith, "The Mystery of 'Juristic Reason'" (2000), 12 *S.C.L.R.* (2d) 211, at pp. 212-13). It is not of great use to speculate on why Dickson J. in *Rathwell, supra*, expressed the third condition as absence of juristic reason but I believe that he may have wanted to ensure that the test for unjust enrichment was not purely subjective in order to be responsive to Martland J.'s criticism in his reasons that application of the doctrine of unjust enrichment contemplated by Dickson J. would require "immeasurable judicial discretion" (p. 473). The importance of avoiding a purely subjective standard was also stressed by McLachlin J. in her reasons in *Peel, supra*, at p. 802, in which she wrote that the application of the test for unjust enrichment should not be "case by case 'palm tree' justice".

41 Perhaps as a result of these two formulations of this aspect of the test, Canadian courts and commentators are divided in their approach to juristic reason. As Borins J.A. notes in his dissent (at para. 105), while "some judges have taken the *Pettkus* formulation literally and have attempted to decide cases by finding a 'juristic reason' for a defendant's enrichment, other judges have decided cases by asking whether the plaintiff has a positive reason for demanding restitution". In his article, "The Mystery of 'Juristic Reason'", *supra*, which was cited at length by Borins J.A., Professor Smith suggests that it is not clear whether the requirement of "absence of juristic reason" should be interpreted literally to require that plaintiffs show the absence of a reason for the defendant to keep the enrichment or, as in the English model, the plaintiff must show a reason for reversing the transfer of wealth. Other commentators have argued that in fact there is no difference beyond semantics between the Canadian and English tests (see, for example, M. McInnes, "Unjust [page650] Enrichment -- Restitution -- Absence of Juristic Reason: *Campbell* v. *Campbell*" (2000), 79 *Can. Bar Rev.* 459).

42 Professor Smith argues that, if there is in fact a distinct Canadian approach to juristic reason, it is problematic because it requires the plaintiff to prove a negative, namely the absence of a juristic reason. Because it is nearly impossible to do this, he suggests that Canada would be better off adopting the British model where the plaintiff must show a positive reason that it would be unjust for the defendant to retain the enrichment. In my view, however, there is a distinctive Canadian approach to juristic reason which should be retained but can be construed in a manner that is responsive to Smith's criticism.

43 It should be recalled that the test for unjust enrichment is relatively new to Canadian jurisprudence. It requires flexibility for courts to expand the categories of juristic reasons as circumstances require and to deny recovery where to allow it would be inequitable. As McLachlin J. wrote in *Peel, supra*, at p. 788, the Court's approach to unjust enrichment, while informed by traditional categories of recovery, "is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice". But at the same time there must also be

guidelines that offer trial judges and others some indication of what the boundaries of the cause of action are. The goal is to avoid guidelines that are so general and subjective that uniformity becomes unattainable.

44 The parties and commentators have pointed out that there is no specific authority that settles this question. But recalling that this is an equitable remedy that will necessarily involve discretion and questions of fairness, I believe that some redefinition and reformulation is required. Consequently, in [page651] my view, the proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. By closing the list of categories that the plaintiff must canvass in order to show an absence of juristic reason, Smith's objection to the Canadian formulation of the test that it required proof of a negative is answered. The established categories that can constitute juristic reasons include a contract (*Pettkus, supra*), a disposition of law (*Pettkus, supra*), a donative intent (*Peter, supra*), and other valid common law, equitable or statutory obligations (*Peter, supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

45 The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.

46 As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstances of a case which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and [page652] that further cases will add additional refinements and developments.

47 In my view, this approach to the juristic reason analysis is consistent with the general approach to unjust enrichment endorsed by McLachlin J. in *Peel, supra*, where she stated that courts must effect a balance between the traditional "category" approach according to which a claim for restitution will succeed only if it falls within an established head of recovery, and the modern "principled" approach according to which relief is determined with reference to broad principles. It is also, as discussed by Professor Smith, *supra*, generally consistent with the approach to unjust enrichment found in the civil law of Quebec (see, for example, arts. 1493 and 1494 of the *Civil Code of Quebec*, S.Q. 1991, c. 64).

(ii) *Application*

48 In this case, the only possible juristic reason from an established category that could be used to justify the enrichment is the existence of the OEB orders creating the LPPs under the "disposition of law" category. The OEB orders, however, do not constitute a juristic reason for the enrichment because they are rendered inoperative to the extent of their conflict with s. 347 of the *Criminal Code*. The plaintiff has thus made out a *prima facie* case for unjust enrichment.

49 Disposition of law is well established as a category of juristic reason. In *Rathwell, supra*, Dickson J. gave as examples of juristic reasons "a contract or disposition of law" (p. 455). In *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445 ("*GST Reference*"), Lamer C.J. held that a valid statute is a juristic reason barring recovery in unjust enrichment. This was affirmed in *Peter, supra*, at p. 1018. Most recently, in *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737, the Ontario Court of Appeal held that the legislation which created the Chinese head tax provided a juristic reason which prevented recovery of the head tax in unjust [page653] enrichment. In the leading Canadian text, *The Law of Restitution, supra*, McCamus and Maddaugh discuss the phrase "disposition of law" from *Rathwell, supra*, stating, at p. 46:

> ... it is perhaps self-evident that an unjust enrichment will not be established in any case where enrichment of the defendant at the plaintiff's expense is required by law.

It seems clear, then, that valid legislation can provide a juristic reason which bars recovery in restitution.

50 Consumers' Gas submits that the LPPs were authorized by the Board's rate orders which qualify as a disposition of law. It seems to me that this submission is predicated on the validity and operability of this scheme. The scheme has been challenged by the appellant on the basis that it conflicts with s. 347 of the *Criminal Code* and, as a result of the doctrine of paramountcy, is consequently inoperative. In the *GST Reference, supra*, Lamer C.J. held that legislation provides a juristic reason "unless the statute itself is *ultra vires*" (p. 477). Given that legislation that would have been *ultra vires* the province cannot provide a juristic reason, the same principle should apply if the provincial legislation is inoperative by virtue of the paramountcy doctrine. This position is contemplated by Borins J.A. in his dissent when he wrote, at para. 149:

> In my view, it would be wrong to say that the rate orders do not provide [Consumers' Gas] with a defence under s. 18 of the *OEBA* because they have been rendered inoperative by the doctrine of federal paramountcy, and then to breathe life into them for the purpose of finding that they constitute a juristic reason for [Consumers' Gas's] enrichment.

51 As a result, the question of whether the statutory framework can serve as a juristic reason depends on whether the provision is held to be inoperative. If the [page654] OEB orders are constitutionally valid and operative, they provide a juristic reason which bars recovery. Conversely, if the scheme is inoperative by virtue of a conflict with s. 347 of the *Criminal Code*, then a juristic reason is not present. In my view, the OEB rate orders are constitutionally inoperative to the extent of their conflict with s. 347 of the *Criminal Code*.

52 The OEB rate orders require the receipt of LPPs at what is often a criminal rate of interest. Such receipt is prohibited by s. 347 of the *Criminal Code*. Both the OEB rate orders and s. 347 of the *Criminal Code* are *intra vires* the level of government that enacted them. The rate orders are *intra vires* the province by virtue of s. 92(13) (property and civil rights) of the *Constitution Act, 1867*. Section 347 of the *Criminal Code* is *intra vires* the federal government by virtue of s. 91(19) (interest) and s. 91(27) (criminal law power).

53 It should be noted that the Board orders at issue did not require Consumers' Gas to collect the LPPs within a period of 38 days. One could then make the argument that this was not an express

operational conflict. But to my mind this is somewhat artificial. I say this because at bottom it is a necessary implication of the OEB orders to require payment within this period. In that respect it should be treated as an express order for purposes of the paramountcy analysis. Consequently, there is an express operational conflict between the rate orders and s. 347 of the *Criminal Code* in that it is impossible for Consumers' Gas to comply with both provisions. Where there is an actual operational conflict, it is well settled that the provincial law is inoperative to the extent of the conflict (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961). As a result, the Board orders are constitutionally inoperative. Because the Board orders are constitutionally inoperative, they do not provide a juristic reason. It therefore falls to Consumers' Gas to show that there was a juristic reason for the enrichment [page655] outside the established categories in order to rebut the *prima facie* case made out by the appellant.

54 The second stage of juristic reason analysis requires a consideration of reasonable expectations of the parties and public policy considerations.

55 When the reasonable expectations of the parties are considered, Consumers' Gas's submissions are at first blush compelling. Consumers' Gas submits, on the one hand, that late payers cannot have reasonably expected that there would be no penalty for failing to pay their bills on time and, on the other hand, that Consumers' Gas could reasonably have expected that the OEB would not authorize an LPP scheme that violated the *Criminal Code*. Because Consumers' Gas is operating in a regulated environment, its reliance on OEB orders should be given some weight. An inability to rely on such orders would make it very difficult, if not impossible, to operate in this environment. At this point, it should be pointed out that the reasonable expectation of the parties regarding LPPs is achieved by restricting the LPPs to the limit prescribed by s. 347 of the *Criminal Code* and also would be consistent with this Court's decision in *Transport North American Express Inc. v. New Solutions Financial Corp.*, [2004] 1 S.C.R. 249, 2004 SCC 7.

56 Consumers' Gas's reliance on the orders would not provide a defence if it was charged under s. 347 of the *Criminal Code* because the orders are inoperative to the extent of their conflict with s. 347. However, its reliance on the orders is relevant in the context of determining the reasonable expectations of the parties in this second stage of the juristic reason analysis.

57 Finally, the overriding public policy consideration in this case is the fact that the LPPs were collected in contravention of the *Criminal Code*. As a matter of public policy, a criminal should not be permitted to keep the proceeds of his crime (*Oldfield v. Transamerica Life Insurance Co. of Canada*, [2002] 1 S.C.R. 742, 2002 SCC 22, at para. 11; [page656] *New Solutions, supra*). Borins J.A. focussed on this public policy consideration in his dissent. He held that, in light of this Court's decision in *Garland No. 1*, allowing Consumers' Gas to retain the LPPs collected in violation of s. 347 would let Consumers' Gas profit from a crime and benefit from its own wrongdoing.

58 In weighing these considerations, from 1981-1994, Consumers' Gas's reliance on the inoperative OEB orders provides a juristic reason for the enrichment. As the parties have argued, there are three possible dates from which to measure the unjust enrichment: 1981, when s. 347 of the *Criminal Code* was enacted, 1994, when this action was commenced, and 1998, when this Court held in *Garland No. 1* that the LPPs were limited by s. 347 of the *Criminal Code*. For the period between 1981 and 1994, when the current action was commenced, there is no suggestion that Consumers' Gas was aware that the LPPs violated s. 347 of the *Criminal Code*. This mitigates in favour of Consumers' Gas during this period. The reliance of Consumers' Gas on the OEB orders, in the absence

of actual or constructive notice that the orders were inoperative, is sufficient to provide a juristic reason for Consumers' Gas's enrichment during this first period.

59 However, in 1994, when this action was commenced, Consumers' Gas was put on notice of the serious possibility that it was violating the *Criminal Code* in charging the LPPs. This possibility became a reality when this Court held that the LPPs were in excess of the s. 347 limit. Consumers' Gas could have requested that the OEB alter its rate structure until the matter was adjudicated in order to ensure that it was not in violation of the *Criminal Code* or asked for contingency arrangements to be made. Its decision not to do this, as counsel for the appellant pointed out in oral submissions, was a "gamble". After the action was commenced and Consumers' Gas was put on notice that there was a serious possibility the LPPs violated the *Criminal Code*, it was no longer [page657] reasonable for Consumers' Gas to rely on the OEB rate orders to authorize the LPPs.

60 Moreover, once this Court held that LPPs were offside, for purposes of unjust enrichment, it is logical and fair to choose the date on which the action for redress commenced. Awarding restitution from 1981 would be unfair to the respondent since it was entitled to reasonably rely on the OEB orders until the commencement of this action in 1994. Awarding restitution from 1998 would be unfair to the appellant. This is because it would permit the respondent to retain LPPs collected in violation of s. 347 after 1994 when it was no longer reasonable for the respondent to have relied on the OEB orders and the respondent should be presumed to have known the LPPs violated the *Criminal Code*. Further, awarding restitution from 1998 would deviate from the general rule that monetary remedies like damages and interest are awarded as of the date of occurrence of the breach or as of the date of action rather than the date of judgment.

61 Awarding restitution from 1994 appropriately balances the respondent's reliance on the OEB orders from 1981-1994 with the appellant's expectation of recovery of monies that were charged in violation of the *Criminal Code* once the serious possibility that the OEB orders were inoperative had been raised. As a result, as of the date this action was commenced in 1994, it was no longer reasonable for Consumers' Gas to rely on the OEB orders to insulate them from liability in a civil action of this type for collecting LPPs in contravention of the *Criminal Code*. Thus, after the action was commenced in 1994, there was no longer a juristic reason for the enrichment of the respondent, so the appellant is entitled to restitution of the portion of monies paid to satisfy LPPs that exceeded an interest rate of 60 percent, as defined in s. 347 of the *Criminal Code*.

[page658]

B. *Defences*

62 Having held that the appellant's claim for unjust enrichment is made out for LPPs paid after 1994, it remains to be determined whether the respondent can avail itself of any defences raised. It is only necessary to consider the defences for the period after 1994, when the elements of unjust enrichment are made out, and thus I will not consider whether the defences would have applied if there had been unjust enrichment before 1994. I will address each defence in turn.

(a) Change of Position Defence

63 Even where the elements of unjust enrichment are made out, the remedy of restitution will be denied where an innocent defendant demonstrates that it has materially changed its position as a result of an enrichment such that it would be inequitable to require the benefit to be returned (*Storthoaks, supra*). In this case, the respondent says that any "benefit" it received from the unlawful charges was passed on to other customers in the form of lower gas delivery rates. Having "passed on" the benefit, it says, it should not be required to disgorge the amount of the benefit (a second time) to overcharged customers such as the appellant. The issue here, however, is not the ultimate destination within the regulatory system of an amount of money equivalent to the unlawful overcharges, nor is this case concerned with the net impact of these overcharges on the respondent's financial position. The issue is whether, as between the overcharging respondent and the overcharged appellant, the passing of the benefit on to other customers excuses the respondent of having overcharged the appellant.

64 The appellant submits that the defence of change of position is not available to a defendant who is a wrongdoer and that, since the respondent in this case was enriched by its own criminal misconduct, it should not be permitted to avail itself of the defence. I agree. The rationale for the change of position [page659] defence appears to flow from considerations of equity. G. H. L. Fridman writes that "[o]ne situation which would appear to render it inequitable for the defendant to be required to disgorge a benefit received from the plaintiff in the absence of any wrongdoing on the part of the defendant would be if he has changed his position for the worse as a result of the receipt of the money in question" (*Restitution* (2nd ed. 1992), at p. 458). In the leading British case on the defence, *Lipkin Gorman v. Karpnale Ltd.*, [1992] 4 All E.R. 512 (H.L.), Lord Goff stated (at p. 533):

> [I]t is right that we should ask ourselves: why do we feel that it would be unjust to allow restitution in cases such as these [where the defendant has changed his or her position]? The answer must be that, where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution.

65 If the change of position defence is intended to prevent injustice from occurring, the whole of the plaintiff's and defendant's conduct during the course of the transaction should be open to scrutiny in order to determine which party has a better claim. Where a defendant has obtained the enrichment through some wrongdoing of his own, he cannot then assert that it would be unjust to return the enrichment to the plaintiff. In this case, the respondent cannot avail itself of this defence because the LPPs were obtained in contravention of the *Criminal Code* and, as a result, it cannot be unjust for the respondent to have to return them.

66 Thus, the change of position defence does not help the respondent in this case. Even assuming that the respondent would have met the other requirements set out in *Storthoaks, supra*, the respondent cannot avail itself of the defence because it is not an "innocent" defendant given that the benefit was received as a result of a *Criminal Code* violation. It is not necessary, as a result, to discuss change of position in a comprehensive manner and I leave a [page660] fuller development of the other elements of this defence to future cases.

(b) Section 18/25 of the *Ontario Energy Board Act*

67 The respondent raises a statutory defence found formerly in s. 18 and presently in s. 25 of the 1998 *OEBA*. The former and the present sections are identical, and read:

> An order of the Board is a good and sufficient defence to any proceeding brought or taken against any person in so far as the act or omission that is the subject of the proceeding is in accordance with the order.

I agree with McMurtry C.J.O. that this defence should be read down so as to exclude protection from civil liability damage arising out of *Criminal Code* violations. As a result, the defence does not apply in this case and we do not have to consider the constitutionality of the section.

68 McMurtry C.J.O. was correct in his holding that legislative provisions purporting to restrict a citizen's rights of action should attract strict construction (*Berardinelli, supra*). In this case, I again agree with McMurtry C.J.O. that the legislature could not reasonably be believed to have contemplated that an OEB order could mandate criminal conduct, despite the broad wording of the section. Section 18/25, thus, cannot provide a defence to an action for restitution arising from an OEB order authorizing criminal conduct. As a consequence, like McMurtry C.J.O., I find the argument on s. 18/25 to be unpersuasive.

69 Because I find that it could not have been the intention of the legislature to bar civil claims stemming from acts that offend the *Criminal Code*, on a strict construction, s. 18/25 cannot protect Consumers' Gas from these types of claims. If the [page661] provincial legislature had wanted to eliminate the possibility of such actions, it should have done so explicitly in the provision. In the absence of such explicit provision, s. 18/25 must be read so as to exclude from its protection civil actions arising from violations of the *Criminal Code* and thus does not provide a defence for the respondent in this case.

(c) Exclusive Jurisdiction and Collateral Attack

70 McMurtry C.J.O. was also correct in his holding that the OEB does not have exclusive jurisdiction over this dispute. While the dispute does involve rate orders, at its heart it is a private law matter under the competence of civil courts and consequently the Board does not have jurisdiction to order the remedy sought by the appellant.

71 In addition, McMurtry C.J.O. is correct in holding that this action does not constitute an impermissible collateral attack on the OEB's order. The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000), at pp. 369-70). Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review). In *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599, this Court described the rule against collateral attack as follows:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked [page662] collaterally -- and a collateral attack may be

> described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

Based on a plain reading of this rule, the doctrine of collateral attack does not apply in this case because here the specific object of the appellant's action is not to invalidate or render inoperative the Board's orders, but rather to recover money that was illegally collected by the respondent as a result of Board orders. Consequently, the collateral attack doctrine does not apply.

72 Moreover, the appellant's case lacks other hallmarks of collateral attack. As McMurtry C.J.O. points out at para. 30 of his reasons, the collateral attack cases all involve a party, bound by an order, seeking to avoid the effect of that order by challenging its validity in the wrong forum. In this case, the appellant is not bound by the Board's orders, therefore the rationale behind the rule is not invoked. The fundamental policy behind the rule against collateral attack is to "maintain the rule of law and to preserve the repute of the administration of justice" (*R. v. Litchfield*, [1993] 4 S.C.R. 333, at p. 349). The idea is that if a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it.

73 In this case, the appellant is not the object of the orders and thus there can be no concern that he is seeking to avoid the orders by bringing this action. As a result, a threat to the integrity of the system does not exist because the appellant is not legally bound to follow the orders. Thus, this action does not appear, in fact, to be a collateral attack on the Board's orders.

[page663]

(d) The Regulated Industries Defence

74 The respondent submits that it can avail itself of the "regulated industries defence" to bar recovery in restitution because an act authorized by a valid provincial regulatory scheme cannot be contrary to the public interest or an offence against the state and, as a result, the collection of LPPs pursuant to orders issued by the OEB cannot be considered to be contrary to the public interest and thus cannot be contrary to s. 347 of the *Criminal Code*.

75 Winkler J. held that the underlying purpose of the defence, regulation of monopolistic industries in order to ensure "just and reasonable" rates for consumers, would be served in the circumstances and as a result the defence would normally apply. However, because of the statutory language of s. 347, Winkler J. determined that the defence was not permitted in this case. He wrote, at para. 34, "[t]he defendant can point to no case which allows the defence unless the federal statute in question uses the word 'unduly' or the phrase 'in the public interest'". Absent such recognition in the statute of "public interest", he held, no leeway for provincial exceptions exist.

76 I agree with the approach of Winkler J. The principle underlying the application of the defence is delineated in *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at p. 356:

> When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

Estey J. reached this conclusion after canvassing the cases in which the regulated industries defence had been applied. Those cases all involved conflict between federal competition law and a provincial regulatory scheme, but the application of the [page664] defence in those cases had to do with the particular wording of the statutes in question. While I cannot see a principled reason why the defence should not be broadened to apply to cases outside the area of competition law, its application should flow from the above enunciated principle.

77 Winkler J. was correct in concluding that, in order for the regulated industries defence to be available to the respondent, Parliament needed to have indicated, either expressly or by necessary implication, that s. 347 of the *Criminal Code* granted leeway to those acting pursuant to a valid provincial regulatory scheme. If there were any such indication, I would say that it should be interpreted, in keeping with the above principle, not to interfere with the provincial regulatory scheme. But s. 347 does not contain the required indication for exempting a provincial scheme.

78 This view is further supported by this Court's decision in *R. v. Jorgensen*, [1995] 4 S.C.R. 55. In that case, the accused was charged with "'knowingly' selling obscene material 'without lawful justification or excuse'" (para. 44). The accused argued that the Ontario Film Review Board had approved the videotapes, therefore it had a lawful justification or excuse. This Court considered whether approval by a provincial body could displace a criminal charge. Sopinka J., for the majority, held that in order to exempt acts taken pursuant to a provincial regulatory body from the reach of the criminal law, Parliament must unequivocally express this intention in the legislative provision in issue (at para. 118):

> While Parliament has the authority to introduce dispensation or exemption from criminal law in determining what is and what is not criminal, and may do so by authorizing a provincial body or official acting under provincial legislation to issue licences and the like, an intent to do so must be made plain.

[page665]

79 The question of whether the regulated industries defence can apply to the respondent is actually a question of whether s. 347 of the *Criminal Code* can support the notion that a valid provincial regulatory scheme cannot be contrary to the public interest or an offence against the state. In the previous cases involving the regulated industries defence, the language of "the public interest" and "unduly" limiting competition has always been present. The absence of such language from s. 347 of the *Criminal Code* precludes the application of this defence in this case.

(e) *De Facto* Doctrine

80 Consumers' Gas submits that because it was acting pursuant to a disposition of law that was valid at the time -- the Board orders -- they should be exempt from liability by virtue of the *de facto*

doctrine. This argument cannot succeed. Consumers' Gas is not a government official acting under colour of authority. While the respondent points to the Board orders as justification for its actions, this does not bring the respondent into the purview of the *de facto* doctrine because the case law does not support extending the doctrine's application beyond the acts of government officials. The underlying purpose of the doctrine is to preserve law and order and the authority of the government. These interests are not at stake in the instant litigation. As a result, Consumers' Gas cannot rely on the *de facto* doctrine to resist the plaintiff's claim.

81 Furthermore, the *de facto* doctrine attaches to government and its officials in order to protect and maintain the rule of law and the authority of government. An extension of the doctrine to a private corporation that is simply regulated by a government authority is not supported by the case law and in my view does not further the underlying purpose of the doctrine. In *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, this Court held, at p. 756, that:

[page666]

> There is only one true condition precedent to the application of the doctrine: the *de facto* officer must occupy his or her office under colour of authority.

It cannot be said that Consumers' Gas was a *de facto* officer acting under colour of authority when it charged LPPs to customers. Consumers' Gas is a private corporation acting in a regulatory context, not an officer vested with some sort of authority. When charging LPPs, Consumers' Gas is engaging in commerce, not issuing a permit or passing a by-law.

82 In rejecting the application of the *de facto* doctrine here, I am cognizant of the passage in *Reference re Manitoba Language Rights*, at p. 757, cited by the intervener Toronto Hydro and which, at first glance, appears to imply that the *de facto* doctrine might apply to private corporations:

> ... the *de facto* doctrine will save those rights, obligations and other effects which have arisen out of actions performed pursuant to invalid Acts of the Manitoba Legislature by public and private bodies corporate, courts, judges, persons exercising statutory powers and public officials. [Emphasis added.]

83 While this passage appears to indicate that "private bodies corporate" are protected by the doctrine, it must be read in the context of the entire judgment. Earlier, at p. 755, the Court referred to the writings of Judge A. Constantineau in *The De Facto Doctrine* (1910), at pp. 3-4. The following excerpt from that passage is relevant:

> The de facto doctrine is a rule or principle of law which ... recognizes the existence of, and protects from collateral attack, public or private bodies corporate, which, though irregularly or illegally organized, yet, under color of law, openly exercise the powers and functions of regularly created bodies ... . [Emphasis added.]

In this passage, I think it is clear that the Court's reference to "private bodies corporate" is limited to issues affecting the creation of the corporation, for example where a corporation was incorporated under an invalid statute. It does not suggest that the acts [page667] of the corporation are shielded from liability by virtue of the *de facto* doctrine.

84 This view finds further support in the following passage from the judgment (at p. 755) :

> That the foundation of the principle is the more fundamental principle of the rule of law is clearly stated by Constantineau in the following passage (at pp. 5-6):
>
> > Again, the doctrine is necessary to maintain the supremacy of the law and to preserve peace and order in the community at large, since any other rule would lead to such uncertainty and confusion, as to break up the order and quiet of all civil administration. Indeed, if any individual or body of individuals were permitted, at his or their pleasure, to challenge the authority of and refuse obedience to the government of the state and the numerous functionaries through whom it exercises its various powers, or refuse to recognize municipal bodies and their officers, on the ground of irregular existence or defective titles, insubordination and disorder of the worst kind would be encouraged, which might at any time culminate in anarchy.

The underlying purpose of the doctrine is to preserve law and order and the authority of the government. These interests are not at stake in the instant litigation. In sum, I find no merit in Consumers' Gas's argument that the *de facto* doctrine shields it from liability and as a result this doctrine should not be a bar to the appellant's recovery.

C. *Other Orders Requested*

(a) Preservation Order

85 The appellant, Garland, requests an "*Amax*-type" preservation order on the basis that the LPPs continue to be collected at a criminal rate during the pendency of this action, and these payments would never have been made but for the delays inherent in litigation (*Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576). In my view, however, a preservation order is not appropriate in this case. Consumers' Gas has now ceased to collect the LPPs at a criminal rate. As a result, if a preservation order were made, there would be no future [page668] LPPs to which it could attach. Even with respect to the LPPs paid between 1994 and the present, to which such an order could attach, a preservation order should not be granted for three further reasons: (1) such an order would serve no practical purpose, (2) the appellant has not satisfied the criteria in the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and (3) *Amax* can be distinguished from this case.

86 First, the appellant has not alleged that Consumers' Gas is an impecunious defendant or that there is any other reason to believe that Consumers' Gas would not satisfy a judgment against it. Even if there were some reason to believe that Consumers' Gas would not satisfy such a judgment, an *Amax*-type order allows the defendant to spend the monies being held in the ordinary course of business -- no actual fund would be created. So the only thing that a preservation order would achieve would be to prevent Consumers' Gas from spending the money earned from the LPPs in a non-ordinary manner (for example, such as moving it off-shore) which the appellant has not alleged is likely to occur absent the order.

87 Second, the respondent submits that by seeking a preservation order the appellant is attempting to avoid Rule 45.02 of the Ontario *Rules of Civil Procedure*, the only source of jurisdiction in Ontario to make a preservation order. The *Rules of Civil Procedure* apply to class proceedings and do not permit such an order in these circumstances. Rule 45.02 provides that, "[w]here the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just" (emphasis added). The respondent submits that the appellant is not in fact claiming a specific fund here. In the absence of submissions by the appellant on this issue, I am of the view that the appellant has not satisfied the criteria set out in the Ontario *Rules of Civil Procedure* and that this Court could refuse to grant the order requested on this basis.

[page669]

88 Finally, the appellant's use of *Amax, supra*, as authority for the type of order sought is without merit. The appellant has cited the judgment very selectively. The portion of the judgment the appellant cites in his written submissions reads in full (at p. 598) :

> Apart from the Rules this Court has the discretion to make an order as requested by appellants directing the Province of Saskatchewan to hold, as stakeholder, such sums as are paid by the appellants pursuant to the impugned legislation but with the right to use such sums in the interim for Provincial purposes, and with the obligation to repay them with interest in the event the legislation is ultimately held to be *ultra vires*. Such an order, however, would be novel, in giving the stakeholder the right to spend the moneys at stake, and I cannot see that it would serve any practical purpose. [Emphasis added.]

The Court in *Amax* went on to refuse to make the order. So while the appellant is right that the Court in *Amax* failed to reject the hypothetical possibility of making such an order in the future, it seems to me that in this case, as in *Amax*, such an order would serve no practical purpose. For these reasons, I find there is no basis for making a preservation order in this case.

(b) Declaration That the LPPs Need Not Be Paid

89 The appellant also seeks a declaration that the LPPs need not be paid. Given that the respondent asserts that the LPP is no longer charged at a criminal rate, issuing such a declaration would serve no practical purpose and as a result such a declaration should not be made.

(c) Costs

90 The appellant is entitled to his costs throughout. This should be understood to mean that, regardless of the outcome of any future litigation, the appellant is entitled to his costs in the proceedings leading up to and including *Garland No. 1* and this appeal. In addition, in oral submissions counsel for the Law Foundation of Ontario made the point that in order to reduce costs in future class actions, "litigation by installments", as occurred in this case, should be [page670] avoided. I agree. On this issue, I endorse the comments of McMurtry C.J.O., at para. 76 of his reasons:

> In this context, I note that the protracted history of these proceedings cast some doubt on the wisdom of hearing a case in instalments, as was done here. Before employing an instalment approach, it should be considered whether there is potential for such a procedure to result in multiple rounds of proceedings through various levels of court. Such an eventuality is to be avoided where possible, as it does little service to the parties or to the efficient administration of justice.

VI. Disposition

91 For the foregoing reasons, I would allow the appeal with costs throughout, set aside the judgment of the Ontario Court of Appeal, and substitute therefor an order that Consumers' Gas repay LPPs collected from the appellant in excess of the interest limit stipulated in s. 347 after the action was commenced in 1994 in an amount to be determined by the trial judge.

Solicitors:

Solicitors for the appellant: McGowan Elliott & Kim, Toronto.

Solicitors for the respondent: Aird & Berlis, Toronto.

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

Solicitor for the intervener the Attorney General for Saskatchewan: Deputy Attorney General for Saskatchewan, Regina.

Solicitors for the intervener Toronto Hydro-Electric System Limited: Ogilvy Renault, Toronto.

Solicitor for the intervener the Law Foundation of Ontario: Mark M. Orkin, Toronto.

[page671]

Solicitors for the intervener Union Gas Limited: Torys, Toronto.

cp/e/qw/qllls

TAB 15

Case Name:

Kidd v. Canada Life Assurance Co.

Between
David Kidd, Alexander Harvey, Jean Paul Marentette, Garry C. Yip, Louie Nuspl, Susan Henderson and Lin Yeomans, Plaintiffs, and
The Canada Life Assurance Company, A.P. Symons, D. Allen Loney and James R. Grant, Defendants
PROCEEDING UNDER the Class Proceedings Act, 1992

[2011] O.J. No. 4751

2011 ONSC 6324

22 C.P.C. (7th) 156

93 C.C.P.B. 211

207 A.C.W.S. (3d) 406

2011 CarswellOnt 11407

Court File No. 05-CV-287556CP

Ontario Superior Court of Justice

P.M. Perell J.

Heard: October 18, 2011.
Judgment: October 26, 2011.

(103 paras.)

Civil litigation -- Civil procedure -- Parties -- Standing -- Class or representative actions -- Certification -- Settlements -- Application by the plaintiffs to certify a class action pertaining to their pension plan for settlement purposes allowed -- Current employee objected to the certification application and to the settlement -- Employee did not have standing to participate in the certification motion -- Even if she did have standing, granting her request would undermine the settlement approval process -- Conditions for certification were satisfied.

Application by the plaintiffs to certify a class action for settlement purposes. The action was commenced in 2005. The defendants were Canada Life Assurance Company and the trustees of the Canada Life Canadian Employees' Pension Plan. The plaintiffs made three major claims. One claim concerning the ownership of the surplus assets of the Pension Plan. The second claim concerned the payment out of surplus funds to certain groups of employees whose participation in the Pension Plan was terminated and who had a claim for a partial winding-up of the Pension Plan. The third claim concerned negating Canada Life's alleged entitlement to be reimbursed for incurring expenses on behalf of the Pension Plan. After many years of negotiating, the parties reached a settlement. A current Canada Life employee named McEarchern objected to the settlement. She did not object to the certification but she claimed that the current Canada Life employees could not be fairly represented by the nominated representative plaintiffs, who she claimed were in a conflict of interest because they were parties to the proposed settlement and they endorsed it. McEarchern wanted a new subclass to be constituted. This subclass would consist of current Canada Life employees, who could then obtain independent advice about the settlement.

HELD: Application allowed. McEarchern did not have standing to participate in the certification motion and she was not entitled to intervener or are necessary party status. Even if she had standing and the right to apply for the creation of a new subclass, there was no conflict of interest that required an adjustment to the composition of the class and subclasses. Granting her request would undermine the settlement approval process. The conditions for certification were satisfied and the action was certified as requested by the plaintiffs. Any objections that McEarchern had about the settlement could be dealt with at the settlement approval hearing.

Statutes, Regulations and Rules Cited:

R

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5(1), s. 5(1) (a), s. 5(1)(b), s. 5(1)(c), s. 5(1)(d), s. 5(1)(e), s. 5(2), s. 15(2), s. 29(4), s. 31(2)

Pension Benefits Act, R.S.O. 1990, c. P.8,

Counsel:

M. Zigler, C. Godkewitsch, A. Guindon, D.B. Williams and J. Foreman for the Plaintiffs David Kidd, Alexander Harvey, Jean Paul Marentette, Susan Henderson and Lin Yeomans.

D. Brown for the Plaintiffs Garry C. Yip and Louie Nuspl.

J. Galway for the Defendant The Canada Life Assurance Company.

L. Reesor for the Defendants A.P. Symons, D. Allen Loney and James R. Grant.

C.A.B. Ferris for the Objector Brenda McEachern.

REASONS FOR DECISION

P.M. PERELL J.:--

A. INTRODUCTION AND OVERVIEW

1 In 2005, David Kidd, Alexander Harvey, and Jean Paul Marentette brought a proposed class action under the *Class Proceedings Act, 1992*, S.O. 1992 against Canada Life Assurance Company and against A.P. Symons, D. Allen Loney and James R. Grant, who are the trustees of the Canada Life Canadian Employees' Pension Plan. Messrs. Kidd, Harvey, and Marentette are proposed as Representative Plaintiffs, and since 2005, they have been joined by Garry C. Yip, Louie Nuspl, Susan Henderson, and Lin Yeomans as additional proposed Representative Plaintiffs.

2 The Plaintiffs make three major claims. One claim concerns the ownership of the surplus assets of the Pension Plan. The Plaintiffs plead that amendments to the Pension Plan concerning the reversion of surplus assets to Canada Life on Plan and Fund termination are unlawful and are of no force or effect. The second claim concerns the payment out of surplus funds to certain groups of employees whose participation in the Pension Plan was terminated and who have a claim for a partial winding-up of the Pension Plan. The third claim concerns negating Canada Life's alleged entitlement to be reimbursed for incurring expenses on behalf of the Pension Plan. The Plaintiffs plead that Canada Life should restore monies, estimated to be in excess of $41 million.

3 After many years of negotiating, the parties have reached a settlement known as the Surplus Settlement Agreement.

4 After an elaborate and untypical process to obtain the direct approval of the putative Class Members to the Surplus Settlement Agreement, the parties take the first step to implementing their settlement, which is this motion for a consent certification of the action for settlement purposes. Untypically and perhaps without precedent, the proposed Class Members have voted for or against the settlement. Assuming certification, a settlement approval hearing under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 and regulatory approvals under pension legislation will be sought.

5 However, Brenda McEachern, a current Canada Life employee, and a putative Class Member, has filed an objection to the certification of the action and to its settlement in accordance with the Surplus Settlement Agreement. Participation of a proposed Class Member at a certification hearing is also untypical.

6 Ms. McEachern does not object so much to certification but rather submits that the current Canada Life employees cannot be fairly represented by the currently nominated Representative Plaintiffs, who are allegedly in a position of conflict of interest with respect to the settlement that they have endorsed. She requests that a new subclass be constituted and that Daryl Clegg, another active employee of Canada Life, be appointed a Representative Plaintiff for the subclass of current Canada Life employees, who then can obtain independent advice about the settlement.

7 The Defendants, but not the Plaintiffs, take the position that Ms. McEachern does not have standing to participate in the certification motion and that her rights are either to opt-out of the class action or to accept certification and then object to the approval of the settlement, as she may be advised. The Defendants also submit that there is no genuine conflict that requires the creation of an additional subclass for the current Canada Life employees and that if a subclass is necessary, then Wilbert Antler should be the Representative Plaintiff for the subclass. Mr. Antler has been involved in the settlement negotiations with the other proposed Representative Plaintiffs from the outset.

8 The position of the proposed Representative Plaintiffs and proposed Class Counsel is that they do not oppose Ms. McEachern having standing on the certification motion, but they join cause with the Defendants in submitting that Ms. McEachern should either (a) opt-out; or, (b) accept certification -- without the creation of a new subclass -- and that she should take her grievances about the settlement to the settlement approval hearing, where there is no doubt that she would have standing. In the alternative, they also support the appointment of Mr. Antler as a Representative Plaintiff.

9 For the Reasons that follow, it is my conclusion that Ms. McEachern does not have standing to participate in the certification motion and that she ought not to be granted what would amount to intervener or necessary party status.

10 Assuming, however, that she has standing and the right to apply for the creation of a new subclass, then, in my opinion, for the purposes of certification, there is no conflict of interest that requires an adjustment to the composition of the class and subclasses. In my opinion, Ms. McEachern's genuine grievance is not about representation but rather about the fairness of the settlement, and her objections about the formation and substance of the settlement can be raised at the settlement approval hearing, providing that she does not opt-out of the class.

11 Further, I am satisfied that the conditions for certification are satisfied, and, therefore, I certify this action as a class action for settlement purposes. Ms. McEachern's objection to the settlement and whether the settlement should be approved will be the subject matter of the settlement approval hearing, which is to be scheduled with appropriate notice to Ms. McEachern and the others who may wish to oppose the settlement.

B. FACTUAL BACKGROUND

1. *Pension Plan Agreements*

12 The original trust agreement for a Pension Plan for Canada Life employees was established on December 31, 1964. Canada Life is the sponsor and administrator of the Pension Plan. The Plan is funded through a trust agreement between Canada Life and the Trustees of the Fund. The individually-named defendants, A.P. Symons, D. Allen Loney and James R. Grant, are the current Trustees of the Fund.

13 Article 8(b) of the 1964 Trust Agreement prohibited any amendments by the Trustees that would result in the return of any portion of the Fund to Canada Life. However, article 10(c) of the 1964 Trust Agreement stated that if the Trust Fund was ever dissolved, any monies remaining in the Fund after paying for all the annuities and deferred annuities were to be returned to Canada Life. But, effective 1965, article 10(c) was amended to preclude the reversion of trust assets upon dissolution of the fund.

14 In 1989, a consolidated and restated Trust Agreement precluded any amendment to the trust agreement that would result in the return of any portion of the fund to Canada Life. Nevertheless, in or about December 31, 1993, changes were made to the 1989 Trust Agreement. Article 8 was revised under the 1993 Trust Agreement to read:

> The Company may at any time, by instrument in writing and with notice to the Trustees, alter or modify any or all of the provisions of the Trust Deed, provided that, no alteration or modification shall increase the Clause 4 Duties, or the liabilities of the Trustees, without their prior written consent.

Despite this change, Article 10 was not amended and continued to provide that should the Plan be dissolved, the Trustees are to use any surplus to purchase additional annuities for employees and pensioners.

15 Effective January 1, 1997, the Plan was merged with The Canada Life Assurance Company Trusteed Canadian Staff Pension Fund (1958) and The Canada Life Assurance Company Trusteed Canadian Agents' Pension Fund. A single "consolidated" Plan was created, and the associated funds were merged into a single fund. The 1997 Plan contained new provisions relating to surplus assets in the Pension Fund. Sections 4.02(c) and 17.06 state:

> *Application of Surplus Assets*
>
> 4.02(c) In the event there are Surplus Assets in the Pension Fund, according to the actuarial valuation report referred to in paragraph (a) above, the Company may, at its discretion, use such Surplus Assets or a portion thereof to offset the amount of Company contributions referred to in paragraph (a) above.
>
> *Surplus Assets*
>
> 17.06 If, after payment of all accrued benefits under the Plan as described in Section 5 (Retirement Benefits), Section 6 (Indexation of Pensions), Section 8 (Benefits on Termination of Employment), Section 9 (Pre-Retirement Death Benefits) and Section 10 (Benefits on Disability) to Members or Field Management Members, their respective Spouses, Beneficiaries and estates and payment of all expenses has been made, there remain Surplus Assets in the Pension Fund, such Surplus Assets **shall revert to the Company or be used as the Company may direct,** subject to the provisions of the Pension Benefits Act and the Income Tax Act. [emphasis added]

16 Article 10 of the 1997 Trust Agreement, however, still required that on dissolution or wind-up, any additional funds that are not required to pay for the annuities and deferred annuities accrued under the Plan, are to be used to increase the annuities or deferred annuities of the Plan members.

17 The Trust Agreement was again restated effective August 7, 2002 (the "2002 Trust Agreement"), and article 13 provides:

> If the Plan is discontinued, in whole or in part, the assets of the Plan shall be distributed in accordance with the directions of the person who is the Plan Administrator for the purposes of the *Pension Benefits Act* (Ontario) provided that such Plan Administrator certifies to the Trustees that such distributions are in accordance with the terms of the Plan and any applicable approvals from the federal and/or provincial pension regulatory authorities that may be required under applicable federal and/or provincial pension legislation, regulations, policies and administrative practices.

18 The most recent restated Plan text effective January 1, 2003 (the "2003 Plan") contains identical provisions with respect to reversion of surplus as contained in article 17.06 of the 1997 Plan.

19 The Plaintiffs claim that the 1997 amendments and other amendments relating to the possibility of reversion of surplus assets to Canada Life on Plan and Fund termination are unlawful, and of no force or effect.

2. *Plan Expenses*

20 The 1964 Trust Agreement provided in article 7 that Canada Life shall pay all costs and expenses in connection with the Fund. At a date unknown to the Plaintiffs, between 1964 and 1988, expenses related to the investment and administration of the Fund began to be charged to the Fund.

21 Under articles 4 and 5 of the 1993 Trust Agreement, the responsibility of payment for costs and expenses changed. These provisions required the Trustees to reimburse the Company for charges incurred in the operation of the Plan and the Fund (the "Plan Expense Amendments").

22 The 2002 Trust Agreement requires at Article 8(i) that the Trustees reimburse the Plan administrator for:

> any reasonable charges, fees, taxes and other expenses, including without limitation any internal expenses of the Plan Administrator and the usual reasonable expenses of any agents of the Plan Administrator incurred in the operation, review, design, amendment and administration of the Plan and investment of the Fund ...

23 The most recent restated Plan text is the 2003 Plan; it contains the following provision:

> *Plan Expenses*
>
> 14.05 All reasonable charges, fees, taxes and other expenses, including, without limitation, any internal expenses of the Plan administrator and the usual and reasonable expenses of any agents of the Plan Administrator, incurred in the operation, review, design, amendment and administration of the Plan and the Trust Agreement or the review, administration, use and investment of the Pension Fund, including Surplus Assets, shall be paid from the Pension Fund unless paid directly by the Company. The Trustee shall, if requested, by the Company, reimburse the Company out of the Pension Fund for any such charges, fees, taxes and other expenses which the Company pays directly.

24 Documents filed with the Financial Services Commission of Ontario disclose the following summary of total costs and expenses charged to the Fund since 1987:

Year	*Total Costs and Expenses*
1987	$2,987,000 (partial amount only)
1988	$3,370,000 (partial amount only)
1989	$4,529,000 (partial amount only)
1990	not available
1991	not available

1992	not available
1993	not available
1994	$2,542,000
1995	$1,734,000
1996	$2,055,000
1997	$2,345,000
1998	$2,342,000
1999	$3,692,000
2000	$4,937,000
2001	$4,344,000
2002	$3,356,000
2003	$2,848,000

25 The Plaintiffs plead that the Plan Expense Amendments were and are contrary to the 1964 and 1989 Trust Agreements, which preclude any portion of the Fund being returned to the Company. The Plaintiffs alleged that the Plan Expense Amendments constitute a partial revocation and breach of trust.

3. *Partial Wind-Ups*

26 Indago Capital Management Inc., a subsidiary of the Company whose employees participated in the Plan, merged with Laketon Investment Management Ltd., effective February 26, 1999. As a result of the merger, 14 employees of Indago, were terminated from employment with the Company. To date, no partial wind-up of the Plan in respect of the termination of the 14 employees of Indago has been declared by the Company. Sue Henderson is a former member of the Pension Plan, and worked for Indago between April 4, 1998 and March 3, 1999. She is the proposed Representative Plaintiff for the Indago Subclass that has a claim for a partial winding-up.

27 Between November 1, 1999 and February 28, 2001, 37 employees of Adason Properties Limited, a subsidiary of the Company) were terminated. The Company has not declared a partial wind-up of the Plan in relation to this termination of employees of Adason to date. Garry Yip and Louie Nuspl are both former members of the Pension Plan. Mr. Yip was employed by Adason between February 18, 1985 and February 9, 2001. Mr. Nuspl was employed by Adason between January 27, 1986 and February 9, 2001. Messrs. Yip and Nuspl are the proposed Representative Plaintiffs for the Adason Subclass that has a claim for a partial winding-up.

28 Employees of Pelican Food Services Limited, a subsidiary of the Company, participated in the Plan. In January of 2001, Canada Life decided to outsource food services, and as a result, 38 employees of Pelican were terminated from employment. No partial wind-up of the Plan has been declared in relation to the termination of former Pelican employees. Lin Yeomans is a former member of the Pension Plan, and was employed by Pelican between November 24, 1984 and December 31, 2000. Mr. Yeomans and two other former employees of Pelican met with lawyers at Koskie Minsky LLP on November 26, 2007 and subsequently retained Koskie Minsky LLP and Harrison Pensa LLP to seek a partial wind-up of the Plan in respect of former Plan members whose employment with Pelican was terminated as a result of the outsourcing of Pelican's food services. Mr. Yeomans is the proposed Representative Plaintiff for the Pelican Subclass.

29 A partial wind-up of the Plan within the meaning of the *Pension Benefits Act*, R.S.O. 1990, ch. P.8 was declared as of July 10, 2003 by Canada Life in relation to members of the Plan who were

terminated from, retired or resigned voluntarily from the Company as a result of the integration with The Great-West Life Assurance Company ("The Integration Partial Wind-up").

30 Canada Life's Partial Wind-up Report discloses an estimated partial wind-up surplus of $92,994,000 attributable to the Integration Partial Wind-Up as of June 30, 2005. The Report, however, does not make any proposal to the Integration Partial Wind-Up participants concerning surplus sharing.

31 Messrs. Kidd, Harvery, and Marentette are part of the group of employees who were affected by the partial wind-up of the Plan. They are also members of Canada Life Canadian Pension Plan Members' Rights Group ("CLPENS") which is a voluntary, unincorporated association of members and former members of the Pension Plan, of which more will be said below. The Plaintiffs plead that Plan members affected by the Integration Partial Wind-Up are entitled to a distribution of surplus, and seek a declarations ascertaining the amount of surplus required to be distributed. Messrs. Kidd, Harvery, and Marentette are the proposed Representative Plaintiffs for the Partial Wind-Up Subclass.

4. *History of the Class Proceeding*

32 Mr. Kidd is a retired employee of Canada Life, whose pension began on January 31, 2005. Mr. Harvey is a retired employee of Canada Life, whose pension began on September 30, 2003.

33 In September 2003, Messrs. Kidd and Harvey received a letter and a notice from Canada Life about a partial wind-up of the pension plan with respect to employees who were terminated by Canada Life or retired or resigned voluntarily between July 10, 2003 and the completion of the integration between Great-West Life/London Life and Canada Life, which was expected to be a two-year period. Neither the letter nor the Notice addressed the surplus assets in the Plan, and Mr. Kidd and others became concerned about the rights of Plan members to surplus assets.

34 Mr. Harvey was concerned about whether members affected by the Partial Wind-Up would receive surplus assets to which they may be entitled. He joined CLPENS and was elected to the Executive. Mr. Kidd also joined CLPENS, which is an association of over 900 members or former members of the Pension Plan. CLPENS was established in October 2004 to advance the interest of current and former Pension Plan Members including active employees, retirees, deferred vested members and their spouses or dependents.

35 The proposed Representative Plaintiffs Kidd and Harvey retained Koskie Minsky LLP and Harrison Pensa LLP for their advice and services in relation to the Partial Wind-Up of the Plan and about the issue of plan expenses being charged to the fund.

36 Mr. Kidd commenced a class action by Notice of Action issued on April 12, 2005, and filed on May 11, 2005. Mr. Marentette commenced a similar action by Statement of Claim issued at the Ontario Superior Court of Justice on February 3, 2005 under Court File No. 05-CV-283395CP. He discontinued his action and was added as a Plaintiff to Mr. Kidd's action.

37 This action was commenced after CLPENS had filed a complaint with the Ontario pension regulator. The complaint led to an investigation by the Financial Services Commission of Ontario, which investigation was suspended, pending the resolution of the class proceeding.

38 The Plaintiffs filed material supporting a motion for certification in October, 2005. The motion for certification was scheduled to be heard in February, 2006, but was adjourned pending settlement discussions among the parties.

39 In April 2007, the parties attended a two-day mediation facilitated by Justice Winkler. The mediation resulted in an agreement on the framework for a potential settlement. On December 1, 2007, after continued negotiations, the parties signed a Memorandum of Understanding.

40 Between 2008 and 2010, the parties continued their negotiations towards a proposal for settling this proceeding, which culminated in a Surplus Settlement Agreement.

41 The Surplus Settlement Agreement involves five key elements: (1) the assets of the Pension Plan will be transferred to a new Pension Plan; (2) administrative expenses will be paid from the assets of the new Pension Plan; (3) eligible active Plan members will be able to suspend their contributions to the Plan for two years; (4) former Plan members affected by a partial wind-up and other Plan members not included in a partial wind-up (deferred/vested members and pensioners) will each receive a share of the surplus assets related to the partial wind-ups of the Plan, estimated to be worth $49.4 million; and (5) Canada Life will also receive a share of the surplus related to the partial wind-ups, estimated to be worth $21.5 million.

42 The Agreement is conditional on obtaining certain levels of consent from past and present Plan members.

43 The proposed Class definition, which has been agreed upon between the parties in the Surplus Settlement Agreement, is composed of the following main groups: (a) the four Partial Wind-Up Subclasses (Integration, Indago, Adason, and Pelican); and (b) all active Plan members as of June 30, 2005, plus any new members up to the date of certification as a class proceeding; and deferred/vested Plan members and pensioners (or their surviving spouses) as at April 12, 2005, who are not part of the active Plan members or included in one of the Partial Wind-Up Subclasses.

44 The proposed class definition under the Surplus Settlement Agreement is as follows:

> (a) all persons, wherever resident, who are or were former members under the Canada Life Canadian Employees Pension Plan (the "Plan") and who were included in the partial wind- up of the Plan declared as at June 30, 2005 (the "Integration Partial Wind-Up") together with the spouses, estates, heirs, beneficiaries, and representatives of any of the above who has died (the "**Integration Partial Wind-Up Subclass**")
>
> (b) all persons, wherever resident, who are or were former members under the Plan who were employed by Indago Capital Management Inc. and whose employment ceased following (and as a result of) a merger of that company with Laketon Investment Management Ltd. on February 26, 1999 together with the spouses, estates, heirs, beneficiaries, and representatives of any of the above who has died (the "**Indago Subclass**");
>
> (c) all persons, wherever resident, who are or were former members under the Plan who were formerly employed by Adason Properties Limited and who were notified of their termination of employment between November 1, 1999 and February 28, 2001 together with the spouses, estates, heirs, bene-

ficiaries, and representatives of any of the above who has died (the **"Adason Subclass"**);

(d) all persons, wherever resident, who are or were former members under the Plan who were employed by Pelican Food Services Limited and whose employment with Pelican Food Services Limited ceased as a result of the outsourcing in January 2001 of that company's operations by Canada Life together with the spouses, estates, heirs, beneficiaries, and representatives of any of the above who has died (the **"Pelican Subclass"**);

(e) all persons, wherever resident, who are not included in subparagraphs (a) to (d) above and

(i) are or were active members of the Plan at any time between June 30, 2005 and the date of this order; or

(ii) were inactive members of the Plan on April 12, 2005; or

(iii) were persons otherwise entitled to benefits under the Plan on April 12, 2005

together with the spouses, estates, heirs, beneficiaries, and representatives of any of the above who has died; and

(f) all persons, wherever resident, who were former members previously entitled to benefits or other payments under the Plan and who would have been included in the partial wind-up of the Plan declared June 30, 2005 (and therefore would have been part of the Integration Partial Wind-Up Subclass) but for the fact that their benefits under the Plan were governed by the laws of Québec, which at the relevant time did not recognize partial pension plan wind-ups in its pension legislation and who were not inactive members of the Plan on April 12, 2005, together with the spouses, estates, heirs, beneficiaries, and representatives of any of the above who has died.

45 In March 2011, a detailed information package was sent to all persons included under the Surplus Settlement Agreement. Following mailing of the Information Packages, a total of 15 meetings were held in cities across Canada (Vancouver, Calgary, Regina, Toronto, London, Montreal and Halifax) to describe the Surplus Settlement Agreement and to provide an opportunity to proposed Class Members to ask questions. At each of the meetings, presentations were made by Canada Life, a CLPENS representative, and Mr. Kidd's counsel. In addition, there were question and answer sessions, where Canada Life representatives were absent from the room.

46 There were also meetings held with active employees of Canada Life to respond to some of their concerns, on May 17, 18, and 19, 2011, in Regina, London, and Toronto respectively. At these meetings, Canada Life made a presentation, followed by a question and answer session in the absence of the Canada Life representatives.

47 There are 5,192 persons in the proposed classes. As of October 14, 2011, 4,244 putative Class Members (82%) have voted in favour of settling their claims in accordance with the Surplus Settlement Agreement. Of the proposed Class Members, 1,107 are current employees of Canada Life. Of these, 874 persons (79%) have voted in favour of the settlement. Of the current Canada Life employees, 45 (1% of the total class, 4% of the current employees) have voted against the settlement.

48 Based on the high levels of consent to the terms of the Surplus Settlement Agreement, the parties are proceeding to the implementation stage. Implementation involves certification of this action as a class proceeding, followed by an opt-out period. Assuming this action is certified as a class proceeding, and subject to staying within agreed upon levels of opt-outs, the parties will jointly move for approval of the settlement of the class proceeding.

49 Assuming court approval, there will be a regulatory approvals sought from the Financial Services Commission of Ontario to implement the settlement.

5. *The Intervention of Brenda McEachern*

50 Brenda McEachern of Vancouver, British Columbia, is a current employee of Canada Life. Having reviewed the information package provided to the proposed class members and having attended the information meetings, she hired Lawson Lundell LLP for independent advice.

51 In May 2011, Ms. McEachern's counsel contacted Koskie Minsky LLP and counsel for the Defendants and advised that she represented a number of active employees of Canada Life. She requested and was provided with documentation with respect to the action, as well as, copies of the proposed Surplus Sharing Agreement and historical pension plan documents.

52 On September 15, 2011, Ms. McEachern's counsel contacted Koskie Minsky LLP and advised that Ms. McEachern would oppose the proposed settlement and might take steps to become involved in this proceeding. She did so by filing delivering motion materials and a factum on October 13, 2011 and October 14, 2011, respectively.

53 Ms. McEachern is concerned whether the interests of the active members of the Plan had been considered appropriately in the negotiation of the Settlement Proposal. She is concerned that no active member of the Plan is a proposed Representative Plaintiff.

54 Ms. McEachern believes that the interests of the proposed Representative Plaintiffs conflict with the current employees who will have an ongoing concern about whether the fund will have adequate resources after surpluses are paid out in partial wind-ups. She desires a healthy actuarial surplus to help prevent erosion of benefit entitlements. She notes that none of the Representative Plaintiffs will be members of the new pension plan, and that they have no interest in the terms of that plan or the declarations being sought about that new plan. Ms. McEachern understands that Daryl Clegg another active employee of Canada Life, currently out of the country, would be prepared to be a representative plaintiff.

55 In response to Ms. McEachern's objection, Wilbert Antler of Toronto, Ontario, delivered an affidavit and volunteered, if necessary, to be another representative plaintiff on behalf of the current employees. He is a pensioner and he is the President of CLPENS.

56 Mr. Antler deposes that although CLPENS and the original proposed Representative Plaintiffs (Messrs. Kidd and Harvey) sought to include an active Plan member as a representative plaintiff, they found no active Plan member who was willing to act. He says that they consulted with active employees. He states that the CLPENS executive committee was active in assisting the proposed representative plaintiffs in negotiating the proposed settlement and ensured that the interests of its entire membership, regardless of category of Plan membership, were considered during these negotiations. He denies that the representative plaintiffs have a conflict and submits that all Plan members are adequately represented by the proposed representative plaintiffs.

57 During the oral argument of the certification motion, Ms. McEachern's counsel conceded that it is only in respect of how the proposed Representative Plaintiffs propose to settle the class action that there is an alleged conflict of interest. In other words, if there was no settlement and this was a certification for the purposes of prosecuting an action against the Defendants, there is no conflict of interests in the proposed class and subclass structure. Ms. McEachern's position, however, is that for the purposes of determining whether and how this particular proposed class action should be certified, -- a class action in which the putative Class Members have voted before the certification motion -- the negotiation of the Surplus Settlement Agreement cannot be ignored and a new subclass with independent legal representation is necessary.

C. THE STANDING OF MS. MCEACHERN

58 At the commencement of the oral argument of the certification motion, I advised the parties that I was concerned whether Ms. McEachern had the standing to make her request that Mr. Clegg be appointed a representative plaintiff for a new subclass for current Canada Life employees. For the Reasons that follow, it is my opinion, that she does not have standing and that it would be dysfunctional and contrary to the operation of the *Class Proceedings Act, 1992* to grant her standing.

59 Class members and putative class members are not typical litigants that control and participate in their own litigation. In many proposed class actions, putative class members may not even be aware that litigation has been commenced on their behalf, and even if they are aware, they may have to take the initiative to find out about the progress of the litigation by making inquiries of the plaintiff's lawyer, perhaps by examining internet postings about the case. It is the proposed representative plaintiff who instructs counsel and who prosecutes the litigation on behalf of the proposed class.

60 The class action statutes do not treat proposed class members or certified class members as normal litigants. Proposed class members have no assigned role before certification and after certification they are notified about the case and provided with an opportunity to opt-out. If they become class members, they are not examined for discovery for the purposes of the common issues trial without a court order. (See *Class Proceedings Act, 1992,* s. 15(2).) They are not liable for costs except for their own individual issues trial. (See *Class Proceedings Act, 1992,* s. 31(2).) They do, however, have the right to object to any settlement that requires court approval if the court exercises its discretion under s. 29(4) of the Act to direct that notice be given of the settlement approval hearing. If the settlement is approved, the objectors are nevertheless bound just like everybody else in the class.

61 Thus, typically, proposed class members do not participate in the class action until individual issues trials or a settlement approval hearing.

62 There is one major exception, a proposed class member that wishes to bring a class action of his or her own may start a rival action. Then, however, there will be a carriage fight to determine which class action is to proceed and which is to be stayed.

63 In the case at bar, proposed Class Members were given advance notice of the certification hearing, and untypically, they were asked to vote for or against a settlement that included a consent certification. In these circumstances, Ms. McEachern, without bringing a carriage motion, requests an order that Mr. Clegg be appointed for an additional subclass for current Canada Life employees.

64 Practically speaking, Ms. McEachern's request is a request for carriage of a class action for the proposed new subclass. However, it is very late for a carriage contest, and she has not made a case to have carriage. Her request is more a co-opting than a competition for carriage. It is a disruptive request and not consistent with the scheme of the legislation.

65 Granting her request could undermine the settlement approval process. Assuming the court granted the request, on the one hand, were Mr. Clegg to oppose settlement, I do not see how the matter could proceed to an approval hearing given the opposition of the representative plaintiff for the current employees. On the other hand, were Mr. Clegg to give instructions to seek approval of the settlement, then his participation would have been redundant.

66 The late arriving request for carriage of a subclass disrupts the settlement approval process, which will provide an opportunity for objectors to the settlement to object. Objections may be based on both the substance of the proposed settlement and the manner in which the settlement was reached. I, therefore, conclude that Ms. McEachern does not have the standing to make this request. She does, however, have standing to make an objection to the settlement's approval, if she does not opt-out of the action.

D. CERTIFICATION AS A CLASS PROCEEDING

1. *The Test for Certification*

67 Pursuant to s. 5(1) of the *Class Proceedings Act, 19* 92, the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims or defences of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff or defendant who would adequately represent the interests of the class without conflict of interest and there is a workable litigation plan.

68 Where certification is sought for the purposes of settlement, all the criteria for certification must still be met: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 22. However, compliance with the certification criteria is not as strictly required because of the different circumstances associated with settlements: *Bellaire v. Daya*, [2007] O.J. No. 4819 (S.C.J.) at para. 16; *National Trust Co. v. Smallhorn*, [2007] O.J. No. 3825 (S.C.J.) at para. 8; *Nutech Brands Inc. v. Air Canada*, [2008] O.J. No. 1065 (S.C.J.) at para. 9.

2. *The Cause of Action Criterion*

69 The first criterion for certification is that the pleadings disclose a cause of action. The Fresh as Amended Statement of Claim raises claims to the ownership and use of surplus assets in the Fund, based on the original Plan documents. The claims for relief arise out of allegations of breach of fiduciary duty, breach of trust and breach of contract in relation to Canada Life and the Trustees' administration of the Plan and the Fund.

70 Pension surplus claims of this nature have been found to satisfy the first criterion for certification as a class proceeding. See: *Paramount Pictures (Canada) Inc. v, Dillon*, [2006] O.J. No. 2368 (S.C.J.); *Sutherland v. Hudson's Bay Co.* (2005), 74 O.R. (3d) 608 (S.C.J.); *CBC Pensioners' National Association v. Canadian Broadcasting Corporation* (S.C.J.); *Lieberman and Morris v. Business Development Bank of Canada*, 2005 BCSC 389.

71 I am satisfied that the first criterion for certification has been satisfied.

3. *The Identifiable Class Criterion*

72 The second criterion for certification is that there is an identifiable class.

73 Putting aside for the moment the issue of whether there should be a subclass for current Canada Life employees, the question of surplus ownership applies equally to all Class members, as defined above. All Class members share common claims in respect of surplus ownership and Plan administration issues, including payment of Plan Expenses out of the Fund.

74 Putting aside for the moment the issue of whether there should be a subclass for current Canada Life employees, the question of entitlements in the partial wind-ups applies to all members of the respective subclasses, as defined above.

75 Thus, once again putting aside for the moment the issue of whether there should be subclass for current Canada Life employees, I am satisfied that the second criterion for certification is satisfied.

76 Turning now to the issue of introducing a new subclass and assuming that Ms. McEachern has standing to make this request, the contested issue with respect to the second criterion for certification is whether there should be a subclass for the current Canada Life employees. (Defining this subclass would not be a problem.)

77 Section 5(2) of the *Class Proceedings Act, 1992* speaks to the matter of subclasses; it states with emphasis added:

> 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.

78 Under s. 5(2) of the *Class Proceedings Act, 1992*, where the class includes a subclass whose members have claims that raise common issues not shared by all members of the class, if necessary to protect their interests, a separate representative plaintiff should be appointed. Subclasses are required to be included in an order certifying the proceedings only if, in the opinion of the court, separate representation is required for the protection of the interests of their members: *Elliott v. Boliden Ltd.*, [2006] O.J. No. 4116 (S.C.J.) at para. 15. In order to justify the creation of a subclass, the subclass must have issues that are not shared by all class members and those claims will be subject to defences that are not applicable to all class members: *578115 Ontario Inc. v. Sears Canada Inc.*, 2010 ONSC 5673 at para. 7.

79 Subclasses are properly certified where there are both common issues for the class members as a whole and other issues that are common to some but not all of the class members: *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 (S.C.J.) at para. 45. Circumstances that necessitate defining subclasses at the certification stage include the circumstance where a subclass of the generally described class raises common issues that could be determined in the class proceeding but are not shared by other members of the class: *Wuttunee v. Merck Frosst Canada Ltd.*, [2009] S.J. No. 179 (Sask. C.A.) at paras. 121-124, rev'g [2007] S.J. No. 7 (Q.B.) and [2008] S.J. No. 101 (Q.B.) and [2008] S.J. No. 324 (Q.B.), leave to appeal to C.A. granted [2008] S.J. No. 378 (C.A.), leave to appeal to S.C.C. ref'd [2008] S.C.C.A. No. 512. The statute envisions that there should be a single, over-riding class, with its set of issues common to all members, some of whom might form a subclass with a distinct additional set of issues common to its members but not other members of the class as a whole: *Wuttunee v. Merck Frosst Canada Ltd., supra,* at para. 125.

80 If the differences between the situation of the representative plaintiff and the class members do not impact on the common issues, then the differences do not affect the representative plaintiff's ability to adequately and fairly represent the class and they do not create a conflict of interest: *Hoy v. Medtronic*, [2001] B.C.J. No. 1968 at paras. 83-85, aff'd [2003] B.C.J. No. 1251 (C.A.); *Endean v. Canadian Red Cross Society*, [1997] B.C.J. No. 1209 (S.C.), rev'd in part (1998), 157 D.L.R. (4th) 465 (C.A.), leave to appeal granted but appeal abandoned, [1998] S.C.C.A. No. 260 (S.C.C.); *T.L. v. Alberta (Director of Child Welfare)*, [2008] A.J. No. 157 (Q.B.) at para. 40, aff'd [2009] A.J. No. 512 (C.A.); *Reid v. Ford Motor Co.*, [2003] B.C.J. No. 2489 (S.C.) at para. 73.

81 As conceded by Ms. McEachern during argument, if this action were being litigated towards a judgment as opposed to being settled in accordance with a settlement agreement, then the current Canada Life employees have no different position with respect to the common issues than the rest of the Class Members. The current Canada Life employees do not have their own claim not shared by all Class members. There are no special or discrete set of common issues for this proposed class. There is no conflict with respect to the claims or the common issues raised by all Class Members. All proposed Class Members have an equal and identical interest in the claim with respect to the administration of the trust fund, and they are all equally interested in determining who has an entitlement to the surplus on a full or partial wind-up of the Plan. After the resolution of the issues of concern to all Class Members, the proposed Subclasses then have partial wind-up claims, and it is these claims that differentiates them from the Class Members who will continue to have an interest in the new Pension Plan but who have no right to object to the Partial Winding-Ups of the old Plan.

82 The proposed Representative Plaintiffs argue that the "conflict" alleged by McEachern is not about the composition of a subclass but actually concerns the probity of the proposed settlement and the fact that Ms. McEachern and a few other active Canada Life employees are unhappy with the terms of that proposed settlement. Further, the proposed Representative Plaintiffs argue that if these employees are dissatisfied with the terms of a proposed settlement, they may opt-out of the class proceeding or challenge the merits of the proposed settlement at the settlement approval hearing in this matter. I agree with this argument.

83 Put shortly, the requirements for an additional subclass for the current Canada Life Employees are not satisfied in the case at bar.

84 The untypical circumstance of the notoriety of the certification motion and the fact that Class Members have voted for or against the settlement does not, in my opinion, alter the fact that the Canada Life employees do not have claims that raise common issues not shared by all the class

members. Moreover, the complaint of the dissenters is really about the propriety of the settlement not the constitution of the representation.

85 I conclude, therefore, that the second criterion is satisfied without the introduction of a new subclass definition.

4. *The Common Issues Criterion*

86 The third criterion for certification is that the claims of the class members raise common issues of fact or law. The following common issues have been agreed to by the parties and are proposed for certification in this proceeding:

(a) Do the Plan and the Trust permit any Plan Expenses to be paid out of, charged to or reimbursed from the Fund?
(b) Have Plan Expenses been invalidly paid from Fund assets? If so,

  (i) what is the quantum of the Plan Expenses invalidly paid from the Fund assets?
  (ii) should all or any portion of the amount of such expenses be repaid by Canada Life to the Fund or to Class members?
  (iii) should the amount of any such expenses to be repaid to the Fund include interest, and if so how should such interest be calculated?

(c) Should any injunctive relief in respect of the payment of Plan Expenses from the Fund be granted? If so, on what terms?
(d) Did any predecessor to the Plan, and any trusts thereunder, permit the costs and expenses of administering such predecessor plan and the pension fund held in respect of such predecessor plan to be paid out of, charged to or reimbursed from the pension fund held in respect of such predecessor plan? If not, what if any relief should be granted?
(e) Do the Plan and the Trust permit the Plan to be merged in whole or in part with another pension plan?
(f) Do the Plan and the Trust permit the Fund to be merged with or transferred in whole or in part to the fund of any other pension plan?
(g) Has Canada Life improperly taken any contribution holidays? If so,

  (i) what is the quantum of the contribution holidays improperly taken?
  (ii) should all or any portion of the amount of such contribution holidays be paid by Canada Life to the Fund?
  (iii) should the amount of any such contribution holidays to be paid to the Fund include interest, and if so how should such interest be calculated?

(h) Do the Plan and the Trust permit the Plan to be amended to include new classes of members?
(i) Has Canada Life improperly funded benefit enhancements under the Plan from Fund assets including surplus? If so:

(i) what is the quantum of such benefit enhancements improperly funded?
(ii) should any amount be paid by Canada Life to the Fund in respect of such benefit enhancements?
(iii) should any such amount to be paid to the Fund include interest, and if so how should such interest be calculated?

87 Separate common issues in respect of each of the partial wind-ups have been proposed. For the Integration Partial Wind-Up Subclass, the following common issues are proposed:

(a) Is the Integration Partial Wind-Up Subclass entitled to any portion of the Integration PWU Surplus?
(b) If so, how much is required to be distributed to the Integration Partial Wind-Up Subclass?

88 For the Indago Subclass, the following common issues are proposed:

(a) Is the Indago Subclass entitled to any portion of any surplus in the Fund allocable to any partial wind-up of the Plan that may be declared as a result of the events described in paragraph 2(b) above?
(b) If so, how much is required to be distributed to the Indago Subclass?

89 For the Adason Subclass, the following common issues are proposed:

(a) Is the Adason Subclass entitled to any portion of any surplus in the Fund allocable to any partial wind-up of the Plan that may be declared as a result of the events described in paragraph 2(c) above?
(b) If so, how much is required to be distributed to the Adason Subclass?

90 For the Pelican Subclass, the following common issues are proposed:

(a) Is the Pelican Subclass entitled to any portion of any surplus in the Fund allocable to any partial wind-up of the Plan that may be declared as a result of the events described in paragraph 2(d) above?
(b) If so, how much is required to be distributed to the Pelican Subclass?

91 The determination of the above common issues will effectively determine all of the matters at issue between the Class and Subclasses and Canada Life in relation to the matters pleaded in the Fresh as Amended Statement of Claim.

92 I am satisfied that the third criterion for certification has been satisfied.

5. *The Preferable Procedure Criterion*

93 The fourth criterion for certification is that a class proceeding would be the preferable procedure. This criterion is informed by the policies of the *Class Proceedings Act, 1992* of: (1) access to justice; (2) judicial economy; and (3) behaviour modification.

94 In the case at bar, a class proceeding is not only an efficient and cost-effective means for determining the issues in dispute between the parties, but it is the only practical procedure. An alternative procedure is by way of a regulatory proceeding before the Financial Services Tribunal; however, the adjudication of surplus entitlement in relation to four separate partial wind-ups and the issues of administration which have been raised in the class proceeding would be more cumbersome for the Tribunal. Given that a single pension plan is at issue, adjudication of this matter through a single class proceeding would constitute a more efficient means of resolving the claims of the Class Members.

95 I am satisfied that the fourth criterion for certification is satisfied.

6. *The Representative Plaintiff Criterion*

96 The fifth criterion for certification is that there is a representative plaintiff(s) who would adequately represent the interests of the class and there is a workable litigation plan, which in this case would involve the administration of the settlement.

97 In assessing the adequacy of a proposed Representative Plaintiff, the court must be satisfied that the individual has retained adequate representation, has developed a workable litigation plan, and has no conflict of interest with other members of the class on the common issues: *Pearson v. Inco, et al.* (2006), 78 O.R. (3d) 641 (C.A.) at para. 92.

98 In the case at bar, each of the Plaintiffs is suitable for the role of Representative Plaintiff. Each has sworn that they understand the nature of the litigation and their responsibilities to fairly and adequately represent class members. They state they do not have any conflict of interest in relation to the interests of other class members and are committed to fulfilling their responsibilities. As discussed above, I have found no conflict of interest. They state that they are satisfied that they have retained suitable Class Counsel to pursue this litigation on their behalf; I agree with them.

99 I am satisfied that the fifth criterion for certification is satisfied.

E. CONCLUSION

100 According, I grant the motion for certification.

101 There should be a case conference to settle the terms of the Certification Order, to fix a date for the settlement approval hearing and to resolve any issues about the procedure for the settlement approval hearing. Ms. McEachern is invited to participate in that case conference.

102 If there is a claim for costs, it can be made at the case conference. My present inclination is that there should be no order as to costs for the certification motion. Ms. McEachern's request for standing arose in novel circumstances and she was in a sense invited to voice her objections at the certification hearing.

103 Order accordingly.

P.M. PERELL J.

cp/e/qlrxg/qlvxw/qlced/qlgpr

TAB 16

Case Name:

Livent Inc. (Special Receiver and Manager of) v. Deloitte & Touche

RE: Livent Inc., through its Special Receiver and Manager, Roman Doroniuk, Plaintiff, and Deloitte & Touche, and Deloitte & Touche LLP, Defendants

[2010] O.J. No. 1919

2010 ONSC 2267

Court File No. (02 CV 225823CM2) 04-CL-5321

Ontario Superior Court of Justice

Master D.E. Short

Heard: February 1, 2010.
Judgment: April 20, 2010.

(126 paras.)

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Costs -- On a bifurcated motion the Court held that it had jurisdiction to order security for costs against the court appointed Special Receiver and Manager -- The Special Receiver Order did not give the Special Receiver "carte blanche" to continue the litigation with no cost exposure -- The Special Receiver was taking the place of the group of claimants who stood to benefit from the litigation -- Bankruptcy and Insolvency Act, s. 38 -- Rules of Civil Procedure, Rule 1.04(1.1), Rule 56.01(1)(d).

Civil litigation -- Civil procedure -- Costs -- Security for costs -- Where plaintiff is corporation or association -- On a bifurcated motion the Court held that it had jurisdiction to order security for costs against the court appointed Special Receiver and Manager -- The Special Receiver Order did not give the Special Receiver "carte blanche" to continue the litigation with no cost exposure -- The Special Receiver was taking the place of the group of claimants who stood to benefit from the litigation -- Bankruptcy and Insolvency Act, s. 38 -- Rules of Civil Procedure, Rule 1.04(1.1), Rule 56.01(1)(d).

Motion by the defendants Deloitte & Touche LLP in Canada (Deloitte Canada) and Deloitte & Touche LLP in the United States (Deloitte US) for security for costs against the plaintiff Livent Inc.

(Livent), through its Special Receiver and Manager Roman Doroniuk. The plaintiff took the position the Court did not have any jurisdiction or power to order security for costs against Livent Inc.'s court appointed Special Receiver and Manager. The action was commenced on behalf of Livent against the defendants, Livent's former auditors, claiming damages totalling $450 million. The plaintiff claimed that Garth Drabinsky and Marion Gottllieb fraudulently manipulated Livent's books and records, and that opportunities to uncover and reveal those manipulations were missed as a consequence of the defendants' breaches of duty. The plaintiff was standing in Livent's stead and was pursuing recovery of losses for the benefit of those who chose to purchase shares or debt instruments. Deloitte Canada was an unsecured creditor of Livent. The Special Receiver Order expressly stated that the Special Receiver "shall have no personal liability as a result of his appointment or as a result of performing his duties". The Special Receiver was empowered by the Special Receiver Order to initiate, prosecute and continue the prosecution of actions "to properly receive, manage, preserve, protect or realize upon the Litigation Assets".

HELD: The plaintiff did not discharge the burden to show that, as a matter of law, the Court had no jurisdiction to order security for costs. There was no impediment on the Court's ability to make an order for security for costs. The Special Receiver Order did not give the Special Receiver "carte blanche" to continue the litigation with no cost exposure. The Special Receiver was taking the place of the group of claimants who stood to benefit from the litigation. The Court had difficulty with the proposition that security costs could not, or at least should not, be ordered against a party who acts in a representative capacity. The Court decided to bifurcate the motion and release another set of reasons dealing with what security, if any, ought to be posted and the manner in which it was to be posted.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 38

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

Rules of Civil Procedure, Rule 1.04(1.1), Rule 56.01(1)(d)

US. Bankruptcy Code, Chapter 11

Counsel:

Counsel for the Defendants (Moving Parties): Brian Leonard and Jeremy Millard: Deloitte & Touche [Canada].

Jenny Stephenson: Deloitte & Touche LLP [US].

Counsel for the Plaintiff (Responding Party): Patrick O'Kelly and Jonathon Levy.

REASONS FOR JUDGMENT

MASTER D.E. SHORT:--

All the world's a stage,
And all the men and women merely players;
They have their exits and their entrances,
And one man in his time plays many parts,
His acts being seven ages.

As You Like It, Act 2, scene 7

Prelude

1 Livent was a well known, vertically integrated, live theatrical entertainment company. It acquired the rights or licenses to works, such as *The Phantom of the Opera*, and produced original shows, reproductions or restorations in its own theatres as well as theatres owned by third parties. It acquired or constructed its own theatres. In addition, it generated revenue by sales of merchandise and cast recordings as well as sales of sponsorships, naming rights and other ancillary revenue.

2 Unfortunately in mid 1998 it all began to come apart. In the words of the allegations made in Livent's Statement of Claim, in the first of several legal proceedings (the 1998 Pleadings"):

> "8. As detailed subsequently, Drabinsky and Gottlieb directly and indirectly received substantial personal benefits from Livent in the form of compensation, bonuses, lavish expenses and costs they caused Livent to assume for their personal benefit, as well as shares, options and calls in Livent securities. Drabinsky and Gottlieb also received, on the information known at present, undisclosed benefits in the form of kickbacks in excess of $7,500,000 funnelled, in part, through a separate corporation. These payments were not disclosed to the shareholders or Board of Directors of Livent."

3 In February of 2002, this specific action was commenced on behalf of Livent against its former auditors for claimed damages totalling $450 Million. It is important to note for the purposes of this motion that the claims against the auditors were brought with the plaintiff being Livent Inc. *through its Special Receiver and Manager*, Roman Doroniuk ("Doroniuk").

4 The civil proceedings eventually were all transferred to the Commercial List in Toronto. By order dated March 20, 2002, Justice Ground ordered, with respect to the various "Actions" relating to this fact situation, that there be "common production of documents and discoveries in the Actions, and that the parties to the Actions are free to use the documents, discovery evidence and information produced in any one of the Actions in any of the other Actions and that the deemed undertaking rule does not apply to prevent such use, for the purposes of the proceedings, discovery and hearing of the Actions only, but the deemed undertaking rule otherwise applies."

5 The allegations such as those set out above ultimately lead to a lengthy criminal trial which has now been completed. As a consequence these largely dormant civil matters have been re-activated.

6 Mr. Justice Colin Campbell ultimately assumed responsibility for judicially managing all these civil matters towards a scheduled 2010 trial date. In May of 2009 he assigned certain responsibilities to me:

> "I have concluded, as noted above, that absent extraordinary circumstances, no motions should be permitted except those which may relate to discovery or secu-

rity for costs, which with the concurrence of the Administrative Master, have been assigned to Master Short."

I. Motion

7 This is a motion for security for costs brought under Rule 56.01 of the *Rules of Civil Procedure* by the defendants, Deloitte & Touche LLP in Canada ("Deloitte Canada"), [incorrectly named in the title of proceedings as Deloitte & Touche] and the Defendant, Deloitte & Touche LLP in the United States ("Deloitte US"),

8 The motion is brought against the plaintiff, Livent Inc. ("Livent") through its Special Receiver and Manager, Roman Doroniuk ("Doroniuk").

9 The Deloitte Defendants (collectively "Deloittes") assert that they have "good reason to believe" that the Plaintiff, Livent Inc. ("Livent"), through its Special Receiver and Manager, Roman Doroniuk ("Special Receiver"), has insufficient assets in Ontario to pay the costs of this proceeding if ordered to do so at the end of this proceeding.

10 Deloitte Canada seeks security for costs in the amount of $2 Million for its prospective costs through to the end of trial, to be posted in instalments. Deloitte US seeks a further amount estimated to be at least $1.4 Million and "quite possibly as high as" $2.3 Million. Thus, somewhere between $3.5 and $4.5 million is sought as security for the legal costs of the defendants in this litigation.

II. *Act One*: Bifurcation of Motion

11 The amounts in issue make this a very meaningful motion to the parties. Counsel for the plaintiff advised at an early stage it intended to seek to establish, as a matter of law, that this court does not have any discretion or power to order security for costs against this *court appointed* special receiver and manager.

12 It was my concern prior to hearing the motion that if I were to uphold the plaintiff's position, then there will be no need to deal with issues such as quantum and other matters relating to the appropriate order to be made, that are normally considered on a security for costs motion.

13 As a consequence I determined that the motions of Deloittes should proceed in two phases. If I rule against the plaintiff on the jurisdictional issue, this court will then be required to address whether security for costs should be posted and, if so, how much, when and on what grounds.

14 Given the quantum involved, I expect my decision may only be the first act in an extended process. In order to permit all issues raised in the motions to be dealt with together, I am extending the effective date of these reasons and thus the date for any appeal from my decision until the date of the release of my next set of reasons dealing with what security, if any, ought to be posted and the manner in which it is to be posted.

III. The Players

15 Livent Inc. was incorporated in December 1989 as Live Entertainment Company of Canada Inc. (" Original Livent")

16 The Plaintiff in the original 1998 action was the corporation, Livent Inc. ("Livent"), which then was a corporation continued by articles of amalgamation under the laws of the Province of Ontario. Livent became a reporting issuer under the Ontario Securities Act ("OSA") in May 1993. Li-

vent's common shares are listed in Canada on the Toronto Stock Exchange and in the United States on the NASDAQ Exchange.

17 The defendant in many of the Actions, Garth Drabinsky was a founder of a predecessor to Livent in 1989. Drabinsky is a lawyer and was a director of Livent from its inception.

18 In the 1998 Pleadings it was alleged:

> "... Drabinsky was a promoter of Livent under the OSA. Drabinsky was the Chairman and Chief Executive Officer of Livent from 1989 until June 15, 1998. From June 15, 1998 to his suspension by Livent on August 10, 1998, Drabinsky was the Vice- Chairman and Chief Creative Director of Livent. Drabinsky's day to day involvement in the operations of Livent ceased on August 18, 1998."

19 Similarly the Defendant Myron Gottlieb was a founder of Original Livent. He was a director of Livent from its inception. Gottlieb's day to day involvement in the operations of Livent also ceased on August 10, 1998.

20 The 1998 Pleading asserts simply that from "inception until July 1998 Drabinsky and Gottlieb ran Livent with an all-pervasive hands-on management style."

21 Deloitte Canada is a limited liability partnership registered under the laws of Ontario and was Livent's auditor for its fiscal years 1993 through 1997 and, in 1998, audited Livent's restated financial statements for its fiscal years 1996 and 1997.

22 The Claim alleges that Deloitte US served as auditor, accountant and consultant to Livent from 1995 to 1998. It is further alleged that Deloitte US provided other accounting and consulting services to Livent between 1990 and 1998.

IV. Accounting Irregularities

23 The Amended Statement of Claim forming part of the 1998 Pleadings addresses the accounting concerns that gave rise to the initial action:

> 10. Drabinsky and Gottlieb fraudulently manipulated the books and records of Livent. The initial public offering of Livent failed to disclose as related party transactions or as compensation a large amount of funds Drabinsky and Gottlieb had fraudulently taken from Livent. These payments had the effect of inflating the stated book value of the assets.
> 11. Drabinsky and Gottlieb thereafter caused Livent to publish annual financial statements and quarterlies they knew to be incorrect by reason of this fraud previously described and for the additional reasons discussed subsequently. The purpose and effect of the manipulation was to inflate the revenue or top line and/or understate or omit expenses and costs incurred in the period. The effect was to overstate earnings (or understate losses) and present a false financial picture of the performance of Livent. The actual results of Livent indicated problems with the costs and profitability of Livent productions. Instead of disclosing these problems and dealing with them directly, Drabinsky and Gottlieb caused them to be covered up with the result that the underlying problems were not addressed and

continued to grow in magnitude. The financial impact when the frauds were ultimately discovered was thus exacerbated.

12. As described in greater detail subsequently, on the information known at present, Drabinsky and Gottlieb achieved this manipulation, with the assistance and involvement of a small inner circle of senior management ... directing the financial staff using four main methods. Each of these methods did not entail the exercise of Judgment in a permissible range of accounting principles, but rather was an improper and fraudulent means purposefully employed by Drabinsky and Gottlieb to manipulate the financial statements of Livent ***as well as to prevent the detection of that manipulation by the Board of Directors of Livent and the investment groups and shareholders that Drabinsky and Gottlieb induced to invest in Livent in 1995 and others on various occasions up to the summer of 1998.*** [my emphasis]

24 It is indirectly on behalf of at least some of those investors that the plaintiff brings this action. The claims contained in the 117 page statement of claim (the "Claim") in the Deloitte action need to be examined to seek to determine the specifics of the basis for those claims:

"68. Deloitte and Deloitte US. owed a duty of care, in contract and in tort ***to Livent on behalf of its creditors, shareholders and other stakeholders (collectively sometimes referred to herein as the "Livent Stakeholders"***) to (a) ensure that Livent's financial statements were reported in accordance with Livent's stated accounting policies and generally accepted accounting principles ("GAAP"); and (b) conduct its audits of Livent in accordance with generally accepted auditing standards CGAAS") and the higher standards of care, as set out in Deloitte's own manuals and other internal sources of guidance published by Deloitte, including higher standards set out in writing by Deloitte US. ("Deloitte Auditing Standards"), that Deloitte represented to Livent and the Livent stakeholders it could reasonably expect from a "Big Six" international accounting firm." [my emphasis]

25 The Claim ultimately references accounting documents collectively defined as the "Original Statements" and asserts that:

"75. Deloitte's unqualified audit opinions on the Original Statements were materially false and misleading. contrary to Deloitte's representations, Deloitte's audit of those financial statements had not been conducted in accordance with GAAS or in compliance with Deloitte Auditing Standards, and Livent's financial position and results of operations had not been presented in those financial statements in conformity with GAAP or Livent's stated accounting policies.

76 Deloitte and Deloitte US. breached the duties they owed to Livent by failing to issue a qualified or an adverse opinion when Livent issued financial statements that omitted disclosures required by GAAP

77. As a consequence of Deloitte's breaches of duty, Deloitte missed repeated opportunities to uncover and reveal the accounting irregularities and errors being orchestrated by Drabinsky and Gottlieb. ***Consequently, the Livent Stakeholders***

were deprived of the opportunity to exercise their collective will by inter alia, replacing corrupt management thereby avoiding further losses inflicted upon Livent and the Livent Stakeholders that were occasioned by the ruinous administration of Drabinsky and Gottlieb." [my emphasis]

V. Drabinsky's Defence

26 From the outset the individual defendants denied any wrongdoing in their pleadings. In his Statement of Defence filed as part of the 1998 Pleadings Mr. Drabinsky set out in detail his response to the claims made. Only a brief extract of a complex argument is appropriate for this synopsis:

> "10. ... The allegation ... that there was "a large amount of funds Drabinsky and Gottlieb had fraudulently taken from Livent" was knowingly false.
> 11. Many of the allegations in the Amended Statement of Claim represent retrospective revisitings by New Management of Livent of accounting judgments made from time to time by various officers or employees of Livent. Livent, as a vertically integrated live theatrical entertainment company, is unique in the Canadian market. The more unique a business is the shallower is the pool of common accounting practices and policies in that industry. However, any reader of the Financial Statements of Livent would have noticed the following:
>
> (a) the material usage of estimates;
> (b) the distinctive nature of certain revenue transactions;
> (c) the critical and variable impact of preproduction costs on assets and profits;
> (d) the growth of deferred costs; and
> (e) the increasing risk of loss which could result from a write-down, or earlier realization, of pre-production costs.
>
> It would be apparent to any reader of the Financial Statements of Livent that the timing of the realization of costs related to a theatrical production involved management in making certain judgments, estimates and assumptions."

VI. Deloitte Defence

27 Not surprisingly the defence of Deloitte Canada asserts at the outset:

> "Contrary to the allegations in the Statement of Claim, Deloitte conducted its audits of Livent's annual financial statements and prepared and issued its audit reports on these financial statements in accordance with Generally Accepted Auditing Standards ("GAAS") applicable in Canada.

28 Once again, the pleadings of the two Deloitte defendants are too detailed to set out in any extended form. However the broad strokes of some of the defences, including the impact of findings by the U.S. Securities and Exchange Commission("SEC"), follow:

"84. On January 13, 1999 the SEC, acting on its own complaint, found Livent to have committed securities fraud as a consequence of the misstatement of its 1995, 1996 and 1997 financial statements and other SEC filings. In reaching that conclusion the SEC made findings that the former senior management of Livent had engaged in a multifaceted and pervasive accounting fraud, involving the manipulation of Livent's financial records and the misstatement of its financial statements over a span of a number of years. The SEC further found that Drabinsky and Gottlieb were the architects of the fraud and that each of [various individuals] participated in the fraud.

85. The SEC found that the participants in the fraud deliberately concealed their manipulation of Livent's financial statements from Deloitte by, inter alia:

(a) falsifying Livent's books and records;
(b) overriding Livent's computerized accounting system so that they could adjust Livent's journal entries in a manner where no trace of the actual original entries remained in Livent's general ledger; and
(c) deliberately concealing from Deloitte the true nature of certain of the Revenue Transactions.

86. ... [5 individuals] all made admissions of guilt in proceedings brought against them by the SEC. ... [4 individuals] each of whom was a Chartered Accountant, pleaded guilty to professional misconduct in proceedings before the Institute of Chartered Accountants of Ontario. Each of these guilty pleas and admissions of guilt included an admission of deliberate concealment of material financial information from Deloitte."

29 Other pleaded defences include claims that by virtue of the actions of Livent's officers the company cannot now complain regarding the reliance of Deloitte on the information provided to it:

"88. To the extent that Livent's annual financial statements were materially misstated, the misstatement did not occur through any fault or neglect of Deloitte. Rather, it occurred as a result of the Frauds which were directed at Deloitte and others. To the extent Drabinsky, Gottlieb and others committed the Frauds they were acting within the scope of their authority as directors, officers and employees of Livent. At law, their acts were effectively the acts of Livent.

89. Livent, having committed and directly benefited from the Frauds cannot, at law, advance a claim against Deloitte for failing to discover Livent's illegal activity. In addition, Livent is vicariously liable to Deloitte for the illegal conduct of Drabinsky, Gottlieb and the other members of its management who participated in the Frauds."

30 The viability of these asserted defences is not for me to determine at this stage. However another asserted defence I believe does impact upon the ultimate result of the motion presently before me:

"*The Stakeholders Have No Claim Against Deloitte*

90. At no time did Deloitte contract to provide services to the Stakeholders. Deloitte did not have any, let alone a special, relationship with the Stakeholders and in conducting the audits of Livent, Deloitte did not owe a duty of care to the individual Stakeholders. The Stakeholders cannot at law recover damages in respect of alleged breaches of owed by Deloitte to Livent whether that claim is advanced directly by the Stakeholders or by Livent on their behalf."

VII. Involvment of Stakeholders in Claims

31 The claims against the Deloitte entities are detailed in the following paragraph from the claim against them:

"209. In particular, the following undisclosed material information, **all of which Deloitte and Deloitte U.S. ought to have discovered and disclosed to Livent *and the Livent Stakeholders*** through the competent application of GAAP, GAAS and Deloitte Auditing Standards, was not reported therein:

(a) the cost of kickbacks fraudulently paid to Drabinsky and Gottlieb were improperly capitalized to Livent's fixed asset and preproduction costs accounts ...;
(b) costs associated with shows (that should otherwise have been expensed) were transferred to fixed asset accounts and capitalized ...;
(d) costs for closed shows were improperly reclassified as capitalized costs of a running show, thereby understating expenses and overstating net income and assets contrary to Livent's accounting policies and GAAP; ...[etc. my emphasis]

32 Again the pleading specifically raises breach of duties allegedly owed to the Livent *Stakeholders*:

"210. **In breach of the duties they owed to Livent and the Livent Stakeholders,** Deloitte and Deloitte US:

(a) negligently issued unqualified Independent Auditors' Reports, with respect to the audited Original Statements of GAAP in both the United States and Canada, Livent's own accounting policies, GAAS and Deloitte Auditing Standards;
(b) negligently reviewed non-audited financial statements, books and records of Livent during the course of providing ongoing auditing accounting, consulting and regulatory compliance advice and services to Livent and, consequently, failed to uncover and disclose the reasonably discoverable fraudulent schemes of Drabinsky and Gottlieb and allowed Drabinsky and Gottlieb to publish non-audited financial statements of Livent which Deloitte ought to have known were not in compliance with GAAP or Livent's own accounting policies; and
(c) **deprived the Livent Stakeholders of the opportunity to take collective action sooner.** " [my emphasis]

211. These breaches of duty by Deloitte and Deloitte US:

(a) facilitated the continuance of the fraud being orchestrated by Drabinsky and Gottlieb **thereby allowing them to inflict greater harm on Livent to the detriment of Livent and the Livent Stakeholders**; and
(b) allowed Drabinsky and Gottlieb, to report improperly the Original Statements inflated revenues, net income, total assets, and shareholder's equity for Livent thereby enhancing the ability of Drabinsky and Gottlieb to cause Livent to assume further onerous liabilities."

33 The defence of Deloitte Canada asserts:

"10. Livent did not suffer any damages as alleged in the Statement of Claim or at all. It was a party to and a beneficiary of the Frauds. Furthermore, any losses suffered by the Stakeholders occasioned by the Frauds are not attributable in whole or in part to any act or omission of Deloitte. Rather, the Stakeholders' losses, if any, are attributable to the illegal conduct of Drabinsky, Gottlieb, Livent and those acting in concert with them.
11. Deloitte denies that Doroniuk has the capacity to bring this or any action to recover the alleged losses or the Stakeholders. Doroniuk's power as Special Receiver has been delegated to him pursuant to a court order dated November 16, 2001 (the "Order"). Pursuant to the Order, Doroniuk is entitled only to pursue Livent's potential claim or claims, if any, against Deloitte. Claims in respect of either the property or the individual losses of the Stakeholders, such as those claimed in this action, are beyond the scope of Doroniuk's powers.
12. Furthermore, Livent itself has no capacity at law to advance claims for any losses of its Stakeholders, particularly in circumstances such as this, where Livent's claims are founded on its own illegal conduct.

VIII. HERCULES

34 In *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 the Supreme Court of Canada addressed the exposure of accountants to claims by investors in a company that ultimately fails.

35 Mr Justice LaForest for the Court addressed "The Effect of the Rule in *Foss v. Harbottle*":

> **58** All the participants in this appeal ... raised the issue of whether the appellants' claims in respect of the losses they suffered in their existing shareholdings through their alleged inability to oversee management of the corporations ought to have been brought as a derivative action in conformity with the rule in *Foss v. Harbottle* rather than as a series of individual actions. The issue was also raised and discussed in the courts below. In my opinion, a derivative action ... would have been the proper method of proceeding with respect to this claim. Indeed, I would regard this simply as a corollary of the idea that the audited reports are provided to the shareholders as a group in order to allow them to take collective (as opposed to individual) decisions. Let me explain.

> **59** The rule in *Foss v. Harbottle* provides that individual shareholders have no cause of action in law for any wrongs done to the corporation and that if an action is to be brought in respect of such losses, it must be brought either by the corporation itself (through management) or by way of a derivative action. The legal rationale behind the rule was eloquently set out by the English Court of Appeal in *Prudential Assurance Co. v. Newman Industries Ltd. (No. 2)*, [1982] 1 All E.R. 354, at p. 367, ...:
>
> **60** ... Any duty owed by auditors in respect of this aspect of the shareholders' functions, then, would be owed not to shareholders qua individuals, but rather to all shareholders as a group, acting in the interests of the corporation. And if the decisions taken by the collectivity of shareholders are in respect of the corporation's affairs, then the shareholders' reliance on negligently prepared audit reports in taking such decisions will result in a wrong to the corporation for which the shareholders cannot, as individuals, recover ...
>
> *Conclusion*
>
> **64** In light of the foregoing, I would find that even though the respondents owed the appellants (qua individual claimants) a prima facie duty of care both with respect to the 1982-83 investments made in NGA and NGH by Hercules and Mr. Freed and with respect to the losses they incurred through the devaluation of their existing shareholdings, such prima facie duties are negated by policy considerations which are not obviated by the facts of the case. Indeed, to come to the opposite conclusion on these facts would be to expose auditors to the possibility of indeterminate liability, since such a finding would imply that auditors owe a duty of care to any known class of potential plaintiffs regardless of the purpose to which they put the auditors' reports. This would amount to an unacceptably broad expansion of the bounds of liability ...

36 In light of the law in Canada as set out above it is clear that the Stakeholders recourse against the auditors can only be sought through the Livent corporate entity. The plaintiff stands in its stead and is obviously pursuing an ultimate recovery for the Stakeholders. Is the manner in which this proceeding to claim the losses they incurred through the devaluation of their existing shareholdings (and other debt instruments), such that any normal *prima facie* entitlement to security for costs is negated by policy considerations, which are not obviated by the facts of the case?

IX. The Stake of the Stakeholders

37 Included in the documents filed before me was the Statement of Claim in a class action commenced in the United States District Court for the Southern District of New York in 1999. The plaintiffs were Cerberus Capital Management LP and Tri-links Investment Trust individually and on behalf of all other others similarly situated as persons or entities who purchased Livent 9 3/8 % Senior Unsecured Notes Due 2004, during the relevant period.

38 In that document Cerberus acknowledges that it was the purchaser of Livent Notes having a total face value of $15,750,000 for a total purchase price of $8.93 million. Similarly, Tri-links purchased a face amount of $21,777,000 for a total price of $8,880,115.

39 It would appear that both of these companies are amongst the creditors included in the classes of Stakeholders on whose behalf the plaintiff is bringing this action. Their claims in the insolvency were asserted for the full face value of the notes which obviously had been purchased at substantial discounts.

40 The settlement reached in the United States, amongst the creditors generally, is reflected in the *Debtors' Modified Fourth Amended Joint Consolidated Liquidating Plan of Reorganization* dated October 10, 2003, which was part of the Chapter 11 proceedings of Livent (U.S.) Inc.

41 Article XV of the Plan deals with the subject of "Prosecution of the Canadian Action." In that article it is directed that "the D&T Litigation shall continue to be prosecuted by the Special Receiver, ... in consultation with the Post-Confirmation D&T Litigation Oversight Committee, which shall supersede the Stakeholders' Committee as of the Effective Date until the Canadian Action, including the D&T Litigation is concluded by Final Order or settlement ..."

42 Significantly in my view the article goes on to provide for the raising of funds pursuant to a majority vote of the D&T Litigation Oversight Committee "... as needed to continue to fund the prosecution of the Canadian Action, including the D&T Litigation ..."

43 Paragraph 15.2 sets out in detail the parties amongst whom any Canadian Action Proceeds are to be distributed. Understandably, the funds are to be distributed first to Classes 4, 5, 6 and 7 pro rata in the proportion that each such Class's contribution to the D&T Litigation Fund bears to the total amount contributed by all of such classes to the D&T Litigation Fund.

44 The plaintiff's factum outlines the four Classes of creditors having Stakeholder roles:

Class	Estimated Claim Base	Total Amount of distributions	Total Percentage Recovery on *Allowed* Claims
Bondholder Class 4	$126,135,000.00	$30,356,118.00	24.12%
US Unsecured Class 5	$33,075,000.00	$7,074,953.00	39.46%
Canadian Unsecured Class 6	$38,375,000.00	$6,965,299.00	15.40%
Subordinated Debt Class 7	$18,708,000.00	$3,482,630.20	16.54%
TOTALS	$216,293,000.00	$47,888,000.00	

45 The factum goes on to assert that these Unsecured Creditors have been paid only a fraction of their Allowed Claims and that the shortfall is approximately $168 million. Conversely, I note that they have already received payment of at least a portion of their claims.

46 The plaintiff asserts that all Remaining Creditors stand to benefit from a successful resolution of the Canadian Action; however there would seem to be little hope for the Classes being the Bondholder Section 510(b) (class 8) and the Allowed Equity Interest claims (class 9) which, under the Plan, rank behind classes 4 to 7.

47 The contractual arrangement amongst the creditors provides for a "Top up" out of any recovery after legal costs etc are paid totalling no more than $1.725 million to be distributed amongst classes 5, 6 and 7 to "equalize recovery percentages" amongst those classes.

X. The D&T Litigation Fund

48 As noted above the Plan provided for the establishment of a "D&T Litigation Fund," defined as:

> "the fund in the amount of $3,171,000 to be established by the Liquidation Trustee and deposited in trust with Stikeman Elliott, counsel to Livent (Canada) in the D&T Litigation, on the Effective Date **for the payment of the Estates' costs and expenses of prosecuting the Canadian Action, including the D&T Litigation".** [emphasis added]

49 In the Plan, "Canadian Action" is defined as any action, including this action and Livent Inc. v. Drabinsky, asserted or to be asserted by Livent to recover monies against non-debtor third parties.

50 It clearly seems reasonable to assume that the D&T Litigation Fund was funded. However, there was no evidence before me as to its current balance (if any).

51 The fact that a substantial litigation fund was established, distinguishes this case from most, if not all, of the reported cases in this area. I believe this is a factor to be taken into account on questions of quantum and timing but does not really impact on whether I have the necessary jurisdiction.

XI. Nature of this Receivership

52 On or about November 19, 1998, Livent applied in both Canada and the United States for statutory protection from its creditors. The application in Canada was made under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA Proceeding"), while the application in the United States was made under Chapter 11 of the *US. Bankruptcy Code*.

53 On November 19, 1998, Ernst & Young Inc. ("E&Y") was appointed Monitor of Livent in the CCAA Proceeding. On July 7 and 8, 1999, a joint motion was brought before Mr. Justice Ground in Ontario and the U.S. Bankruptcy Court approving a sale agreement dated May 28, 1999 between Livent, its subsidiaries and SFX Entertainment Inc. ("SFX") whereby substantially all of the assets, property, and undertakings of Livent would be sold to SFX. This sale was approved by this Court by way of order dated July 8, 1999 and E&Y was appointed as the receiver of the assets vended by Livent to SFX.

54 On September 29, 1999 E&Y was appointed the Receiver and Manager of all of the remaining assets, property and undertakings of Livent.

55 E&Y declined to consider whether or not Livent had any potential claim against Deloitte on the basis of an alleged conflict of interest. Ultimately, on November 16, 2001, Doroniuk was appointed on E& Y's application to manage "the asset of Livent Inc., being the potential claim or claims of Livent Inc., if any, against Deloitte". Doroniuk commenced this proceeding by a Notice of Action issued on February 28, 2002.

56 Deloittes US argues that because the claims of certain classes of unsecured creditors have now been paid out of the estate, in the event the defendants are successful, there is unlikely to be sufficient monies remaining in the estate to pay any costs awarded against the plaintiff after the trial.

XII. The Motion and the "New" Rules -

Rule 56.01 and Rule 1.04(1.1): *Proportionality*

57 Rule 56.01(1)(d) provides that a court may order security for costs as is just where the plaintiff is a corporation or a nominal plaintiff, and where there is good reason to believe that the plaintiff has insufficient assets in Ontario to pay the defendant's costs.

58 The Deloitte defendants assert that the purpose of Rule 56 is to protect a defendant against the danger that a plaintiff will lack the funds to satisfy a costs award granted to the defendant. They argue that firstly, fairness requires that a defendant need not shoulder the financial burden of defending litigation if it will be unable to recover its costs if it succeeds at trial and secondly, those who stand to benefit from a successful claim should equally bear the risk of loss.

59 I accept that there is good reason to believe that an award of costs in favour of Deloitte defendants, should they be successful at trial, would go unsatisfied. But, does that matter if the plaintiff is a Court-appointed Receiver?

60 Nothing in Rule 56 appears to remove this Court's jurisdiction or discretion to order security for costs where a receiver is involved. Thus it would seem that I must be guided by cases previously decided under the previously rules, subject to the impact of any applicable newly enacted rules.

61 I believe that while helpful in this specific situation, having regard to the fact this motion was launched prior to January 1, 2010, but heard after that date, I do not believe I would have come to any different conclusion whether the old or new rules applied.

62 Nevertheless, in approaching this motion I have also endeavoured to consider the impact, if any, of the newly specified requirement for "*proportionality*" as set out in Rule 1.04:

> *General Principle*
>
> **1.04** (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

63 Lord Woolf notes, in the fifth chapter of his report *Access to Justice*:

> "1. The overall aim of my Inquiry is to improve access to justice by reducing the inequalities, cost, delay and complexity of civil litigation and to introduce greater certainty as to timescales and costs. My specific objectives are:
>
> (a) to provide appropriate and proportionate means of resolving disputes;
> (b) to establish "equality of arms" between the parties involved in civil cases;

(c) to assist the parties to resolve their disputes by agreement at the earliest possible date; and
(d) to ensure that the limited resources available to the courts can be deployed in the most effective manner for the benefit of everyone involved in civil litigation."

64 What is the most "proportionate" means to resolve the issues before me? More particularly, how is an "equality of arms" to be established in a case such as this where enormous sums have already been expended by both sides in a claim for damages approaching half a billion dollars? How have the courts dealt with similar situations under the *Bankruptcy and Insolvency Act* and also in "commercial" class actions in recent years?

65 It is with these questions in mind I come to consider the existing case law and statutory provisions dealing with situations paralleling the case before me. To treat comparable fact situations differently due to the structure underpinning the claimant, rather than the substance of the dispute, would not accord with my view of a "proportionate" solution.

XIII. Comparable Situations

* *Bankruptcy and Insolvency Act.*

66 Section 38 of the *Bankruptcy and Insolvency Act* deals with the procedure for a creditor bringing a proceeding when the trustee refuses or is unable to bring the proposed action:

> "**38.** (1) Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses or neglects to take the proceeding, **the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk**, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the court may direct.
>
> (2) On an order under subsection (1) being made, the trustee shall assign and transfer to the creditor all his right, title and interest in the chose in action or subject-matter of the proceeding, including any document in support thereof.
> (3) **Any benefit derived** from a proceeding taken pursuant to subsection (1), to the extent of his claim and the costs, **belongs exclusively to the creditor** instituting the proceeding, and the surplus, if any, belongs to the estate ..." [my emphasis]

67 Section 38 (4) addresses situations where the Trustee elects, with the permission of the inspectors to bring the requested action for the benefit of the estate. However the provision is silent on whether the trustee can be required to post security for costs. However, that issue has been addressed in the caselaw which I will canvas later in these reasons.

* *Commercial Class Actions*

68 In recent years appellate courts have turned their attention to the question of whether or not costs in a class action involving "commercial" issues ought to be awarded and in particular whether a representative plaintiff ought to be responsible or held liable for those costs in the action.

69 Shortly before this motion was argued, Justice Strathy released his reasons in Allen v. Aspen Group Resources Corp., [2009] O.J. No. 5213; which related in part to the suitability of a proposed representative plaintiff in a certification application for a commercial class action. In his reasons he noted:

> "**154** The most forceful complaint was made by counsel on behalf of WeirFoulds, to the effect that Mr. Allen lacks the capacity to pay a costs award. He submits in his factum that "... this Plaintiff Allen is but a straw man, by his own admission, and without the substantial assets it would take to defray the defendants' cost collectively should he lose." Mr. O'Connor submits that the court should refuse to certify the action unless Mr. Allen is replaced by or joined with another plaintiff who has financial substance. He suggests that there are some substantial shareholders of Aspen in Alberta who, assuming they are within the class, would have the ability to pay a costs award.
>
> **155** ... in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, Chief Justice McLachlin suggested that the capacity of the proposed representative to bear costs would be a relevant consideration on this inquiry-she stated, at para. 41:
>
> * In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally).
>
> **156** This observation was discussed by Cullity J. in *Mortson v. Ontario Municipal Employees Retirement Board* (2004), 4 C.P.C. (6th) 115, [2004] O.J. No. 4338 (Sup. Ct.), who held that, at the certification stage, a proposed plaintiff is not required to show that he or she has the ability to satisfy a costs award. He stated, at paras. 90 - 94:
>
> * The statements in *Dutton* and [of Nordheimer J. in *Pearson v. Inco*, [2002] O.J. No. 2764] are routinely relied on by defendants' counsel on motions for certification under the CPA. The interpretation placed on them by defendant's counsel in this case would have a result of defeating, or frustrating, the legislative objective of access to justice. It would, in effect, limit recourse to class proceedings to cases where the proposed representative plaintiffs were either wealthy or could demonstrate that a commitment for funding assistance was in place -- a sort of halfway house towards requiring security for costs. Until further authoritative guidance is provided, I do not believe I am compelled to accept such an interpretation of section 5(1)(e) of the CPA ..."

70 The leading case relating to the liability for costs of an unsuccessful representative class action plaintiff is the Court of Appeal's 2006 decision in *Kerr v. Danier Leather Inc.* Subsequent to determining the main issue in the case, the court issued a brief endorsement addressing costs of the mat-

ter which can be found at [2006] O.J. No. 3770; 20 B.L.R. (4th) 1; 151 A.C.W.S. (3d) 383; 2006 CarswellOnt 5723.

71 The Court, consisting of Justices Laskin, Goudge and Blair, noted:

> "4 The Ontario class action legislation recognizes that courts are to approach the issue of costs in class actions using the same general discretion as in ordinary actions, but may also consider whether the class proceeding was a test case, raised a novel point of law, or involved a matter of public interest. See *Class Proceedings Act, 1992*, S.O. 1992, c. 6.
>
> 5 Here only the last two of these need to be considered. In our view, neither are at play in this litigation. It involves established principles of statutory interpretation, implied representation, and judicial regard for the business judgment of management. While the context may be new, this is not enough to turn any of the issues into a novel point of law. Moreover, the case does not raise issues of general interest or importance to the public at large.
>
> 6 Rather it is a commercial dispute between sophisticated commercial actors who are well resourced. The representative plaintiff's claim is, in essence, that the substantial gain he made through his shareholdings of the corporate appellant (approximately $1.5 million), should have been even greater. This is not a case of personal injury or one that raises public law issues; nor is it a contest characterized by significant power imbalance.
>
> 7 We therefore see no basis for departing from the usual approach to costs in this court ..."

72 On the appeal to the Supreme Court of Canada in *Danier*, [2007] 3 S.C.R. 331, the above costs award was upheld following a further analysis of the circumstances surrounding the action, Justice Binnie wrote for the Court:

> 60 The appellant Durst argued that the Court of Appeal erred as a matter of law in awarding costs against him as the representative plaintiff because of its misinterpretation of s. 31(1) of the *Class Proceedings Act, 1992*. Quite apart from s. 31(1), he says, general concerns about access to justice justified a departure from the usual rule that costs follow the event. The Court of Appeal, in effect, held that there was no more reason in this case for the successful defendants to carry the full costs of the defence than in any other commercial litigation.
>
> ...
>
> 62 There is no doubt that the representative plaintiff, Mr. Durst, was outraged by what he regarded as the devious conduct of the respondents, and considered that it was in the public interest to call them to account. Nevertheless, he also has a major personal financial interest in the outcome ...

63 There is nothing to be criticized in any of this. The trial judge noted that the costs incurred by Mr. Durst in this litigation outweighed any personal financial benefit. However, protracted litigation has become the sport of kings in the sense that only kings or equivalent can afford it. Those who inflict it on others in the hope of significant personal gain and fail can generally expect adverse cost consequences.

64 The appellants are correct to point out that there is a strong public interest in setting the rules of adequate disclosure by issuers prior to closing, that indeed proper disclosure is the heart and soul of the securities regulations across Canada. However, regard must also be had to the situation of the respondents/defendants who have incurred the costs of a 44-day trial and 5 days in the Court of Appeal and one day here to defend themselves against serious allegations, and who in this instance have prevailed.

65 Section 31(1) of the *Class Proceedings Act, 1992*, provides:

> 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.

It has not been established that this is a "test case" in the conventional sense of a case selected to resolve a legal issue applicable to other pending or anticipated litigation. Nor have the appellants raised a "novel point of law". As we have seen, the heart of the case is simply a shareholder dispute over a lot of money requiring the application of well settled principles of statutory interpretation to particular legislative provisions. This is the usual fodder of commercial litigation ...

...

68 We are certainly not dealing with people on either side who are historically disadvantaged. Nor, as the Court of Appeal noted, "is it a contest characterized by significant power imbalance" ([2006] O.J. No. 3770 (QL), at para. 6). Though many Canadians are investors and the resolution of the present dispute will affect future actions for prospectus misrepresentation, **the Court of Appeal rightly concluded that this is, in essence, "a commercial dispute between sophisticated commercial actors who are well resourced"** (Ibid.). If anything, converting an ordinary piece of commercial litigation into a class proceeding may be seen by some observers simply as an *in terrorem* strategy to try to force a settlement. Be that as it may, Mr. Durst was well aware that as a representative plaintiff he ran the risk of being held solely responsible for the defendants' costs if the action failed. He gambled on his interpretation of s. 131(1) and lost.

69 Nor do general concerns about access to justice warrant a departure from the usual cost consequences in this case. While I agree with counsel for the appel-

> lants that "[a]n award of costs that exceeds or outweighs the potential benefits of litigation raises access to justice issues" (Supp. A.F., at para. 39), **it should not be assumed that class proceedings invariably engage access to justice concerns to an extent sufficient to justify withholding costs from the successful party.** I agree with the observation of Nordheimer J. in *Gariepy* that caution must be exercised not to stereotype class proceedings. "[T]he David against Goliath scenario" he writes, "does not necessarily represent an accurate portrayal of the real conflict" (para. 6). Class actions have become a staple of shareholder litigation. **The Court of Appeal took the view that this case is a piece of Bay Street litigation that was well run and well financed on both sides. Success would have reaped substantial rewards for the representative plaintiff and his counsel.** He put the representative respondents to enormous expense and I see no error in principle that would justify our intervention in the discretionary costs order made against him by the Court of Appeal." [my emphasis]

73 The impact of these findings on parties to current class actions was demonstrated in recent reasons of Justice Lax, released while this matter was under reserve, in a proposed class action by bank employees relating to claims asserted for allegedly unpaid overtime (*Fresco v. Canadian Imperial Bank of Commerce,* 2010 ONSC 1036):

> **17** This was an important case for the plaintiff and for the defendant. Ms. Fresco and CIBC each engaged a law firm highly experienced in prosecuting and defending complex class proceedings. Each also engaged a law firm that was experienced in employment-related class actions. Each had a team of lawyers of an equivalent number who attended at case conferences, cross-examinations and the motion hearing. It is obvious that the plaintiff as well as the defendant devoted considerable resources to the proceeding and Ms. Fresco and the Law Foundation could reasonably have expected and should reasonably have expected to be subject to a substantial costs order if the plaintiff was unsuccessful on the motion.
>
> **18** In arriving at an appropriate award, **I have taken into account the access to justice concerns** of the CPA and that the claim involved a matter of some public interest. The amount of costs I award on a partial indemnity basis is $525,000, inclusive of fees, disbursements and GST. In my view, this award is justified by the amount in issue in the proceeding, its complexity and importance, the reasonable expectations of Ms. Fresco, **the success achieved and by the principle of indemnity**. While costs awards in class proceedings must be made keeping in mind the three goals of the CPA and the overriding principle of reasonableness as articulated by the Court of Appeal in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291, [2004] O.J. No. 2634, **justice is a two-way street in class proceedings in Ontario** and awards in this range and higher have been made in favour of successful plaintiffs in other cases. **I have no doubt that if Ms. Fresco had emerged as the successful party, she would be seeking costs that would also leave one breathless**. This award, even if unprecedented, represents a fair and reasonable amount for the unsuccessful party to pay to the successful party in the particular circumstances of this case." [my emphasis]

74 I now turn to a consideration of other cases which bear upon the issues before me.

XIV. Authorities relied upon by Plaintiff.

75 Counsel for the Special Receiver relied primarily upon four cases in resisting the assertion that this Court has jurisdiction to make the order sought by the accounting firms.

76 The long-standing precedent relied upon by counsel, was *Mancini Estate (Trustee of) v. Falconi* (H.C.J.), [1989] O.J. No. 1410; 70 O.R. (2d) 171; a decision of Mr. Justice Gray concerning whether or not a trustee, Clarkson, Gordon Inc. could be required to post security for costs, with regard to an action being brought by it as receiver.

77 The court held that in instances such as where is clear that the plaintiff is bringing the action in a representative capacity, the court should not anticipate that resort will be made to the "personal assets" of the trustee:

> My ruling is that I am not going to permit the matter to go beyond the estate assets so far as these motions are concerned. The point was not raised earlier and the plaintiff is Clarkson, Gordon Inc., trustee in the estates of the bankrupts. It is clear from the statement of claim that the plaintiff is not suing personally. I am not going to decide the matter on the narrow basis that the word "plaintiff" in rule 56.01, simply means Clarkson, Gordon Inc. since, in my view, the plaintiff is Clarkson, Gordon Inc., as trustee in bankruptcy.

78 The learned judge then addressed the issue, which is central to the plaintiff's position before me:

> **12** ... I am now going to deal with the question of whether the trustee is or is not subject to the making of an order for security for costs. **The trustee's position is that it exercises a public duty and that suing in a representative capacity for the benefit of all creditors causes it not to be subject to an order for security for costs.** Three authorities were put forward in support of this proposition: *Rainbow v. Kittoe*, [1916] 1 Ch. 313; *Trustee of Property of E.R. Delorme, Debtor v. American Equitable Ins. Co. of New York*, [1938] O.W.N. 110, [1938] 2 D.L.R. 774n, 19 C.B.R. 166 (H.C.J.), and *Trustee of Altridge Ltd. v. Cook*, [1960] O.W.N. 310 (H.C.J.), overruling [1960] O.W.N. 272. [my emphasis]

79 After analysing these decisions, Justice Gray considered the factual situation before him:

> **19** Counsel for the moving parties in these motions before me claim that there is no evidence before me that the trustee is acting for creditors in general and not a restricted class, and that it is up to the trustee to show this.
>
> **20** Counsel for the plaintiff submits that it is pleaded that the trustee acts for the creditors generally. My reading of the 150 paragraphs in the statement of claim confirms this. The fact that there has been no suggestion or pleading otherwise thus far tends to confirm this.

> **21** I recognize that there is little direct authority, save as aforesaid, and that the two Ontario cases were decided under Rule 373, but **I have reached the conclusion that the trustee in this action is acting in a representative capacity for the benefit of the three estates generally with the result that, in the relevant circumstances, an order for security for costs should not be made against the trustee under rule 56.01(d).** [my emphasis]

80 Is this a principle of general application and is it still the law in Ontario as asserted by counsel for the plaintiff?

81 More recently Justice Farley quoted from the above decision in the second case referred to by the plaintiff's counsel, *Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.,* [1994] O.J. No. 1917. In his decision Farley, J. addressed the position of an interim receiver who was endeavouring to determine the validity of *Mechanics Lien Act* ("MLA")claims being asserted against the mining lands of Curragh located in the Yukon. In this case which was dealt with on the Commercial List he held:

> **5 ... The Interim Receiver is an officer of this court** and is answerable through this court to all affected parties in this proceeding. The Interim Receiver must exercise its own independent Judgment as to the Yukon proceedings. It is there to provide some discipline to these proceedings. Given the "request for assistance" that I have requested from other courts (including the Yukon court) in the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B.3 as amended ("BIA") proceedings, **I would be of the view that the Interim Receiver should be viewed as at least a quasi-officer of the Yukon Court as a result of the Ontario proceedings before me.**
>
> **6 In its representative capacity, I do not see that the Interim Receiver should be required to post security for costs.** While it is true that some of the MLA claims may be narrowed or thinned out, I do not see this process as being substantially different in principle from a trustee receiving and accepting or rejecting proofs of claims (possibly after requesting more information or documentation). I therefore do not view this situation as an "us" vs "them" situation. **Rather it is the Interim Receiver acting in the best interests of all creditors holding valid claims.** This is not akin to a section 38 BIA process where the fruits of the claim against a third party (who does not have a claim as such in the bankruptcy) have been hived off to those creditors who wish to finance the expedition. The Rules of Civil Procedure, R.R.O. 1990, Reg. 194 come into play by virtue of s. 4 of the General Rules under BIA:
>
> The practice of the court in civil actions or matters, including the practice in chambers, shall. in cases not provided for by the Act or these Rules, and so far as it is applicable and not inconsistent with the Act or these Rules, apply to all proceedings under the Act or these Rules. [my emphasis]

82 To a degree the case before me is an "us" versus "them" matter as there apparently are outstanding claims for unpaid fees owing to the defendants by Livent. As well, I do not view this claim

as a "normal course" debt recovery claim being brought on behalf of the estate to recover funds for the common benefit of all creditors.

83 These are not the type of claims that would be addressed in a normal claims process. I see this process as being "substantially different in principle from a trustee receiving and accepting or rejecting proofs of claims". Moreover, creditors such as unpaid suppliers of footlights and curtains in no way would have relied upon the challenged financial information. It would seem based on the amounts involved and having regard to the requirements of *Hercules* that this claim is being asserted through Livent, at least in part for the benefit of those who chose, either before or after the Corporation discovered its financial problems, to purchase shares or debt instruments.

84 The third case relied upon by the plaintiff is a 1938 decision of Master Barlow, affirmed on appeal by Middleton, J.A., *Delorme (Trustee of) v. American Equitable Assurance Co. of New York* [1938] O.J. No. 428; [1938] 2 D.L.R. 774; [1938] O.W.N. 110; 19 C.B.R. 166. Before me, the Special Receiver asserts that this case stands for the proposition that security for costs may be ordered only where litigation has been commenced for the benefit of one or a specific group of creditors that have decided to fund the action themselves. His counsel submits that this "is not the situation we are faced with in the instant case".

85 In particular Master Barlow held in *Delorme*:

> **6** Counsel for the plaintiff contends that a trustee in bankruptcy is not compelled to give security for costs. I would agree with this contention if this were an ordinary action prosecuted by the trustee in bankruptcy of the debtor for the benefit of the estate generally ...
>
> **12** Sec. 69 of *The Bankruptcy Act*, adopted a proceeding which has been in use under *The Assignments and Preferences Act* for many years. Under *The Assignments and Preferences Act* a creditor who desires to bring an action which the assignee refuses to bring has the right to make application and obtain an order from a Judge authorizing the creditor to take proceedings in the name of the assignee but at his own expense and risk upon such terms and conditions of indemnity as the Judge may prescribe. It is under this practice that the above mentioned cases were decided.
>
> **13** I am of the opinion that a trustee in bankruptcy in whose name an action is brought and continued by a creditor pursuant to sec. 69 of *The Bankruptcy Act* is in no different position than an assignee in whose name an action is brought by a creditor pursuant to *The Assignments and Preferences Act.*
>
> **14** I am, therefore, of the opinion that an order must go for security for costs."

86 The question of whether the action is "for all" or "for one" was also addressed by Master Funduk in 1991 in the fourth case relied upon by the plaintiff, *B & W Building Maintenance Ltd. v. Superstein* [1991] A.J. No. 17; 116 A.R. 149; 2 C.B.R. (3d) 21:

> First, there are **no assets available for preferred or unsecured creditors so costs awarded against the estate will not be paid out of the estate.** The prior-

ity given by s. 107(1) (b)(i) Bankruptcy Act, now s. 136(1)(b)(i), is academic. The costs cannot come out of any "secured" assets because of the opening phrase of s. 136(1).

Second, the trustee is not prosecuting this action for the benefit of the general body of creditors.

...

If the Plaintiff is successful in the action what will the trustee do with the money? **Will it fall into the estate for the benefit of all the creditors?**

I think not.

The Treasury Branches holds a general assignment of book debts, so any debt owing by the Defendants to the Plaintiff goes to the Treasury Branch.

The bottom line is that the trustee is prosecuting this action for the benefit of the Treasury Branches only. Even *Clarkson, Gordon* [*Falconi*] recognizes this kind of distinction.

If the Plaintiff is successful the fruits of the action will go to the Treasury Branches.

The trustee is prosecuting this action solely on behalf of a secured creditor.
...

Secured creditors are generally outside the scope of the Bankruptcy Act and they should prosecute their own actions. Secured creditors should not use trustees in bankruptcy as front men.

...

It might be logically argued that if a trustee is prosecuting an action the fruits of which will go only to a secured creditor that the trustee is just a nominal plaintiff.

I conclude that the Court does have jurisdiction to require a trustee in bankruptcy to provide security for costs.

XV. Defendants' Authorities

87 Counsel for both defendants put a number of cases before me. I have set out below extracts which I found particularly helpful.

88 In 2006, in *Future Health Inc. v. State Farm Automobile Insurance Co., Future Health Inc. v. State Farm Automobile Insurance Co.,* [2006] O.J. No. 4769 the Ontario Superior Court ordered a trustee to post security for costs as a nominal Plaintiff under Rule 56.01(1)(d). The Deloitte defendants argue that consistent with the well-established law referenced by the British Columbia Court

of Appeal in *Sigurdson v. Fidelity Insurance Company of Canada*, [1980] B.C.J. No. 488. In *Future Health* Justice Festeryga held that since courts have ordered costs against a trustee personally at the end of an unsuccessful action,

> "I see no valid reason why I should not exercise my discretion to make an Order that the Trustee in Bankruptcy post security for costs."

89 In a number of instances Canadian courts in the last thirty years have consistently rejected the proposition that simply because the entity pursuing the litigation is a Receiver or Trustee, that Receiver or Trustee need not bear the economic consequences of its decisions. As recently stated by the Alberta Court of Queen's Bench, in imposing liability for costs on the unsuccessful Receiver Manager and Trustee, PricewaterhouseCoopers, at the end of a proceeding:

> "It would be unjust for Crossing to be successful in the litigation and then be denied the fruits thereof because the Receiver Manager and Trustee pursued litigation without assuming liability to pay the costs. Such would be a one-way risk." [*Crossing Co. v. Banister Pipelines* Inc., [2004] A.J. No. 81 (Alta. Q.B.)]

90 The Court went on to elaborate as to why a "one-way risk", favouring the Trustee or Receiver Manager, cannot be supported:

> "It is my view that Receiver/Managers, Trustees, ought not to be allowed to pursue litigation with immunity against personal liability for costs. Where there is no statutory duty to pursue the litigation and where the Receiver/Manager, Trustee knows or ought to know there will likely be insufficient assets in the estate to satisfy any award of costs, if unsuccessful, he should be held personally liable for costs: *Vancouver Trade Mart Inc. (Trustee) v. Creative Prosperity Capital Corp.* (1998) 7 C.B.R. (4th) 3. As stated in L.W. Holden & C.H. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 3d ed, loose-leaf (Toronto; Carswell, 1992) at 7. **I also find it immaterial whether the trustee is an unsuccessful defendant or an unsuccessful plaintiff. However, it is notable that Receiver/Managers, Trustees are entitled to indemnity out of the bankrupt estate provided there was no misconduct on their behalf**: *Sigurdson v. Fidelity Insurance Co. of Canada et al* (1980), 110 D.L.R. (3d) 491."

91 It is argued that the reason why the courts in Ontario, as well as other provinces, including British Columbia and Alberta, have repeatedly held that trustees will be held personally liable for costs, was explained by Smith, J. in *Mainland Lumber Ltd. (Trustee of) v. Weldwood of Canada Sales Ltd.,* [1984] O.J. No. 1047:

> "There are two conflicting policies, one of protecting successful defendants from unwarranted charges just as they would be protected when a creditor sued personally and the other policy of encouraging diligence and fearlessness in trustees in their administration of bankrupt estates. The former is stronger and should prevail only because **the trustee has every means at his disposal to protect his position either by resorting to the assets when they prove sufficient or to the interested creditors whenever they display a sufficient interest in the litigation**, or to a section 20 application pursuant to *The Bankruptcy Act*."

92 While I still feel the court must weigh the respective equities of the positions of the parties and would not be comfortable with a hard and fast rule that the defendant is *always* entitled to security nevertheless I believe Justice Smith's inclination is supported by other Ontario jurisprudence.

93 As stated by the Court in *Enescu v. Wawansea Mutual Insurance Company* [2005] O.J. No. 4836 (Ont. Sup. Ct.) at para 6:

> "Creditors cannot hide behind impecunious plaintiffs on the issue of security for costs ... If they intended to reap the reward of litigation they should also bear the burden of cost consequences in the event that the action should fail unless there is positive evidence that the creditors are not able to do so."

94 Regional Senior Justice Then denied leave to appeal from this decision, citing several recent authorities that support the principle that if creditors intend to reap the rewards of litigation, they should also bear the cost consequences in the event the action should fail, holding that creditors "cannot hide behind impecunious plaintiffs on the issue of security for costs".

95 This principle was also recognized by Nordheimer, J. in *Design 19 Construction v. Marks* [2002] O.J. No. 1091. Because the creditors would be the beneficiaries if the bankrupt corporate plaintiff was successful in the litigation, their ability to contribute money to protect the defendant's right to recover costs if successful at trial, was held to be critical. Nordheimer, J. stated:

> "If the creditors are prepared to take the benefit of this action, then I fail to see why they should not also have to accept the burden of it".

96 In *Greenwood Forest Products (1969) Ltd. (Receiver-Manager of) v. Newnes Machine Ltd.*, [1986] B.C.J. No. 1174; the British Columbia Supreme Court ordered the costs of a trial to be paid by the Court-appointed Receiver. In so doing, the Court rejected the distinction between a trustee in bankruptcy and a Court-appointed Receiver as being material for the purposes of imposing liability for costs. The Court observed that the duties of both a trustee and a Court-appointed Receiver, in realizing assets on behalf of all creditors, are similar, such that it would be "monstrously unfair" for a successful litigant to be treated as an unsecured creditor in respect of his costs:

> "These authorities show that the receiver-manager is personally liable for costs. He may protect himself by an indemnity but that is irrelevant when considering the opposite party's right to recover costs from him.
>
> I see no distinction between the position of the receiver-manager in the case at bar and the position of the trustee in bankruptcy in *Sigurdson v. Fidelity Insurance Company of Canada*. Each took civil proceedings as plaintiff which proved to be unsuccessful. In my opinion the receiver-manager is personally liable for the costs of this action.
>
> **It was argued by counsel that the receiver-manager's position was different from the position of the trustee in bankruptcy in the *Sigurdson* case. The receiver-manager was appointed by the Court with duties imposed upon him by Court order. The trustee in bankruptcy was not so appointed. I must reject that submission.** In a broad sense, both a receiver-manager and a trustee in

> bankruptcy have similar duties. Although the Court-appointed receiver-manager is an officer of the Court his primary interest is in realizing assets charged under the mortgage or debenture which has given rise to his appointment. He may be responsible for distributing what is realized to creditors other than the secured creditors if there is a surplus. The trustee in bankruptcy is responsible for realizing the assets on behalf of all creditors. But in my respectful opinion this difference is not a reason for holding that the receiver-manager is not liable for costs. He is a trustee with duties as a trustee similar to a trustee in bankruptcy and similar to the trustees in that broad class of trustees referred to by the Court of Appeal in the *Sigurdson* case." (Emphasis added)

97 Having considered, the four cases relied upon by the plaintiff 's counsel I am left with a strong inclination to agree with the comment of my Alberta colleague at the outset of his synopsis of the argument before him in B & W Building:

> "The only argument put forward by counsel for the trustee is that security for costs cannot (or at least should not) be ordered against a party who acts in a representative capacity. Counsel for the trustee relies on *Clarkson Gordon v. Falconi*, 38 C.P.C. (2d) 208 (Ont.S.C.) for that dubious proposition.
>
> I have difficulty with that proposition."

98 As do I.

99 However it is essential to also examine the terms of the relevant court orders specific to this case to determine the extent to which those orders restrict whit would otherwise, in my view, be permissible.

XVI. Receiver "Without Security"

100 While not the subject of extensive oral argument, the plaintiff's factum did assert that since the "Special Receiver Order" expressly states that the Special Receiver assumed his role as receiver and manager on a "without security" basis it would not be appropriate for the court to make an order requiring the posting of security for costs in this case.

101 The actual provision reads:

> THIS COURT ORDERS THAT Roman Doroniuk, C.A. be and is hereby appointed Special Receiver and Manager (the "Special Receiver") without security of the:
>
> (a) asset of Livent Inc. being the potential claim or claims of Livent it, if any, against Deloitte, (the "Deloitte Litigation"); and
> (b) asset of Livent Inc. being the potential claim or claims of Livent Inc., if any, against former management ... (the "Drabinsky Litigation"), the Deloitte Litigation and the Drabinsky Litigation are referred to collectively as the "Litigation Assets";

102 In my view this "without security" provision is a common which is intended to refer to security being posted to assure the proper performance by the appointee of his professional responsibili-

ties. In rejecting the plaintiff's argument I adopt the analysis of the author of *Kerr and Hunter on Receivers and Administrators* (18th edition):

> "5-18 *Security to be given by receiver*. The court may (and almost invariably. will) direct that, before a receiver begins to act, or within a specified time after his appointment, he must either: (a) give such security as the court may determine; or (b) file and serve all parties to the proceedings evidence that he already has in force sufficient security, in either case **sufficient to cover his liability for his acts and omissions *as receiver*.**" [my emphasis]

103 However it remains necessary to consider the other provisions of the Special Receiver Order.

XVII. The Appointing Order: Provisions and Protections

104 The Deloitte Defendants assert that here is no order, including the Special Receiver Order, that precludes the court from ordering security for costs as against the estate of Livent.

105 Conversely the plaintiff relies on the terms of at least two orders. The first being the original Receivership Order under which E&Y was empowered, authorized, (but not obligated) to:

> "... initiate, prosecute and continue the prosecution of any and all actions, applications, administrative hearings, arbitrations or proceedings, in Ontario or elsewhere, as may in its Judgment be necessary or desirable to properly receive, manage, operate, preserve, protect or realize upon [Livent's] Assets and to secure payment of rent, advances, tax credits, tax refunds, license fees and accounts receivable from the Assets;"

106 As noted above Deloitte Canada was the auditor of Livent and was an unsecured creditor of Livent with an outstanding claim against the Livent estate. In particular, Deloitte Canada was a "Class 6" claim for in the amount of CDN $403,784.99. It is asserted that prior to the point in time that E&Y was appointed as receiver Deloitte Canada did not file a Proof of Claim. On February 16, 2004 the Liquidation Trustee under the Plan issued a Notice of Revision or Disallowance of Deloitte Canada's claim against the estate for the reasons set out in the Amended Statement of Claim in this proceeding. On February 20, 2004, Deloitte Canada filed a Dispute Notice to the Notice of Revision and Disallowance, citing the reasons set out in its Statement of Defence in this proceeding.

107 The plaintiff's counsel argues that by virtue of its status as an unsecured creditor of Livent, Deloitte Canada had standing in all proceedings arising out of the CCAA Proceeding and the eventual receivership of Livent. It is suggested that the Deloitte Defendants are not in a position to challenge the specific terms of the resulting order since Deloitte Canada was included on the Service List in the CCAA Proceeding and was provided with notice of E&Y's motion to appoint Roman Doroniuk as the Special Receiver and Manager of Livent's claims against Deloittes.

108 Does the failure of the Deloitte Defendants to effectively challenge the terms of the Special Receiver Order prior to its being made, create an estoppel that ought to deprive me of any jurisdiction to make any order with respect to security for costs these many years later?

109 I do not believe it does. The norm for motions of this type is to wait at least until after the pleadings are complete prior to launching such an application. I will consider later in these reasons

the impact of the time that has elapsed since the action was commenced but I do not see any justification to prevent an order being made by me at this time, simply as a result of initial inaction. Moreover the Livent Stakeholders were equally in a position to ensure the original order included a clear provision relating to security for costs.

110 I note that the Special Receiver Order expressly states that the Special Receiver "shall have no personal liability as a result of his appointment or as a result of performing his duties" under the order.

111 In addition, the Special Receiver clearly was appointed as the independent litigation supervisor on the basis that he would be indemnified out of the Assets, as defined in the Receivership Order, of the Debtors' consolidated estates in priority to all persons (save and except the Receiver E&Y).

112 I also need to consider that fact that the Special Receiver's mandate under the Special Receiver Order differs from the original Receivership Order in that there is now a direction to the Special Receiver:

> [...] the Special Receiver is hereby empowered, authorized ***and directed*** as follows:
>
> [...]
>
> (b) **to initiate, prosecute and continue** to [sic] **the prosecution of any and all actions**, applications, administrative hearings, arbitrations or proceedings, in Ontario or elsewhere, as may in the judgment of the Special Receiver may be necessary or desired to properly receive, manage, preserve, protect or realize upon the Litigation Assets; [emphasis added]

113 I do not interpret these provisions as the Special receiver being given *carte blanche* to continue the litigation with absolutely no cost exposure. Rather he takes the place of the group of claimants who stand to benefit from this litigation.

114 I therefore conclude based on the cases considered and the terms of the relevant court documents that there is no impediment on my ability to make an order for security for costs at this time.

XVII. Intermission

115 As indicated at the outset of these reasons, I split the argument of this motion. By virtue of the foregoing decision I will now consider the appropriate order to be made in the unique circumstances of this case.

116 Looking forward that will have to be addressed in argument is the relevance of delay in bringing this motion.

117 In *Kawkaban Corp. v. Second Cup Ltd.,* [2005] O.J. No. 4197; 260 D.L.R. (4th) 352; 202 O.A.C. 367; 16 C.P.C. (6th) 178 the Ontario Divisional Court allowed an appeal from an order requiring the posting of costs by an impecunious plaintiff, where there was no suggestion that the lawsuit was frivolous or vexatious and the defendant provided no adequate reason for delay in bringing motion, when it had knowledge the plaintiff was impecunious from time the letter which gave rise to the action was written.

118 In that case, the appellant commenced this action by a statement of claim on March 1, 2000. Counsel was served with the motion for security for costs more than four years later on May 18, 2004.

119 Mr. Justice O'Driscoll in the Divisional Court observed:

> 28 [26] In *Re 423322 Ontario Ltd. et al. and Bank of Montreal* (1988), 66 O.R. (2d) 123, 128, Granger J., in dismissing an appeal from Master Peppiatt (65 O.R. (2d) 136), said:
>
> > "In his reasons the learned master found that the defendants had failed to satisfy him as to their reason for delaying in bringing their application for security for costs, and this finding would appear to be fatal to the defendants' motion. It is also important to note that the learned master did not find the litigation to be frivolous or vexatious. Accepting that the action is not frivolous or vexatious and the defendants cannot explain their delay, I am not prepared to order the plaintiffs to provide security for costs as I am convinced on the material that such an order will result in the plaintiffs being unable to continue with these proceedings. I am advised that this action is fixed for trial commencing in December, 1988. In *John Wink Ltd. v. Sico Inc.* (1987), 57 O.R. (2d) 705 at pp. 708-9, 15 C.P.C. (2d) 187 (H.C.J.), Reid J. stated:
> >
> > > There can be no question that an injustice would result if a meritorious claim were prevented from reaching trial because of the poverty of the plaintiff. If the consequence of an order for costs would be to destroy such a claim no order shall be made. Injustice would be even more manifest if the impoverishment of the plaintiff were caused by the very acts of which the plaintiff complains in the action.
> >
> > > ...
> >
> > > In my respectful opinion, unless a claim is plainly devoid of merit, it should be allowed to proceed. That is the only "special circumstance" that I would require. While the adoption of this standard might allow some cases to go to trial that the trial will prove should not have proceeded, nevertheless, the danger of injustice resulting from wrongly destroying claims that should have been permitted to go to trial is to my mind a greater injustice. In my experience, there are very few claims that are entirely without merit that go to and through a trial. The onus on plaintiff is therefore not to show that the claim is likely to succeed. It is merely to show that it is not almost certain to fail.
>
> In my opinion, having regard to the delay in bringing the motion and the fact that the plaintiffs' action is not frivolous or vexatious and is founded upon the actions of the defendants which the plaintiffs alleged caused its

> insolvency, I am not prepared to exercise my discretion and order the plaintiffs to submit to an order for security for costs at this stage. If I was to make such an order it would cause an injustice."

120 Justice O'Driscoll concluded by citing the words of Justice Granger in *Re 423322 Ontario Ltd.* (supra):

> "In my opinion, having regard to the delay in bringing the motion and the fact that the plaintiffs' action is not frivolous or vexatious and is founded upon the actions of the defendants which the plaintiffs alleged caused its insolvency, I am not prepared to exercise my discretion and order the plaintiffs to submit to an order for security for costs at this stage. If I was to make such an order it would cause an injustice."

121 In my current view there is certainly a difference in the situation in the present case. In the next phase I will be looking to the assistance of counsel in crafting an order that will, in all the circumstances, not cause an injustice, to either party.

122 Since 2001 the Bench and Bar Ontario have been fortunate in being able to look to the *Annual Review of Civil Litigation* edited by Justices Archibald and Echlin of this court. In the *Foreword* to the 2007 edition, Justice LeBel noted that "the development of the law should be viewed as a discussion in the process of exchange within our society which engages the bar, judiciary, law schools and even interest groups." It is my hope that the breadth of my review in this case will at least in part help to it in the form that process of exchange in cases such as this.

123 The lead article in the recently published 2009 edition was entitled "*The End of the Action at Its Beginning: The Relationship between Security for Costs Motions and the Insolvent Corporate Plaintiff*" written by Justice Archibald, together with Christian Vernon. In that article the author's address the big difficulty of addressing the competing interests in cases such as this:

> "In our current global economic climate, there would appear to be increased likelihood that lawsuits will be brought by insolvent corporate plaintiffs, or that corporate plaintiffs with lawsuits already in progress may become insolvent during the course of litigation. In the next decade, this issue will of great significance for both plaintiffs and defendants. Defendants' counsel will have an interest in seeking and obtaining security from corporate plaintiff with questionable finances. Plaintiffs' counsel will have an interest in resisting orders for security; or in assessing whether to bring suits on behalf of corporations with minimal assets ..."

124 The authors address the major concern I expect have had in coming to my ultimate conclusion:

> "In a great many cases, a successful motion for security for costs effectively spells the end of the litigation. This is especially true where the plaintiff is insolvent. ... if the plaintiff corporation is a shell company that is being directed to pursue a course of litigation by a risk-averse shareholder, the order for-security for costs effectively upends the shareholder's litigation strategy, and in most cases will also mean the end of the litigation. The difficulty for motions judges in these situations is to carefully balance the interests of the defendant in not being

> put to a costly defence by a plaintiff with nothing on the line, while also recognizing that an order for security could derail a prima facie meritorious claim."

125 Dealing with a situation such as that under consideration they write:

> "It is worth noting, however, that in certain situations the insolvent plaintiff may actually be operating inside bankruptcy protection and the suit itself could be brought by the Receiver/Manager. In some cases, an order for security for costs will not spell the end of the litigation if the litigation is seen to be particularly meritorious from the perspective of the insolvent company's creditors.... It may be to the advantage of the creditors as a whole for the Receiver/Manager to pursue particularly meritorious litigation. Two examples might be the collection of a contract debt, or the voiding of a fraudulent preference. Naturally, in such a situation, the defendant would generally be wise to seek an order for security for costs. The defendant would appear to be *prima facie* entitled to an order for security, and if the action is sufficiently meritorious and valuable, the plaintiff may consider debtor-in-possession financing for its litigation.

XVIII. Determination

126 In the result it is my conclusion that the plaintiff has not discharged its burden to show that, as a matter of law, I have no discretion to order security for costs in the circumstances of this case. I look forward to the submissions from all counsel in the second act.

MASTER D.E. SHORT

cp/e/qlafr/qljxr/qlhcs

TAB 17

Indexed as:

Mangan v. Inco Ltd.

Between
James Mangan, plaintiff, and
Inco Limited, defendant

[1998] O.J. No. 551

38 O.R. (3d) 703

55 O.T.C. 161

27 C.E.L.R. (N.S.) 141

16 C.P.C. (4th) 165

77 A.C.W.S. (3d) 709

Court File No. C-1923/96

Ontario Court of Justice (General Division)
Sudbury, Ontario

Poupore J.

February 11, 1998.

(28 pp.)

[Ed. note: A Corrigendum was released by the Court February 12, 1998 and the correction has been made to the text.]

Practice -- Persons who can sue and be sued -- Individuals and corporations, status or standing -- Class or representative actions, members of class -- Settlements -- Breach, what constitutes -- Barristers and solicitors -- Relationship with client -- Confidential communications.

Motion by the defendant for relief from alleged violations of minutes of settlement. Sulphur dioxide gas escaped from the defendant's premises, and an action was commenced under the Class Proceedings Act. Extensive negotiations and mediation resulted in detailed minutes of settlement. Under the settlement the defendants were required to establish a telephone hotline to provide information to

claimants, and were required to publish notices in newspapers and on radio broadcasts. Class counsel retained a marketing firm to design, produce and distribute a large number of "claim form kits" to potential claimants. Most of the kits were mailed, but some were left at distribution points together with a leaflet advertising the services of the class counsel's firm. The defendant argued that the provisions of the Act prohibited any notice not first approved by the Court, and that the class counsel's tactics violated the spirit of the settlement. Class counsel stated that they had good reason to believe that many class members were not aware of their rights under the settlement after receiving the court-approved notice. They also argued that communications with potential class members were protected by privilege.

HELD: Motion granted. It was not for the court to rule on the spirit of the settlement. However, the Act required all notices to be approved by the Court. The solicitation campaign did not constitute privileged solicitor-client communication, as there was no intention of confidentiality or confidentiality in fact and no element of litigation strategy involved. Class counsel was restrained from further attempts at giving unapproved notice and was required to provide the defendant with copies of all notices of claim received after the mailing of the claim form kits. The defendant was entitled to as many additional peremptory challenges, pursuant to the terms of settlement, as there were notices of claim obtained under the unauthorized notice. Class counsel was responsible for the defendant's solicitor and client costs in exercising its additional peremptory challenges. Class counsel was prohibited from recovering its costs of providing the unauthorized notice, either from the defendant or from the class. Class counsel was liable for the defendant's costs in respect of any claims found to be fraudulent.

Statutes, Regulations and Rules Cited:

Act Respecting Champerty.
Canadian Charter of Rights and Freedoms, 1982, ss. 1, 2(b).
Class Proceedings Act, 1992, ss. 17, 17(4), 17(5), 17(6), 17(6)(c), 17(6)(d), 20, 33(1).

Counsel:

James M. Young and Michael McGowan, for the plaintiff.
Larry P. Lowenstein, for the defendant.

POUPORE J.:--

THE FACTS

1 Sulphur dioxide and/or other gases were released from Inco Limited's Copper Cliff plant on November 16, 1995. As a result, a potentially large number of persons living within the gases plume area may have been adversely affected.

2 This action was commenced under the Class Proceedings Act, 1992 (The Act) on March 8, 1996. Lengthy and difficult settlement negotiations ensued, including mediation. Detailed Minutes of Settlement were executed on the 16th day of September, 1997.

3 The within class proceèding was certified on the 25th day of November, 1997. The Order certifying the proceeding specified in part:

> NOTICE
>
> 23. THIS COURT ORDERS that notice be provided to the Class by:
> (a) the defendant's causing notices substantially in the dorm attached hereto as Schedule "G" to be published in the Sudbury Star and in Northern Life on 2 occasions each, one week apart;
> (b) the defendant's causing notices in the form of a French language translation of schedule "G" to be published in the Le Voyageur on 2 occasions, one week apart;
> (c) the defendant's causing notices substantially in the form attached hereto as Schedule "H" to be read on each radio station located in Sudbury on 2 occasions each between 7 and 9 a.m. or between 5 and 7 p.m. A french language translation of Schedule "H" shall be used on french language stations; and
> (d) the plaintiffs establishing a telephone hotline for claimants to call to request information.
> 24. THIS COURT ORDERS that the plaintiff and defendant shall coordinate the notice efforts and agree on the timing and incidental details of the notices. Any disputes shall be summarily determined by this court.

4 The Minutes of Settlement and Order provided for a compensation chart, breaking claims down into categories. Category 1 dealt with claimants whose symptoms were not confirmed by clinical notes and records or medical reports (subjective classification of the symptoms). Damages for Category 1 claimants who chase not to opt out of the Class, pursuant to the provisions of the court approved notice, could be randomly audited by a referee, challenged by Inco and/or assessed by a mediator or arbitrator. As part of the arbitration process, the arbitrator was given the discretion to award solicitor and client costs against any claimant who made a fraudulent misrepresentation or omission and also may be required to pay the arbitrator's costs. 20% of the amount awarded was to be deducted for legal fees with an additional 10% deducted for the Class Proceedings Fund. Compensation for successful claimants in this category was fixed at a flat rate depending on the severity of the symptoms; $250 for mild, $1,000 for moderate and $1,250 for severe symptoms.

5 In March, 1997, Class counsel commissioned a survey to obtain statistical evidence for possible use under s. 23 of the Act. Based on information received, counsel formed the opinion that possibly between 5,000 and 10,000 people may have suffered symptoms from the gas release. Prior to the execution of the Minutes of Settlement, Class counsel obtained a list of names, addresses and telephone numbers of people who lived in the plume area in 1995 as well as people who moved out of the area after the release.

6 On or before October 28, 1997 (prior to court approval for Notice of Certification) Class counsel retained the services of a marketing firm to design, produce and eventually mail a large number of what is described as "claim form kits". These kits consisted of an envelope, a covering letter, an 8-page class action settlement guide, a 4-page detailed claim form, a notice of claim coupon and a return envelope with Class counsel's address and a prepaid postage stamp thereon. To demonstrate the nature and effect of the claim form kits, a front and back view of the envelope together with the covering letter are attached to this judgment as Appendix "A".

7 On December 18, 1997, prior to the date set in the November 25, 1997 Order for potential claimants to opt out of the Class Proceedings (opt out date December 29, 1997), the marketing firm mailed, by bulk mail, approximately 8,632 claim form kits to anyone who lived in the plume area. A further 2,072 kits were bulk mailed to people who appeared to have moved from the plume area since the gas release. Where someone appeared to have moved from the plume area to one of two addresses, the marketing firm mailed kits to both addresses.

8 Class counsel also left claim form kits (up to 99) at several distribution points in the plume area. These distribution points included businesses, convenience stores, a coffee shop and Lotto 649 counter. The kits contained the same before described material together with a leaflet advertising their law firm personnel and services in connection with wills and powers of attorney.

9 Beginning December 23, 1997 (prior to opt out date), and continuing on December 29, December 30, December 31, 1997 to the date of this motion, law students employed by Class counsel telephoned addressees of the bulk mail kits. A script was followed by the students. They were also given a list of sample questions and answers in case issues arose during the calls.

10 On December 16, 17, 18, 19 and 22, 1997 (prior to opt out date) and on December 31, 1997, Class counsel entered into various business premises and inquired whether an owner or manager was available. Class counsel would then inform that individual about the gas release and the general nature of the Class Action. If the response indicated that customers or staff were affected, Class counsel would engage in a discussion. Where prospects of claims appeared most promising, Class counsel left a "Notice to All Persons Exposed" at the premises for posting and claim forms.

11 On December 17, 1997 (prior to opt out period), Class counsel also wrote to contacts at several institutions in the plume area. These letters sought assistance in locating persons present at the institutions at the time of the gas release.

12 The evidence discloses Class counsel's efforts have been extremely successful in increasing the number of claim forms submitted.

13 On January 6, 1998, defendant's counsel faxed this Court an "urgent message" with a copy to Class counsel. This motion resulted.

Argument

14 Inco argues that the provisions of the Act prohibit any notice within a class proceeding that is not first approved by the Court. It attempts to demonstrate the necessity for this position by stating that while the Court approved notice complied with s. 17(6) of the Act, the material disseminated by Class counsel failed to mention the provisions for opting out of the Class, Class counsel's fees, Class Proceedings Fund fees and Inco's rights of challenge and/or for random assessments. The impropriety of Class counsel promoting their firm members and the firm itself with respect to wills and powers of attorney under the auspicious of what could be considered court proceedings was mentioned as well.

15 Inco further states that the settlement arrived at after long and difficult negotiations, including mediation prohibited Class counsel's actions.

16 Class counsel on the other hand state that the provisions of the Act respecting notice are cumulative. They do not prevent vigorous counsel from issuing their own notice in a form of their choosing.

17 Class counsel state they had good reason to believe many Class members did not know of or understand their rights under the settlement after receiving, if at all, the Court approved notice. Mr. McGowan, for the plaintiff, went so far as to state that he was of this opinion even at the time of seeking court approval of the settled upon Court notice of certification.

18 Further, it was argued that Class members are entitled to untrammelled legal advice and the Court ought not to shackle the scope of Class counsel's work except where there has been a clear and objectionable excess. Class counsel go on to raise the question of privilege with respect to their communications with potential Class members. They particularly object to Inco's request to know who responded to these communications and to view the claim forms filed.

19 Also, Class counsel state that they, no less than any other citizen, have a constitutionally protected right of free expression. They go on to quote Sections 1 and 2(b) of the Canadian Charter of Rights and Freedoms Act.

THE ISSUES:

20

1. Does notice within a Class Proceeding require prior Court approval: before certification; after certification but before the opting out period; and after the opting out period expires?
2. To what extent may Class counsel communicate with both potential and actual Class members
3. Does the settlement arrived at by the parties in this proceeding impact on No. 1 and/or No. 2 above?

THE LAW:

Issue #1 - Notice

21 Class actions are very powerful devices that multiply the stakes of ordinary litigation many fold. Consequently, the parties to a class action and counsel for the class are driven by very strong incentives which do not necessarily coincide with the interests of absent class members or tend to promote fairness to the other side. The Court's review of notices to the class is designed to provide a check on the tendency of a class action to be turned into an instrument of oppression or unfairness through the dissemination of misleading, incomplete, one-sided or otherwise inappropriate notices. "Notice is available fundamentally for the protection of the members of the class or otherwise for the fair conduct of the action and should not be used merely as a device for the undesirable solicitation of claims."

> Advisory Committee Notes, 1966 Amendment, Subdivision (d)(2), U.S. Fed. R. Civ. P. 23

22 American courts have recognized that notice in a class action is a powerful instrument that carries with it a great potential for abuse. For example, various parties will have a strong interest in the decisions of Class members to opt out or not. Court supervision of any attempt to systematically notify the class about the case is essential if the opt-out decision is to be informed, balanced and independent:

It is essential that class members' decisions to participate or to withdraw be made on the basis of independent analysis of their own self interest, and the vehicle for accomplishing this is the class notice. See Impervious Paint Ind. v. Ashland Oil, 508 F. Supp. 720, 723 (W.D. Ky.), appeal dismissed without op., 659 F.2d 1081 (6th Cir. 1981). Accordingly, it is essential that the district court closely monitor the notice process and take steps necessary to ensure that class members are informed of the opportunity to exclude themselves or to participate in the judgment. Id. at 1202; see Fed. R. Civ. P. 23(c)(2).

The notice disseminated to class members is "crucial" to the entire scheme of Rule 23. See Kleiner 751 F.2d at 1202 ("In view of the tension between the preference for class adjudication and the individual autonomy afforded by exclusion, it is critical that the class receive accurate and impartial information regarding the status, purposes and effects of the class action."). Notice "sets forth an impartial recital of the subject matter of the suit, informs members that their rights are in litigation, and alerts them to take appropriate steps to make certain their individual interests are protected." Erhardt v. Prudential Group, Inc., 629 F. 2d 843, 846 (2d Cir. 1980); Impervious Paint Ind., 508 F. Supp. at 723.

"It is the responsibility of the court to direct the 'best notice practicable' to class members, Rule 23(c)(2), and to safeguard them from unauthorized, misleading communications from the parties or their counsel." Erhardt, 629 F.2d at 846. Misleading communications to class members concerning litigation pose a serious threat to the fairness of the litigation process, the adequacy of representation and the administration of justice generally. In re School Asbestos Litigation, 842 F.2d at 680. "Unsupervised, unilateral communications with the plaintiff class sabotage the goal of informed consent by urging exclusion on the basis of a one-sided presentation of the facts, without opportunity for rebuttal. The damage from misstatements could well be irreparable." Kleiner 751 F.2d at 1203. Here, I find that unilateral communications with class members by various attorneys were misleading and made it unlikely that class members, who received these communications or were informed of their contents, made an informed choice to exclude themselves from the class.

...

I find that the misleading aspects of the communications of counsel were self-evident. These communications undermined the spirit of the notice plan approved by this Court.

...

I approved the notice plan because it apprised prospective class members of the terms of the proposed settlement in a neutral fashion that would enable class members to make an informed choice. Id.; see In re Corrugated Container Anti-trust Litig., 643 F.2d 195, 223 (5th Cir. 1981). I now conclude that the mislead-

ing letters and advertisements of counsel opposed to the settlement interfered with the careful balance that the notice package achieved. Instead of providing class members with documents that would enable a reasonable person to make an informed, intelligent decision whether to opt out or remain a member of the class, some counsel have now exposed class members to one-sided, misleading claims that likely will prohibit a "free and unfettered" decision to opt out of the class. See Erhardt, 629 F.2d at 846 ("Unapproved notices to class members which are factually or legally incomplete, lack objectivity and neutrality, or contain untruths will surely result in confusion and adversely affect the administration of justice."). (emphasis added)

Georgine v. AmChem Products, Inc., 160 F.R.D. 478, 490, 497 (E.D. Pa. 1995)

Notice to class members is crucial to the entire scheme of Rule 23(b)(3). It sets forth an impartial recital of the subject matter of the suit, informs members that their rights are in litigation, and alerts them to take appropriate steps to make certain their individual interests are protected. See In re Gypsum Antitrust Cases, 565 F.2d 1123, 1125(9 Cir. 1977); In re Nissan Motor Corp. Antitrust Litigation, 552 F.2d 1088 (5 Cir. 1977). It also preserves the right of class members to "opt out" if they believe their interests are antagonistic to the other class members, or if they wish to proceed by separate suit. In re Nissan Motor Corp. Antitrust Litigation, supra at 1104-05.

It is the responsibility of the court to direct the "best notice practicable" to class members, Rule 23(c)(2), and to safeguard them from unauthorized, misleading communications from the parties or their counsel. Unapproved notices to class members which are factually or legally incomplete, lack objectivity and neutrality, or contain untruths will surely result in confusion and adversely affect the administration of justice. (emphasis added)

Erhardt v. Prudential Group, Inc., 629 F.2d 843, 846 (2nd Cir. 1980)

Unapproved communications to class members that misrepresent the status or effect of the pending action also have an obvious potential for confusion and/or adversely affecting the administration of justice. Particularly should such communications seem vested with official authority, there arises not only the risk of subsequent disenchantment with the judicial process, but also the danger that individuals will be induced to act to their detriment in reliance upon misinformation and/or falsehoods. Thus entailed in this abuse is something more than a general interest in orderly process which is shared by the court and the public; there is the added interest of the individual in achieving a full and fair judicial remedy.

Waldo v. Lakeshore Estates, Inc., 433 F. Supp. 782, 790-91 (E.D. La. 1977)

> Commentators have suggested that FR Civ P 23(c)(2) notice should emanate from the court and on the court's stationery in order to prevent FR Civ P 23 from being used as a device to enable client solicitation.
>
> 32B Am Jur 2d FEDERAL COURTS, s. 2062

23 One of the greatest risks of unsupervised notice is that the party providing the notice will fail to disclose its interest in the case. The drafters of the Act worried specifically about this problem, requiring that class counsel's fee arrangements be disclosed and establishing judicial supervision of notice to insure adequate disclosure. Accordingly, s. 17(6)(c) and (d) of the Act provide (emphasis added):

> Notice under this section shall, unless the court orders otherwise, ...
>
> (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 ...

24 Here, Class counsel's fees depended upon the number of claims submitted into the settlement: 20% of the amounts awarded were to be diverted to Class counsel (and a further 10% was to go to the Class Proceedings Fund). This, however, was not revealed in Class counsel's unauthorized solicitation campaign although the "claim form kits" were cloaked with the appearance of a dispassionate summary of the claims process and its consequences.

25 In a spirit similar to section 17 of the Act, American courts have recognized that the failure to disclose one's financial interest in a case renders a notice materially misleading:

> Various communications disseminated to class members by attorneys opposed to this settlement were, on their face, clearly materially false and misleading in several respects. Many of the letters and advertisements were misleading because they ... did not reveal the personal interests of the drafters of the letters and advertisements.
>
> ...
>
> Another misleading characteristic of the letters and advertisements disseminated by counsel is that each of them failed to disclose that the authors had a strong pecuniary interest in disseminating/publishing the communications ... In addition, asbestos plaintiffs' counsel would benefit financially from additional opt-outs ...
>
> ...
>
> In the instant case, because none of the communications at issue revealed to the recipient that the drafter had a financial motive to obtain additional opt-outs, the recipient was not on notice to closely scrutinize the substance of the communications. Moreover, as apparent disinterested officers of the court, class members likely believed the communications. (emphasis added)

Georgine, 160 F.R.D. at 490, 494-95, 496

26 Unsupervised notice promulgated by an interested party interferes with the efficacy and fairness of a class action. Unsupervised notice can also work great unfairness to other parties as well as associate the court involuntarily with the unseemliness that goes along with private solicitation by an interested party. Through experience, United States courts have become aware of the "heightened susceptibilities of nonparty class members to solicitation amounting to barratry as well as the increased opportunities of the parties or counsel to 'drum up' participation in the proceeding".

Waldo v. Lakeshore Estates, Inc., 433 F. Supp. 782, 790 (E.D. La. 1977)).

27 In one American case in which class counsel had engaged in mass mailings to class members which included brochures about their practices, the court issued a protective order because of such demonstrated "potential for abusive communications with class members."

Reed v. American Steamship Co., 682 F. Supp. 333, 339 (E.D. Mich. 1988)

28 In another American case involving an unauthorized mass mailing by class counsel soliciting participation in a class action, the court aptly summarized the objections to the practice:

> The impropriety of this letter is clear even if addressed solely to Rule 23(c)(1) class members whose continued involvement in the suit is uncertain. It was even more improper because it was sent to non-class members whose inclusion in the class is now sought. It has the odour of barratry.
>
> There is no provision in the Federal Rules for counsel for a party, sua sponte, to notify class members or non-class members, formally or informally, of the pendency of a lawsuit. In an action such as this one, arising under Subsection (b)(2) of Rule 23 of the Federal Rules of Civil Procedure, notice to class members is governed by the provisions of Rule 23(d)(2). Rule 23(d)(2) vests the court with the sole discretionary authority to issue notice. As Rule 23(d)(2) states, the discretionary notice is for the purpose of assuring fair conduct of an action or protecting class members -- it is not for undesirable solicitation of claims. See, EEOC v. Red Arrow Corp., 392 F.Supp. 64, 8 FEP Cases 621 (E.D. Mo. 1974); Cherner v. Transitron Electronic Corp., 201 F.Supp. 934 (D.Mass. 1962); Hormel v. United States, 17 F.R.D. 303 (S.D.N.Y. 1955). In fact, class member communications initiated by counsel without court supervision which have improper connotations are considered a breach of professional ethics. Halverson v. Convenient Food Mart, Inc., 458 F.2d 927 (7th Cir. 1972). n7 Further, solicitous communication with persons who are not even class members for the purpose of representation is a sufficient basis for denial of class action status with respect to those persons improperly solicited. Carlisle v. LTV Electrosystems, Inc., 54 F.R.O. 237(N.O. Tex. 1972).
>
> n7 See also Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc. 481 F.2d 1045, 1050 (2d Cir. 1973) cert. den. 94 S.Ct. 722.

In EEOC v. Red Arrow Corp., supra, the EEOC (without prior authorization by court) placed an advertisement in the newspaper soliciting unsuccessful applicants at the defendant company to participate in a lawsuit. Chastising the EEOC, the court said:

Said advertisement was neither authorized nor was any mention of it made to this Court prior to publication. Such conduct is wholly and totally reprehensible and is inconsistent with the high standard of conduct required from an officer of the Court. This Court has never and shall never countenance such demeanor [sic] on the part of an attorney for to do so would undermine the very bulwarks of our jurisprudential heritage. Id.

While refusing to dismiss the action entirely, the court ruled that no fruits of the impermissible publication would be admissible in evidence and that any similar publication would result in dismissal.

Clearly, it is the responsibility of the court to either promulgate a discretionary 23(d)(2) notice where one is deemed appropriate or to designate that a party send such a notice under the court's supervision. 38 Moore's Federal Practice P23.72 (1974) citing Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure, 81 Harv. L. Rev. 356, 398, n.157 (1967). Professor Moore cautions:

[If] a notice is sent out by the parties the court should carefully supervise its contents in order to avoid the undesirable solicitation of claims or other improprieties. Id. (Emphasis supplied).

The authority and responsibility is also vested in the court to supervise the conduct of the parties even after the notice is sent. Professor Moore continues:

Should the notice elicit any inquiries from class members, the court should likewise supervise the contents of any responses. Id.

Lewis v. Vloomsburg Mills, Inc., 1976 U.S. Dist. LEXIS 17261, at *5-8 (D. S.Car. 1976)

29 The unsupervised "drumming up" of business presents a special danger of unfairness in a case like this one, where compensation has been authorized for people who claim completely subjective ailments without any medical backup (Category 1) and consequently where the opportunity for fraud lurks. The Act induces defendants to agree to such settlements with the assurance that the court will review and approve any attempt to give notice. This scheme enables the court to screen for and prevent the issuance of notices that tend to invite fraudulent or abusive claims. When the court is circumvented, the result is notices such as the December 12, 1997 cover letter (Appendix "A") sent to thousands by Class counsel highlighting: People who did not get medical treatment can still get up to $1,250 each in compensation.

30 In the United States, the authority of a court to check abuses in the dissemination of notices in a class action has been a matter of judicial interpretation, and, as the cases cited above show, many courts have found that the prevention of abuse requires that courts play an active role in scrutinizing the attempts of interested parties to promulgate notices. It is true that some commentators in the United States dispute whether the court should play such a role. In Ontario, however, there is no room for argument. Section 20 of the Act makes this supervising role of the court mandatory. The Act expresses a preference for the judicial ability to review class notices and prevent the abuses that have sprung up in the United States as a result of unsupervised solicitations. Class counsel's systematic campaign of notice without the approval of the court violated the plain language of the Act.

31 At the end of the section titled "Notice Under The Proposed Class Actions Act", the Law Reform Commission Report makes 11 recommendations. The last of these recommendations states:

> (11) Notice should not be given unless the court approves its content.

32 Subsections 17(4) and (5) of the Act explicitly contemplate the modes of notice that may be given in a class proceeding, including the very ones employed by Class counsel:

> (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;
> (d) by any means or combination of means that the court considers appropriate.
>
> (5) The court may order that notice be given to different class members by different means.

33 In all circumstances, it is "the court" which will order notice; and s. 20 leaves no doubt: "[a] notice under section 17, 18 or 19 shall be approved by the court before it is given".

34 I am satisfied the notice provisions of the Act require all notices be approved by the Court including before certification, after certification before the opting out period expires as well as after.

Issue #2 - Solicitor Client Communication

35 Prior court approval for all notices given under the Act does not mean that Class counsel may not communicate with members of a class it represents for legitimate purposes in a nonabusive way. The Act does however clearly forbid unilateral efforts to give "notice" and Class counsel's mass solicitation campaign cannot be regarded as anything other than a concerted effort to give notice.

36 The composition of a class is not fixed or determinable until the opt-out period required by the Act has expired. In the opt-out period, potential class members are free to decide whether or not to participate in the class action. The Act requires this option because individuals pursuing their self-interest may have very good reasons not to be bound by a resolution of the class case. They may want to preserve their rights to pursue individual actions; they may not feel that they have been wronged; or they may have other available avenues of redress which they perceive to be superior than the class proceeding. Thus, no matter how the relationship of class counsel and class members

is classified after the opt-out period has expired, during the opt-out period potential class members can be regarded as no more than potential clients of class counsel.

37 As stated by Newberg (the well known American treatise on class actions):

> Courts are concerned during the period after certification but before the expiration of the exclusion period with the possibility of solicitation or champerty by the attorneys for the class representative or the negotiation of piecemeal settlements by the defendants. During this exclusion period, the status of class members is particularly amorphous because the putative class may contain members who will reject the class action remedy.
>
> Newberg on Class Actions, s. 15.15, at 15A3 (3rd ed. 1992)

38 Privilege will be extended to communications which meet the test propounded by Wigmore and accepted by the Supreme Court of Canada:

> 1. The communication must originate in confidence that they will not be disclosed;
> 2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
> 3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
> 4. The injury that would inure to the relation by the disclosure of the communication must be greater that the benefit thereby gained for the correct disposal of litigation.
>
> 8 Wigmore, Evidence (McNaughton rev. 1961), par. 2285, at 527, as quoted by Spence, J. in Slavutych v. Baker (1975), [1976] 1 S.C.R. 254 at 260.

39 Privilege will attach to communication between solicitor and client if it is made in the course of seeking legal advice with the intention that it be kept confidential.

Solosky v. Canada, [1980] 1 S.C.R. 821 at 835

Descôteaux v. Mierzwinski, [1982] 1 S.C.R. 860 at 870-72

40 Thus when communication between solicitor and client is made in the presence of third parties and no reasonable steps are taken to ensure that the conversation would be kept confidential no privilege attaches to the communication. Accordingly, where a document was widely circulated within a bank with no notation on its face that it was to be kept confidential, and no intention that it be kept confidential, it was not privileged.

> Toronto Dominion Bank v. Leigh Instruments Ltd. (1997), 32 O.R. (3d) 575 (Gen. Div.)
>
> R.D. Manes & M.P. Silver, Solicitor-Client Privilege in Canadian Law (Toronto: Butterworths, 1993) at 79-82

41 Class counsel's solicitation campaign cannot be considered privileged solicitor client communications consistent with these authorities. The campaign was undertaken with no intention of confidentiality or confidentiality in fact. By Class counsel's admission, most of the recipients of the solicitations were not class members, and Class counsel knew this would be the case before sending the solicitations. Similarly, no steps were taken to insure that the solicitations be treated as confidential communications. No warning or indication of secrecy was included with the solicitations and recipients were at all times free to circulate and share the materials as they saw fit.

42 Class counsel have also not raised any valid claim of solicitors' work product or litigation privilege relating to their unauthorized solicitations. The conduct concerned involves no work product and no invasion of privacy. There is no element of fact, evidence presentation, or litigation strategy involved. The conduct in issue relates to attempts to publicize the Settlement and locate claimants. Furthermore, Class counsel have taken no steps to maintain privacy. They have sought publicity and they have placed their conduct in the public domain.

Issue #3 - The effect of the settlement

43 There is no doubt Inco considered it had a complete settlement, including what notices would be given to possible Class members. The Minutes of Settlement set out the notice of certification in detail and the method of its delivery by print and radio media. The Minutes of Settlement did not prohibit any other forms of notice which might be undertaken by Class Council.

44 Inco's counsel states Class counsel violated the spirit of the settlement. That may be so from Inco's perspective. However, if one thing is to be learned, it is that defence counsel in dealing in Class Proceedings ought to be extremely careful and diligent while crafting settlement documentation. Often times, Class counsel have a direct interest in the number of claimants coming forward to join the Class.

45 The settlement documentation did not restrict the complained of course of action of Class counsel and the Court is not going to attempt to rule upon what Inco states was the spirit of the settlement.

Remedy and Order

46 It was submitted that an appropriate remedy for Class counsel's unapproved solicitation campaign must take into account the effect of the campaign on the Court's process, on putative Class members and on Inco.

47 As to the Court's process, unauthorized mass notice campaigns engaged in by Class counsel render the Act's careful regulation of notice and the Court's role in supervising notice ineffectual and irrelevant. This is complicated further by Class counsel using material imprinted with the court style of cause to tout their firm and firm members. An appropriate remedy must promote future compliance with the Act and respect for the court's process.

48 As to Inco, the campaign may have invited abusive and fraudulent claims by highlighting the opportunity to claim up to $1,250, without any support whatsoever, in a mass distribution that by admission reached thousands who are not class members. Inco submits that it would be inappropriate to deprive class members with bona fide claims of the compensation they are entitled to under the settlement because Class counsel undertook an unauthorized notice campaign. Rather, Inco submits it should be afforded adequate opportunity to investigate any fraud and abuse that may have

been engendered by Class counsel's solicitation and be compensated for any such fraud or abuse discovered. To this end, Inco requests the Court to order that: (a) Class counsel provide it with copies of all notice of claim coupons it received in this action together with the date of receipt; (b) Class counsel supply a list of all claimants who have responded to any of its unauthorized solicitations; (c) Inco be entitled to additional peremptory challenges pursuant to the terms of this settlement in respect of any claimants who have responded to unauthorized solicitations, so that such claimants shall be subject to individual assessment at Inco's discretion; (d) Class counsel be denied their fees from any claimant who responded to an unauthorized solicitation; (e) Class counsel pay Inco's costs and the costs of the Arbitrator on a solicitor and client basis in respect of any claims discovered to be fraudulent or exaggerated; (f) Class counsel indemnify Inco for any claims submitted by anyone who received unapproved solicitations after Inco protested this matter to the Court; and (g) for the costs of this motion.

49 As to putative Class members who may have been induced to forgo opting out of this case or claiming compensation through Inco's pre-existing program, it is submitted that an appropriate remedy would require Class counsel to be denied their fees and costs under the settlement in respect of any claimant who has made a claim after being the recipient of an unauthorized solicitation, such that successful claimants be entitled to retain the monies which would otherwise have been remitted to Class counsel by way of fees. This would require the Court to order Class counsel to ascertain the necessary information from claimants.

50 The Court was requested by the defendant to declare that the conduct of Class counsel violated the Rules of Professional Conduct and an Act Respecting Champerty, R.S.O. 1897 as referred to in ss. 33(1) of the Act. Firstly, these proceedings are not the proper forum to deal with the Law Society's Rules of Professional Conduct. Secondly, I am not sure the Court has jurisdiction to make the declaration requested with respect to champerty by virtue of an Act Respecting Champerty, R.S.O. 1897 merely being referred to in ss. 33(1) of the Act. In any event, it is not necessary for me to do so in order to properly dispose of this motion.

51 In all the circumstances and given the actions of Class counsel, left unchecked, would have resulted in substantially increasing their own gain, this Court is satisfied the following Order is required:

1. Class counsel shall forthwith cease and be restrained from all further attempts at giving unapproved notice in these proceedings;
2. Class counsel shall provide forthwith the solicitors for Inco with copies of all notice of claim coupons they received in this action after December 18, 1997, together with the date of receipt;
3. Inco shall have as many additional peremptory challenges, pursuant to the terms of the Minutes of Settlement, as it is determined that there were notice of claim coupons filed by Category I claimants, as a result of the unauthorized notice, to be exercised at Inco's discretion;
4. Class counsel shall be responsible for Inco's solicitor and client costs in exercising the additional preemptory challenges referred to in No. 3 above;
5. Class counsel shall not recover either from the defendant or the Class any of their costs and disbursements incurred in giving any of the unauthorized notices referred to in these reasons;

6. Class counsel shall pay Inco's costs and the costs of the Arbitrator on a solicitor and client scale in respect of any claims submitted by Category I claimants as a result of the unauthorized notice and found to be fraudulent.

52 Submissions regarding costs have yet to be made so I will reserve on same until after argument. Counsel are invited to approach me through the trial coordinator to arrange a suitable date. If it is the intention of the defendant to request costs against Class counsel personally, then it is directed to give Class counsel notice of its intention in writing, sufficiently prior to the date set, for preparation.

POUPORE J.

* * * * *

APPENDIX "A"

DESMARAIS, KEENAN
Barristers and Solicitors
Suite 100, 30 Durham St.
Sudbury, Ontario
P3C 5E5

MANGAN v. INCO

Class Action Claim Forms Inside

Communiquons-nous avec vous dans la langue officielle de votre choix? Telephone (705) 675-7269

Are we communicating with you in the official language of your choice? Telephone (705) 675-7269

This package contains

Class Action Claim Forms

for the MANGAN v. INCO class action settlement
for the November 16, 1995 accidental release
of Sulpher Dioxide Gas.

DEADLINES: CLAIMANTS MUST

1. file a Notice of Claim by March 6, 1998, and
2. file a Detailed Claim Form by June 8, 1998.

(REDUCED FROM IS ORIGINAL SIZE OF 9 3/16" X 5 3/4")

DESMARAIS, KEENAN
Barristers and Solicitors
Suite 100, 30 Durham St.
Sudbury, Ontario
P3C 5E5

MCGOWAN & ASSOCIATES
Barristers and Solicitors
Suite 405,
133 Richmond St. West
Toronto, Ontario

M5H 2L3

December 12, 1997

Dear

Mangon v. Inco Ltd. Class Action

We are the lawyers for the class in the class action lawsuit about the sulphur dioxide gas release from Inco's Copper Cliff acid plant on November 16, 1995 at about 5:00 p.m.

If you or a member of your family were adversely affected by the gas, and wish to make a claim under the settlement of this case, you may use the enclosed papers.

As explained in the enclosed Guide (cream coloured paper):

1. you must file the Notice of Claim Coupon (blue paper) not later than March 6, 1998;

   and

2. you must file the Detailed Claim Form (green paper) not later than June 8, 1998.

You may obtain further information by calling 705-675-7269.

Yours very truly,

James M. Young
(Desmaris, Keenan)

Yours very truly,

Michael McGowan
(McGowan & Associates)

P.S. People who did not get medical treatment can still get up to $1,250 each in compensation. See the Guide for details.

qp/s/bbd/mjb/DRS

TAB 18

2008 CarswellOnt 2534, 2008 C.E.B. & P.G.R. 8295, 70 C.C.P.B. 249, 63 C.P.C. (6th) 107, 167 A.C.W.S. (3d) 863

2008 CarswellOnt 2534, 2008 C.E.B. & P.G.R. 8295, 70 C.C.P.B. 249, 63 C.P.C. (6th) 107, 167 A.C.W.S. (3d) 863

McGee v. London Life Insurance Co.

BARBARA McGEE and PAULINE McCALLUM (Plaintiffs) and LONDON LIFE INSURANCE COMPANY LIMITED (Defendant)

Ontario Superior Court of Justice

Lax J.

Heard: February 6, 2008
Judgment: May 6, 2008[FN*]
Docket: 07-CV-327818CP

Counsel: H. Goldblatt, D.L. Campbell, L. Sokolov for Plaintiffs / Moving Parties

J. Galway, A. Thornton for Defendant / Responding Party

Subject: Civil Practice and Procedure; Corporate and Commercial

Civil practice and procedure --- Parties — Representative or class proceedings not under class proceedings legislation — Requirements — General principles

Proposed representative plaintiffs were former employees of company and members of its staff pension plan — There was partial wind-up of plan as result of reorganization — Plaintiffs alleged that company committed breaches of trust and fiduciary duty by refusing to complete partial wind-up of plan and by applying all or part of partial wind-up assets for purposes other than for exclusive benefit of class members — Plaintiffs commenced action for declaration that company breached its statutory obligations under Pension Benefits Act, order for restitution, order for injunction, order directing accounting, and order directing distribution of partial wind-up assets — Plaintiffs brought motion for action to be certified as class proceeding and to be appointed as representatives of class — Motion granted — Plaintiffs satisfied each of requirements of Class Proceedings Act — Allegations supported causes of action — Proposed class was objectively ascertainable, rationally bounded, and was not unnecessarily broad — Class members were all identically situated with respect to each of common issues — Plaintiffs satisfied preferable procedure requirement in respect of both ownership and distribution of surplus issues.

Civil practice and procedure --- Parties — Representative or class proceedings not under class proceedings legislation — Representative plaintiff — General principles

Proposed representative plaintiffs were former employees of company and members of its staff pension plan —

There was partial wind-up of plan as result of reorganization — Plaintiffs alleged that company committed breaches of trust and fiduciary duty by refusing to complete partial wind-up of plan and by applying all or part of partial wind-up assets for purposes other than for exclusive benefit of class members — Plaintiffs commenced action for declaration that company breached its statutory obligations under Pension Benefits Act, order for restitution, order for injunction, order directing accounting, and order directing distribution of partial wind-up assets — Plaintiffs brought motion for action to be certified as class proceeding and to be appointed as representatives of class — Motion granted — Plaintiffs satisfied each of requirements of Class Proceedings Act — Allegations supported causes of action — Proposed class was objectively ascertainable, rationally bounded, and was not unnecessarily broad — Class members were all identically situated with respect to each of common issues — Plaintiffs satisfied preferable procedure requirement in respect of both ownership and distribution of surplus issues.

Pensions --- Practice in pension actions — Parties

Proposed representative plaintiffs were former employees of company and members of its staff pension plan — There was partial wind-up of plan as result of reorganization — Plaintiffs alleged that company committed breaches of trust and fiduciary duty by refusing to complete partial wind-up of plan and by applying all or part of partial wind-up assets for purposes other than for exclusive benefit of class members — Plaintiffs commenced action for declaration that company breached its statutory obligations under Pension Benefits Act, order for restitution, order for injunction, order directing accounting, and order directing distribution of partial wind-up assets — Plaintiffs brought motion for action to be certified as class proceeding and to be appointed as representatives of class — Motion granted — Plaintiffs satisfied each of requirements of Class Proceedings Act — Allegations supported causes of action — Proposed class was objectively ascertainable, rationally bounded, and was not unnecessarily broad — Class members were all identically situated with respect to each of common issues — Plaintiffs satisfied preferable procedure requirement in respect of both ownership and distribution of surplus issues.

Cases considered by *Lax J.*:

Attard v. Maple Leaf Foods Inc. (1998), 1998 CarswellOnt 1548, 20 C.P.C. (4th) 346 (Ont. Gen. Div. [Commercial List]) — referred to

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

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

Hunt v. T & N plc (1990), 1990 CarswellBC 216, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), (sub nom. *Hunt v. Carey Canada Inc.*) [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, (sub nom. *Hunt v. Carey Canada Inc.*) 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 1990 CarswellBC 759, 4 C.C.L.T. (2d) 1 (S.C.C.) — considered

Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services) (2007), (sub nom. *Kerry (Canada) Inc. v. DCA Employees Pension Committee*) 2007 C.E.B. & P.G.R. 8249, 60 C.C.P.B. 67, (sub nom. *DCA Employees Pension Committee v. Ontario (Superintendent of Financial Services)*) 282 D.L.R. (4th) 227, (sub nom. *Nolan v. Superintendent of Financial Services (Ont.)*) 225 O.A.C. 163, (sub nom. *Kerry (Canada) Inc. v. DCA Employees Pension Committee*) 86 O.R. (3d) 1, 2007 CarswellOnt 3493, 2007 ONCA 416, 32 E.T.R. (3d) 161 (Ont. C.A.) — considered

Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services) (2008), 2008 CarswellOnt 423, 2008 CarswellOnt 424 (S.C.C.) — referred to

MacDougall v. Ontario Northland Transportation Commission (2006), 56 C.C.P.B. 296, 2006 CarswellOnt 6212, 31 C.P.C. (6th) 86 (Ont. S.C.J.) — distinguished

MacDougall v. Ontario Northland Transportation Commission (2007), 221 O.A.C. 150, 39 C.P.C. (6th) 63, 59 C.C.P.B. 194, 2007 CarswellOnt 881, 2007 C.E.B. & P.G.R. 8236 (Ont. Div. Ct.) — referred to

Markle v. Toronto (City) (2004), 42 C.C.P.B. 69, 2004 CarswellOnt 4291 (Ont. S.C.J.) — referred to

Maurer v. McMaster University (1991), 4 O.R. (3d) 139, 82 D.L.R. (4th) 6, 1991 C.E.B. & P.G.R. 8107, 1991 CarswellOnt 688 (Ont. Gen. Div.) — referred to

Maurer v. McMaster University (1995), 1995 CarswellOnt 467, 1995 C.E.B. & P.G.R. 8224, 23 O.R. (3d) 577, 8 C.C.P.B. 129, 80 O.A.C. 392, 125 D.L.R. (4th) 45 (Ont. C.A.) — referred to

Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services) (2004), 45 B.L.R. (3d) 161, 41 C.C.P.B. 106, 2004 C.E.B. & P.G.R. 8112, 242 D.L.R. (4th) 193, 324 N.R. 259, 189 O.A.C. 201, 17 Admin. L.R. (4th) 1, [2004] 3 S.C.R. 152, 75 O.R. (3d) 479 (note), 2004 CarswellOnt 3172, 2004 CarswellOnt 3173, 2004 SCC 54 (S.C.C.) — considered

Ormrod v. Etobicoke (City) Hydro-Electric Commission (2001), 3 C.P.C. (5th) 253, (sub nom. *Ormrod v. Etobicoke (Hydro-Electric Commission))* 53 O.R. (3d) 285, 28 C.C.P.B. 261, 2001 CarswellOnt 614, 8 C.C.E.L. (3d) 48 (Ont. S.C.J.) — referred to

Paramount Pictures (Canada) Inc. v. Dillon (2006), 2006 CarswellOnt 3536, 29 C.P.C. (6th) 13, 53 C.C.P.B. 88, 24 E.T.R. (3d) 189, 2006 C.E.B. & P.G.R. 8205 (Ont. S.C.J.) — considered

Police Retirees of Ontario Inc. v. Ontario (Municipal Employees' Retirement Board) (1997), 35 O.R. (3d) 177, 1997 CarswellOnt 3084, 17 C.C.P.B. 49 (Ont. Gen. Div.) — referred to

Potter v. Bank of Canada (2007), 2007 CarswellOnt 1816, 2007 C.E.B. & P.G.R. 8238, 59 C.C.P.B. 219, 31 E.T.R. (3d) 163, 223 O.A.C. 166, 85 O.R. (3d) 9, 282 D.L.R. (4th) 553, 37 C.P.C. (6th) 104, 2007 ONCA 234 (Ont. C.A.) — considered

Ryan v. Ontario (Municipal Employees Retirement Board) (2006), 51 C.C.P.B. 237, 29 C.P.C. (6th) 24, 2006 CarswellOnt 883 (Ont. S.C.J.) — referred to

Schmidt v. Air Products of Canada Ltd. (1994), (sub nom. *Stearns Catalytic Pension Plans, Re)* 155 A.R. 81, (sub nom. *Stearns Catalytic Pension Plans, Re)* 73 W.A.C. 81, 1994 C.E.B. & P.G.R. 8173, 1994 CarswellAlta 138, [1995] O.P.L.R. 283, 1994 CarswellAlta 746, 3 C.C.P.B. 1, 20 Alta. L.R. (3d) 225, (sub nom. *Stearns Catalytic Pension Plans, Re)* 168 N.R. 81, [1994] 8 W.W.R. 305, 3 E.T.R. (2d) 1, 4 C.C.E.L. (2d) 1, [1994] 2 S.C.R. 611, 115 D.L.R. (4th) 631 (S.C.C.) — considered

Sutherland v. Hudson's Bay Co. (2005), 74 O.R. (3d) 608, 2005 CarswellOnt 2564, 46 C.C.P.B. 225, 17 E.T.R. (3d) 287, 17 C.P.C. (6th) 199 (Ont. S.C.J.) — considered

Vivendi Universal Canada Inc. v. Jellinek (2006), 2006 CarswellOnt 5616, 55 C.C.P.B. 131, 32 C.P.C. (6th)

254 (Ont. S.C.J.) — referred to

Western Canadian Shopping Centres Inc. v. Dutton (2001), (sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere*) 201 D.L.R. (4th) 385, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, 272 N.R. 135, 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, [2001] 2 S.C.R. 534 (S.C.C.) — considered

Statutes considered:

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

Generally — referred to

s. 5 — referred to

s. 5(1)(a) — referred to

s. 5(1)(b) — referred to

s. 5(1)(c) — referred to

s. 5(1)(d) — referred to

s. 5(1)(d) — referred to

s. 5(1)(e) — considered

s. 37(a) — referred to

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

Generally — referred to

Pension Benefits Act, R.S.O. 1990, c. P.8

Generally — referred to

s. 69 — referred to

s. 70(6) — considered

s. 87 — referred to

Rules considered:

Rules of Civil Procedure, O. Reg. 537/87

R. 75 — referred to

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

R. 10 — considered

R. 12 [rep. & sub. O. Reg. 770/92] — considered

R. 12.08 [en. O. Reg. 288/99] — referred to

R. 10.01 — considered

R. 10.01(1) — considered

R. 21.01(1)(b) — referred to

MOTION by plaintiffs for class proceeding certification, and to be appointed as representatives of class in action regarding distribution of pension plan assets.

Lax J.:

1 The proposed representative plaintiffs, Barbara McGee and Pauline McCallum, are former employees of the London Life Insurance Company and members of its Staff Pension Plan (the "Plan"). For convenience, I will refer to them as the plaintiffs. They are affected by a partial wind-up of the Plan as a result of the 1996 reorganization and discontinuance in 1996 of a significant portion of the business of London Life (the "1996 reorganization"). They seek to have this action certified as a class proceeding pursuant to section 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c.6 and to be appointed as representatives of the class to represent similarly-situated former employees and beneficiaries ("Partial Wind-Up Group"). The proposed class is described generally as those administrative employees of London Life, with a vested entitlement under the Plan who ceased to be employed between January 1, 1996 and December 31, 1996 as a result of the 1996 reorganization, including any beneficiaries of any deceased class member or of a member who dies prior to the resolution of this proceeding on its merits.

2 The plaintiffs assert in the Statement of Claim that the Plan has been funded by a trust since its inception in 1916, that London Life characterized the Plan as a trust so as to obtain favourable tax treatment from Canada Revenue Agency and its predecessor agencies, that the assets of the Plan are impressed with a trust, that the employees own the surplus, and accordingly that the Partial Wind-Up Group are entitled to a distribution of surplus from the Plan as of the partial wind-up date. They allege that London Life committed breaches of trust and fiduciary duty by refusing to complete the partial wind-up of the Plan and by applying all or part of the partial wind-up assets for purposes other than for the exclusive benefit of the class members.

3 They seek, *inter alia*, a declaration that London Life, as administrator, breached its statutory obligations under the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*") by failing to complete the partial wind-up; an order for restitution of an amount equal to any portion of the partial wind-up assets not applied for the exclusive benefit of the class; an order for injunction; an order directing an accounting of the Plan assets and accounting of the entitlement of each member to their proper portion; and, an order directing the distribution of the partial wind-up assets. In the alternative, they seek damages for breach of trust and breach of fiduciary duty in the amount of $11,050,000, constituting the approximate amount of the partial wind-up surplus as of May 1, 2005, in accordance with an actuarial report dated September 2005, prepared for London Life in respect of the 1996 reorganization.

4 London Life opposes a certification order. Although it agrees that the issue of surplus ownership should be determined in a court proceeding, it disputes that a class proceeding is the preferable procedure to resolve this issue. It submits that this should be determined in an individual proceeding brought by one or more plan members through a representation order under Rule 10.01 of the *Rules of Civil Procedure*. It further submits that if the plaintiffs succeed on the issue of surplus ownership, issues of valuation and distribution of surplus should be determined by the Financial Services Commission of Ontario ("FSCO").

5 There are two main issues to be resolved. First, is a class proceeding preferable to an individual action for the resolution of the common issues? Second, if the plaintiffs are successful in establishing entitlement to ownership of the surplus, should issues of valuation and distribution be determined within the court proceeding or by FSCO? Some additional background is necessary.

The Partial Wind-Up Process

6 Following the 1996 reorganization, the Superintendent of Financial Services commenced an investigation under section 69 of the *PBA* to determine whether or not to order a partial wind-up of the Plan as a result of the 1996 reorganization. On February 17, 2000, the Superintendent issued a Notice of Proposal proposing to order a partial wind-up of the Plan. London Life appealed the Notice of Proposal to the Financial Services Tribunal (the "Tribunal"). The Plan Members' Committee was granted intervenor status. In its decision dated February 7, 2001, the Tribunal determined that the statutory criteria for ordering a partial wind-up under section 69 of the *PBA* had been met and, as a result, ordered the Superintendent to carry out the partial wind-up of the Plan in respect of former Plan members affected by the 1996 reorganization.

7 In November 2001, William M. Mercer ("Mercer") filed a partial wind-up report with FSCO using data as at December 31, 1995. This report showed that there were 380 Plan members affected by the partial wind-up. In August 2002, FSCO requested certain revisions to the report in order to comply with the Tribunal's decision. In October 2002, Mercer filed a revised partial wind-up report. This report shows 491 members affected by the partial wind-up and a surplus of $5,283,500, calculated as at December 31, 1995. Subsequently, FSCO accepted December 31, 1995 as the partial wind-up date for the 1996 reorganization.

8 In June 2003, the Supreme Court of Canada granted leave to appeal in the *Monsanto* case where the issue of required distribution of surplus on a partial wind-up was squarely before the Courts. FSCO issued an announcement that until court proceedings were final, the Superintendent would not be taking any specific action to require the distribution of surplus assets related to partial wind-ups, but that plan administrators were to ensure that adequate assets were maintained in the pension plan to meet their obligations. On July 29, 2004, the Supreme Court of Canada dismissed the appeal in the *Monsanto* case and ruled that surplus assets relating to the partial wind-up of a pension plan must be distributed at the time of the partial wind-up: See, *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152 (S.C.C.).

9 By letter to London Life dated August 19, 2004, FSCO noted that the partial wind-up had not yet been completed and reminded London Life of its "fiduciary obligation to ensure that any remaining assets related to the wound-up portion [of the Plan] are paid out in an expeditious manner." FSCO also requested an update of the funding position of the wound-up portion of the Plan together with a timetable for the distribution of any surplus by October 18, 2004. Subsequently, London Life sought and obtained numerous extensions to the filing deadline.

10 In January 2005, correspondence from London Life's counsel to FSCO indicated that the Plan may no longer have a surplus and, in June 2005, that it appeared "certain that the Plan is now in deficit, prior to any consideration of surplus" relating to the partial wind-up of the Plan. In September 2005, London Life's counsel provided updated financial information to FSCO for the wound-up portion of the Plan. This stated that the surplus attributable to the partial wind-up, calculated as at May 1, 2005 (using data as at December 31, 1995) was estimated to be

$11,050,500.00. London Life submitted that it was entitled to the surplus attributable to the partial wind-up and that it proposed to leave it in the Plan.

11 In February 2006, counsel for the Members' Committee advised counsel for London Life in a letter copied to FSCO, that the members considered the surplus attributable to the partial wind-up to be impressed with a trust and that the members were in the process of considering their options in respect of pursuing their claim to such surplus, including proceeding by way of class action. Subsequently, by letter dated June 30, 2006, FSCO required that London Life file a revised partial wind-up report providing for distribution of all assets attributable to the partial wind-up. FSCO confirmed that all remaining assets attributable to the partial wind-up had to be distributed and stated that, even if it were determined that the employer was entitled to the surplus under the Plan, member consent to any distribution to the employer would be required. London Life has taken issue with this.

12 By letter to FSCO dated October 6, 2006, counsel for London Life requested a meeting with FSCO representatives to discuss, among other issues, "the matter of the surplus assets relating to the partial wind-ups," including the partial wind-up for the 1996 reorganization. A meeting took place, without notice to the Members' Committee or their counsel on December 20, 2006. Soon after, their counsel advised FSCO that it was the intention of the Committee to commence legal proceedings in the Ontario Court regarding the members' entitlement to distribution of surplus attributable to the partial wind-up resulting from the 1996 reorganization and to seek certification as a class action. FSCO responded that it would take no further action regarding the surplus issue until the legal proceedings were concluded.

13 It is the plaintiffs' position that the proceedings before FSCO have involved undue delay and give rise to a reasonable concern that the FSCO process is not in keeping with basic principles of fairness and natural justice. On the latter issue, they submit that but for the commencement of this proposed class proceeding, FSCO would have determined the issue of surplus entitlement solely on the basis of submissions and materials tendered by London Life. London Life disputes that there was anything inappropriate for the regulator to agree to meet with it to discuss the surplus ownership issue and that there was, in any event, no substantive discussion at this meeting on the surplus ownership issue.

14 On the issue of delay, the plaintiffs point out that approximately seven years have elapsed since the Tribunal ruled requiring a partial wind-up of the Plan and more than three years have elapsed since the Supreme Court of Canada released its decision in *Monsanto*. They attribute the delay to FSCO's failure to conduct its processes expeditiously and London Life's failure to comply in a timely fashion with FSCO's orders and directives. London Life disputes that it disregarded FSCO's requirements or failed to exercise diligence. According to London Life, after the release of the *Monsanto* decision, it took some time for London Life and Mercer to prepare an updated position in respect of the wound-up portion of the Plan.

15 Finally, they submit that London Life has failed to segregate the partial wind-up assets and maintain a division between the wound-up portion of the Plan and its on-going portion, to the prejudice of Plan members affected by the partial wind-up in respect of any interest that they may have in the surplus attributable to the partial wind-up. They assert that the actuarial valuations filed by London Life demonstrate that it used a substantial portion of the surplus (including that portion that ought to have been allocated to the partial wind-up) for the purpose of funding its own obligations to the Plan as a whole. They argue that London Life's failure to comply with FSCO's orders and policies has been "enabled, in large measure, by FSCO's comparatively weak enforcement regime and practices". While FSCO has the authority to enforce its orders and directives by prosecuting violations, they submit that it has not exercised this authority in this case.

16 In summary, the issues of the amount of the actual surplus, if any, who is entitled to it, and whether it has been protected, are very much in dispute. The plaintiffs have the onus of demonstrating that the requirements of certification are met. I turn then to these requirements.

1. Cause of Action — section 5(1)(a)

17 The test for determining whether a cause of action exists for the purposes of certification is the "plain and obvious" test, which is the same test that is used under Rule 21.01(1)(b) to determine whether a pleading discloses a cause of action. Its most well-known articulation is found in *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.).

18 As *Monsanto* confirms, Section 70(6) of the *PBA* requires that surplus assets relating to the partial wind-up of a pension plan must be distributed at the time of the partial wind-up. Where plan members have a right to pension fund assets, including surplus, the assets must be used for the exclusive benefit of plan members. Where the assets are used for other purposes, this can amount to breach of trust, breach of fiduciary duty and/or breach of the employer's obligation to act in good faith towards plan members: *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611 (S.C.C.). The question whether plan members have a right to a pension surplus is determined on the basis of an analysis of the pension plan and the structures created under it. The inquiry primarily turns on whether there has been some express or implied declaration of trust and an alienation of trust property for the benefit of employees: *Schmidt*, at para. 90.

19 I have already referred to the allegations in the Statement of Claim that London Life created the Staff Pension Fund as a special purpose fund in 1916 and funded and later registered the Plan based on its characterization as a trust. The plaintiffs allege London Life breached its equitable and statutory obligations by failing to complete the partial wind-up, failing to distribute the partial wind-up surplus to members of the class and that it applied all or part of the wind-up assets for purposes other than the exclusive benefit of class members. London Life does not dispute that the Statement of Claim discloses a cause of action. I am satisfied that the allegations support the causes of action pleaded and meet this requirement for certification.

2. An Identifiable Class — s. 5(1)(b)

20 The plaintiffs propose the following class definition:

> All Office members (i.e. administrative employees) of the London Life Insurance Company Staff Pension Plan, Registration No. 0343368 with a vested entitlement under the Plan, who were employed by the London Life Insurance Company ("London Life") and who ceased to be employed between January 1, 1996 and December 31, 1996, as a result, either directly or indirectly, of:
>
> (i) the 1996 reorganization of London Life; or
>
> (ii) the discontinuance in 1996 of a significant portion of the business of London Life.
>
> For clarity, the Class proposed by the Plaintiffs would include all individuals who ceased employment in the relevant period whether voluntarily or at the Defendant's initiative and further that the Class would include any beneficiaries of any member of the Class who has died or who may die prior to the resolution of the merits of this proceeding.

21 I prefer the modification proposed by the defendant and would amend the class definition as follows:

> All Office members (i.e. administrative employees) of the London Life Insurance Company Staff Pension Plan, Registration No. 0343368 with a vested entitlement under the Plan, who were employed by the London Life Insurance Company ("London Life") and whose employment was terminated by London Life in 1996 or who voluntarily resigned or retired as a result of the 1996 reorganization of London Life or the discontinuance in 1996

of a significant portion of the business of London Life, including such members' beneficiaries or estates.

22 The proposed class is a defined group of former employees of London Life (or their beneficiaries or estates) who were members of a particular pension plan and who ceased to be employees during a defined period for specified reasons. I am satisfied that the class definition comprises all persons whose rights may be affected by the resolution of the common issues, to which I will later refer. The proposed class is objectively ascertainable, rationally bounded, and is not unnecessarily broad and meets the requirements of section 5(1)(b) as interpreted by *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at paras. 17 and 18.

3. Common Issues — s. 5(1)(c)

23 The plaintiffs propose the following common issues:

> (a) Are the Plan assets, in particular the surplus assets, impressed with a trust in favour of the Plan members, former Plan members, and other beneficiaries?
>
> (b) What is the quantum of the partial wind-up surplus?
>
> (c) What is the entitlement of members of the class to the partial wind-up surplus?
>
> (d) What is the appropriate method for calculating surplus entitlements of the members of the class?
>
> (e) Did London Life commit breaches of trust, breaches of fiduciary duty, breaches of its employer obligation of good faith, or breaches of its statutory obligations in respect of members of the class?

24 London Life refers to proposed common issues (a) and (c) as the surplus ownership issue; proposed common issues (b) and (d) as the surplus distribution issues; and, proposed common issue (e) as the breach issue. It takes the position that if the court is prepared to certify this proceeding, only the surplus ownership issue should be certified. In that event, it submits that the more appropriate question to be certified is:

> Who as between the members of the class and London Life is entitled to the surplus allocable to the partial wind-up of the London Life Insurance Company Staff Pension Plan arising from the 1996 reorganization of London Life?

25 The Supreme Court of Canada addressed the proper approach to commonality in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.):

> ...the underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated *vis a vis* the opposing party. Nor is it necessary that common issues predominate over non common issues or that the resolution of the common issues would be determinative of each class member's claim, however, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to the individual issues. [para. 39]

26 An issue of law or fact will be considered to be common for the purposes of this analysis if its resolution in the plaintiff's favour will benefit the entire class, although not necessarily to the same extent. It need only move the litigation forward and has been described as a "low bar" to certification: *Cloud v. Canada (Attorney General)*

(2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 65.

27 Here, the class members are all identically situated with respect to each of the common issues. The resolution of the common issues in the plaintiffs' favour will in fact resolve the proceeding on its merits, leaving only the distribution of the surplus, or, the allocation of damages to individual members of the class in accordance with the method determined by the court. I am satisfied with the plaintiffs' proposed common issues, except that I would amend common issues (c) and (d) as follows:

> (c) What is the entitlement of the members of the class to the partial wind-up surplus or damages?
>
> (d) What is the appropriate method for calculating surplus entitlements or damages of the members of the class?

4. Preferable Procedure — s. 5(1)(d)

28 The preferability analysis is conducted through the lens of the three policy objectives of the *CPA*: judicial economy, access to justice, and behaviour modification: *Hollick*, at paras. 27-28 and 30-31; *Cloud*, at paras 73-75. London Life submits that none of these objectives are achieved by certification. It submits that any member of the Plan has standing to pursue the central question, namely who owns the surplus, and any judicial finding in an individual action or application with respect to this issue will be binding on London Life, whether obtained by one London Life Plan member or all. It further submits that as a corollary, a determination by the court of the trust and surplus ownership issues will effectively bind and determine the surplus entitlement of each individual member of the Plan, present and former, and that access to justice and judicial economy can equally or preferably be achieved by an individual action or application and that the surplus ownership issue is not, therefore, an issue where certification under the *CPA* is necessary in order to avoid a multiplicity of proceedings.

29 In support of this submission, London Life relies on a number of pension related cases where the individual plaintiff or applicant obtained a representation order under Rule 10.01 of the *Rules of Civil Procedure*: *Maurer v. McMaster University* (1991), 4 O.R. (3d) 139 (Ont. Gen. Div.), at 141 rev'd in part (1995), 23 O.R. (3d) 577 (Ont. C.A.); *Police Retirees of Ontario Inc. v. Ontario (Municipal Employees' Retirement Board)* (1997), 35 O.R. (3d) 177 (Ont. Gen. Div.); *Attard v. Maple Leaf Foods Inc.* (1998), 20 C.P.C. (4th) 346 (Ont. Gen. Div. [Commercial List]); *Ryan v. Ontario (Municipal Employees Retirement Board)* (2006), 29 C.P.C. (6th) 24 (Ont. S.C.J.).

30 These cases do not address a competition between a class proceeding and a representative action under Rule 10.01. They do not address preferability. Further, it is unclear that Rule 10.01 is even available in circumstances where class members can be readily ascertained, found and served. It provides in part:

> 10.01 (1) In a proceeding concerning ....
>
> . . . . .
>
> a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest or may be affected by the proceeding *and who cannot be readily ascertained, found or served.* (emphasis added)

31 The purpose of Rule 10 is discussed in *Sutherland v. Hudson's Bay Co.*, [2005] O.J. No. 1455 (Ont. S.C.J.). There, Cullity J. certified an action brought by members of a pension plan who claimed to be entitled to surplus on the basis that the Plan was impressed with a trust. The question arose as to whether the members of certain related Plans should be represented, and if so, whether by certifying defendant classes or by a representation order under Rule 10.01. This issue is discussed at paras. 77 to 88 of the decision. It is clear from the discussion that a representa-

tion order was made because the members of the related Plans shared an identity of interest in that they had a legitimate concern to see that the plaintiff class obtained no more than its entitlement. However, Cullity J. found that as there was no claim for relief against the members of the related Plans or the assets in these Plans, it was undesirable and unnecessary to treat them as defendants and to subject them to the procedures applicable to class defendants under the *CPA*. He concluded that an order under Rule 10.01 would serve the purpose of ensuring that all members of the related Plans were bound.

32 In *Paramount Pictures (Canada) Inc. v. Dillon*, [2006] O.J. No. 2368 (Ont. S.C.J.), Cullity J. was also concerned to ensure that unrepresented parties "who may be affected by the proceeding" within the meaning of Rule 10 be given an opportunity to assert and protect their rights. In that case, by the time the motion for certification was heard, the class definition had been revised to address this problem. However, the following comments from this decision provide further guidance as to the purpose of Rule 10. In his discussion of preferable procedure, Cullity J. said at para. 36:

> In cases like *Sutherland*, a representation order under Rule 10 may be preferable to certification of a separate class of defendants or respondents, whose interests are indirect or tangential and may — but will not necessarily be affected by the outcome of the proceedings. However, the structured procedure under the CPA, with the special powers of the court in section 12, and the rules relating to costs, discoveries and limitations, should, I believe, ordinarily be adopted with respect to a class of defendants or respondents whose interest are directly in issue.

33 Thus, the choice between a class proceeding or a representative action appears to turn on whether the interests of the class members are direct interests or whether they are indirect and tangential. Where the interests of the class are direct, Cullity J. concluded in the same paragraph that, "the procedure under the *CPA* can be eminently suited to the resolution of disputes relating to the respective rights of members and employers under pension Plans." The limited use of Rule 10 is made clearer in para. 38:

> Moreover, in addition to the above considerations, I note that, of the 139 members of the Sharing Group, all but 12 have been located and have retained Koskie Minsky. A representation order under Rule 10 could possibly be made with respect to the missing persons but not, it seems, with respect to the other 127, as having retained Koskie Minsky for the purpose of the proceeding, a finding that they could not readily be served would appear to be precluded. If that is correct, the preconditions in Rule 10.01 would not be satisfied with respect to them. Rather than add them as parties and make a representation order with respect to the missing persons, it is, in my judgment, preferable to certify the proceedings in respect of the entire class.

34 Finally, in *Potter v. Bank of Canada* (2007), 85 O.R. (3d) 9 (Ont. C.A.), which was also a pension case, the Court of Appeal reversed the decision of the motions judge who had found that s. 37(a) of the *CPA* encompassed actions that may be brought under Rule 10 and that the plaintiff was therefore required to seek relief in a representative proceeding under Rule 10 rather than in a class proceeding. In rejecting this interpretation of s. 37(a), the Court said:

> ... It is beyond controversy that one of the primary objectives [of the *CPA*] was to facilitate access to justice. An aspect of that was to reduce the legal and economic obstacles for actions that would otherwise have to be brought as representative actions under the *Rules of Civil Procedure*. ... [para. 38].
>
> . . . . .
>
> ... it would be anomalous to interpret s. 37(a) as automatically removing that remedial benefit for actions that could be brought as representative proceedings under Rule 10. Such an interpretation would make it impossible to do what the *Act* was designed to achieve. [para. 39].

. . . . .

> This interpretation of s. 37(a) is consistent with the seminal research paper on class actions, *Ontario Law Reform Commission, Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982). At p. 846 of vol. 3 of that report, the Ontario Law Reform Commission reiterated that its primary concern was to provide a reformed procedure for actions that would otherwise be brought as representative proceedings pursuant to the *Rules of Practice*, R.R.O. 1980, Reg. 540 (as they were then called). The Commission was careful to say, by contrast, that its recommended class action legislation should not apply to any representative action authorized by any other Act. [para. 41].

35 Although the court did not address how to choose between Rule 10 and a class proceeding, it seems to me that these comments lend force to the plaintiffs' submission that Rule 10 has a narrower purpose for circumstances where parties "cannot be readily ascertained, found or served". This is consistent with the comments of Cullity J. in *Sutherland* and *Paramount* that I have earlier referred to.

36 Finally, the representation rule, Rule 75, that existed under the former *Rules of Civil Procedure* was carried over and became Rule 12 of the *Rules of Civil Procedure* until the current version of Rule 12 was enacted in 1992. It seems clear that the current version of Rule 12 was enacted to accommodate the enactment of the *Class Proceedings Act, 1992*. The procedure of the *CPA* was too elaborate and complex (and unnecessary) for some claims by trade unions and unincorporated associations and in 1999, Rule 12.08 was enacted. It permits the court to authorize one or more members of the association or trade union to sue on behalf of all the members without resort to the *CPA*. It follows that with the enactment of the *CPA*, representative proceedings are preserved outside the class action framework, but only in a limited way. The representation of groups is by and large addressed by the *CPA*.

37 In this case, the class is entirely composed of members who have a direct interest in the proceedings. The October 2002 Mercer report indicates that there are 491 members of the Plan. London Life opposes for "privacy concerns", the plaintiffs' request for an order for production of a list of names and addresses of class members, but it does not dispute that such a list is available. There is no evidence that the class members cannot readily be ascertained, found or served. I am doubtful that a representation order under Rule 10 can even be made.

38 London Life places considerable reliance on the decision of Hennessy J. in *MacDougall v. Ontario Northland Transportation Commission* (2006), 31 C.P.C. (6th) 86 (Ont. S.C.J.), aff'd (2007), 39 C.P.C. (6th) 63 (Ont. Div. Ct.), where certification was refused. It was held that the determinations as to whether the pension fund was held pursuant to a trust and whether certain plan amendments passed by the employer constituted a breach of trust were not amenable to a class proceeding.

39 There are considerable differences between *McDougall* and the case at bar. In *McDougall*, there was an ongoing plan and no evidence that any wind-up was contemplated. The plaintiffs had no current interest or entitlement to the ongoing surplus. In fact, the plaintiffs had repeatedly asserted that they were not pursuing individual claims or seeking monetary awards. As well, there was an apparent conflict in interest between retired and active employees not represented by unions. If the declarations sought were made, opting-out would not allow groups or individuals, whose interest were in conflict to seek an individual or group remedy, or preserve their rights.

40 Hennessy J. found that the financial rationale of the access to justice goal was much diminished as the claimants did not seek individual monetary relief. There was no obvious judicial economy to be realized where the single restitution award would flow from the question of entitlement. A ruling on the status of the Plan and the validity of the amendments could be achieved in other ways. Her conclusion that a class proceeding was not the preferable procedure is supported on the facts of that case, but, as I have said, it was not a winding-up case and the only remedy sought was a declaration.

41 Class proceedings have been found to be appropriate in pension and employee benefit cases to resolve issues that are similar, if not identical to the issues in this case: See, for example, *Sutherland*, at para. 71; *Paramount*, at para. 36; *Ormrod v. Etobicoke (City) Hydro-Electric Commission*, [2001] O.J. No. 754 (Ont. S.C.J.); *Vivendi Universal Canada Inc. v. Jellinek*, [2006] O.J. No. 3687 (Ont. S.C.J.). I am satisfied that in this case, the *CPA* is the most comprehensive regime for the resolution of the issues in this litigation and the procedural vehicle most likely to achieve the goals of judicial economy, access to justice and behaviour modification. Bifurcating the ownership and distribution of surplus issues would not serve these goals.

42 The claims at issue here do not arise exclusively or even primarily out of the *PBA* regime, or the provisions of the Plan documentation, but are fundamentally based on the common law of trusts, including a trust analysis of London Life's treatment of the Plan pursuant to the historic provisions of the *ITA*. Section 87 of the *Pension Benefits Act* does not cloak the Superintendent with jurisdiction to remedy breaches of the defendant's common law obligations pursuant to the law of trusts and the application of the federal *Income Tax Act*. The Superintendent has jurisdiction to remedy infringements of the *PBA* regime or enforce the provisions of a pension plan's constituting documents, but issues of surplus ownership and related breach of trust claims fall outside the *PBA* regime.

43 The decision of the Ontario Court of Appeal in *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)* (2007), 86 O.R. (3d) 1 (Ont. C.A.), leave to appeal to S.C.C. granted, January 31, 2008 [2008 CarswellOnt 423 (S.C.C.)], does not support the defendant's submission that the surplus distribution issues in this case can be addressed by the Superintendent as the claims and remedies that the plaintiffs seek are broader in scope. However, I would not in any event bifurcate the proceeding as it would not achieve judicial economy.

44 By contrast, in a class proceeding, the resolution of the common issues in the plaintiffs' favour will effectively determine the lawsuit on its merits, leaving only the allocation of damages to individual members of the class in accordance with the method determined by the court. The mechanisms available under the *CPA* can assist in the efficient advancement of this process. The court can rule on an appropriate formula to calculate the surplus attributable to each member of the class, determine the appropriate composition for the class and award any damages to which class members may be entitled in the event there are insufficient funds in the wound-up portion of the Plan. Pursuant to section 25(1)(c) of the *CPA*, the assistance of the Superintendent's office can be obtained to the extent that the technical expertise of this office is necessary or desirable to make an allocation of surplus.

45 I conclude that the plaintiffs have satisfied the preferable procedure requirement in respect of both the ownership and distribution of surplus issues.

Representative Plaintiff — s. 5(1)(e)

46 I am satisfied that the proposed representative plaintiffs meet the requirements set out in this section of the *CPA*.

47 The plaintiffs have therefore satisfied each of the requirements of the *CPA* and the action will be certified as a class proceeding.

Litigation Plan

48 The parties have some minor differences with respect to the timing of the delivery of the Statement of Defence and examinations for discovery, but the plaintiffs have indicated that they are content with the defendant's proposed timing. A case conference can be arranged to address this and other unresolved matters of procedure, including approval of the notices. I see no reason to depart from the general rule that the representative plaintiff bears the costs of notice: *Markle v. Toronto (City)*, [2004] O.J. No. 3024 (Ont. S.C.J.) at para. 5. The defendant is ordered

to produce a list of names and addresses of class members to the plaintiffs within 30 days.

Order

49 The motion for certification is granted with costs to the plaintiffs. If requested, I will fix the costs of the motion, in which case the parties are to agree on a schedule for the exchange of written submissions and provide these to me within 60 days.

Motion granted.

FN* Leave to appeal refused at *McGee v. London Life Insurance Co.* (2008), 2008 CarswellOnt 3850, 70 C.C.P.B. (Ont. Div. Ct.).

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TAB 19

2009 CarswellOnt 3028, 53 C.B.R. (5th) 196, 75 C.C.P.B. 206

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2009 CarswellOnt 3028, 53 C.B.R. (5th) 196, 75 C.C.P.B. 206

Nortel Networks Corp., Re

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Ontario Superior Court of Justice [Commercial List]

Morawetz J.

Heard: April 20, 2009
Judgment: May 27, 2009[FN*]
Docket: 09-CL-7950

Counsel: Janice Payne, Steven Levitt, Arthur O. Jacques for Steering Committee of Recently Severed Canadian Nortel Employees

Barry Wadsworth for CAW-Canada, George Borosh, Debra Connor

Lyndon Barnes, Adam Hirsh for Board of Directors of Nortel Networks Corporation, Nortel Networks Limited

Alan Mersky, Derrick Tay for Applicants

Henry Juroviesky, Eli Karp, Kevin Caspersz, Aaron Hershtal for Steering Committee for the Nortel Terminated Canadian Employees Owed Termination and Severance Pay

M. Starnino for Superintendent of Financial Services or Administrator of the Pension Benefits Gurantee Fund

Leanne Williams for Flextronics Telecom Systems Ltd.

Jay Carfagnini, Chris Armstrong for Monitor, Ernst & Young Inc.

Gail Misra for Communication, Energy and Paperworkers Union of Canada

J. Davis-Sydor for Brookfield Lepage Johnson Controls Facility Management Services

Mark Zigler, S. Philpott for Certain Former Employees of Nortel

G.H. Finlayson for Informal Nortel Noteholders Group

A. Kauffman for Export Development Canada

Alex MacFarlane for Unsecured Creditors' Committee (U.S.)

Subject: Insolvency

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

Appointment of representative counsel — Telecommunication company entered protection under Companies' Creditors Arrangement Act — Telecommunications company ceased paying former employees with unsecured claims — Several groups of employees claimed entitlement to assets of company, including current working employees, and pensioners — Several law firms maintained that different classes should be established representing employees with different interests, with different legal representatives for each — Five law firms brought motions regarding representation — Law firm KM appointed representative for all potential classes of employee — Court has broad power to appoint representative counsel — Employees and retirees were vulnerable creditors, and had little means to pursue claims beyond representative counsel — No party denied choice of counsel as employees entitled to obtain individual counsel — No current conflict of interest between pensioned and non-pensioned employees — Many classes of employee had similar interest in pension plan — Claims under pension, to extend it was funded, not affected by CCAA proceedings — Pension claims by terminated employees creating conflict with other claims was only hypothetical — All former employees had community of interest.

Cases considered by *Morawetz J.*:

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

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

Statutes considered:

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

Generally — referred to

s. 11 — considered

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

Generally — referred to

Pension Benefits Act, R.S.O. 1990, c. P.8

Generally — referred to

Rules considered:

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

R. 10 — referred to

R. 10.01 — considered

R. 12.07 — considered

MOTIONS regarding appointment of counsel in proceedings under *Companies' Creditors Arrangement Act.*

***Morawetz J.*:**

1 On May 20, 2009, I released an endorsement appointing Koskie Minsky as representative counsel with reasons to follow. The reasons are as follows.

2 This endorsement addresses five motions in which various parties seek to be appointed as representative counsel for various factions of Nortel's current and former employees (Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation are collectively referred to as the "Applicants" or "Nortel").

3 The proposed representative counsel are:

> (i) Koskie Minsky LLP ("KM") who is seeking to represent all former employees, including pensioners, of the Applicants or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in respect of a pension from the Applicants. Approximately 2,000 people have retained KM.
>
> (ii) Nelligan O'Brien Payne LLP and Shibley Righton LLP (collectively "NS") who are seeking to be co-counsel to represent all former non-unionized employees, terminated either prior to or after the CCAA filing date, to whom the Applicants owe severance and/or pay in lieu of reasonable notice. In addition, in a separate motion, NS seeks to be appointed as co-counsel to the continuing employees of Nortel. Approximately 460 people have retained NS and a further 106 have retained Macleod Dixon LLP, who has agreed to work with NS.
>
> (iii) Juroviesky and Ricci LLP ("J&R") who is seeking to represent terminated employees or any person claiming an interest under or on behalf of former employees. At the time that this motion was heard approximately 120 people had retained J&R. A subsequent affidavit was filed indicating that this number had increased to 186.
>
> (iv) Mr. Lewis Gottheil, in-house legal counsel for the National Automobile, Aerospace, Transportation and General Workers Union of Canada ("CAW") who is seeking to represent all retirees of the Applicants who were formerly members of one of the CAW locals when they were employees. Approximately 600 people have retained Mr. Gottheil or the CAW.

4 At the outset, it is noted that all parties who seek representation orders have submitted ample evidence that establishes that the legal counsel that they seek to be appointed as representative counsel are well respected members of the profession.

5 Nortel filed for CCAA protection on January 14, 2009 (the "Filing Date"). At the Filing Date, Nortel employed approximately 6,000 employees and had approximately 11,700 retirees or their spouses receiving pension and/or benefits from retirement plans sponsored by the Applicants.

6 The Monitor reports that the Applicants have continued to honour substantially all of the obligations to active employees. However, the Applicants acknowledge that upon commencement of the CCAA proceedings, they ceased making almost all payments to former employees of amounts that would constitute unsecured claims. Included in those amounts were payments to a number of former employees for termination and severance, as well as amounts under various retirement and retirement transition programs.

7 The Monitor is of the view that it is appropriate that there be representative counsel in light of the large number of former employees of the Applicants. The Monitor is of the view that former employee claims may require a combination of legal, financial, actuarial and advisory resources in order to be advanced and that representative counsel can efficiently co-ordinate such assistance for this large number of individuals.

8 The Monitor has reported that the Applicants' financial position is under pressure. The Monitor is of the view that the financial burden of multiple representative counsel would further increase this pressure.

9 These motions give rise to the following issues:

(i) when is it appropriate for the court to make a representation and funding order?

(ii) given the completing claims for representation rights, who should be appointed as representative counsel?

Issue 1 - Representative Counsel and Funding Orders

10 The court has authority under Rule 10.01 of the *Rules of Civil Procedure* to appoint representative counsel where persons with an interest in an estate cannot be readily ascertained, found or served.

11 Alternatively, Rule 12.07 provides the court with the authority to appoint a representative defendant where numerous persons have the same interests.

12 In addition, the court has a wide discretion pursuant to s. 11 of the CCAA to appoint representatives on behalf of a group of employees in CCAA proceedings and to order legal and other professional expenses of such representatives to be paid from the estate of the debtor applicant.

13 In the KM factum, it is submitted that employees and retirees are a vulnerable group of creditors in an insolvency because they have little means to pursue a claim in complex CCAA proceedings or other related insolvency proceedings. It was further submitted that the former employees of Nortel have little means to pursue their claims in respect of pension, termination, severance, retirement payments and other benefit claims and that the former employees would benefit from an order appointing representative counsel. In addition, the granting of a representation order would provide a social benefit by assisting former employees and that representative counsel would provide a reliable resource for former employees for information about the process. The appointment of representative counsel

would also have the benefit of streamlining and introducing efficiency to the process for all parties involved in Nortel's insolvency.

14 I am in agreement with these general submissions.

15 The benefits of representative counsel have also been recognized by both Nortel and by the Monitor. Nortel consents to the appointment of KM as the single representative counsel for all former employees. Nortel opposes the appointment of any additional representatives. The Monitor supports the Applicants' recommendation that KM be appointed as representative counsel. No party is opposed to the appointment of representative counsel.

16 In the circumstances of this case, I am satisfied that it is appropriate to exercise discretion pursuant to s. 11 of the CCAA to make a Rule 10 representation order.

Issue 2 - Who Should be Appointed as Representative Counsel?

17 The second issue to consider is who to appoint as representative counsel. On this issue, there are divergent views. The differences primarily centre around whether there are inherent conflicts in the positions of various categories of former employees.

18 The motion to appoint KM was brought by Messrs. Sproule, Archibald and Campbell (the "Koskie Representatives"). The Koskie Representatives seek a representation order to appoint KM as representative counsel for all former employees in Nortel's insolvency proceedings, except:

> (a) any former chief executive officer or chairman of the board of directors, any non-employee members of the board of directors, or such former employees or officers that are subject to investigation and charges by the Ontario Securities Commission or the United States Securities and Exchange Commission:
>
> (b) any former unionized employees who are represented by their former union pursuant to a Court approved representation order; and
>
> (c) any former employee who chooses to represent himself or herself as an independent individual party to these proceedings.

19 Ms. Paula Klein and Ms. Joanne Reid, on behalf of the Recently Severed Canadian Nortel Employees ("RSCNE"), seek a representation order to appoint NS as counsel in respect of all former Nortel Canadian non-unionized employees to whom Nortel owes termination and severance pay (the "RSCNE Group").

20 Mr. Kent Felske and Mr. Dany Sylvain, on behalf of the Nortel Continuing Canadian Employees ("NCCE") seek a representative order to appoint NS as counsel in respect of all current Canadian non-unionized Nortel employees (the "NCCE Group").

21 J&R, on behalf of the Steering Committee (Mr. Michael McCorkle, Mr. Harvey Stein and Ms. Marie Lunney) for Nortel Terminated Canadian Employees ("NTCEC") owed termination and severance pay seek a representation order to appoint J&R in respect of any claim of any terminated employee arising out of the insolvency of Nortel for:

> (a) unpaid termination pay;
>
> (b) unpaid severance pay;

(c) unpaid expense reimbursements; and

(d) amounts and benefits payable pursuant to employment contracts between the Employees and Nortel

22 Mr. George Borosh and/or Ms. Debra Connor seek a representation order to represent all retirees of the Applicants who were formerly represented by the CAW (the "Retirees") or, alternatively, an order authorizing the CAW to represent the Retirees.

23 The former employees of Nortel have an interest in Nortel's CCAA proceedings in respect of their pension and employee benefit plans and in respect of severance, termination pay, retirement allowances and other amounts that the former employees consider are owed in respect of applicable contractual obligations and employment standards legislation.

24 Most former employees and survivors of former employees have basic entitlement to receive payment from the Nortel Networks Limited Managerial and Non-negotiated Pension Plan (the "Pension Plan") or from the corresponding pension plan for unionized employees.

25 Certain former employees may also be entitled to receive payment from Nortel Networks Excess Plan (the "Excess Plan") in addition to their entitlement to the Pension Plan. The Excess Plan is a non-registered retirement plan which provides benefits to plan members in excess of those permitted under the registered Pension Plan in accordance with the *Income Tax Act*.

26 Certain former employees who held executive positions may also be entitled to receive payment from the Supplementary Executive Retirement Plan ("SERP") in addition to their entitlement to the Pension Plan. The SERP is a non-registered plan.

27 As of Nortel's last formal valuation dated December 31, 2006, the Pension Plan was funded at a level of 86% on a wind-up basis. As a result of declining equity markets, it is anticipated that the Pension Plan funding levels have declined since the date of the formal valuation and that Nortel anticipates that its Pension Plan funding requirements in 2009 will increase in a very substantial and material matter.

28 At this time, Nortel continues to fund the deficit in the Pension Plan and makes payment of all current service costs associated with the benefits; however, as KM points out in its factum, there is no requirement in the Initial Order compelling Nortel to continue making those payments.

29 Many retirees and former employees of Nortel are entitled to receive health and medical benefits and other benefits such as group life insurance (the "Health Care Plan"), some of which are funded through the Nortel Networks' Health and Welfare Trust (the "HWT").

30 Many former employees are entitled to a payment in respect of the Transitional Retirement Allowance ("TRA"), a payment which provides supplemental retirement benefits for those who at the time of their retirement elect to receive such payment. Some 442 non-union retirees have ceased to receive this benefit as a result of the CCAA proceedings.

31 Former employees who have been recently terminated from Nortel are owed termination pay and severance pay. There were 277 non-union former employees owed termination pay and severance pay at the Filing Date.

32 Certain former unionized employees also have certain entitlements including:

(a) Voluntary Retirement Option ("VRO");

(b) Retirement Allowance Payment ("RAP"); and

(c) Layoff and Severance Payments

33 The Initial Order permitted Nortel to cease making payments to its former employees in respect of certain amounts owing to them and effective January 14, 2009, Nortel has ceased payment of the following:

(a) all supplementary pensions which were paid from sources other than the Registered Pension Plan, including payments in respect of the Excess Plan and the SERP;

(b) all TRA agreements where amounts were still owing to the affected former employees as at January 14, 2009;

(c) all RAP agreements where amounts were still owing to the affected former employees as at January 14, 2009;

(d) all severance and termination agreements where amounts were still owing to the affected former employees as at January 14, 2009; and

(e) all retention bonuses where amounts were still owing to affected former employees as at January 14, 2009.

34 The representatives seeking the appointment of KM are members of the Nortel Retiree and Former Employee Protection Committee ("NRPC"), a national-based group of over 2,000 former employees. Its stated mandate is to defend and protect pensions, severance, termination and retirement payments and other benefits. In the KM factum, it is stated that since its inception, the NRPC has taken steps to organize across the country and it has assembled subcommittees in major centres. The NRPC consists of 20 individuals who it claims represent all different regions and interests and that they participate in weekly teleconference meetings with legal counsel to ensure that all former employees' concerns are appropriately addressed.

35 At paragraph 49 of the KM factum, counsel submits that NRPC members are a cross-section of all former employees and include a variety of interests, including those who have an interest in and/or are entitled to:

(a) the basic Pension Plan as a deferred member or a member entitled to transfer value;

(b) the Health Care Plan;

(c) the Pension Plan and Health Care Plan as a survivor of a former employee;

(d) Supplementary Retirement Benefits from the Excess Plan and the SERP plans;

(e) severance and termination pay ; and

(f) TRA payments.

36 The representatives submit that they are well suited to represent all former employees in Nortel's CCAA proceedings in respect of all of their interests. The record (Affidavit of Mr. D. Sproule) references the considerable experience of KM in representing employee groups in large-scale restructurings.

37 With respect to the allegations of a conflict of interest as between the various employee groups (as described below), the position of the representatives seeking the appointment of KM is that all former employees have unsecured claims against Nortel in its CCAA proceedings and that there is no priority among claims in respect of Nortel's assets. Further, they submit that a number of former employees seeking severance and termination pay also have other interests, including the Pension Plan, TRA payments and the supplementary pension payments and that it would unjust and inefficient to force these individuals to hire individual counsel or to have separate counsel for separate claims.

38 Finally, they submit that there is no guarantee as to whether Nortel will emerge from the CCAA, whether it will file for bankruptcy or whether a receiver will be appointed or indeed whether even a plan of compromise will be filed. They submit that there is no actual conflict of interest at this time and that the court need not be concerned with hypothetical scenarios which may never materialize. Finally, they submit that in the unlikely event of a serious conflict in the group, such matters can be brought to the attention of the court by the representatives and their counsel on a *ex parte* basis for resolution.

39 The terminated employee groups seeking a representation order for both NS and J&R submit that separate representative counsel appointments are necessary to address the conflict between the pension group and the employee group as the two groups have separate legal, procedural, and equitable interests that will inevitably conflict during the CCAA process.

40 They submit that the pensioners under the Pension Plan are continuing to receive the full amount of the pension from the Pension Plan and as such they are not creditors of Nortel. Counsel submits that the interest of pensioners is in continuing to receive to receive their full pension and survivor benefits from the Pension Plan for the remainder of their lives and the lives of surviving spouses.

41 In the NS factum at paragraphs 44 - 58, the argument is put forward as to why the former employees to whom Nortel owes severance and termination pay should be represented separately from the pensioners. The thrust of the argument is that future events may dictate the response of the affected parties. At paragraph 51 of the factum, it is submitted that generally, the recently severed employees' primary interest is to obtain the fastest possible payout of the greatest amount of severance and/or pay in lieu of notice in order to alleviate the financial hardships they are currently experiencing. The interests of pensioners, on the other hand, is to maintain the status quo, in which they continue to receive full pension benefits as long as possible. The submission emphasizes that issues facing the pensioner group and the non-pensioner group are profoundly divergent as full monthly benefit payments for the pensioner group have continued to date while non-pensioners are receiving 86% of their lump sums on termination of employment, in accordance with the most recently filed valuation report.

42 The motion submitted by the NTCEC takes the distinction one step further. The NTCEC is opposed to the motion of NS. NS wishes to represent both the RSCNE and the NCCE. The NTCEC believes that the terminated employees who are owed unpaid wages, termination pay and/or severance should comprise their own distinct and individual class.

43 The NTCEC seek payment and fulfillment of Nortel's obligations to pay one or several of the following:

(a) TRA;

(b) 2008 bonuses; and

(c) amendments to the Nortel Pension Plan

44 Counsel to NTCEC submits that the most glaring and obvious difference between the NCCE and the NTCEC, is that NCCE are still employed and have a continuing relationship with Nortel and have a source of employment income and may only have a contingent claim. The submission goes on to suggest that, if the NCCE is granted a representation order in these proceedings, they will seek to recover the full value of their TRA claim from Nortel during the negotiation process notwithstanding that one's claim for TRA does not crystallize until retirement or termination. On the other hand, the terminated employees, represented by the NTCEC and RSCNE are also claiming lost TRA benefits and that claim has crystallized because their employment with Nortel has ceased. Counsel further submits that the contingent claim of the NCCE for TRA is distinct and separate with the crystallized claim of the NTCEC and RSCNE for TRA.

45 Counsel to NTCEC further submits that there are difficulties with the claim of NCCE which is seeking financial redress in the CCAA proceedings for damages stemming from certain changes to the Nortel Networks Limited Managerial and Non-negotiated Pension Plan effective June 1, 2008 and Nortel's decision to decrease retirees benefits. Counsel submits that, even if the NCCE claims relating to the Pension Plan amendment are quantifiable, they are so dissimilar to the claims of the RSCNE and NTCEC, that the current and former Nortel employees cannot be viewed as a single group of creditors with common interests in these proceedings, thus necessitating distinct legal representation for each group of creditors.

46 Counsel further argues that NTCEC's sole mandate is to maximize recovery of unpaid wages, termination and severance pay which, those terminated employees as a result of Nortel's CCAA filing, have lost their employment income, termination pay and/or severance pay which would otherwise be protected by statute or common law.

47 KM, on behalf of the Koskie Representatives, responded to the concerns raised by NS and by J&R in its reply factum.

48 KM submits that the conflict of interest is artificial. KM submits that all members of the Pension Plan who are owed pensions face reductions on the potential wind-up of the Pension Plan due to serious under-funding and that temporarily maintaining of status quo monthly payments at 100%, although required by statute, does not avoid future reductions due to under-funding which offset any alleged overpayments. They submit that all pension members, whether they can withdraw 86% of their funds now and transfer them a locked-in vehicle or receive them later in the form of potentially reduced pensions, face a loss and are thus creditors of Nortel for the pension shortfalls.

49 KM also states that the submission of the RSCNE that non-pensioners may put pressure on Nortel to reduce monthly payments on pensioners ignores the *Ontario Pension Benefits Act* and its applicability in conjunction with the CCAA. It further submits that issues regarding the reduction of pensions and the transfers of commuted values are not dealt with through the CCAA proceedings, but through the Superintendent of Financial Services and the Plan Administrator in their administration and application of the PBA. KM concludes that the Nortel Pension Plans are not applicants in this matter nor is there a conflict given the application of the provisions of the PBA as detailed in the factum at paragraphs 11 - 21.

50 KM further submits that over 1,500 former employees have claims in respect of other employment and retirement related benefits such as the Excess Plan, the SERP, the TRA and other benefit allowances which are claims that have "crystallized" and are payable now. Additionally, they submit that 11,000 members of the Pension Plan are entitled to benefits from the Pensioner Health Care Plan which is not pre-funded, resulting in significant claims in Nortel's CCAA proceedings for lost health care benefits.

51 Finally, in addition to the lack of any genuine conflict of interest between former employees who are pen-

sioners and those who are non-pensioners, there is significant overlap in interest between such individuals and a number of the former employees seeking severance and termination pay have the same or similar interests in other benefit payments, including the Pension Plan, Health Care Plan, TRA, SERP and Excess Plan payments. As well, former employees who have an interest in the Pension Plan also may be entitled to severance aud termination pay.

52 With respect to the motions of NS and J&R, I have not been persuaded that there is a real and direct conflict of interest. Claims under the Pension Plan, to the extent that it is funded, are not affected by the CCAA proceedings. To the extent that there is a deficiency in funding, such claims are unsecured claims against Nortel. In a sense, deficiency claims are not dissimilar from other employee benefit claims.

53 To the extent that there may be potentially a divergence of interest as betweeu pension-based claims and terminated-employee clauns, these distinctions are, at this time, hypothetical. At this stage of the proceeding, there has been no attempt by Nortel to propose a creditor classification, let alone a plan of arrangement to its creditors. It seems to me that the primary emphasis should be placed on ensuring that the arguments of employees are placed before the court in the most time efficient and cost effective way possible. In my view, this can be accomplished by the appointment of a single representative counsel, knowledgeable and experienced in all facets of employee claims.

54 It is conceivable that there will be differences of opinion between employees at some point in the future, but if such differences of opinion or conflict arise, I am satisfied that this issue will be recognized by representative counsel and further directions can be provided.

55 A submission was also made to the effect that certain individuals or groups of individuals should not be deprived of their counsel of choice. In my view, the effect of appointing one representative counsel does not, in any way, deprive a party of their ability to be represented by the counsel of their choice. The Notice of Motion of KM provides that any former employee who does not wish to be bound by the representative order may take steps to notify KM of their decision and may thereafter appear as an independent party.

56 In the responding factum at paragraphs 28 - 30, KM submits that each former employee, whether or not entitled to an interest in the Pension Plan, has a common interest in that each one is an unsecured creditor who is owed some form of deferred compensation, being it severance pay, TRA or RAP payments, supplementary pensions, health benefits or benefits under a registered Pension Plan and that classifying former employees as one group of creditors will improve the efficiency and effectiveness of Nortel's CCAA proceedings and will facilitate the reorganization of the company. Further, in the event of a liquidation of Nortel, each former employee will seek to recover deferred compensation claims as an unsecured creditor. Thus, fragmentation of the group is undesirable. Further, all former employees also have a common legal position as unsecured creditors of Nortel in that their claims all arise out of the terms and conditions of their employment and regardless of the form of payment, unpaid severance pay and termination pay, unpaid health benefits, unpaid supplementary pension benefits and other unpaid retirement benefits are all remuneration of some form arising from former employment with Nortel.

57 The submission on behalf of KM concludes that funds in a pension plan can also be described as deferred wages. An employer who creates a pension plan agrees to provide benefits to retiring employees as a form of compensation to that employee. An underfunded pension plan reflects the employer's failure to pay the deferred wages owing to former employees.

58 In its factum, the CAW submits that the two proposed representative individuals are members of the Nortel Pension Plan applicable to unionized employees. Both individuals are former unionized employees of Nortel and were members of the CAW. Counsel submits that naming them as representatives on behalf of all retirees of Nortel who were members of the CAW will not result in a conflict with any other member of the group.

59 Counsel to the CAW also stated that in the event that the requested representation order is not granted, those

600 individuals who have retained Mr. Lewis Gottheil will still be represented by him, and the other similarly situated individuals might possibly be represented by other counsel. The retainer specifically provides that no individual who retains Mr. Gottheil shall be charged any fees nor be responsible for costs or penalties. It further provides that the retainer may be discontinued by the individual or by counsel in accordance with applicable rules.

60 Counsel further submits that the 600 members of the group for which the representation order is being sought have already retained counsel of their choice, that being Mr. Lewis Gottheil of the CAW. However, if the requested representative order is not granted, there will still be a group of 600 individual members of the Pension Plan who are represented by Mr. Gottheil. As a result, counsel acknowledges there is little to no difference that will result from granting the requested representation order in this case, except that all retirees formerly represented by the union will have one counsel, as opposed to two or several counsel if the order is not granted.

61 In view of this acknowledgement, it seems to me that there is no advantage to be gained by granting the CAW representative status. There will be no increased efficiencies, no simplification of the process, nor any real practical benefit to be gained by such an order.

62 Notwithstanding that creditor classification has yet to be proposed in this CCAA proceeding, it is useful, in my view, to make reference to some of the principles of classification. In *Stelco Inc., Re*, the Ontario Court of Appeal noted that the classification of creditors in the CCAA proceeding is to be determined based on the "commonality of interest" test. In *Stelco Inc., Re*, the Court of Appeal upheld the reasoning of Paperny J. (as she then was) in *Canadian Airlines Corp., Re* and articulated the following factors to be considered in the assessment of the "commonality of interest".

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

Stelco Inc., Re (2005), 15 C.B.R. (5th) 307 (Ont. C.A.), paras 21-23; *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), para 31.

63 I have concluded that, at this point in the proceedings, the former employees have a "commonality of interest" and that this process can be best served by the appointment of one representative counsel.

64 As to which counsel should be appointed, all firms have established their credentials. However, KM is, in my

view, the logical choice. They have indicated a willingness to act on behalf of all former employees. The choice of KM is based on the broad mandate they have received from the employees, their experience in representing groups of retirees and employees in large scale restructurings and speciality practice in the areas of pension, benefits, labour and employment, restructuring and insolvency law, as well as my decision that the process can be best served by having one firm put forth the arguments on behalf of all employees as opposed to subdividing the employee group.

65 The motion of Messrs. Sproule, Archibald and Campbell is granted and Koskie Minsky LLP is appointed as Representative Counsel. This representation order is also to cover the fees and disbursements of Koskie Minsky.

66 The motions to appoint Nelligan O'Brien Payne and Shibley Righton, Juroviesky and Ricci, and the CAW as representative counsel are dismissed.

67 I would ask that counsel prepare a form of order for my consideration.

Order accordingly.

FN* Additional reasons at *Nortel Networks Corp., Re* (2009), 2009 CarswellOnt 3530 (Ont. S.C.J. [Commercial List]).

END OF DOCUMENT

TAB 20

Case Name:

Pacific Coastal Airlines Ltd. v. Air Canada

Between
Pacific Coastal Airlines Limited, plaintiff, and
Air Canada and Air BC Limited, defendants

[2001] B.C.J. No. 2580

2001 BCSC 1721

19 B.L.R. (3d) 286

110 A.C.W.S. (3d) 259

Vancouver Registry No. S003953

British Columbia Supreme Court
Vancouver, British Columbia

Tysoe J.

Heard: November 19 - 20, 2001.
Judgment: December 7, 2001.

(59 paras.)

Estoppel -- Estoppel by record (res judicata) -- Records of courts -- Res judicata as a bar to subsequent proceedings -- Cause of action estoppel v. issue estoppel -- Collateral issues decided in prior proceedings -- Practice -- Pleadings -- Striking out pleadings -- Grounds, abuse of process, hopeless suit -- Torts -- Interference with economic relations.

Application by Air Canada to dismiss Pacific's claims in tort. The claims were based upon conduct prior to an Order sanctioning a plan of compromise and arrangement restructuring Canadian Airlines Corporation and Canadian Airlines International under the Companies' Creditors Arrangement Act, (CCAA). Pacific was a regional carrier for Canadian. Canadian ran into financial difficulties and Air Canada agreed to merge with Canadian upon a financial restructuring. Pacific's tort claims arose from the termination by Canadian of its rights to operate its routes using their code and its inability to obtain bookings using the code. In the CCAA proceeding Pacific's claim was determined to be $370,000. Pacific disputed this amount and stated that there were claims for damages for

breach of contract, inducing breach of contract, breach of fiduciary duty and other economic torts which claims had not been formalized or adjudicated. On approval Pacific's claim was classified as that of an unsecured creditor to be paid 14 cents on the dollar of their claim. Pacific did not accept or appeal the determination and returned the payment. Pacific commenced this action asserting four tort claims and two claims pursuant to the Competition Act. This application was restricted to the tort claims for inducing breach of contract, unlawful interference with contractual relations, conspiracy and breach of confidence. Air Canada asserted that these claims were precluded by the CCAA proceedings on the basis of res judicata or abuse of process. It further maintained that the claims could not succeed because Pacific could not establish the causation link between their damages and the conduct of Air Canada since the CCAA proceedings had found that Canadian would have ceased operations if Air Canada had not provided financial support to it.

HELD: Application dismissed. The causes of action asserted by Pacific could not have been pursued in the CCAA proceedings. There was no basis for invoking the doctrine of res judicata or cause of action estoppel because the CCAA proceeding did not deal with disputes between creditors of Canadian and third parties. Issue estoppel did not apply as none of the criteria and matters considered in the CCAA proceeding involved a decision on an issue which was required to be proven by Pacific in order to establish their tort claims. The principal question in the CCAA proceeding was whether the restructuring plan was fair and reasonable. The re-alignment of the routes which gave rise to this action was only an incidental issue. The CCAA proceeding did not require an inquiry into matters prior to the filing of the plan of arrangement. The amount determined by the claims officer as owing to Pacific was based upon inadequate notice of termination of Pacific's agreement with Canadian and not upon Pacific's tort claims. There was no abuse of process as this action was not repetitious of the CCAA proceedings which did not involve a determination of any of Pacific's tort claims. It was not demonstrated that Pacific was unable to establish causation between the damages suffered and the improper actions of Air Canada.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, Competition Act, Rule 18A.

Counsel:

V. Philippe Lalonde and Kenneth P. Regier, Q.C., for the plaintiff.
Sean F. Dunphy and Michael J. Libby, for the defendants.

TYSOE J.:--

INTRODUCTION

1 The Defendants apply under Rule 18A for an order dismissing the Plaintiff's claims sounding in tort. These claims are based upon allegations of conduct by the Defendants prior to the Order granted on June 27, 2001 by the Alberta Queen's Bench sanctioning the plan of compromise and arrangement (the "Restructuring Plan" or the "Plan") of Canadian Airlines Corporation and Canadian Airlines International Ltd. (which I will refer to individually and collectively as "Canadian", unless the context requires them to be identified individually, in which case I will refer to them as

"CAC" and "CAIL") under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the "CCAA").

2 The Plaintiff's claims against the Defendants fall into two categories. The first category includes the tort claims of inducing breach of contract, unlawful interference with contractual relations, conspiracy and breach of confidence. The second category of claims relates to alleged breaches of the Competition Act, R.S.C. 1985, c. C-34, as amended. This Rule 18A application focuses only on the tort claims and does not relate to any of the claims based on the Competition Act. In addition, the Defendants have not required the Plaintiff to prove the elements of the tort claims on this application and it is agreed that I am to assume for the purposes of this application that the Plaintiff would be able to prove all of the requisite elements of the alleged torts. It is the position of the Defendants that, even if the Plaintiff could prove all of the requisite elements of the alleged torts, it is estopped from pursuing the tort claims as a result of determinations made in Canadian's CCAA proceedings or it is unable to prove that the Defendants' actions caused its loss.

FACTS

3 I will now set out the facts which underlie this matter. In view of the assumption which it has been agreed I am to make for the purposes of this application, it is not necessary for me to make any findings with respect to disputed facts. I will set out facts which I believe to be undisputed and I am being asked to give effect to findings of fact made by the Alberta Queen's Bench in the CCAA proceedings.

4 Canadian and Air Canada were the two national airlines in Canada during the years leading up to 2000. The two airlines flew planes on major national and international routes, and they made arrangements with regional carriers to service smaller communities within Canada. The Plaintiff was one of the regional carriers which worked with Canadian. Air BC Limited, which is a wholly owned subsidiary of Air Canada, has been one of the regional carriers for Air Canada.

5 On or about November 1, 1997, the Plaintiff and CAIL entered into an agreement (the "Agreement") in which it was agreed that the Plaintiff would operate its air services to carry passengers and cargo on behalf of CAIL on the route between Nanaimo and Vancouver. The routes covered by the Agreement were subsequently expanded to include routes between Vancouver and two other communities on Vancouver Island, Comox and Campbell River. The Agreement permitted the Plaintiff to use CAIL's flight designator code (the "CP Code") on these routes. This permission enabled the Plaintiff to sell tickets with the CP Code, which facilitated connections to Canadian's national and international flights departing from and arriving in Vancouver. The Agreement provided that it was to renew automatically for one year periods from November 1 to October 31 in each year after 1997 unless terminated by 120 days' notice prior to November 1 (or cancelled pursuant to provisions of the Agreement which are not relevant to this application).

6 Canadian encountered financial difficulties through most of the 1990s. It underwent financial restructurings in 1994 and 1996, but continued to sustain losses. Canadian had discussions with Air Canada in early 1999 about a potential merger or other transaction but they were unable to reach an agreement. Canadian then pursued other alternatives but was not successful. On November 11, 1999, a numbered company named 853350 Alberta Ltd. ("853350"), which was financed and partially owned by Air Canada, made a take-over bid to acquire all of the shares of CAC (which owned the majority of the shares of CAIL). Air Canada indicated that it would merge with Canadian but

only if Canadian completed a financial restructuring which would enable Air Canada to effect the acquisition on a financially sound basis.

7 In December 1999, Air Canada purchased certain assets from Canadian for $45 million in order to allow Canadian to have sufficient liquidity to continue operations until the completion of the take-over bid. In early January 2000, 853350 purchased 82% of CAC's common shares and all of its preferred shares. Canadian and Air Canada then embarked on efforts to restructure the financial affairs of Canadian on a consensual basis without having to resort to formal proceedings.

8 It is alleged in the present action that on or about January 17, 2000, a representative of Canadian Regional Airlines Ltd. ("Canadian Regional"), a subsidiary of CAIL, told the Plaintiff that the use of the CP Code was being taken away from it. By letter dated February 4, 2000, the Plaintiff was advised the following by Canadian Regional:

> This letter is to notify you that effective April 2, 2000 the flying you are currently doing under CP code pursuant to the Commercial Agreement on Vancouver to Nanaimo, Campbell River and Comox will be terminated.

Effective April 2, 2000, Air BC Limited began operating the three routes using the CP Code (as well as the AC code, which it had been previously using as the regional carrier for Air Canada). It is alleged that all bookings made with the Plaintiff on these routes prior to April 2, 2000 were transferred to Air BC Limited and that the Plaintiff's flights using the CP Code were removed from the computer reservation systems so that no bookings using the CP Code could be made for the benefit of the Plaintiff after April 2, 2000.

9 On February 1, 2000, Canadian announced a moratorium on payments to its lenders and lessors. It continued with its private negotiations but pressure from certain creditors forced it to commence the CCAA proceedings in the Alberta Queen's Bench on March 24, 2000. A stay order was obtained by Canadian on that day and it provided, among other things, that Canadian was authorized to terminate or cancel such contracts and agreements as it deemed advisable, provided that there was to be provision in the Restructuring Plan for the consequences of any such terminations or cancellations.

10 By Orders in the CCAA proceedings dated April 7 and May 8, 2000, Paperny J. appointed a claims officer and set out a procedure for the creditors of Canadian to dispute the amounts of their claims for voting and distribution purposes should they disagree with the amounts set out in claims lists prepared by Canadian. The procedure included an appeal to the court in the event that the creditor disagreed with the amount of its claim as determined by the claims officer. The April 7 Order also provided that Canadian was to file its Restructuring Plan by April 25 and that meetings of Canadian's creditors were to be held on May 26 to consider and vote upon the Plan.

11 Canadian listed the Plaintiff's claim to be in the amount of $370,000. The Plaintiff did not accept this figure and filed a Voting/Distribution Dispute Notice dated May 4, 2000 (the party filling out the form was given the choice of indicating whether it disputed the amount of its claim for purposes of voting and for purposes of distribution, and the Plaintiff indicated that it was disputing the amount of its claim for purposes of distribution). In the Dispute Notice, the Plaintiff stated that the Agreement was wrongfully and effectively terminated on April 1, 2000 and that Air Canada had taken over the routes previously operated by the Plaintiff. The Dispute Notice stated that there were claims for damages against both Canadian and Air Canada for breach of contract, inducing breach

of contract, breach of fiduciary duty and certain other economic torts and that the claims had not been formalized for court or regulatory purposes as yet. Attached to the Dispute Notice was an appendix setting out the Plaintiff's dollar claim in the amount of $1,537,818, together with a further sum of $64,000 regarding computerized reservation system charges. The Dispute Notice stated that, in addition, there were claims in an, as yet, undetermined amount for damages for breach of contract, inducing breach of contract, breach of fiduciary duty and other economic torts and that the position and liability of Air Canada in relation to both Canadian and the Plaintiff had yet to be determined.

12 Canadian filed its Restructuring Plan and the creditor groups approved it at the meetings held on May 26, 2000. The Plan provided different treatment for four creditor groups. The Plaintiff fell within the class called the affected unsecured creditors which had total claims of approximately $700 million. The Plan proposed that the affected unsecured creditors would receive 14 cents on the dollar of their claims. This payment was to be funded by Air Canada. The Plan had the usual type of release provision, by which the affected creditors were deemed to release Canadian and its subsidiaries of all claims against them upon the implementation of the Plan.

13 In accordance with the provisions of the CCAA, it was necessary to have the Restructuring Plan sanctioned by the court. The court hearing, which is often referred to as the fairness hearing, was set before Paperny J. on June 5, 2000, and it lasted until June 19, 2000. There were two vociferous opponents of the Plan, Resurgence Asset Management LLC (which is colloquially referred to as a vulture fund) and four minority shareholders of CAC. Paperny J. gave her decision on June 27, 2000 (cited as Re Canadian Airlines Corp., 2000 ABQB 442; [2000] A.J. No. 771). I will subsequently deal with her reasons in some detail but I will simply indicate at this stage that she sanctioned the Plan and dismissed applications which had been brought by Resurgence and the minority shareholders.

14 An articled student at the Alberta law firm representing the Plaintiff attended at the fairness hearing on June 16 to seek a date for an application in the following week for the Plaintiff to be excluded from the CCAA proceedings. Another member of the law firm appeared on June 19 and stated that she was finalizing her instructions but had drafted a notice of motion and affidavit.

15 On June 22 the Plaintiff's Alberta law firm wrote a letter to the claims officer, with a copy to Canadian's lawyers, stating that the Plaintiff would not be participating in the claims procedure as it did not intend to claim any distribution under the Plan. On June 26 Canadian's lawyers wrote back pointing out that the Plaintiff would nevertheless remain an affected unsecured creditor and have its claim compromised in accordance with the provisions of the Plan. The Plaintiff's lawyers replied on June 28, stating that (i) the Plaintiff would not be making a claim for distribution and would not be participating in the process, and (ii) the claims officer had neither the role nor the jurisdiction to continue with the disputed claims process vis-a-vis the Plaintiff. On July 10, the Plaintiff's lawyers wrote a letter to the claims officer stating that the Plaintiff intended to sue Air Canada in British Columbia and that the Plaintiff withdrew its Dispute Notice and took no position on the quantum of its claim against CAIL for the purposes of compromise under the Plan.

16 The claims officer proceeded with the determination of the Plaintiff's claim. He considered submissions made by Canadian's lawyer and, on July 12, he determined the Plaintiff's claim in the amount of $370,000. No appeal was taken from this determination

17 The Restructuring Plan was implemented and Canadian was subsequently merged with Air Canada. The Plaintiff was sent a cheque in the amount of $51,800 as part of the distribution under the Plan but counsel for the Plaintiff returned the cheque to Canadian.

18 This action was commenced by the Plaintiff on July 20, 2000 against Air Canada and Air BC Limited. The Plaintiff asserts four tort claims and two claims pursuant to the Competition Act. As mentioned earlier, the present application is restricted to a consideration of the four tort claims of inducing breach of contract, unlawful interference with contractual relations, conspiracy and breach of confidence.

ISSUES

19 The issues on this application, as framed by counsel for the Defendants with some modification by me, are as follows:

> (a) do the doctrines of res judicata or abuse of process prevent the Plaintiff from asserting the tort claims?
> (b) should the tort claims be dismissed on the basis that the Plaintiff cannot establish causation between the conduct of the Defendants and the damages it suffered?

DISCUSSION

(a) Res Judicata and Abuse of Process

20 Much has been written in case decisions and textbooks about the doctrines of res judicata and abuse of process. Although many people commonly refer separately to the doctrines of res judicata and issue estoppel, they are properly viewed as part of the principle of estoppel by res judicata, the two components of which are cause of action estoppel and issue estoppel. In simple terms, the doctrines of res judicata and abuse of process within the present context stand for the proposition that a party may not litigate a cause of action or an issue which has been or could have been litigated in earlier proceedings. Counsel do not have a fundamental disagreement about the relevant law, and the dispute on this application concerns the application of the law to the present circumstances.

21 The decision in 420093 B.C. Ltd. v. Bank of Montreal (1995), 128 D.L.R. (4th) 488 (Alta. C.A.) contains an excellent discussion of the topics of cause of action estoppel, issue estoppel, collateral attack on prior orders and abuse of process. As the decision is reported, I will not quote from it extensively. After pointing out that estoppel by res judicata is a rule of evidence, O'Leary J.A. summarized the principle in the following terms:

> A prior judicial decision will not raise an estoppel by res judicata, either issue estoppel or cause of action estoppel, unless (i) it was a final decision pronounced by a court of competent jurisdiction over the parties and subject matter; (ii) the decision was, or involved, a determination of the same issue or cause of action as that sought to be controverted or advanced in the present litigation; and (iii) the parties to the prior judicial proceeding or their privies are the same persons as the parties to the present action or their privies. (p. 494)

In dealing with the topic of abuse of process, the Alberta Court of Appeal relied on another leading authority, the decision of the Manitoba Court of Appeal in Solomon v. Smith (1987), 45 D.L.R.

(4th) 266, 22 C.P.C. (2d) 12, [1988] 1 W.W.R. 410. O'Leary J.A. quoted the following portion of a passage from that decision discussing the use of the doctrine of abuse of process in circumstances where res judicata cannot be invoked:

> I agree ... that a plea of issue estoppel is not available. However, to permit the Statement of Claim to proceed would be an abuse of process and that is the principle applicable. In considering this doctrine, it seems to me prudent to avoid hard and fast institutionalized rules such as those which attach to the plea of issue estoppel. By encouraging the determination of each case on its own facts against the general principle of the plea of abuse, serious prejudice to either party as well as to the proper administration of justice can best be avoided. ... we must be vigilant to ensure that the system does not become unnecessarily clogged with repetitious litigation of the kind here attempted. There should be an end to this litigation. To allow the plaintiff to retry the issue of misrepresentation would be a classic example of abuse of process - - a waste of time and resources of litigants and the court and an erosion of the principle of finality so crucial to the proper administration of justice. (p. 275 of 45 D.L.R. (4th) and pp. 504-5 of 128 D.L.R. (4th))

I will now address each of these principles in the context of the present circumstances.

(i) Cause of action estoppel

22 Cause of action estoppel is clearly inapplicable in the present circumstances. The causes of action being asserted in the present litigation were not and could not have been pursued in the CCAA proceedings. There was no determination in the CCAA proceedings with respect to the causes of action alleged against the Defendants of inducing breach of contract, interference with contractual relations, conspiracy and breach of confidence.

23 Counsel for the Defendants submits that res judicata can extend to matters that ought to have been raised and is not restricted to issues actually determined on the merits. I agree with that proposition but I do not agree with the attempt of counsel to extend it to the present case by arguing that the Plaintiff could have advanced the allegations in its Dispute Notice before the Alberta Court and is now precluded from advancing them in this action.

24 It is true that, in addition to alleging breach of contract by Canadian, the Dispute Notice made reference to allegations against Air Canada for inducing breach of contract, breach of fiduciary duty and other economic torts. However, the Plaintiff could not have pursued those claims in the CCAA proceedings. The purpose of a CCAA proceeding, as reflected in the preamble to the legislation, is to "facilitate compromises and arrangements between companies and their creditors". Its purpose 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.

25 A somewhat analogous situation arose in Royal Bank v. Gentra Canada Investments Inc., [2000] O.J. No. 315 (Ont. Sup. Ct.). The Royal Bank sought to recover from Gentra an amount paid by it on a letter of credit issued to Gentra in connection with obligations of a company which subsequently initiated CCAA proceedings. In the CCAA proceedings, title to one of the debtor company's

properties was vested in Gentra and the Royal Bank had been given notice of the application to have the property vested in Gentra. One of the issues in the subsequent litigation was whether the Royal Bank was estopped from objecting to the allocation which Gentra made to the funds received under the letter of credit in respect of this property, given that it could have appeared at the hearing of the application to have the property vested in Gentra. Lederman J. held that there was no basis for invoking the doctrine of res judicata or issue estoppel because the CCAA proceeding did not deal with disputes between creditors inter se and there was no provision in the restructuring plan expressly delineating the dispute between Gentra and the Royal Bank.

26 I hold that the Plaintiff is not prevented by the doctrine of cause of action estoppel from pursuing its tort claims in this action.

(ii) Issue estoppel

27 The question here is whether there was a determination of an issue in the CCAA proceedings which the Plaintiff is estopped from denying and which fatally affects its claims in this litigation. The two potential sources of such a determination are the ruling of Paperny J. in sanctioning the Restructuring Plan and the ruling of the claims officer in ascertaining the amount of the Plaintiff's damages.

28 The global issue before Paperny J. was whether the Restructuring Plan should be sanctioned. She stated that the criteria which needed to be satisfied were as follows:

> (1) there must be compliance with all statutory requirements;
> (2) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and
> (3) the plan must be fair and reasonable.
>
> (para. 60)

In connection with the fairness and reasonableness of the Plan, Paperny J. considered the following matters in addition to the favourable vote of the creditors:

> a. The composition of the unsecured vote;
>
> b. What creditors would receive on liquidation or bankruptcy as compared to the Plan;
>
> c. Alternatives available to the Plan and bankruptcy;
>
> d. Oppression;
>
> e. Unfairness to Shareholders of CAC; and
>
> f. The public interest.
>
> (para. 96)

After considering these matters, Paperny J. concluded that the Plan was fair and reasonable.

29 In my view, none of the above criteria and matters considered by Paperny J. involved a decision on an issue which is required to be proven by the Plaintiff in order to sustain its tort claims in

this action. Paperny J. was directing her mind to the statutory requirements and to the fairness and reasonableness of the Plan. She was not directing her mind to activities of Air Canada in connection with Canadian's relationship with the Plaintiff.

30 The closest that Paperny J. came to considering matters relevant to this litigation was when she dealt with the allegation of Resurgence that Canadian and Air Canada had oppressed, unfairly disregarded or unfairly prejudiced their interests. In its Notice of Motion, Resurgence alleged, among other things, that (i) Air Canada induced Canadian to breach its obligations under its contract with Resurgence and other noteholders, (ii) Air Canada conspired with Canadian to default on the notes and to cause the failure of Canadian, and (iii) Air Canada and 853350 used their control of Canadian to, among other things, cause Canadian to re-align its flight route networks, thereby decreasing Canadian's revenues and increasing Air Canada's profitability through reduced competition.

31 In her Reasons for Decision, Paperny J. summarized Resurgence's allegations in the following two passages:

> Resurgence alleges that it has been oppressed or had its rights disregarded because the Petitioners and Air Canada disregarded the specific provisions of their trust indenture, that Air Canada and 853350 dealt with other creditors outside of the CCAA, refusing to negotiate with Resurgence and that they are generally being treated inequitably under the Plan. (para. 146)
>
> Resurgence complained that certain transfers of assets to Air Canada and its actions in consolidating the operations of the two entities prior to the initiation of the CCAA proceedings were unfairly prejudicial to it. (para. 153)

Paperny J. found either that these allegations were not proven or did not constitute unfairness. All but one of these allegations are unrelated to the Plaintiff's tort claims. The only one of the allegations that has some relevance to the Plaintiff is the one which Resurgence referred to as the realignment of the flight route network and which Paperny J. referred to as a consolidation of the operations of Air Canada and Canadian prior to the commencement of the CCAA proceedings. I quote the relevant portions of the two paragraphs in which Paperny J. dealt with this allegation:

> The evidence establishes that the financial support and corporate integration that has been provided by Air Canada was not only in Canadian's best interest, but its only option for survival. The suggestion that the renegotiations of these leases, various sales and the operational realignment represents an assumption of a benefit by Air Canada to the detriment of Canadian is not supported by the evidence.
>
> I find the transactions predating the CCAA proceedings, were in fact Canadian's life blood in ensuring some degree of liquidity and stability within which to conduct an orderly restructuring of its debt. There was no detriment to Canadian or to its creditors, including its unsecured creditors.
>
> (para. 155 and 156)

32 On a fair reading of the Reasons for Decision, the most that can be said in respect of the operational realignment is that Paperny J. held that the evidence did not support a conclusion that Air Canada had received an overall benefit or that the creditors of Canadian were prejudiced. She did not absolve Air Canada of any torts which it may have committed in connection with the operational realignment. In stating that there was no detriment to Canadian's creditors, she was referring to the ability of the creditors to recover from Canadian's assets and she was not suggesting that there was no detriment to creditors such as the Plaintiff who claimed to be harmed by torts committed by Air Canada.

33 In his oral submissions, counsel for the Defendants borrowed language found in constitutional cases and submitted that the pith and substance of the reasons of Paperny J. was that the re-alignment of the routes was fair and reasonable and that the very issue before her was the integration of the routes. I disagree. The principal question before Paperny J. was whether the Restructuring Plan was fair and reasonable. The re-alignment of the routes was an incidental issue in the sense of determining whether the process leading up to the Plan was unfair on the basis that Air Canada was obtaining an unfair benefit. She was not giving a global blessing or release in respect of all actions taken by Air Canada in connection with the re-alignment of the routes, including any torts it may have committed. Nor was she deciding that any of the requisite elements of the torts alleged in this action did not exist.

34 A similar situation existed in Samos Investments Inc. v. Pattison, [2000] B.C.J. No. 1344, although that decision involved a consideration of the principle by which collateral attacks on orders are prohibited. In that case, an order had been made approving a company's plan of arrangement under the Company Act by which the shares of minority shareholders were acquired at a price of $70 a share. One of the minority shareholders subsequently sued numerous parties alleging that prior to the plan of arrangement there had been a conspiracy to increase the number of shares in the company held by the majority shareholder and thereby dilute the value of the minority shares (from $100 a share to the $70 acquisition value). The majority of the B.C. Court of Appeal held that the subsequent action did not constitute a collateral attack on the order approving the plan of arrangement and refused to grant a stay of proceedings in respect of the subsequent action.

35 Rowles and Mackenzie JJ. wrote concurring judgments on behalf of the majority. Rowles J. held that the inquiry by the Court on the application to approve the plan of arrangement was limited by the terms of the plan and the relevant legislation, and that an application to approve a plan does not require an inquiry into past matters. Mackenzie J. agreed with the position taken by the company at the hearing to approve the plan that the objections made by the minority shareholders (and which were the subject matter of the subsequent action) were outside the scope of the arrangement hearing.

36 Similarly in the present case, the application to sanction the Restructuring Plan did not require an inquiry into past matters such as the actions of the Defendants prior to the filing of the Plan in relation to the Agreement. Those past matters were outside the scope of the fairness hearing before Paperny J. Although Paperny J. did consider past matters when she dealt with the allegations of oppression, she was required to do so because Resurgence had filed a notice of motion alleging that the actions of Canadian, Air Canada and 853350 were oppressive and unfairly prejudicial within the meaning of s. 234 of the Business Corporations Act, S.A. 1981, c. B-15. While there may be occasion when a court will have to consider past matters in order to determine whether a restructuring plan under the CCAA is fair and reasonable, those past matters would have to be related to the con-

tents of the restructuring plan. In the instant case, the actions in relation to the breach or termination of the Agreement were not related to the provisions of the Plan and were not matters which Paperny J. was asked to consider in deciding whether the Plan was fair and reasonable.

37 The second potential source of a determination in the CCAA proceedings of an issue which may be in contention in this action is the ruling of the claims officer in determining the amount of the Plaintiff's claim. The claims officer did not decide an issue which is fatal to the Plaintiff's tort claims in this litigation because he accepted that there had been inadequate notice of termination of the Agreement and he assessed the damages flowing therefrom. Although the Plaintiff's Dispute Notice made reference to economic tort claims, the claims officer did not deal with any of them and restricted his findings to damages caused by Canadian's inadequate notice of termination.

38 During the course of submissions, I raised the possibility that the Plaintiff may be estopped in this action from denying the amount of the damages caused by the alleged torts on the basis that those damages are the same as the damages caused by Canadian's breach or wrongful termination of the Agreement. Counsel for the Plaintiff responded that the measure of damages for a tort is different from the measure of damages for breach of contract. Counsel referred me to two texts on the topic of damages, J.G. Fleming, Law of Torts, 9th ed. (Sydney: LBC Information Services, 1998) at p. 765 and H.D. Pitch and R.M. Snyder, Damages for Breach of Contract, 2nd ed.(Vancouver: Carswell, 1989 and updates) at pp. 1-1 and 1-2 where, among other things, it is stated that it may be possible to recover aggravated and exemplary damages in tort claims, but not in actions for breach of contract.

39 I have concluded that I should not decide on this application whether the Plaintiff is estopped from asserting compensatory damages in this action which are different from the damages assessed by the claims officer in the CCAA proceeding. The Notice of Motion for this application requests an order dismissing the Plaintiff's tort claims. If I were to conclude that the Plaintiff is estopped from asserting different compensatory damages, it would only limit the amount of its damages which can be recovered in this litigation and it would not lead to a dismissal of any of its tort claims. Hence, it is my view that I would be going beyond the purview of the Notice of Motion if I made a ruling on this point. In addition, the point was raised by me during the course of submissions and counsel did not have a full opportunity to research and consider the issue. I leave the point open for further argument at trial (or on a subsequent Rule 18A application if leave were to be granted pursuant to Rule 18A(12)).

40 I hold that there was not a determination of any issue in the CCAA proceedings which the Plaintiff is estopped from denying and which would lead to the dismissal of any of its tort claims.

(iii) Abuse of process

41 As noted in Solomon v. Smith, the doctrine of abuse of process may be invoked to prevent repetitious litigation when the requirements of estoppel by res judicata have not been technically fulfilled.

42 In my view, with the potential exception of the amount of compensatory damages, the present litigation is not repetitious of the CCAA proceedings. Those proceedings dealt with the restructuring of Canadian's financial affairs as a prelude to a merger with Air Canada, including the compromising of the claims of Canadian's creditors. The present litigation involves a determination of whether Air Canada and its subsidiary, Air BC Limited, committed any torts against the Plaintiff in

connection with the re-alignment of Canadian's regional routes (in particular, the three regional routes flown by the Plaintiff under the terms of the Agreement). The CCAA proceedings did not involve a determination of any of those tort claims or of any of the requisite elements of the tort claims.

43 In addition to submitting that the Plaintiff is attempting to undermine the CCAA process by re-litigating the very issues and factual determinations already made by the Alberta Court (a submission which I have rejected), counsel for the Defendants argues that this proceeding is an affront to the Court because it ignores that the very foundation of its allegations was expressly permitted by the Alberta Court in advance of the breach of the Agreement and was subsequently absolved by it.

44 There is a disagreement between the parties as to whether Canadian breached the Agreement or wrongfully terminated it. A sub-issue in this regard is whether the wrong was committed when the February 4, 2000 letter was sent (or on January 17, 2000 when the Plaintiff was orally advised that the CP Code was being taken away from it) or when Air BC Limited began flying the routes using the CP Code on April 2, 2000. In making the submission, counsel for the Defendants is relying on the fact that the March 24, 2000 stay order in the CCAA proceedings authorized Canadian to terminate such contracts and agreements as it deemed advisable.

45 Even assuming that Canadian's wrong was a termination of the Agreement which occurred after the March 24, 2000 stay order, it cannot be said that the Alberta Court authorized the commission of any torts by the Defendants. All it did was authorize Canadian to terminate contracts and agreements, provided that it made provision for any consequences in the Restructuring Plan. Canadian was still liable for any wrongful terminations, albeit that the damages in respect of any wrongful terminations could be compromised by the Plan (provided that the Plan received the requisite approval or sanctioning by Canadian's creditors and the Alberta Court). The authorization contained in the March 24 order did not relieve Canadian, much less the Defendants, of any liability incurred as a result of the termination of any of Canadian's contracts or agreements.

46 Nor did the Alberta Court subsequently absolve either Canadian or the Defendants in respect of the breach or termination of the Agreement. The most the Alberta Court held in connection with the re-alignment of flight routes was that it did not render the Restructuring Plan unfair or unreasonable. It did not purport to relieve either Canadian or the Defendants of the consequences of the breach or termination of the Agreement or any other of Canadian's contracts or agreements. The relief achieved by Canadian in connection with the breach or termination of the Agreement was that the consequential damages were compromised by operation of the CCAA when the Plan was approved or sanctioned by Canadian's creditors and the Alberta Court. This compromise operated for the benefit of Canadian, not the Defendants (this statement is subject to an argument which was not pursued on this application to the effect that Air Canada is entitled to the benefit of the release contained in the Plan as a result of its subsequent merger with Canadian).

47 I hold that it is not an abuse of process to allow the Plaintiff to pursue the tort claims in this action.

(b) Causation and Damages

48 One of the findings made by Paperny J. from the evidence introduced at the fairness hearing was that Canadian would have ceased operations if Air Canada had not provided financial support to it commencing in December 1999. Counsel for the Defendants submits that based on this finding,

the Plaintiff cannot succeed on its tort claims because it would have suffered its losses in any event of the Defendants' actions. In support of this submission, counsel relies on the decisions in Cabral v. Metzger (1991), 83 Alta. L.R. (2d) 271 (C.A.), Edwin Hill & Partners v. First National Finance Corp., [1988] 3 All E.R. 801 (C.A.), Rogers Cable TV Ltd. v. 373041 Ontario Ltd., [1996] O.J. No. 2033 (Gen. Div.) and Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd., [1983] 6 W.W.R. 385 (S.C.C.).

49 In my view, these decisions are all distinguishable. None of them stand for the proposition that when a party provides financial support to allow a company to continue in business, that party is not liable in respect of torts involving or related to the company which it may subsequently commit on the basis that the torts are not the cause of any damages.

50 In both the Edwin Hill and Rogers Cable decisions, the Court relied on the concept of superior rights. In Edwin Hill, a property developer encountered financial difficulties and a mortgagee of the developer's property was in the position to exercise its power of sale and appoint a receiver. The mortgagee agreed that it would finance the development rather than pursue its remedies but, as a condition of this agreement, it required the developer to terminate its contract with an architect. In an action by the architect against the mortgagee for procuring a breach of its contract, the Court held that the mortgagee was not liable on the basis that it was justified to interfere with the contract as a result of its superior right to receive payment of its loan.

51 Similarly, in Rogers Cable, an owner of an apartment building was sued for interfering with a contract between Rogers Cable and tenants of the building. The Court held that the owner of the apartment building was justified in interfering with the contractual rights because it had a superior right to deal with the tenants of the building.

52 In my opinion, these two decisions have no application to the circumstances giving rise to this action. It has not been shown that the Defendants had any rights which were superior to the rights of the Plaintiff. The fact that Air Canada provided financial support to Canadian by way of purchasing assets from Canadian does not give it superior rights over other parties, including the Plaintiff.

53 The Cabral case involved a personal injury claim. The trial judge simply held that the plaintiff had not proved that his hearing loss was caused by the motor vehicle accident in question, especially in view of the fact that he had worked in a noisy environment for some years. This conclusion was upheld on appeal. In my view, the decision is distinguishable from the present circumstances because in Cabral, there were two competing potential causes of the hearing loss and the trial judge held that it had not been proven that the accident was the cause. In the case at bar, the Plaintiff's damages were caused by a breach or a termination of the Agreement, and there was no other competing cause in operation at the relevant time.

54 The fourth case relied upon by counsel for the Defendants on this point is Canada Cement LaFarge. In that case, the Court held that there was no causal connection between the unlawful activities of the defendant and the demise of the plaintiff's enterprise because it was not shown that the defendant's use of an imported raw material which competed with the plaintiff's product was part of an unlawful scheme to injure the plaintiff in its business. This decision is also distinguishable because it was not proven in that case that the unlawful activities of the defendant were a cause of the plaintiff's demise. In the present case, the breach or termination of the Agreement did give rise to the Plaintiff's loss and the issue at trial will be whether the Defendants tortiously participated in the breach or termination.

55 The Defendants' argument may have had a more solid footing if the financial support provided to Canadian was causally linked to Canadian's breach or termination of the Agreement. For example, Air Canada could possibly have acquired superior rights if it was a condition to its provision of financial support that Canadian terminate the Agreement, but there is no evidence of any conditions being attached to Air Canada's $45 million purchase of assets from Canadian. In addition, it should be noted that the financial support was in the form of purchases of assets and, while the purchase monies provided liquidity for Canadian, there is nothing to indicate that the aggregate purchase price was in excess of the fair market value of the assets.

56 Similarly, the Defendants' argument would have more force if the alleged tortious acts had saved Canadian from its demise and the evidence established that Canadian would inevitably have failed if those acts had not been taken. In my view, the evidence before me does not go that far. Air Canada had announced that it would only merge with Canadian if there was a financial restructuring so that the acquisition could be accomplished on a financially sound basis but that condition did not necessarily involve a breach or termination of the Agreement. In response to Resurgence's complaint that Air Canada caused Canadian to re-align its flight route networks, Paperny J. did state that the financial support and corporate integration provided by Air Canada was Canadian's only option for survival. However, this finding does not mean that Canadian's only option for survival was the breach or wrongful termination of the Agreement. Canadian may have been able to survive if it gave timely notice to bring the Agreement to an end as of October 31, 2000, and it has not been demonstrated that it was essential to Canadian's continued existence for the Agreement to be breached or wrongfully terminated as of April 2, 2000.

57 The evidence before me does not establish that the Agreement would inevitably have been breached or terminated apart from the February 4, 2000 letter (or the January 17, 2000 conversation) and the actions which took place on April 2, 2000. In other words, it has not been shown that these matters did not cause the Plaintiff's loss because there was another cause which would have inevitably brought about the loss.

58 I hold that it has not been demonstrated that the Plaintiff is unable to establish causation between the conduct of the Plaintiff and the damages it suffered as a result of allegedly improper actions of the Defendants.

CONCLUSION

59 I dismiss the Defendants' application. I grant costs of the application to the Plaintiff in the cause.

TYSOE J.

cp/i/qlsng/qlbrl

TAB 21

2007 CarswellOnt 7288, 38 C.B.R. (5th) 284

C

2007 CarswellOnt 7288, 38 C.B.R. (5th) 284

Ravelston Corp., Re

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE RAVELSTON CORPORATION LIMITED AND RAVELSTONMANAGEMENT INC.

AND IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED, AND THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED

Ontario Superior Court of Justice

Cumming J.

Heard: November 7, 2007
Judgment: November 8, 2007
Docket: 05-CL-005863

Counsel: Richard B. Jones, Lisa Corne for Class A and Class B Preferred Shares of Argus Corporation Limited

A. MaeFarlane, J. Dietrich for RSM Richter

Roslynn Kogan for Conrad Black

Derek J. Bell for Sun Time Media Group Inc.

Subject: Insolvency; Estates and Trusts; Civil Practice and Procedure

Bankruptcy and insolvency --- Receiving order — Miscellaneous issues

Appointing counsel in receivership proceedings — ACL was wholly owned subsidiary of RCL, and each owned 61 per cent and 17 per cent respectively, of common shares of H — R was appointed receiver and manager, interim receiver and monitor of RCL and ACL in April and May 2005 — On August 30, 2005, receiver sent notice to all preference shareholders of ACL seeking establishment of concerned preference shareholders as organized collective group with representative counsel, which led to present ACL preference shareholder group ("APSG"), representing 52 per cent of all preference shareholders, and made up of 61 per cent of Class A and 49 per cent of Class B preference shareholders — APSG moved to appoint solicitor to act as independent counsel to represent interests of all

Class A and Class B shareholders in receivership proceedings of RCL — Motion dismissed — 48 per cent of ACL preference shareholders were not represented by APSG and had not been served with respect to motion — Order sought was overreaching and sought to vary terms of receivership order under which R was appointed by elevating solicitor to position of quasi receiver — Receiver was not in actual or fairly perceived conflict of loyalties in being receiver to both RCL and ACL — Motion was premature inasmuch as it should await determination as to whether H had any real value to its common shareholders RCL and ACL — Alleged wrongdoing by officers and directors of ACL and RCL with causes of action accruing to Class A preference shareholders was not good reason to grant motion — Interests of Class A preference shareholders, as stakeholder in receiverships, were fairly and competently represented by receiver, and APSG could continue to represent interests of their clients in receiverships without motion being granted.

Cases considered by *Cumming J.*:

Ravelston Corp., Re (2007), 2007 CarswellOnt 661, 29 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]) — referred to

Ravelston Corp., Re (2007), 152 C.R.R. (2d) 91, 2007 CarswellOnt 755, 29 C.B.R. (5th) 34, 84 O.R. (3d) 611 (Ont. S.C.J. [Commercial List]) — referred to

Ravelston Corp., Re (2007), 29 C.B.R. (5th) 45, 2007 CarswellOnt 1115, 2007 ONCA 135, 85 O.R. (3d) 175 (Ont. C.A.) — referred to

Ravelston Corp., Re (2007), 2007 CarswellOnt 2114, 2007 ONCA 268, 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]) — referred to

Statutes considered:

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

Generally — referred to

Rules considered:

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

R. 10.01(1)(f) — pursuant to

R. 12.08 — pursuant to

MOTION by certain preference shareholders to appoint independent counsel to represent interests of all Class A and Class B shareholders in receivership proceedings.

***Cumming J.*:**

The Motion

1 Some 61% of the Class "A" and 49% of the Class "B" preference shareholders ("Argus Preference Shareholder Group") of Argus Corporation Limited ("Argus") bring a motion to appoint Richard B. Jones, Q.C. of Aylesworth LLP ("Aylesworth") to act as independent counsel ("Representative Counsel") to represent the interests of *all* Class

"A" and Class "B" shareholders in the receivership proceeding of Ravelston Corporation Limited ("RCL") (other than representing RCL itself and any person related to RCL).

2 Argus is a wholly owned subsidiary of RCL. Argus has some 61% of the common shares of Hollinger Inc. ("Hollinger"). RCL owns some 17% of the common shares of Hollinger. Lord Conrad Black has the controlling interest in RCL. RSM Richter Inc. ("Richter") was appointed receiver and manager, interim receiver and monitor of RCL and Argus in April and May, 2005. The extensive background to the receivership of RCL and its history are set forth in *Ravelston Corp., Re*, [2007] O.J. No. 414 (Ont. S.C.J. [Commercial List]), aff'd. (Ont. C.A.) and *Ravelston Corp., Re*, [2007] O.J. No. 536 (Ont. S.C.J. [Commercial List]), leave to appeal denied (Ont. C.A. [In Chambers]).

3 This motion was initiated September 20, 2007, at which time the motion contemplated that the fees and disbursements of the intended Representative Counsel would form a charge on Argus' property ranking *pari passu* with the Receiver's Charge (overlooking the interests of RCL's secured creditors). In the alternative, Aylesworth suggested that there be a charge on any distributions to Argus preference shareholders (overlooking the fact that this could mean diminishing the distribution to preference shareholders who had no notice of the motion). After a case conference the motion was deferred for further consideration by Aylesworth as to whether the motion would be pursued.

4 On the return of the motion November 7, Aylesworth advised that its new position was that the requested Court order provide only that "the issues regarding the payment of reasonable fees and disbursements...be determined at such time and on such terms as to notice as this Court may hereafter order."

5 Approximately 48% of the Argus preference shareholders are not represented by the 52% Argus Preference Shareholder Group bringing the motion at hand. The unrepresented group have not been served in respect of the motion at hand. The Receiver opposes the motion in part upon the basis of lack of service of the motion materials.

6 On August 30, 2005, working with CIBC Mellon, Argus' transfer agent, the Receiver sent a notice to all preference shareholders of Argus, at the expense of the estate, and included a letter from Mr. George G. Stevens, a preference shareholder and the affiant for the moving party. The letter gave notice of seeking the establishment of concerned Argus preference shareholders as an organized, collective group with representative counsel, such initiative being dependent upon contributing a *pro rata* share of funds to defray the costs of representation on behalf of the preference shareholders. This initiative led to the present Argus Preference Shareholder Group which, as noted above, represents only 52% of all preference shareholders. They have been effectively represented in the RCL receivership proceedings since that time by counsel. They have recently changed counsel and are now represented by Aylesworth.

7 There are, in my view, four problems with the motion at hand.

8 First, the new, present motion materials should have been sent by mail to all of the Class A and Class B preference shareholders. This could be done through obtaining an updated list from CIBC Mellon and could be done at an estimated modest cost of perhaps $5,000. A newspaper advertisement could also have been utilized as a means of communication to preference shareholders who could not be reached by a mailing.

9 The motion is nominally brought pursuant to Rule 12.08 of the Rules of Civil Procedure but from my reading of the Rules is in reality properly to be bought under Rule 10.01(1) (f). This allows for an order to be made appointing a representative in a proceeding in respect of persons who "cannot be readily ascertained, found or served." This is not the case here.

10 Aylesworth suggested in the course of submissions that a 'comeback clause' in the proposed order would suffice, but this implies a mailing in all events. A mailing of the proposed motion would be far superior to a mailing after the

fact.

11 Second, in my view, the draft of the requested order is overreaching and seeks, in effect, to vary the terms of the receivership order under which Richter was appointed by elevating Mr. Jones (nominally to be Representative Counsel) to the position of a quasi receiver with a corresponding restriction upon the powers and obligations of Richter as Receiver.

12 For example, the draft order suggests Richter in its capacity as Receiver would not be able to pursue any proposed course of action, agreement, proceeding or an asset disposition if the Representative Counsel disagreed (and in such event would have to seek directions and approval from the Court). For example, Richter would be obligated to provide access to all information and the voluminous extant documentation notwithstanding relevancy, cost and possible concerns as to privilege. There should not be fetters put upon the Receiver which add delay, inconvenience, extra costs and inefficiencies.

13 Richter has been effectively consulting with all stakeholders (including the Argus preference shareholders) in the related receiverships in respect of matters which may affect their interests. As noted above, the Receiver has encouraged the Argus preference shareholders to have the advantage of their own counsel since the commencement of the receivership.

14 Third, Aylesworth in its submissions asserts that the Receiver is in a conflict of loyalties in being receiver to both RCL and Argus. I disagree. In my view, there is no actual or fairly perceived conflict. The Receiver's goal has always been to maximize the value at Hollinger. The interests of the Argus preference shareholders and RCL are identical in this regard. If Hollinger has no or minimal value then both the Argus preference shareholders and RCL will as common shareholders of Hollinger have shares of no indirect value to their own shareholders. The evidentiary record to date suggests that Hollinger is insolvent. At this time, the chance of any return to Hollinger's common shareholders seems remote.

15 Even if there is ever any such return it also seems probable that the insolvency of RCL and Argus means there would not be any distribution to their own respective shareholders. The point is, the motion at hand is, at the least, premature inasmuch as it should await the determination as to whether Hollinger has any real value to its common shareholders, RCL and Argus.

16 Fourth, Aylseworth asserts that there has been wrongdoing by the officers and directors of Argus and RCL with causes of action accruing to the Argus preference shareholders. I do not see this as a good reason to grant the motion. I mention that access to the courts has always been available, of course, through the preference shareholders being able, if they so chose, to commence a class action under the *Class Proceedings Act*, 1992, S.O. 1992, c.6. Assuming certification, all Argus preference shareholders could be included in the class (with a right of opt-out). This approach would incidentally have avoided the present concern of the Argus Preference Shareholder Group that some 48% of preference shareholders (ie. the 48% not in the Group) may get a 'free ride' through the efforts of counsel for the Group, with counsel only being funded by members of the Group. Seeking leave for a derivative action on behalf of Argus has been an alternative possibility.

Disposition

17 For the reasons given, the motion is dismissed. I emphasize that, in my view, the interests of the Argus preference shareholders, as a stakeholder in the receiverships, are fairly and competently being represented by Richter as Receiver. Moreover, counsel for the Argus Preference Shareholder Group has represented, and can continue to effectively represent, the interests of their clients in the receiverships without the motion being granted. In my view, dismissing the motion is in the best interests of *all* stakeholders in the receiverships and results in no disadvantage to the moving party.

Motion dismissed

END OF DOCUMENT

TAB 22

Case Name:

Robertson v. ProQuest Information and Learning Co.

RE: IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc. and Canwest (Canada) Inc.
AND RE: Heather Robertson, Plaintiff, and ProQuest Information and Learning Company, Cedrom-SNI Inc., Toronto Star Newspapers Ltd., Rogers Publishing Limited and Canwest Publishing Inc., Defendants

[2011] O.J. No. 1160

2011 ONSC 1647

Court File Nos. 03-CV-252945CP, CV-10-8533-00CL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

March 15, 2011.

(34 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Sanction by court -- Application by the representative plaintiff and by one of the defendants, who was governed by an order under the Companies' Creditors Arrangement Act, for approval of a settlement that would resolve plaintiff's class proceeding and claim under the Act allowed -- Settlement would result in fair and reasonable outcome -- Settlement was recommended by all of the involved parties and it was not opposed by the defendants in the class proceeding who were not included in it.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Settlements -- Application by the representative plaintiff and by one of the defendants, who was governed by an order under the Companies' Creditors Arrangement Act, for approval of a settlement that would resolve plaintiff's class proceeding and claim under the Act allowed -- Settlement would result in fair and

reasonable outcome -- Settlement was recommended by all of the involved parties and it was not opposed by the defendants in the class proceeding who were not included in it.

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Settlements -- Approval -- Application by the representative plaintiff and by one of the defendants, who was governed by an order under the Companies' Creditors Arrangement Act, for approval of a settlement that would resolve plaintiff's class proceeding and claim under the Act allowed -- Settlement would result in fair and reasonable outcome -- Settlement was recommended by all of the involved parties and it was not opposed by the defendants in the class proceeding who were not included in it.

Application by Robertson and by the defendant Canwest Publishing Inc. for approval of a settlement. Robertson, who was a plaintiff in her own capacity and was also the representative plaintiff in a class proceeding, commenced this action in July 2003. The action was certified as a class proceeding in October 2008. Robertson claimed compensatory damages of $500 million and punitive and exemplary damages of $250 million against the defendants for copyright infringement. In January 2010 Canwest was granted an initial order pursuant to the Companies' Creditors Arrangement Act. In April 2010 Robertson filed a claim under the Arrangement Act for $500 million. The Monitor's opinion was that this claim was worth $0. The proposed settlement would resolve the class proceeding and the proceeding under the Arrangement Act. Court approval was not required for the claim under the Arrangement Act but it was required for the class proceeding. Under the settlement the claim under the Arrangement Act would be allowed in the amount of $7.5 million for voting and distribution purposes. Robertson undertook to vote in favour of the proposed Plan under the Arrangement Act. The action would be dismissed against Canwest, which did not admit liability. The action would not be dismissed against the other defendants. The Monitor was involved in the negotiation of the settlement and recommended approval for it concluded that the settlement agreement was a fair and reasonable resolution for Canwest.

HELD: Application allowed. The settlement agreement met the tests for approval under the Arrangement Act and under the Class Act. No one, including the non-settling defendants who received notice, opposed the settlement. Robertson was a very experienced and sophisticated litigant who previously resolved a similar class proceeding against other media companies. The settlement agreement was recommended by experienced counsel and it was entered into after serious negotiations between sophisticated parties. It would result in a fair and reasonable outcome, partly because Canwest was in an insolvency proceeding with all of its attendant risks and uncertainties.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 29, s. 34

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

Counsel:

Kirk Baert, for the Plaintiff.

Peter J. Osborne and *Kate McGrann*, for Canwest Publishing Inc.

Alex Cobb, for the CCAA Applicants.

Ashley Taylor and *Maria Konyukhova*, for the Monitor.

REASONS FOR DECISION

S.E. PEPALL J.:--

Overview

1 On January 8, 2010, I granted an initial order pursuant to the provisions of the *Companies' Creditors Arrangement Act* ("*CCAA*") in favour of Canwest Publishing Inc. ("CPI") and related entities (the "LP Entities"). As a result of this order and subsequent orders, actions against the LP Entities were stayed. This included a class proceeding against CPI brought by Heather Robertson in her personal capacity and as a representative plaintiff (the "Representative Plaintiff"). Subsequently, CPI brought a motion for an order approving a proposed notice of settlement of the action which was granted. CPI and the Representative Plaintiff then jointly brought a motion for approval of the settlement of both the class proceeding as against CPI and the *CCAA* claim. The Monitor supported the request and no one was opposed. I granted the judgment requested and approved the settlement with endorsement to follow. Given the significance of the interplay of class proceedings with *CCAA* proceedings, I have written more detailed reasons for decision rather than simply an endorsement.

Facts

2 The Representative Plaintiff commenced this class proceeding by statement of claim dated July 25, 2003 and the action was case managed by Justice Cullity. He certified the action as a class proceeding on October 21, 2008 which order was subsequently amended on September 15, 2009.

3 The Representative Plaintiff claimed compensatory damages of $500 million plus punitive and exemplary damages of $250 million against the named defendants, ProQuest Information and Learning LLC, Cedrom-SNI Inc., Toronto Star Newspapers Ltd., Rogers Publishing Limited and CPI for the alleged infringement of copyright and moral rights in certain works owned by class members. She alleged that class members had granted the defendants the limited right to reproduce the class members' works in the print editions of certain newspapers and magazines but that the defendant publishers had proceeded to reproduce, distribute and communicate the works to the public in electronic media operated by them or by third parties.

4 As set out in the certification order, the class consists of:

> A. All persons who were the authors or creators of original literary works ("Works") which were published in Canada in any newspaper, magazine, periodical, newsletter, or journal (collectively "Print Media") which Print Media have been reproduced, distributed or communicated to the public by telecommunication by, or pursuant to the purported authorization or permission of, one or more of the defendants, through any electronic database, excluding electronic databases in which only a precise electronic reproduction of the Work or substantial portion thereof is made available (such as PDF and analogous copies) (collectively "Electronic Media"), excluding:

(a) persons who by written document assigned or exclusively licensed all of the copyright in their Works to a defendant, a licensor to a defendant, or any third party; or

(b) persons who by written document granted to a defendant or a licensor to a defendant a license to publish or use their Works in Electronic Media; or

(c) persons who provided Works to a not for profit or non-commercial publisher of Print Media which was licensor to a defendant (including a third party defendant), and where such persons either did not expect or request, or did not receive, financial gain for providing such Works; or

(d) persons who were employees of a defendant or a licensor to a defendant, with respect to any Works created in the course of their employment.

Where the Print Media publication was a Canadian edition of a foreign publication, only Works comprising of the content exclusive to the Canada edition shall qualify for inclusion under this definition.

(Persons included in clause A are thereinafter referred to as "Creators". A "licensor to a defendant" is any party that has purportedly authorized or provided permission to one or more defendants to make Works available in Electronic Media. References to defendants or licensors to defendants include their predecessors and successors in interest)

B. All persons (except a defendant or a licensor to a defendant) to whom a Creator, or an Assignee, assigned, exclusively licensed, granted or transmitted a right to publish or use their Works in Electronic Media.

(Persons included in clause B are hereinafter referred to as "Assignees")

C. Where a Creator or Assignee is deceased, the personal representatives of the estate of such person unless the date of death of the Creator was on or before December 31, 1950.

5 As part of the *CCAA* proceedings, I granted a claims procedure order detailing the procedure to be adopted for claims to be made against the LP Entities in the *CCAA* proceedings. On April 12, 2010, the Representative Plaintiff filed a claim for $500 million in respect of the claims advanced against CPI in the action pursuant to the provisions of the claims procedure order. The Monitor was of the view that the claim in the *CCAA* proceedings should be valued at $0 on a preliminary basis.

6 The Representative Plaintiff's claim was scheduled to be heard by a claims officer appointed pursuant to the terms of the claims procedure order. The claims officer would determine liability and would value the claim for voting purposes in the *CCAA* proceedings.

7 Prior to the hearing before the claims officer, the Representative Plaintiff and CPI negotiated for approximately two weeks and ultimately agreed to settle the *CCAA* claim pursuant to the terms of a settlement agreement.

8 When dealing with the consensual resolution of a *CCAA* claim filed in a claims process that arises out of ongoing litigation, typically no court approval is required. In contrast, class proceeding

settlements must be approved by the court. The notice and process for dissemination of the settlement agreement must also be approved by the court.

9 Pursuant to section 34 of the *Class Proceedings Act*, the same judge shall hear all motions before the trial of the common issues although another judge may be assigned by the Regional Senior Judge (the "RSJ") in certain circumstances. The action had been stayed as a result of the CCAA proceedings. While I was the supervising CCAA judge, I was also assigned by the RSJ to hear the class proceeding notice and settlement motions.

10 Class counsel said in his affidavit that given the time constraints in the *CCAA* proceedings, he was of the view that the parties had made reasonable attempts to provide adequate notice of the settlement to the class. It would have been preferable to have provided more notice, however, given the exigencies of insolvency proceedings and the proposed meeting to vote on the *CCAA* Plan, I was prepared to accept the notice period requested by class counsel and CPI.

11 In this case, given the hybrid nature of the proceedings, the motion for an order approving notice of the settlement in both the class action proceeding and the *CCAA* proceeding was brought before me as the supervising *CCAA* judge. The notice procedure order required:

1) the Monitor and class counsel to post a copy of the settlement agreement and the notice order on their websites;
2) the Monitor to publish an English version of the approved form of notice letter in the National Post and the Globe and Mail on three consecutive days and a French translation of the approved form of notice letter in La Presse for three consecutive days;
3) distribution of a press release in an approved form by Canadian Newswire Group for dissemination to various media outlets; and
4) the Monitor and class counsel were to maintain toll-free phone numbers and to respond to enquiries and information requests from class members.

12 The notice order allowed class members to file a notice of appearance on or before a date set forth in the order and if a notice of appearance was delivered, the party could appear in person at the settlement approval motion and any other proceeding in respect of the class proceeding settlement. Any notices of appearance were to be provided to the service list prior to the approval hearing. In fact, no notices of appearance were served.

13 In brief, the terms of the settlement were that:

a) the *CCAA* claim in the amount of $7.5 million would be allowed for voting and distribution purposes;
b) the Representative Plaintiff undertook to vote the claim in favour of the proposed *CCAA* Plan;
c) the action would be dismissed as against CPI;
d) CPI did not admit liability; and
e) the Representative Plaintiff, in her personal capacity and on behalf of the class and/or class members, would provide a licence and release in respect of the freelance subject works as that term was defined in the settlement agreement.

14 The claims in the action in respect of CPI would be fully settled but the claims which also involved ProQuest would be preserved. The licence was a non-exclusive licence to reproduce one or more copies of the freelance subject works in electronic media and to authorize others to do the same. The licence excluded the right to licence freelance subject works to ProQuest until such time as the action was resolved against ProQuest, thereby protecting the class members' ability to pursue ProQuest in the action. The settlement did not terminate the lawsuit against the other remaining defendants. Under the *CCAA* Plan, all unsecured creditors, including the class, would be entitled to share on a pro rata basis in a distribution of shares in a new company. The Representative Plaintiff would share pro rata to the extent of the settlement amount with other affected creditors of the LP Entities in the distributions to be made by the LP Entities, if any.

15 After the notice motion, CPI and the Representative Plaintiff brought a motion to approve the settlement. Evidence was filed showing, among other things, compliance with the claims procedure order. Arguments were made on the process and on the fairness and reasonableness of the settlement.

16 In her affidavit, Ms. Robertson described why the settlement was fair, reasonable and in the best interests of the class members:

> In light of Canwest's insolvency, I am advised by counsel, and verily believe, that, absent an agreement or successful award in the Canwest Claims Process, the prospect of recovery for the Class against Canwest is minimal, at best. However, under the Settlement Agreement, which preserves the claims of the Class as against the remaining defendants in the class proceeding in respect of each of their independent alleged breaches of the class members' rights, as well as its claims as against ProQuest for alleged violations attributable to Canwest content, there is a prospect that members of the Class will receive some form of compensation in respect of their direct claims against Canwest.
>
> Because the Settlement Agreement provides a possible avenue of recovery for the Class, and because it largely preserves the remaining claims of the Class as against the remaining defendants in the class proceeding, I am of the view that the Settlement Agreement represents a reasonable compromise of the Class claim as against Canwest, and is both fair and reasonable in the circumstances of Canwest's insolvency.

17 In the affidavit filed by class counsel, Anthony Guindon of the law firm Koskie Minsky LLP noted that he was not in a position to ascertain the approximate dollar value of the potential benefit flowing to the class from the potential share in a pro rata distribution of shares in the new corporation. This reflected the unfortunate reality of the *CCAA* process. While a share price of $11.45 was used, he noted that no assurance could be given as to the actual market price that would prevail. In addition, recovery was contingent on the total quantum of proven claims in the claims process. He also described the litigation risks associated with attempting to obtain a lifting of the *CCAA* stay of proceedings. The likelihood of success was stated to be minimal. He also observed the problems associated with collection of any judgment in favour of the Representative Plaintiff. He went on to state:

> ... The Representative Plaintiff, on behalf of the Class, could have elected to challenge Canwest's initial valuation of the Class claim of $0 before a Claims Officer, rather than entering into a negotiated settlement. However, a number of factors militated against the advisability of such a course of action. Most importantly, the claims of the Class in the class proceeding have not been proven, and the Class does not enjoy the benefit of a final judgment as against Canwest. Thus, a hearing before the Claims Officer would necessarily necessitate a finding of liability as against Canwest, in addition to a quantification of the claims of the Class against Canwest.
>
> ... a negative outcome in a hearing before a Claims Officer could have the effect of jeopardizing the Class claims as against the remaining defendants in the class proceeding. Such a finding would not be binding on a judge seized of a common issues trial in the class proceeding; however, it could have persuasive effect.
>
> Given the likely limited recovery available from Canwest in the Claims Process, it is the view of Class Counsel that a negotiated resolution of the quantification of Class claim as against Canwest is preferable to risking a negative finding of liability in the context of a contested Claims hearing before a Claims Officer.

18 The Monitor was also involved in the negotiation of the settlement and was also of the view that the settlement agreement was a fair and reasonable resolution for CPI and the LP Entities' stakeholders. The Monitor indicated in its report that the settlement agreement eliminated a large degree of uncertainty from the *CCAA* proceeding and facilitated the approval of the Plan by the requisite majorities of stakeholders. This of course was vital to the successful restructuring of the LP Entities. The Monitor recommended approval of the settlement agreement.

19 The settlement of the class proceeding action was made prior to the creditors' meeting to vote on the Plan for the LP Entities. The issues of the fees and disbursements of class counsel and the ultimate distribution to class members were left to be dealt with by the class proceedings judge if and when there was a resolution of the action with the remaining defendants.

Discussion

20 Both motions in respect of the settlement were heard by me but were styled in both the *CCAA* proceedings and the class proceeding.

21 As noted by Jay A. Swartz and Natasha J. MacParland in their article "*Canwest Publishing - A Tale of Two Plans*"[1]:

> "There have been a number of *CCAA* proceedings in which settlements in respect of class proceedings have been implemented including *McCarthy v. Canadian Red Cross Society, (Re:) Grace Canada Inc., Muscletech Research and Development Inc.,* and *(Re:) Hollinger Inc.* ... The structure and process for notice and approval of the settlement used in the LP Entities restructuring appears to be the most efficient and effective and likely a model for future approvals. Both motions in respect of the Settlement, discussed below, were heard by the *CCAA* judge but were styled in both proceedings." [citations omitted]

(a) Approval

(i) *CCAA* Settlements in General

22 Certainly the court has jurisdiction to approve a *CCAA* settlement agreement. As stated by Farley J. in *Re Lehndorff General Partner Ltd.*,[2] the *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Very broad powers are provided to the *CCAA* judge and these powers are exercised to achieve the objectives of the statute. It is well settled that courts may approve settlements by debtor companies during the *CCAA* stay period: *Re Calpine Canada Energy Ltd.*[3]; *Re Air Canada*[4]; and *Re Playdium Entertainment Corp.*[5] To obtain approval of a settlement under the *CCAA*, the moving party must establish that: the transaction is fair and reasonable; the transaction will be beneficial to the debtor and its stakeholders generally; and the settlement is consistent with the purpose and spirit of the *CCAA*. See in this regard *Re Air Canada*[6] and *Re Calpine.*[7]

(ii) Class Proceedings Settlement

23 The power to approve the settlement of a class proceeding is found in section 29 of the *Class Proceedings Act*, 1992[8]. That section states:

> 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.
>
> (2) A settlement of a class proceeding is not binding unless approved by the court.
>
> (3) A settlement of a class proceeding that is approved by the court binds all class members.
>
> (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 proceedings;
> (b) a statement of the result of the proceeding; and
> (c) a description of any plan for distributing settlement funds.

24 The test for approval of the settlement of a class proceeding was described in *Dabbs v. Sun Life Assurance Co. of Canada*[9]. The court must find that in all of the circumstances the settlement is fair, reasonable and in the best interests of those affected by it. In making this determination, the court should consider, amongst other things:

a) the likelihood of recovery or success at trial;
b) the recommendation and experience of class counsel; and
c) the terms of the settlement.

As such, it is clear that although the *CCAA* and class proceeding tests for approval are not identical, a certain symmetry exists between the two.

25 A perfect settlement is not required. As stated by Sharpe J. (as he then was) in *Dabbs v. Sun Life Assurance Co. of Canada*[10]:

> Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.

26 Where there is more than one defendant in a class proceeding, the action may be settled against one of the defendants provided that the settlement is fair, reasonable and in the best interests of the class members: *Ontario New Home Warranty Program et al. v. Chevron Chemical et al.*[11]

(iii) The Robertson Settlement

27 I concluded that the settlement agreement met the tests for approval under the *CCAA* and the *Class Proceedings Act*.

28 As a general proposition, settlement of litigation is to be promoted. Settlement saves time and expense for the parties and the court and enables individuals to extract themselves from a justice system that, while of a high caliber, is often alien and personally demanding. Even though settlements are to be encouraged, fairness and reasonableness are not to be sacrificed in the process.

29 The presence or absence of opposition to a settlement may sometimes serve as a proxy for reasonableness. This is not invariably so, particularly in a class proceeding settlement. In a class proceeding, the court approval process is designed to provide some protection to absent class members.

30 In this case, the proposed settlement is supported by the LP Entities, the Representative Plaintiff, and the Monitor. No one, including the non-settling defendants all of whom received notice, opposed the settlement. No class member appeared to oppose the settlement either.

31 The Representative Plaintiff is a very experienced and sophisticated litigant and has been so recognized by the court. She is a freelance writer having published more than 15 books and having been a regular contributor to Canadian magazines for over 40 years. She has already successfully resolved a similar class proceeding against Thomson Canada Limited, Thomson Affiliates, Information Access Company and Bell Global Media Publishing Inc. which was settled for $11 million after 13 years of litigation. That proceeding involved allegations quite similar to those advanced in the action before me. In approving the settlement in that case, Justice Cullity described the involvement of the Representative Plaintiff in the class proceeding:

> The Representative Plaintiff, Ms. Robertson, has been actively involved throughout the extended period of the litigation. She has an honours degree in English from the University of Manitoba, and an M.A. from Columbia University in New York. She is the author of works of fiction and non-fiction, she has been a regular contributor to Canadian magazines and newspapers for over 40 years, and she was a founder member of each of the Professional Writers' Association of Canada and the Writers' Union of Canada. Ms. Robertson has been in communication with class members about the litigation since its inception and has obtained funds

> from them to defray disbursements. She has clearly been a driving force behind the litigation: *Robertson v. Thomson Canada*[12].

32 The settlement agreement was recommended by experienced counsel and entered into after serious and considered negotiations between sophisticated parties. The quantum of the class members' claim for voting and distribution purposes, though not identical, was comparable to the settlement in *Robertson v. Thomson Canada*. In approving that settlement, Justice Cullity stated:

> Ms. Robertson's best estimate is that there may be 5,000 to 10,000 members in the class and, on that basis, the gross settlement amount of $11 million does not appear to be unreasonable. It compares very favourably to an amount negotiated among the parties for a much wider class in the U.S. litigation and, given the risks and likely expense attached to a continuation of the proceeding, does not appear to be out of line. On this question I would, in any event, be very reluctant to second guess the recommendations of experienced class counsel, and their well informed client, who have been involved in all stages of the lengthy litigation.[13]

33 In my view, Ms. Robertson's and Mr. Guindon's description of the litigation risks in this class proceeding were realistic and reasonable. As noted by class counsel in oral argument, issues relating to the existence of any implied license arising from conduct, assessment of damages, and recovery risks all had to be considered. Fundamentally, CPI was in an insolvency proceeding with all its attendant risks and uncertainties. The settlement provided a possible avenue for recovery for class members but at the same time preserved the claims of the class against the other defendants as well as the claims against ProQuest for alleged violations attributable to CPI content. The settlement brought finality to the claims in the action against CPI and removed any uncertainty and the possibility of an adverse determination. Furthermore, it was integral to the success of the consolidated plan of compromise that was being proposed in the *CCAA* proceedings and which afforded some possibility of recovery for the class. Given the nature of the CCAA Plan, it was not possible to assess the final value of any distribution to the class. As stated in the joint factum filed by counsel for CPI and the Representative Plaintiff, when measured against the litigation risks, the settlement agreement represented a reasonable, pragmatic and realistic compromise of the class claims.

34 The Representative Plaintiff, Class Counsel and the Monitor were all of the view that the settlement resulted in a fair and reasonable outcome. I agreed with that assessment. The settlement was in the best interests of the class and was also beneficial to the LP Entities and their stakeholders. I therefore granted my approval.

S.E. PEPALL J.

cp/e/qllxr/qlvxw/qlbdp

1 Annual Review of Insolvency Law, 2010, J.P. Sarra Ed, Carswell, Toronto at page 79.

2 (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.) at 31.

3 2007 ABQB 504 at para. 71; leave to appeal dismissed 2007 ABCA 266 (Alta. C.A.).

4 (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J.).

5 (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J.) at para. 23.

6 *Supra.* at para. 9.

7 *Supra.* at para. 59.

8 S.O. 1992, c. 6.

9 [1998] O.J. No. 1598 (Ont. Gen. Div.) at para. 9.

10 (1998), 40 O.R. (3d) 429 at para 30.

11 [1999] O.J. No. 2245 (Ont. S.C.J.) at para. 97.

12 [2009] O.J. No. 2650 at para. 15.

13 *Robertson v. Thomson Canada*, [2009] O.J. No. 2650 para. 20.

TAB 23

Indexed as:

Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.

The Maritime Life Assurance Company, appellant;
v.
Saskatchewan River Bungalows Ltd. and Connie Doreen Fikowski, respondents.

[1994] 2 S.C.R. 490

[1994] S.C.J. No. 59

File No.: 23194.

Supreme Court of Canada

1994: March 14; 1994: June 23.

Present: La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Insurance -- Policy lapse -- Waiver -- Insurance premium remaining unpaid after grace period expired -- Insurer requesting immediate payment of premium -- Whether insurer waived right to compel timely payment under policy -- If so, whether waiver still in effect when payment tendered.

Insurance -- Relief against forfeiture -- Waiver -- Insurance premium remaining unpaid after grace period expired -- Insurer requesting immediate payment of premium -- Whether insurer waived right to compel timely payment under policy -- If not, whether relief against forfeiture should be granted under s. 10 of Judicature Act, R.S.A. 1980, c. J-1.

In 1978, Maritime issued an insurance policy on the life of MF to the respondent Saskatchewan River Bungalows Ltd. ("SRB"). In 1984, ownership of the policy was transferred to the respondent Fikowski ("CF"), who became the beneficiary. SRB remained responsible for paying the annual premiums. On July 24, 1984, SRB mailed a cheque to pay the annual premium due on July 26, but this cheque was never received by Maritime, nor was it deducted from SRB's bank account. After the grace period expired on August 26, Maritime sent a late payment offer to SRB agreeing to ac-

cept payment of the July premium if it was postmarked or received by September 8, but SRB did not respond to this offer. In November Maritime wrote a letter advising CF that the premium due on July 26, 1984 remained unpaid and stating that "this policy is now technically out of force, and we will require immediate payment of $1,361 to pay the July 1984-85 premium". Finally, in February 1985 Maritime sent a notice of policy lapse to the respondents. The application for reinstatement appended to the notice required evidence of insurability. Since SRB closed its hotel business and picked up the corporate mail infrequently during the winter season, it did not become aware of the late payment offer, the November letter or the lapse notice until April 1985. It then began to search for the lost premium cheque. It was not until July 1985 that SRB sent a replacement cheque to Maritime, and a cheque for the 1985 premium. Both cheques were refused. MF was by then terminally ill and uninsurable. He died in August. Maritime rejected SRB's claim for benefits under the policy on the ground that it was no longer in force. The trial judge dismissed the respondents' claim for benefits under the policy and refused to grant them relief against forfeiture. A majority of the Court of Appeal allowed the respondents' appeal. The issues here are whether Maritime waived its right to compel timely payment in accordance with the terms of the policy, and, if there was no waiver, whether the respondents are entitled to relief against forfeiture under s. 10 of the Judicature Act.

Held: The appeal should be allowed.

The respondents are not entitled to any of the benefits under the policy. The demand for payment in the November letter was a clear and unequivocal expression of Maritime's intention to continue coverage upon payment of the July premium and, as such, constituted waiver of the time requirements for payment under the policy. The waiver was not still in effect, however, when SRB tendered payment of the missing premium in July 1985. Waiver can be retracted if reasonable notice is given to the party in whose favour it operates. A notice requirement should not be imposed, however, where there is no reliance on the waiver. Here, the respondents were not aware of Maritime's waiver until they received the November letter in April 1985 and therefore did not rely on it. The statement that "this policy has lapsed" contained in the February lapse notice accordingly took effect on its terms. In any event, once the respondents opened their mail in April 1985, they clearly became aware of Maritime's intention to retract its waiver. Even if a reasonable notice requirement were imposed, it would thus be adequately met by the respondents' failure to tender a replacement cheque until July 1985, three months later. Maritime had no obligation to accept the replacement cheque, and the policy lapsed. Maritime was required to reinstate coverage only if the respondents provided evidence of insurability, which was not possible in this case.

Relief against forfeiture is an equitable remedy and is purely discretionary. The factors to be considered by the court in the exercise of its discretion are the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach. The reasonable conduct requirement is not met in this case. The respondents knew, at all relevant times, that MF was terminally ill and uninsurable, but they nonetheless chose to have their correspondence from Maritime sent to a post office mail box over the winter, and to collect their mail only intermittently. When the respondents learned that payment of the premium was nine months overdue in April 1985, they did not tender a replacement cheque, but rather waited three months, until July 1985. As the respondents are barred by their conduct from recovering, it is not necessary to determine whether the court's general power to relieve against forfeiture under s. 10 of

the Judicature Act applies to contracts regulated by the Insurance Act or whether relief from forfeiture can operate generally as a before-loss remedy in the insurance context.

Cases Cited

Referred to: Holwell Securities Ltd. v. Hughes, [1974] 1 All E.R. 161; W. J. Alan & Co. v. El Nasr Export and Import Co., [1972] 2 Q.B. 189; Re Tudale Explorations Ltd. and Bruce (1978), 88 D.L.R. (3d) 584; Mitchell and Jewell Ltd. v. Canadian Pacific Express Co., [1974] 3 W.W.R. 259; Marchischuk v. Dominion Industrial Supplies Ltd., [1991] 2 S.C.R. 61; Federal Business Development Bank v. Steinbock Development Corp. (1983), 42 A.R. 231; Duplisea v. T. Eaton Life Assurance Co., [1980] 1 S.C.R. 144; Anguish v. Maritime Life Assurance Co. (1987), 51 Alta. L.R. (2d) 376, leave to appeal refused, [1988] 2 S.C.R. vii; McGeachie v. North American Life Assurance Co. (1893), 20 O.A.R. 187 (C.A.), aff'd (1893), 23 S.C.R. 148; Northern Life Assurance Co. of Canada v. Reierson, [1977] 1 S.C.R. 390; Hartley v. Hymans, [1920] 3 K.B. 475; Charles Rickards Ltd. v. Oppenhaim, [1950] 1 K.B. 616; Guillaume v. Stirton (1978), 88 D.L.R. (3d) 191 (Sask. C.A.), leave to appeal refused, [1978] 2 S.C.R. vii; Shiloh Spinners Ltd. v. Harding, [1973] A.C. 691; Liscumb v. Provenzano (1985), 51 O.R. (2d) 129 (H.C.J.), aff'd 55 O.R. (2d) 404 (C.A.); Stenhouse v. General Casualty Insurance Co. of Paris, [1934] 3 W.W.R. 564; Swan Hills Emporium & Lumber Co. v. Royal General Insurance Co. of Canada (1977), 2 A.R. 63; Johnston v. Dominion of Canada Guarantee and Accident Insurance Co. (1908), 17 O.L.R. 462.

Statutes and Regulations Cited

Insurance Act, R.S.A. 1980, c. I-5, ss. 201, 205, 211. Judicature Act, R.S.A. 1980, c. J-1, s. 10.

Authors Cited

Snell, Edmund Henry Turner. Snell's Equity, 29th ed. London: Sweet & Maxwell, 1990.
Waddams, S. M. The Law of Contracts, 3rd ed. Toronto: Canada Law Book, 1993.

APPEAL from a judgment of the Alberta Court of Appeal (1992), 127 A.R. 43, 20 W.A.C. 43, 92 D.L.R. (4th) 372, 10 C.C.L.I. (2d) 278, [1992] I.L.R. 1-2895, reversing a decision of the Court of Queen's Bench dismissing the respondents' action against the appellant. Appeal allowed.

James D. McCartney and Brian E. Leroy, for the appellant. James S. Peacock, for the respondents.

Solicitors for the appellant: MacKimmie Matthews, Calgary. Solicitors for the respondents: Code Hunter, Calgary.

The judgment of the Court was delivered by

MAJOR J.:--

I. Facts

1 On July 26, 1978, the appellant Maritime Life Assurance Company ("Maritime") issued an insurance policy on the life of Michael Fikowski Sr. to the respondent Saskatchewan River Bungalows Ltd. ("SRB"). In 1984, ownership of the policy was transferred to the respondent Connie Fikowski, at which time she became the beneficiary. SRB retained the responsibility of paying the annual premiums under the policy.

2 The policy issued to the respondents was a term policy, renewable every five years. The policy expiry date was the insured's 70th birthday -- July 26, 2000. However, prior to July 26, 1988, the policyholder had an option to convert the policy to a new life or endowment policy. The policy contained the following conditions relating to premium payment:

> 2. PREMIUM PAYMENT PROVISIONS
>
> (1) General
>
> The agreements made by the Company and contained in this contract are conditional upon payment of the premiums as they become due.
>
> Each premium is payable on or before its due date at the Head Office of the Company.
>
> (2) Grace Period
>
> After the first premium has been paid, a grace period of thirty-one days following its due date is allowed for the payment of each subsequent premium. During the grace period, this policy continues in effect.
>
> (3) Non-payment of Premiums
>
> If any premium remains unpaid at the end of the grace period, this policy automatically lapses (terminates because of non-payment of premiums).
>
> Under certain conditions, this policy may be reinstated, as described below.
>
> (4) Reinstatement
>
> This policy may be reinstated within 3 years of the date of the lapse upon written application to the Company subject to the following conditions:
>
> a) evidence that satisfies the Company of the life insured's good health and insurability must be submitted; and
> b) all unpaid premiums plus interest, at a rate to be determined by the Company, must be paid to the Company.

3 Over the years, SRB paid the annual policy premium irregularly. In 1979, the policy lapsed after SRB failed to pay the annual premium within the 31-day grace period. The policy was subsequently reinstated in accordance with the reinstatement provision (clause 2(4)) of the policy. In

1981, SRB again failed to make payment within the grace period. On this occasion, Maritime accepted late payment and did not require evidence of insurability or an application for reinstatement.

4 On July 24, 1984, SRB mailed a cheque for $1,316 to pay the annual premium due on July 26, 1984. On August 13, 1984, SRB received a premium due notice from Maritime, requesting payment of $1,361. It sent Maritime a cheque for $45 -- the difference between the July 24 cheque and the amount demanded in the payment due notice. This second cheque was received by Maritime on August 22, 1984. The first cheque, in the amount of $1,316, was never received by Maritime, nor was it deducted from SRB's bank account.

5 Subsequent to the expiry of the grace period on August 26, 1984, Maritime sent a late payment offer to SRB. In this offer, Maritime agreed to accept late payment of the July premium if it was "postmarked or, if not mailed, received in the Head Office at Halifax, N.S." on or before September 8, 1984. The offer also contained an explicit reserve of Maritime's right to require evidence of insurability. SRB did not respond to the late payment offer.

6 On November 28, 1984, Maritime wrote a letter ("the November letter") advising the respondent Connie Fikowski that the premium due on July 26, 1984 remained unpaid. This letter contained the following statement:

> Unfortunately this policy is now technically out of force, and we will require immediate payment of $1,361.00 to pay the July 1984-85 premium.

7 Finally, on February 2, 1985, Maritime sent a notice of policy lapse to the respondents. This notice was originally sent to an incorrect address in Vancouver, but was eventually forwarded to SRB. It read, in part:

> According to our records this policy has lapsed for non-payment of the premium due on the date shown. The policy is no longer in force and no benefits are payable. Because your insurance affords valuable protection and represents a worthwhile investment we invite you to apply for reinstatement of the policy.

The Application for Reinstatement appended to the lapse notice required evidence of insurability.

8 SRB closed its hotel business at Lake Louise, Alberta for the winter season around the middle of November 1984. SRB picked up the corporate mail on an infrequent basis throughout the winter. As a result, SRB did not become aware of the late payment offer, the November letter or the lapse notice until April 1985. They then began to search for the lost premium cheque. It was not until July 1985 that SRB sent a replacement cheque to Maritime, and a cheque for the 1985 premium. Both cheques were refused.

9 On July 9, 1985, SRB's insurance agent informed Maritime that Michael Fikowski Sr. was terminally ill and uninsurable. On August 10, 1985, Michael Fikowski Sr. died. On October 11, 1985, Maritime rejected SRB's claim for benefits under the policy on the ground that it was no longer in force. The respondents then commenced the present action, claiming a right to benefits under the policy or, alternatively, relief against forfeiture.

II. Judgments Below

A. Alberta Court of Queen's Bench

10 Deyell J. rejected the plaintiffs' claim and refused to grant them relief against forfeiture. He made no specific finding as to whether a cheque was actually mailed to Maritime by SRB in July 1984, but emphasized that Maritime did not receive payment and advised SRB accordingly. Deyell J. reasoned that the respondents had to "live with the results" of their decision to have their corporate mail sent to Lake Louise throughout the year. As well, he considered that SRB was obliged to do more than search for a cancelled cheque when they learned of the policy lapse in April of 1985. Deyell J. further ruled that Connie Fikowski was bound by SRB's actions.

B Alberta Court of Appeal

11 A majority of the Alberta Court of Appeal allowed the respondents' appeal: (1992), 127 A.R. 43, 20 W.A.C. 43, 92 D.L.R. (4th) 372, 10 C.C.L.I. (2d) 278, [1992] I.L.R. 1-2895. The majority held that the postal acceptance rule did not apply, since an express term of the policy required that premiums be paid, not posted, by the due date: Holwell Securities Ltd. v. Hughes, [1974] 1 All E.R. 161. However, both Harradence and Hetherington JJ.A. considered that, because it encouraged policyholders to mail premium payments, Maritime was barred from demanding strict compliance with the time requirements for payment under the policy. Harradence J.A. cast this ruling in terms of estoppel, while Hetherington J.A. relied on waiver. Both agreed that, until the respondents were notified that the 1984 cheque had not been received and were given a reasonable period during which to effect payment, Maritime could not terminate the policy for non-payment.

12 Hetherington J.A. considered that none of Maritime's acts, including the late payment offer, the November letter and the lapse notice, gave the respondents reasonable notice that Maritime intended to rely on the lapsing provision of the policy. The February lapse notice was premature because it stated that "this policy has lapsed", without giving reasonable notice to the respondents. As such, Maritime's right to rely on the lapsing provision of the policy was never reinstated. She concluded that the policy was still in force in August 1985.

13 Harradence J.A. found that the respondents could have made payment within a reasonable period after they received actual notice of the overdue premium in April 1985. However, the respondents failed to pay within this period. Their three-month delay in providing a replacement cheque was unreasonable, and the policy lapsed. However, Harradence J.A. concluded that it was an appropriate case to relieve against forfeiture under s. 10 of the Judicature Act, R.S.A. 1980, c. J-1.

14 In dissent, McClung J.A. stated that Maritime did not waive its right to rely on the lapsing provision of the policy by encouraging policyholders to use the mail. He found that while Maritime had waived its position in the November letter, the eventual payment of the missing premium in July 1985 did not comply with the request for "immediate payment" in the November letter. As a result, there was no waiver. In addition, he concluded that the Court had no jurisdiction to relieve against forfeiture since the field was occupied by a statutory scheme (the Insurance Act, R.S.A. 1980, c. I-5).

III. Issues

15 This appeal raises two issues:

(1) Did Maritime waive its right to compel timely payment in accordance with the terms of the policy?
(2) If there was no waiver, are the respondents entitled to relief against forfeiture under the Judicature Act, R.S.A. 1980, c. J-1., s. 10?

IV. Analysis
A. Waiver

16 Maritime's position is that the policy issued to the respondents lapsed after the expiry of the grace period for payment of the 1984 premium. Fikowski Sr.'s death occurred when the policy was not in force and the respondents had no right to benefits under it.

17 The respondents' position is that Maritime, through its conduct, waived its right to compel timely payment under the policy. The respondents further submit that none of Maritime's acts were sufficient to retract its waiver of time and that the policy was still in force at the time of death.

18 Although the parties argued in terms of waiver, Harradence J.A. considered the doctrine of promissory or equitable estoppel. Recent cases have indicated that waiver and promissory estoppel are closely related: see e.g. W. J. Alan & Co. v. El Nasr Export and Import Co., [1972] 2 Q.B. 189 (C.A.), and Re Tudale Explorations Ltd. and Bruce (1978), 88 D.L.R. (3d) 584 (Ont. Div. Ct.), at p. 587. The noted author Waddams suggests that the principle underlying both doctrines is that a party should not be allowed to go back on a choice when it would be unfair to the other party to do so: S. M. Waddams, The Law of Contracts (3rd ed. 1993), at para. 606. It is not necessary for the purpose of this appeal to determine how or whether promissory estoppel and waiver should be distinguished. As the parties have chosen to frame their submissions in waiver, only that doctrine need be dealt with.

19 Waiver occurs where one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party: Mitchell and Jewell Ltd. v. Canadian Pacific Express Co., [1974] 3 W.W.R. 259 (Alta. S.C.A.D.); Marchischuk v. Dominion Industrial Supplies Ltd., [1991] 2 S.C.R. 61 (waiver of a limitation period). The elements of waiver were described in Federal Business Development Bank v. Steinbock Development Corp. (1983), 42 A.R. 231 (C.A.), cited by both parties to the present appeal (Laycraft J.A. for the court, at p. 236):

> The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.

20 Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.

21 As there is little doubt that Maritime had full knowledge of its rights under the respondents' policy, the waiver issue turns entirely on Maritime's intentions. The respondents have identified several factors which, in their view, support a finding that Maritime "clearly and unequivocally" intended to waive its right to timely payment. In particular, the respondents submit that by encouraging policyholders to pay by mail, by requesting payment of the 1984 premium after the expiry of the policy grace period, by delaying issuance of the February lapse notice, by failing to return the $45 partial payment, and in accepting late payment in 1981, Maritime waived its right to require payment in accordance with the terms of the policy.

22 It is not necessary to address each of the factors identified by the respondents, for it seems clear that the November letter, taken alone, constituted a waiver of Maritime's right to receive timely payment under the policy. The November letter contained the following statement:

> Unfortunately this policy is now technically out of force, and we will require immediate payment of $1,361.00 to pay the July 1984-85 premium.

23 As late as November 28, 1984, Maritime was willing to continue coverage under the policy upon payment of the July 1984 premium. The November letter makes no mention of evidence of insurability, nor does it speak of reinstatement. As such, it constitutes clear evidence of Maritime's intention to waive its right to compel timely payment. In this regard, little weight should be given to the assertion that the policy was "technically out of force", for the qualifier "technical" removes all meaning from the expression "out of force". In any event, this assertion does not detract from the clarity of Maritime's demand for payment.

24 The appellant submits that, whereas the right to compel timely payment is clearly waived where premium payments are received and deposited by an insurance company after the expiry of the policy grace period (Duplisea v. T. Eaton Life Assurance Co., [1980] 1 S.C.R. 144; Anguish v. Maritime Life Assurance Co. (1987), 51 Alta. L.R. (2d) 376 (C.A.), leave to appeal refused, [1988] 2 S.C.R. vii), a mere demand for payment beyond the grace period is insufficient. Support for that proposition is found in McGeachie v. North American Life Assurance Co. (1893), 20 O.A.R. 187 (C.A.), aff'd (1893), 23 S.C.R. 148, and in Northern Life Assurance Co. of Canada v. Reierson, [1977] 1 S.C.R. 390. In both cases, this Court concluded that a demand for payment was equivocal or insufficient to give rise to a waiver. However, in some circumstances a demand for payment may constitute waiver. The nature of waiver is such that hard and fast rules for what can and cannot constitute waiver should not be proposed. The overriding consideration in each case is whether one party communicated a clear intention to waive a right to the other party.

25 The demand for payment in the present appeal provides stronger evidence of waiver than did the demands in either McGeachie or Reierson. The demand for payment by the appellant in its November letter was made well beyond the expiry of the grace period. As well, payment in the present case was tendered prior to the occurrence of the event insured against. Any doubt about whether Maritime intended to waive the time requirements of the policy was resolved by the testimony of its legal advisor, who indicated that, having received the $45 partial payment, Maritime was still awaiting payment of the July 1984 premium in January 1985. It was for this reason that the lapse notice was not sent until February 2, 1985. In these circumstances, the demand for payment in the November letter was a clear and unequivocal expression of Maritime's intention to continue coverage upon payment of the July premium and, as such, constituted waiver of the time requirements for payment under the policy.

26 As the November letter constituted waiver, the question is then whether the waiver was still in effect when SRB tendered payment of the missing premium in July 1985.

27 Waiver can be retracted if reasonable notice is given to the party in whose favour it operates: Hartley v. Hymans, [1920] 3 K.B. 475; Charles Rickards Ltd. v. Oppenhaim, [1950] 1 K.B. 616; Guillaume v. Stirton (1978), 88 D.L.R. (3d) 191 (Sask. C.A.), leave to appeal refused, [1978] 2 S.C.R. vii. As Waddams notes, the "reasonable notice" requirement has the effect of protecting reliance by the person in whose favour waiver operates: The Law of Contracts, supra, at paras. 604 and 606. It follows that a notice requirement should not be imposed where reliance is not an issue: ibid. at para. 606. In the present appeal, the respondents were not aware of Maritime's waiver until they received the November letter, along with the lapse notice and late payment offer, in April 1985. It follows that they did not rely on Maritime's waiver. In such circumstances, Maritime was not required to give any notice of its intention to lapse the policy. The statement that "this policy has lapsed", contained in the February lapse notice, took effect on its terms.

28 In any event, once the respondents opened their mail in April 1985, they clearly became aware of Maritime's intention to retract its waiver. An informal communication of a party's intention to insist on strict compliance with the terms of a contract is sufficient notice: see e.g. Guillaume v. Stirton, supra. The respondents did not tender a replacement cheque until July 1985, three months after they became aware of Maritime's intentions. As such, even if a reasonable notice requirement were imposed, it would be adequately met by the respondents' failure to act between April and July.

29 Maritime's waiver, as contained in the November letter, was no longer in effect when the respondents sought to make payment in July 1985. Maritime had no obligation to accept the replacement cheque, and the policy lapsed. Maritime was required to reinstate coverage only if the respondents provided evidence of insurability, which was not possible in this case. Therefore, the respondents are not entitled to any of the benefits under the policy.

B. Relief Against Forfeiture

30 The second issue on appeal is the Court's equitable jurisdiction to relieve against forfeiture. The respondents submit that the general power to grant relief, contained in s. 10 of the Judicature Act, should be exercised in this case. The appellant contends that the Judicature Act does not apply since the field is occupied by a statutory scheme (the Insurance Act). It further submits that the respondents' loss was not a forfeiture and argues that, in any event, this is not an appropriate case for granting relief.

31 Section 10 of the Judicature Act reads:

> 10 Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

32 The power to grant relief against forfeiture is an equitable remedy and is purely discretionary. The factors to be considered by the Court in the exercise of its discretion are the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach: Shiloh Spinners Ltd. v. Harding, [1973] A.C. 691 (H.L.); Snell's Equity (29th ed. 1990), at pp. 541-42.

33 The Ontario High Court in Liscumb v. Provenzano (1985), 51 O.R. (2d) 129, aff'd 55 O.R. (2d) 404 (C.A.), relying on the Shiloh decision, summarized the governing principles as follows (at p. 137, per McKinlay J.):

> I consider that the following are the appropriate questions to consider in determining whether there should be relief from forfeiture in this case: first, was the conduct of the plaintiff reasonable in the circumstances; second, was the object of the right of forfeiture essentially to secure the payment of money, and third, was there a substantial disparity between the value of the property forfeited and the damage caused the vendor by the breach?

34 The first element of the test set out in Liscumb -- the reasonable conduct requirement -- is not met in this case. The respondents knew, at all relevant times, that Fikowski Sr. was terminally ill and uninsurable. Nonetheless, they chose to have their correspondence from Maritime sent to Lake Louise over the winter, and to collect their mail only intermittently. When the respondents learned that payment of the premium was nine months overdue in April 1985, they did not tender a replacement cheque, but rather waited three months, until July 1985. The trial judge, who was in a position to assess the respondents' conduct, concluded that it was not reasonable. He wrote:

> The corporation chose to have a mail box at the Post Office at Lake Louise to receive its corporate mail on a 12 month basis and having made that decision I think they must live with the results. If you only pick-up your mail every two weeks then you are going to be late in getting notices that may be of some importance. Ultimately when the advice that the policy had lapsed was received in late April or early May of 1985 Mr. Michael Fikowski and Mr. J. D. Thomas started a search for a cancelled cheque. Under the circumstances in this day and age of long distance telephones and all the communications that are available I think that they had an obligation to their company to take additional procedures in regard to this matter. They were advised that payment had not been made. There were procedures to have the policy reinstated. If they were going to do anything about it, it had to be done quickly. It wasn't until July 25th, if memory serves me correctly, met [sic] the replacement cheque was sent out, that is three months after they ultimately received the notice.
>
> I therefore find that the plaintiff's case fails and that they are not entitled to relieve against forfeiture.

35 As the failure to satisfy the first test in Liscumb determines the outcome of this appeal, it is unnecessary to comment on the second and third tests outlined in the case.

36 As the respondents are barred by their conduct from recovering, it is not necessary to determine whether our general power to relieve against forfeiture under s. 10 of the Judicature Act applies to contracts regulated by the Insurance Act. However, I would note that the existence of a statutory power to grant relief where other types of insurance are forfeited (Insurance Act, ss. 201, 205 and 211) does not preclude application of the Judicature Act to contracts of life insurance. The Insurance Act does not "codify" the whole law of insurance; it merely imposes minimum standards

on the industry. The appellant's argument that the "field" of equitable relief is occupied by the Insurance Act must therefore be rejected.

37 Several of the authorities cited by the appellant involved forfeitures made under statutory insurance conditions, which is not the case here: Stenhouse v. General Casualty Insurance Co. of Paris, [1934] 3 W.W.R. 564 (Alta. S.C.A.D.); Swan Hills Emporium & Lumber Co. v. Royal General Insurance Co. of Canada (1977), 2 A.R. 63 (S.C.A.D.). The case of Johnston v. Dominion of Canada Guarantee and Accident Insurance Co. (1908), 17 O.L.R. 462 (C.A.) treated the insurance legislation at issue as a statutory code, and for this reason is no longer good law.

38 It is also unnecessary to determine whether relief from forfeiture can operate generally as a before-loss remedy in the insurance context. Clearly, the holder of a term life policy has no vested right to benefits until the loss insured against -- death of the insured -- has occurred. However, a modern understanding of the doctrine of relief would likely expand the notion of forfeiture to include less tangible losses, such as the loss of an option to convert a term policy into one under which benefits would be certain, or the loss of one's insurability. This question remains open.

C. Conclusion

39 For the foregoing reasons, I would allow the appeal with costs, set aside the judgment of the Alberta Court of Appeal and restore the judgment at trial.

qp/d/hbb/DRS/DRS

TAB 24

Case Name:

Sauer v. Canada (Attorney General)

RE: Bill Sauer, Plaintiff/Moving Party, and The Attorney General of Canada, on behalf of Her Majesty the Queen in Right of Canada as represented by the Minister of Agriculture, Defendant/Respondent

[2010] O.J. No. 3381

2010 ONSC 4399

Court File No. 05-CV-287428CP

Ontario Superior Court of Justice

G.R. Strathy J.

Heard: August 5, 2010.
Judgment: August 10, 2010.

(25 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Definition of class -- Motion by plaintiffs to amend statement of claim to delete references to a former defendant and to amend the certification order by removing from the class definition the words "except in the province of QuÚbec" allowed -- Plaintiff cattle farmers sued government as a result of the closure of international orders to Canadian beef products following a single case of mad cow disease -- Proposed amendment to class definition would promote judicial efficiency, save costs, and ensure consistent result -- Right of newly added QuÚbec class members to opt out was fundamental to court's jurisdiction over those parties.

Motion by the plaintiff to amend the statement of claim to delete references to a former defendant and to amend the certification order by removing from the class definition the words "except in the province of QuÚbec," so that the class proceeding would become a national class action. The plaintiffs were cattle farmers who sued the government as a result of the closure of international orders to Canadian cattle and beef products following a 2003 diagnosis of a single case of mad cow disease in an Alberta cow. The Crown was alleged to have been negligent as regulator of the cattle industry in Canada and the statement of claim included allegations of misfeasance in public office. The present action was one of several class actions commenced in different Canadian provinces. The parties

then discussed the desirability of proceeding in a single jurisdiction with a result that would be binding on all cattle farmers across Canada.

HELD: Motion allowed. The amendment of the claim was not opposed and was granted. The certification order was amended as requested subject to an opt-out-right to the Quebec residents who would now become class members in this proceeding. The proposed amendment would promote judicial efficiency, save costs for the parties, and ensure a consistent result applicable to cattle farmers across Canada. There would bc no common issues relating only to the QuÚbec class members and there ware no conflicts amongst class members on the common issues. The right of the newly added QuÚbec class members to opt out was fundamental to the court's jurisdiction over those parties in this proceeding and was integral to the court's duty to ensure the fair conduct of this proceeding.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 8, s. 8(3), s. 9, s. 12

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 26.05

Counsel:

Cameron Pallett and Gilles Gareau, for the Plaintiff/Moving Party.

Dale Yurka, for the Defendant/Respondent.

ENDORSEMENT

1 **G.R. STRATHY J.**:-- The plaintiff seeks two orders. First, he requests leave to deliver an amended statement of claim deleting references to Ridley Inc. ("Ridley"), a former defendant, against which the action has been dismissed. That relief is not opposed and will be granted, with the defendant being entitled to respond to the amended pleading pursuant to rule 26.05 of the *Rules of Civil Procedure* R.R.O. 1990, Reg. 194.

2 The second order sought is to amend the certification order by removing from the class definition the words "except in the province of Québec." The effect of this order, which will be conditional upon the suspension or stay of a pending class action in Québec, will be to make this proceeding a national class action. This request is not opposed by the defendant, but it raises the question of whether an opt-out right should be given to the Québec residents who will now become class members in this proceeding. For the reasons that follow, I have concluded that an opt-out right is fundamental to this court's jurisdiction over the Québec members of the class and that it must be a term of the order.

Background

3 This is a class proceeding against the government of Canada, currently brought on behalf of all Canadian cattle farmers (except those in the province of Québec). The claim arises from the closure of international borders to Canadian cattle and beef products following the May 20, 2003 diagnosis of a single case of bovine spongiform encephalopathy ("BSE") or "mad cow disease" in an Alberta

cow. BSE is a fatal neurological disease of cattle that is transmitted when healthy cattle eat feed containing the rendered remains of infected cattle. Rendered remains of cattle were routinely added to calf feed until the Canadian government prohibited the practice in October 1997.

4 The action was originally commenced against both the Crown and Ridley, the alleged manufacturer of BSE-contaminated feed consumed by the Alberta cow. The Crown is alleged to have been negligent as regulator of the cattle industry in Canada and the statement of claim, as amended, includes allegations of misfeasance in public office.

5 This is one of four class actions that were commenced in April 2005, on behalf of Canadian cattle farmers in Québec, Alberta, Saskatchewan, and Ontario. The representative plaintiffs in Québec, Alberta and Saskatchewan sought to represent their respective provincial cattle farmers. The representative plaintiff in Ontario sought to represent cattle farmers in Ontario and the remaining provinces. In February of 2008, the statement of claim in this action was amended on consent to include cattle farmers in Alberta and Saskatchewan and the actions in those provinces were stayed in favour of this action. The class definition, as amended, included "all persons who as at May 20, 2003 were resident in Canada (except the province of Québec) and farmed cattle." The action was subsequently settled as against Ridley, as part of a national settlement with that defendant, and the settlement was approved by Lax J.: *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 (S.C.J.). In the same reasons, Lax J. certified this action as against the Crown on behalf of a national class that excluded residents of Québec. The Divisional Court denied leave to appeal: *Sauer v. Canada (Attorney General)* (2009), 246 O.A.C. 256, [2009] O.J. No. 402 (Div. Ct.).

6 In the province of Québec, the class action proceeded as *Donald Bernèche c. Procureur général du Canada et Ministère de l'Agriculture et de l'Agroalimentaire du Canada*, (No. 500-06-000284-055) under the case management of the Honourable Richard Wagner of the Québec Superior Court (the "*Bernèche* action").

7 In June of 2006, the Crown sought to stay the *Bernèche* action pending the outcome of this action. Justice Wagner dismissed the motion and leave to appeal was refused. In June of 2007, Justice Wagner certified the *Bernèche* action as a class action on behalf of the cattle farmers of that province: *Bernèche c. Canada (Procureur général)* [2007] R.J.Q. 1602, [2007] J.Q. No. 6368 (C.S.Q.).

8 As a result of the settlement with Ridley, both this action and the *Bernèche* action have been dismissed without costs as against that defendant.

9 For at least the past year, the parties have discussed the desirability of proceeding in a single jurisdiction with a result that would be binding on all cattle farmers across Canada. The subject has been canvassed at various case conferences and court attendances in Ontario and Québec. On May 27, 2010, Justice Wagner and I presided over a joint case management teleconference involving counsel in this action and the *Bernèche* action. It was agreed that a motion could be brought before me in this action requesting amendment of the class definition to include the Québec class members, conditional on a suspension or stay of the *Bernèche* action. If I were to grant that order, a subsequent motion could be brought before Justice Wagner in the *Bernèche* action, requesting suspension of that action.

Discussion

10 I am satisfied that it is appropriate to grant the order sought, subject to protection of the rights of the newly-added Québec class members. The advantages of doing so are quite obvious and are

recognized by all concerned. It will promote judicial efficiency, save costs for the parties, and ensure a consistent result applicable to cattle farmers across Canada. As counsel for the Crown quite properly observes, it would be unacceptable for there to be different results for farmers in different regions of this country.

11 While this action and the *Bernèche* action are similar and arise out of the same event, they are not identical. The class descriptions are obviously different, the common issues are different, and different legal regimes are applicable. While it cannot be said unequivocally that there are no legal differences that might result in different outcomes in the two jurisdictions, class counsel in both jurisdictions are satisfied that the Québec class members will not suffer a disadvantage by being included in the class in this action, and they may very well obtain an advantage.

12 It is not necessary to appoint an additional representative plaintiff on behalf of the Québec class members or to create a sub-class of Québec class members. There will be no common issues relating only to the Québec class members and there are no conflicts amongst class members on the common issues. Class counsel is fully bilingual, a bilingual web-site will continue to be maintained and Québec class counsel will remain active members of the national class action team.

13 The remaining issue is whether the newly-added Québec class members must be given an opportunity to opt out of this action. I have been advised that there were no opt-outs in the *Bernèche* action, in spite of the fact that class members had two opportunities to do so, once following certification and once after the approval of the Ridley settlement. There have been a small number of opt-outs in this action.

14 Section 8 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*C.P.A.*") provides that an order certifying a class proceeding must, among other things, describe the class and must "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." Section 9 provides that any member of a class involved in a class proceeding may opt out in the manner, and within the time, specified in the certification order.

15 As has been said many times, the class definition is critical because it:

* identifies persons who have a potential claim for relief against the defendants;
* defines the parameters of the lawsuit so as to identify those persons who are bound by the result; and
* describes who is entitled to notice of certification.

See: *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172, [1998] O.J. No. 4913 (Ont. Gen. Div.), per Winkler J. at para. 10.

16 Mr. Pallett submits that the *C.P.A.* expressly states that class members have only one right to opt out, after the certification order, and that it does not contemplate that there will be successive opt-out rights. He also submits that the Québec class members have already had two opportunities to opt out and that it is unnecessary and inappropriate to give them yet another opportunity. He argues that, if the Québec Superior Court grants a stay of that action, it will have determined that this court has jurisdiction over the Québec class members and that I should defer to that court's decision as a matter of comity.[1]

17 In my view, the right of the newly added Québec class members to opt out is fundamental to the court's jurisdiction over those parties in this proceeding and is integral to the court's duty to ensure the fair conduct of this proceeding. The fact that they may have been given a prior opportunity to opt out of another proceeding in another jurisdiction, which had a different class definition, different common issues, and was governed by a different legal system, is irrelevant to their rights in this action.

18 In *Smith Estate v. National Money Mart Co.*, 2010 ONSC 1334, [2010] O.J. No. 873 (S.C.J.), a decision Mr. Pallett brought to my attention, Perell J. allowed an amendment to the original class definition which resulted in the scope of the class being expanded and the number of class members being increased. He stated, at para. 49, "[t]hey are entitled to the usual rights to opt-out." It seems to me that this right flows as a matter of course from the expansion of the class definition.

19 The right to opt out is not a mere technicality. It is the foundation for the court's jurisdiction over class members because it is the mechanism by which those class members become bound by the court's decision. This was emphasized by Sharpe J.A. in giving the judgment of the Court of Appeal in *Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321, [2005] O.J. No. 506 (C.A.) at para. 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.

20 The Court of Appeal's decision in that case stands for the proposition that proper notice to non-resident class members, including notice of their right to opt out of the proceeding, is fundamental to the enforceability of the court's judgment in relation to those class members.

21 In this case, the grant of opt-out rights to the newly-added Québec class members supports comity and displays deference to the court of a sister province by respecting the right of residents of that province to opt out of a proceeding in this province if they do not wish to be bound by the outcome.

22 I am satisfied that on amending the class definition set out in a certification order pursuant to s. 8(3) of the *C.P.A.*, I have a corollary jurisdiction to specify opt-out terms. Furthermore, counsel acknowledge that I have jurisdiction under s. 12 of the *C.P.A.* to make any order I consider "appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination."

23 Counsel have not identified any practical reason why the newly-added Québec class members should not be given an opportunity to opt out. Nor have they identified any prejudice to any party in granting an opportunity to opt out. If the Québec Superior Court determines that a stay of the *Bernèche* action is appropriate, it is contemplated that the Québec class members will be given notice of that decision, and of this decision, in a publication that is distributed throughout Québec and is received by all members of the class in that province. There is no reason why the notice cannot include notice of their opt-out rights.

Conclusion

24 In summary, an order will issue:

(a) granting leave to the plaintiff to deliver an amended statement of claim in the form proposed and permitting the defendant to respond to the amendments as provided by rule 26.05;

(b) subject to the Québec Superior Court suspending or staying the *Bernèche* action,

(i) amending the class definition in this action to remove the words "except in the province of Québec";

(ii) directing that notice of the certification order, as amended, be given to class members who are residents of the province of Québec and that such notice shall specify the manner in which those class members may opt out of this proceeding and a date after which class members may not opt out;

(iii) directing that the costs of such notice shall be borne equally by the plaintiff and the defendant; and

(c) that, except as aforesaid, there be no costs of this motion.

25 In general terms, the draft notice and the method of dissemination proposed by counsel are acceptable. I would suggest that, well in advance of the suspension hearing in the Québec Superior Court, counsel should submit for my review a revised notice incorporating opt-out provisions. If necessary, a case conference can be convened to review the notice and a final approved version could be available for submission to Justice Wagner for his consideration on the suspension motion.

G.R. STRATHY J.

cp/e/qlcct/qlmxj

1 Counsel refers to art. 3137 of the *Civil Code of Québec*, S.Q. 1991, c. 64: " On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same object is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority."

Case Name:

Sino-Forest Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended
AND IN THE MATTER OF A Plan of Compromise or Arrangement of Sino-Forest Corporation, Applicant

[2012] O.J. No. 3627

2012 ONSC 4377

92 C.B.R. (5th) 99

2012 CarswellOnt 9430

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

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: June 26, 2012.
Judgment: July 27, 2012.

(98 paras.)

Bankruptcy and insolvency law -- Creditors and claims -- Claims -- Priorities -- Application by Sino-Forest Corporation ("SFC") for a declaration that the shareholder claims and the indemnity claims against SFC were "equity claims" as defined in the Companies' Creditors Arrangement Act ("CCAA"), allowed -- Shareholders had commenced actions against SFC and had joined SFC's auditors and underwriters as defendants -- Auditors and underwriters launched contribution and indemnity claims against SFC -- Characterization of indemnity claims were dependent on the characterization of the underlying shareholder claims -- Shareholder claims were clearly equity claims, as they related to the ownership, purchase or sale of SFC shares -- Accordingly, indemnity claims were also equity claims.

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application of Act -- Compromises and arrangements -- Claims -- Priority -- Application by Sino-Forest Corporation ("SFC") for a declaration that the shareholder claims and the indemnity claims against

SFC were "equity claims" as defined in the Companies' Creditors Arrangement Act ("CCAA"), allowed -- Shareholders had commenced actions against SFC and had joined SFC's auditors and underwriters as defendants -- Auditors and underwriters launched contribution and indemnity claims against SFC -- Characterization of indemnity claims were dependent on the characterization of the underlying shareholder claims -- Shareholder claims were clearly equity claims, as they related to the ownership, purchase or sale of SFC shares -- Accordingly, indemnity claims were also equity claims.

Application by Sino-Forest Corporation ("SFC") for an order directing that the shareholder claims against SFC were "equity claims" as defined in s. 2 of the Companies' Creditors Arrangement Act ("CCAA") as well as any indemnity claims against SFC that were related to or arose from the shareholder claims. Shareholders had commenced claims against SFC in Ontario, Quebec, Saskatchewan and New York. While the claims varied in certain respects, they all alleged that SFC's actions and misrepresentations artificially inflated SFC's share prices and caused the shareholders to suffer a monetary loss resulting from the ownership, purchase or sale of the shares. The shareholders had joined the auditors and underwriters as defendants to their claims against SFC. The auditors and underwriters consequently claimed against SFC for contribution and indemnity. The auditors argued that their claims were not "equity claims", as they had distinct claims against SFC independent of the shareholders' claims which were not dependent on the success of the shareholders' claims. The underwriters also argued that SFC's application was premature. If the claims were determined to be equity claims, they would be subordinated to other claims.

HELD: Application allowed. SFC's application was not premature, as the threshold issue of whether or not the two sets of claims were equity claims did not depend on the determination or quantification of any claim. Rather, its effect established whether the claims of the auditors and the underwriters would be subordinated pursuant to the provisions of the CCAA. The characterization of the indemnity claims turned on the characterization of the underlying primary claims of the shareholders. The claims advanced in the shareholder claims were clearly equity claims and fell squarely within the definition in s. 2 of the CCAA. Those shareholder claims provided the basis for the indemnity claims. The focus of the definition of "equity claim" was not on the identity of the claimant but the nature of the claim. But for the shareholders' claims, it was inconceivable that the auditors and underwriters would have launched the sizable claims they did against SFC. It would have been inconsistent to have arrived at a conclusion that enabled either the auditors or the underwriters, through a claim for indemnification, to be treated as creditors when the underlying shareholders actions could not have the same status. It did not matter whether the indemnity claims had been made at common law or whether they were based in contract.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2, s. 2, s. 6(8), s. 22(1)

Securities Act, R.S.O. 1990, c. S.5,

Counsel:

Robert W. Staley and Jonathan Bell, for the Applicant.

Jennifer Stam, for the Monitor.

Kenneth Dekker, for BDO Limited.

Peter Griffin and Peter Osborne, for Ernst & Young LLP.

Benjamin Zarnett, Robert Chadwick and Brendan O'Neill, for the Ad Hoc Committee of Noteholders.

James Grout, for the Ontario Securities Commission.

Emily Cole and Joseph Marin, for Allen Chan.

Simon Bieber, for David Horsley.

David Bish, John Fabello and Adam Slavens, for the Underwriters Named in the Class Action.

Max Starnino and Kirk Baert, for the Ontario Plaintiffs.

Larry Lowenstein, for the Board of Directors.

ENDORSEMENT

G.B. MORAWETZ J.:--

Overview

1 Sino-Forest Corporation ("SFC" or the "Applicant") seeks an order directing that claims against SFC, which result from the ownership, purchase or sale of an equity interest in SFC, are "equity claims" as defined in section 2 of the *Companies' Creditors Arrangement Act* ("CCAA") including, without limitation: (i) the claims by or on behalf of current or former shareholders asserted in the proceedings listed in Schedule "A" (collectively, the "Shareholder Claims"); and (ii) any indemnification claims against SFC related to or arising from the Shareholder Claims, including, without limitation, those by or on behalf of any of the other defendants to the proceedings listed in Schedule "A" (the "Related Indemnity Claims").

2 SFC takes the position that the Shareholder Claims are "equity claims" as defined in the CCAA as they are claims in respect of a monetary loss resulting from the ownership, purchase or sale of an equity interest in SFC and, therefore, come within the definition. SFC also takes the position that the Related Indemnity Claims are "equity claims" as defined in the CCAA as they are claims for contribution or indemnity in respect of a claim that is an equity claim and, therefore, also come within the definition.

3 On March 30, 2012, the court granted the Initial Order providing for the CCAA stay against SFC and certain of its subsidiaries. FTI Consulting Canada Inc. was appointed as Monitor.

4 On the same day, the Sales Process Order was granted, approving Sales Process procedures and authorizing and directing SFC, the Monitor and Houlihan Lokey to carry out the Sales Process.

5 On May 14, 2012, the court issued a Claims Procedure Order, which established June 20, 2012 as the Claims Bar Date.

6 The stay of proceedings has since been extended to September 28, 2012.

7 Since the outset of the proceedings, SFC has taken the position that it is important for these proceedings to be completed as soon as possible in order to, among other things, (i) enable the business operated in the Peoples Republic of China ("PRC") to be separated from SFC and put under new ownership; (ii) enable the restructured business to participate in the Q4 sales season in the PRC market; and (iii) maintain the confidence of stakeholders in the PRC (including local and national governmental bodies, PRC lenders and other stakeholders) that the business in the PRC can be successfully separated from SFC and operate in the ordinary course in the near future.

8 SFC has negotiated a Support Agreement with the Ad Hoc Committee of Noteholders and intends to file a plan of compromise or arrangement (the "Plan") under the CCAA by no later than August 27, 2012, based on the deadline set out in the Support Agreement and what they submit is the commercial reality that SFC must complete its restructuring as soon as possible.

9 Noteholders holding in excess of $1.296 billion, or approximately 72% of the approximately $1.8 billion of SFC's noteholders' debt, have executed written support agreements to support the SFC CCAA Plan as of March 30, 2012.

Shareholder Claims Asserted Against SFC

(i) Ontario

10 By Fresh as Amended Statement of Claim dated April 26, 2012 (the "Ontario Statement of Claim"), the Trustees of the Labourers' Pension Fund of Central and Eastern Canada and other plaintiffs asserted various claims in a class proceeding (the "Ontario Class Proceedings") against SFC, certain of its current and former officers and directors, Ernst & Young LLP ("E&Y"), BDO Limited ("BDO"), Poyry (Beijing) Consulting Company Limited ("Poyry") and SFC's underwriters (collectively, the "Underwriters").

11 Section 1(m) of the Ontario Statement of Claim defines "class" and "class members" as:

> All persons and entities, wherever they may reside who acquired Sino's Securities during the Class Period by distribution in Canada or on the Toronto Stock Exchange or other secondary market in Canada, which securities include those acquired over the counter, and all persons and entities who acquired Sino's Securities during the Class Period who are resident of Canada or were resident of Canada at the time of acquisition and who acquired Sino's Securities outside of Canada, except the Excluded Persons.

12 The term "Securities" is defined as "Sino's common shares, notes and other securities, as defined in the OSA". The term "Class Period" is defined as the period from and including March 19, 2007 up to and including June 2, 2011.

13 The Ontario Class Proceedings seek damages in the amount of approximately $9.2 billion against SFC and the other defendants.

14 The thrust of the complaint in the Ontario Class Proceedings is that the class members are alleged to have

purchased securities at "inflated prices during the Class Period" and that absent the alleged misconduct, sales of such securities "would have occurred at prices that reflected the true value" of the securities. It is further alleged that "the price of Sino's Securities was directly affected during the Class Period by the issuance of the Impugned Documents".

(ii) Quebec

15 By action filed in Quebec on June 9, 2011, Guining Liu commenced an action (the "Quebec Class Proceedings") against SFC, certain of its current and former officers and directors, E&Y and Poyry. The Quebec Class Proceedings do not name BDO or the Underwriters as defendants. The Quebec Class Proceedings also do not specify the quantum of damages sought, but rather reference "damages in an amount equal to the losses that it and the other members of the group suffered as a result of purchasing or acquiring securities of Sino at inflated prices during the Class Period".

16 The complaints in the Quebec Class Proceedings centre on the effect of alleged misrepresentations on the share price. The duty allegedly owed to the class members is said to be based in "law and other provisions of the *Securities Act*", to ensure the prompt dissemination of truthful, complete and accurate statements regarding SFC's business and affairs and to correct any previously-issued materially inaccurate statements.

(iii) Saskatchewan

17 By Statement of Claim dated December 1, 2011 (the "Saskatchewan Statement of Claim"), Mr. Allan Haigh commenced an action (the "Saskatchewan Class Proceedings") against SFC, Allen Chan and David Horsley.

18 The Saskatchewan Statement of Claim does not specify the quantum of damages sought, but instead states in more general terms that the plaintiff seeks "aggravated and compensatory damages against the defendants in an amount to be determined at trial".

19 The Saskatchewan Class Proceedings focus on the effect of the alleged wrongful acts upon the trading price of SFC's securities:

> The price of Sino's securities was directly affected during the Class Period by the issuance of the Impugned Documents. The defendants were aware at all material times that the effect of Sino's disclosure documents upon the price of its Sino's [sic] securities.

(iv) New York

20 By Verified Class Action Complaint dated January 27, 2012, (the "New York Complaint"), Mr. David Leapard and IMF Finance SA commenced a class proceeding against SFC, Mr. Allen Chan, Mr. David Horsley, Mr. Kai Kit Poon, a subset of the Underwriters, E&Y, and Ernst & Young Global Limited (the "New York Class Proceedings").

21 SFC contends that the New York Class Proceedings focus on the effect of the alleged wrongful acts upon the trading price of SFC's securities.

22 The plaintiffs in the various class actions have named parties other than SFC as defendants, notably, the Underwriters and the auditors, E&Y, and BDO, as summarized in the table below. The positions of those parties are detailed later in these reasons.

	Ontario	Quebec	Saskatchewan	New York
E&Y LLP	X	X	-	X
E&Y Global	-	-	-	X
BDO	X	-	-	-
Poyry	X	X	-	-
Underwriters	11	-	-	2

Legal Framework

23 Even before the 2009 amendments to the CCAA dealing with equity claims, courts recognized that there is a fundamental difference between shareholder equity claims as they relate to an insolvent entity versus creditor claims. Essentially, shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditor claims are not being paid in full. Simply put, shareholders have no economic interest in an insolvent enterprise: *Blue Range Resource Corp. (Re)*, [2000] 4 W.W.R. 738 (Alta. Q.B.) [*Blue Range Resources*]; *Stelco Inc. (Re)*, 2006 CanLII 1773 (Ont. S.C.J.) [*Stelco*]; *Royal Bank of Canada v. Central Capital Corp.* (1996), 27 O.R. (3d) 494 (C.A.).

24 The basis for the differentiation flows from the fundamentally different nature of debt and equity investments. Shareholders have unlimited upside potential when purchasing shares. Creditors have no corresponding upside potential: *Nelson Financial Group Limited (Re)*, 2010 ONSC 6229 [*Nelson Financial*].

25 As a result, courts subordinated equity claims and denied such claims a vote in plans of arrangement: *Blue Range Resource, supra*; *Stelco, supra*; *EarthFirst Canada Inc. (Re)* (2009), 56 C.B.R. (5th) 102 (Alta. Q.B.) [*EarthFirst Canada*]; and *Nelson Financial, supra.*

26 In 2009, significant amendments were made to the CCAA. Specific amendments were made with the intention of clarifying that equity claims are subordinated to other claims.

27 The 2009 amendments define an "equity claim" and an "equity interest". Section 2 of the CCAA includes the following definitions:

> "Equity Claim" means a claim that is in respect of an equity interest, including a claim for, among others, (...)
>
> (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
>
> (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);
>
> "Equity Interest" means
>
> (a) in the case of a company other than an income trust, a share in the company - or a warrant or option or another right to acquire a share in the company - other than one that is derived from a convertible debt,

28 Section 6(8) of the CCAA prohibits a distribution to equity claimants prior to payment in full of all non-equity claims.

29 Section 22(1) of the CCAA provides that equity claimants are prohibited from voting on a plan unless the court orders otherwise.

Position of Ernst & Young

30 E&Y opposes the relief sought, at least as against E&Y, since the E&Y proof of claim evidence demonstrates in its view that E&Y's claim:

> (a) is not an equity claim;
> (b) does not derive from or depend upon an equity claim (in whole or in part);
> (c) represents discreet and independent causes of action as against SFC and its directors and officers arising from E&Y's direct contractual relationship with such parties (or certain of such parties) and/or the tortious conduct of SFC and/or its directors and officers for which they are in law responsible to E&Y; and
> (d) can succeed independently of whether or not the claims of the plaintiffs in the class actions succeed.

31 In its factum, counsel to E&Y acknowledges that during the periods relevant to the Class Action Proceedings, E&Y was retained as SFC's auditor and acted as such from 2007 until it resigned on April 5, 2012.

32 On June 2, 2011, Muddy Waters LLC ("Muddy Waters") issued a report which purported to reveal fraud

at SFC. In the wake of that report, SFC's share price plummeted and Muddy Waters profited from its short position.

33 E&Y was served with a multitude of class action claims in numerous jurisdictions.

34 The plaintiffs in the Ontario Class Proceedings claim damages in the aggregate, as against all defendants, of $9.2 billion on behalf of resident and non-resident shareholders and noteholders. The causes of action alleged are both statutory, under the *Securities Act (Ontario)* and at common law, in negligence and negligent misrepresentation.

35 In its factum, counsel to E&Y acknowledges that the central claim in the class actions is that SFC made a series of misrepresentations in respect of its timber assets. The claims against E&Y and the other third party defendants are that they failed to detect these misrepresentations and note in particular that E&Y's audit did not comply with Canadian generally accepted accounting standards. Similar claims are advanced in Quebec and the U.S.

36 Counsel to E&Y notes that on May 14, 2012 the court granted a Claims Procedure Order which, among other things, requires proofs of claim to be filed no later than June 20, 2012. E&Y takes issue with the fact that this motion was then brought notwithstanding that proofs of claim and D&O proofs of claim had not yet been filed.

37 E&Y has filed with the Monitor, in accordance with the Claims Procedure Order, a proof of claim against SFC and a proof of claim against the directors and officers of SFC.

38 E&Y takes the position that it has contractual claims of indemnification against SFC and its subsidiaries and has statutory and common law claims of contribution and/or indemnity against SFC and its subsidiaries for all relevant years. E&Y contends that it has stand-alone claims for breach of contract and negligent and/or fraudulent misrepresentation against the company and its directors and officers.

39 Counsel submits that E&Y's claims against Sino-Forest and the SFC subsidiaries are:

(a) creditor claims;
(b) derived from E&Y retainers by and/or on behalf of Sino-Forest and the SFC subsidiaries and E&Y's relationship with such parties, all of which are wholly independent and conceptually different from the claims advanced by the class action plaintiffs;
(c) claims that include the cost of defending and responding to various proceedings, both pre- and post-filing; and
(d) not equity claims in the sense contemplated by the CCAA. E&Y's submission is that equity holders of Sino-Forest have not advanced, and could not advance, any claims against SFC's subsidiaries.

40 Counsel further contends that E&Y's claim is distinct from any and all potential and actual claims by the plaintiffs in the class actions against Sino-Forest and that E&Y's claim for contribution and/or indemnity is not based on the claims against Sino-Forest advanced in the class actions but rather only in part on those claims, as any success of the plaintiffs in the class actions against E&Y would not necessarily lead to success against Sino-

Forest, and vice versa. Counsel contends that E&Y has a distinct claim against Sino-Forest independent of that of the plaintiffs in the class actions. The success of E&Y's claims against Sino-Forest and the SFC subsidiaries, and the success of the claims advanced by the class action plaintiffs, are not co-dependent. Consequently, counsel contends that E&Y's claim is that of an unsecured creditor.

41 From a policy standpoint, counsel to E&Y contends that the nature of the relationship between a shareholder, who may be in a position to assert an equity claim (in addition to other claims) is fundamentally different from the relationship existing between a corporation and its auditors.

Position of BDO Limited

42 BDO was auditor of Sino-Forest Corporation between 2005 and 2007, when it was replaced by E&Y.

43 BDO has a filed a proof of claim against Sino-Forest pursuant to the Claims Procedure Order.

44 BDO's claim against Sino-Forest is primarily for breach of contract.

45 BDO takes the position that its indemnity claims, similar to those advanced by E&Y and the Underwriters, are not equity claims within the meaning of s. 2 of the CCAA.

46 BDO adopts the submissions of E&Y which, for the purposes of this endorsement, are not repeated.

Position of the Underwriters

47 The Underwriters take the position that the court should not decide the equity claims motion at this time because it is premature or, alternatively, if the court decides the equity claims motion, the equity claims order should not be granted because the Related Indemnity Claims are not "equity claims" as defined in s. 2 of the CCAA.

48 The Underwriters are among the defendants named in some of the class actions. In connection with the offerings, certain Underwriters entered into agreements with Sino-Forest and certain of its subsidiaries providing that Sino-Forest and, with respect to certain offerings, the Sino-Forest subsidiary companies, agree to indemnify and hold harmless the Underwriters in connection with an array of matters that could arise from the offerings.

49 The Underwriters raise the following issues:

(i) Should this court decide the equity claims motion at this time?
(ii) If this court decides the equity claims motion at this time, should the equity claims order be granted?

50 On the first issue, counsel to the Underwriters takes the position that the issue is not yet ripe for determination.

51 Counsel submits that, by seeking the equity claims order at this time, Sino-Forest is attempting to pre-empt the Claims Procedure Order, which already provides a process for the determination of claims. Until such time as the claims procedure in respect of the Related Indemnity Claims is completed, and those claims are determined pursuant to that process, counsel contends the subject of the equity claims motion raises a merely hypothetical question as the court is being asked to determine the proper interpretation of s. 2 of the CCAA

before it has the benefit of an actual claim in dispute before it.

52 Counsel further contends that by asking the court to render judgment on the proper interpretation of s. 2 of the CCAA in the hypothetical, Sino-Forest has put the court in a position where its judgment will not be made in the context of particular facts or with a full and complete evidentiary record.

53 Even if the court determines that it can decide this motion at this time, the Underwriters submit that the relief requested should not be granted.

Position of the Applicant

54 The Applicant submits that the amendments to the CCAA relating to equity claims closely parallel existing U.S. law on the subject and that Canadian courts have looked to U.S. courts for guidance on the issue of equity claims as the subordination of equity claims has long been codified there: see e.g. *Blue Range Resources*, *supra*, and *Nelson Financial, supra*.

55 The Applicant takes the position that based on the plain language of the CCAA, the Shareholder Claims are "equity claims" as defined in s. 2 as they are claims in respect of a "monetary loss resulting from the ownership, purchase or sale of an equity interest".

56 The Applicant also submits the following:

(a) the Ontario, Quebec, Saskatchewan and New York Class Actions (collectively, the "Class Actions") all advance claims on behalf of shareholders.

(b) the Class Actions also allege wrongful conduct that affected the trading price of the shares, in that the alleged misrepresentation "artificially inflated" the share price; and

(c) the Class Actions seek damages relating to the trading price of SFC shares and, as such, allege a "monetary loss" that resulted from the ownership, purchase or sale of shares, as defined in s. 2 of the CCAA.

57 Counsel further submits that, as the Shareholder Claims are "equity claims", they are expressly subordinated to creditor claims and are prohibited from voting on the plan of arrangement.

58 Counsel to the Applicant also submits that the definition of "equity claims" in s. 2 of the CCAA expressly includes indemnity claims that relate to other equity claims. As such, the Related Indemnity Claims are equity claims within the meaning of s. 2.

59 Counsel further submits that there is no distinction in the CCAA between the source of any claim for contribution or indemnity; whether by statute, common law, contractual or otherwise. Further, and to the contrary, counsel submits that the legal characterization of a contribution or indemnity claim depends solely on the characterization of the primary claim upon which contribution or indemnity is sought.

60 Counsel points out that in *Return on Innovation Capital v. Gandi Innovations Limited*, 2011 ONSC 5018, leave to appeal denied, 2012 ONCA 10 [*Return on Innovation*] this court characterized the contractual indemnification claims of directors and officers in respect of an equity claim as "equity claims".

61 Counsel also submits that guidance on the treatment of underwriter and auditor indemnification claims can be obtained from the U.S. experience. In the U.S., courts have held that the indemnification claims of underwriters for liability or defence costs constitute equity claims that are subordinated to the claims of general creditors. Counsel submits that insofar as the primary source of liability is characterized as an equity claim, so too is any claim for contribution and indemnity based on that equity claim.

62 In this case, counsel contends, the Related Indemnity Claims are clearly claims for "contribution and indemnity" based on the Shareholder Claims.

Position of the Ad Hoc Noteholders

63 Counsel to the Ad Hoc Noteholders submits that the Shareholder Claims are "equity claims" as they are claims in respect of an equity interest and are claims for "a monetary loss resulting from the ownership, purchase or sale of an equity interest" per subsection (d) of the definition of "equity claims" in the CCAA.

64 Counsel further submits that the Related Indemnity Claims are also "equity claims" as they fall within the "clear and unambiguous" language used in the definition of "equity claim" in the CCAA. Subsection (e) of the definition refers expressly and without qualification to claims for "contribution or indemnity" in respect of claims such as the Shareholder Claims.

65 Counsel further submits that had the legislature intended to qualify the reference to "contribution or indemnity" in order to exempt the claims of certain parties, it could have done so, but it did not.

66 Counsel also submits that, if the plain language of subsection (e) is not upheld, shareholders of SFC could potentially create claims to receive indirectly what they could not receive directly (*i.e.*, payment in respect of equity claims through the Related Indemnity Claims) - a result that could not have been intended by the legislature as it would be inconsistent with the purposes of the CCAA.

67 Counsel to the Ad Hoc Noteholders also submits that, before the CCAA amendments in 2009 (the "CCAA Amendments"), courts subordinated claims on the basis of:

(a) the general expectations of creditors and shareholders with respect to priority and assumption of risks; and
(b) the equitable principles and considerations set out in certain U.S. cases: see e.g. *Blue Range Resources*, *supra*.

68 Counsel further submits that, before the CCAA Amendments took effect, courts had expanded the types of claims characterized as equity claims; first to claims for damages of defrauded shareholders and then to contractual indemnity claims of shareholders: see *Blue Range Resources*, *supra* and *EarthFirst Canada*, *supra*.

69 Counsel for the Ad Hoc Noteholders also submits that indemnity claims of underwriters have been treated as equity claims in the United States, pursuant to section 510(b) of the U.S. Bankruptcy Code. This submission is detailed at paragraphs 20-25 of their factum which reads as follows:

> 20. The desire to more closely align the Canadian approach to equity claims with the U.S. approach was among the considerations that gave rise to the codification of the

treatment of equity claims. Canadian courts have also looked to the U.S. law for guidance on the issue of equity claims where codification of the subordination of equity claims has been long-standing.

Janis Sarra at p. 209, Ad Hoc Committee's Book of Authorities, Tab 10.

> Report of the Standing Senate Committee on Banking, Trade and Commerce, "Debtors and Creditors Sharing the Burden: A Review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement act*" (2003) at 158, [...]
>
> *Blue Range* [*Resources*] at paras. 41-57 [...]

21. Pursuant to s. 510(b) of the *U.S. Bankruptcy Code*, all creditors must be paid in full before shareholders are entitled to receive any distribution. s. 510(b) of the *U.S. Bankruptcy Code* and the relevant portion of s. 502, which is referenced in s. 510(b), provide as follows:

> s. 510. Subordination
>
> (b) For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under 502 on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.
>
> s. 502. Allowance of claims or interests
>
> (e) (1) Notwithstanding subsections (a), (b) and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that
>
> ...
>
> (B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; or
>
> ...
>
> (2) A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection

(d) of this section, the same as if such claim had become fixed before the date of the filing of the petition.

22. U.S. appellate courts have interpreted the statutory language in s. 510(b) broadly to subordinate the claims of shareholders that have a nexus or causal relationship to the purchase or sale of securities, including damages arising from alleged illegality in the sale or purchase of securities or from corporate misconduct whether predicated on pre or post-issuance conduct.

Re Telegroup Inc. (2002), 281 F. 3d 133 (3rd Cir. U.S. Court of Appeals) [...]

American Broadcasting Systems Inc. v. Nugent, U.S. Court of Appeals for the Ninth Circuit, Case Number 98-17133 (24 January 2001) [...]

23. Further, U.S. courts have held that indemnification claims of underwriters against the corporation for liability or defence costs when shareholders or former shareholders have sued underwriters constitute equity claims in the insolvency of the corporation that are subordinated to the claims of general creditors based on: (a) the plain language of s. 510(b), which references claims for "reimbursement or contribution" and (b) risk allocation as between general creditors and those parties that play a role in the purchase and sale of securities that give rise to the shareholder claims (i.e., directors, officers and underwriters).

In re Mid-American Waste Sys., 228 B.R. 816, 1999 Bankr. LEXIS 27 (Bankr. D. Del. 1999) [*Mid-American*] [...]

In re Jacom Computer Servs., 280 B.R. 570, 2002 Bankr. LEXIS 758 (Bankr. S.D.N.Y. 2002) [...]

24. In *Mid-American*, the Court stated the following with respect to the "plain language" of s. 510(b), its origins and the inclusion of "reimbursement or contribution" claims in that section:

> *... I find that the plain language of s. 510(b), its legislative history, and applicable case law clearly show that s. 510(b) intends to subordinate the indemnification claims of officers, directors, and underwriters for both liability and expenses incurred in connection with the pursuit of claims for rescission or damages by purchasers or sellers of the debtor's securities.* The meaning of amended s. 510(b), specifically the language "for reimbursement or contribution . . . on account of [a claim arising from rescission or damages arising from the purchase or sale of a security]," can be discerned by a plain reading of its language.
>
> ... it is readily apparent that the rationale for section 510(b) is not limited to

> preventing shareholder claimants from improving their position vis-a-vis general creditors; *Congress also made the decision to subordinate based on risk allocation. Consequently, when Congress amended s. 510(b) to add reimbursement and contribution claims, it was not radically departing from an equityholder claimant treatment provision, as NatWest suggests; it simply added to the subordination treatment new classes of persons and entities involved with the securities transactions giving rise to the rescission and damage claims*. The 1984 amendment to s. 510(b) is a logical extension of one of the rationales for the original section -- *because Congress intended the holders of securities law claims to be subordinated, why not also subordinate claims of other parties (e.g., officers and directors and underwriters) who play a role in the purchase and sale transactions which give rise to the securities law claims?* As I view it, in 1984 Congress made a legislative judgment that claims emanating from tainted securities law transactions should not have the same priority as the claims of general creditors of the estate. [emphasis added] [...]
>
> 25. Further, the U.S. courts have held that the degree of culpability of the respective parties is a non-issue in the disallowance of claims for indemnification of underwriters; the equities are meant to benefit the debtor's direct creditors, not secondarily liable creditors with contingent claims.
>
> *In re Drexel Burnham Lambert Group*, 148 B.R. 982, 1992 Bankr. LEXIS 2023 (Bankr. S.D.N.Y. 1992) [...]

70 Counsel submits that there is no principled basis for treating indemnification claims of auditors differently than those of underwriters.

Analysis

Is it Premature to Determine the Issue?

71 The class action litigation was commenced prior to the CCAA Proceedings. It is clear that the claims of shareholders as set out in the class action claims against SFC are "equity claims" within the meaning of the CCAA.

72 In my view, this issue is not premature for determination, as is submitted by the Underwriters.

73 The Class Action Proceedings preceded the CCAA Proceedings. It has been clear since the outset of the CCAA Proceedings that this issue - namely, whether the claims of E&Y, BDO and the Underwriters as against SFC, would be considered "equity claims" - would have to be determined.

74 It has also been clear from the outset of the CCAA Proceedings, that a Sales Process would be undertaken and the expected proceeds arising from the Sales Process would generate proceeds insufficient to satisfy the claims of creditors.

75 The Claims Procedure is in place but, it seems to me that the issue that has been placed before the court

on this motion can be determined independently of the Claims Procedure. I do not accept that any party can be said to be prejudiced if this threshold issue is determined at this time. The threshold issue does not depend upon a determination of quantification of any claim. Rather, its effect will be to establish whether the claims of E&Y, BDO and the Underwriters will be subordinated pursuant to the provisions of the CCAA. This is independent from a determination as to the validity of any claim and the quantification thereof.

Should the Equity Claims Order be Granted?

76 I am in agreement with the submission of counsel for the Ad Hoc Noteholders to the effect that the characterization of claims for indemnity turns on the characterization of the underlying primary claims.

77 In my view, the claims advanced in the Shareholder Claims are clearly equity claims. The Shareholder Claims underlie the Related Indemnity Claims.

78 In my view, the CCAA Amendments have codified the treatment of claims addressed in pre-amendment cases and have further broadened the scope of equity claims.

79 The plain language in the definition of "equity claim" does not focus on the identity of the claimant. Rather, it focuses on the nature of the claim. In this case, it seems clear that the Shareholder Claims led to the Related Indemnity Claims. Put another way, the inescapable conclusion is that the Related Indemnity Claims are being used to recover an equity investment.

80 The plain language of the CCAA dictates the outcome, namely, that the Shareholder Claims and the Related Indemnity Claims constitute "equity claims" within the meaning of the CCAA. This conclusion is consistent with the trend towards an expansive interpretation of the definition of "equity claims" to achieve the purpose of the CCAA.

81 In *Return on Innovation*, Newbould J. characterized the contractual indemnification claims of directors and officers as "equity claims". The Court of Appeal denied leave to appeal. The analysis in *Return on Innovation* leads to the conclusion that the Related Indemnity Claims are also equity claims under the CCAA.

82 It would be totally inconsistent to arrive at a conclusion that would enable either the auditors or the Underwriters, through a claim for indemnification, to be treated as creditors when the underlying actions of the shareholders cannot achieve the same status. To hold otherwise would indeed provide an indirect remedy where a direct remedy is not available.

83 Further, on the issue of whether the claims of E&Y, BDO and the Underwriters fall within the definition of equity claims, there are, in my view, two aspects of these claims and it is necessary to keep them conceptually separate.

84 The first and most significant aspect of the claims of E&Y, BDO and the Underwriters constitutes an "equity claim" within the meaning of the CCAA. Simply put, but for the Class Action Proceedings, it is inconceivable that claims of this magnitude would have been launched by E&Y, BDO and the Underwriters as against SFC. The class action plaintiffs have launched their actions against SFC, the auditors and the Underwriters. In turn, E&Y, BDO and the Underwriters have launched actions against SFC and its subsidiaries. The claims of the shareholders are clearly "equity claims" and a plain reading of s. 2(1)(e) of the CCAA leads to the same conclusion with respect to the claims of E&Y, BDO and the Underwriters. To hold otherwise, would,

as stated above, lead to a result that is inconsistent with the principles of the CCAA. It would potentially put the shareholders in a position to achieve creditor status through their claim against E&Y, BDO and the Underwriters even though a direct claim against SFC would rank as an "equity claim".

85 I also recognize that the legal construction of the claims of the auditors and the Underwriters as against SFC is different than the claims of the shareholders against SFC. However, that distinction is not, in my view, reflected in the language of the CCAA which makes no distinction based on the status of the party but rather focuses on the substance of the claim.

86 Critical to my analysis of this issue is the statutory language and the fact that the CCAA Amendments came into force after the cases relied upon by the Underwriters and the auditors.

87 It has been argued that the amendments did nothing more than codify pre-existing common law. In many respects, I accept this submission. However, I am unable to accept this submission when considering s. 2(1) of the CCAA, which provides clear and specific language directing that "equity claim" means a claim that is in respect of an equity interest, including a claim for, among other things, "(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d)".

88 Given that a shareholder claim falls within s. 2(1)(d), the plain words of subsections (d) and (e) lead to the conclusions that I have set out above.

89 I fail to see how the very clear words of subsection (e) can be seen to be a codification of existing law. To arrive at the conclusion put forth by E&Y, BDO and the Underwriters would require me to ignore the specific words that Parliament has recently enacted.

90 I cannot agree with the position put forth by the Underwriters or by the auditors on this point. The plain wording of the statute has persuaded me that it does not matter whether an indemnity claim is seeking no more than allocation of fault and contribution at common law, or whether there is a free-standing contribution and indemnity claim based on contracts.

91 However, that is not to say that the full amount of the claim by the auditors and Underwriters can be characterized, at this time, as an "equity claim".

92 The second aspect to the claims of the auditors and underwriters can be illustrated by the following hypothetical: if the claim of the shareholders does not succeed against the class action defendants, E&Y, BDO and the Underwriters will not be liable to the class action plaintiffs. However, these parties may be in a position to demonstrate that they do have a claim against SFC for the costs of defending those actions, which claim does not arise as a result of "contribution or indemnity in respect of an equity claim".

93 It could very well be that each of E&Y, BDO and the Underwriters have expended significant amounts in defending the claims brought by the class action plaintiffs which, in turn, could give rise to contractual claims as against SFC. If there is no successful equity claim brought by the class action plaintiffs, it is arguable that any claim of E&Y, BDO and the Underwriters may legitimately be characterized as a claim for contribution or indemnity but not necessarily in respect of an equity claim. If so, there is no principled basis for subordinating this portion of the claim. At this point in time, the quantification of such a claim cannot be determined. This must be determined in accordance with the Claims Procedure.

94 However, it must be recognized that, by far the most significant part of the claim, is an "equity claim".

95 In arriving at this determination, I have taken into account the arguments set forth by E&Y, BDO and the Underwriters. My conclusions recognize the separate aspects of the Related Indemnity Claims as submitted by counsel to the Underwriters at paragraph 40 of their factum which reads:

> ...it must be recognized that there are, in fact, at least two different kinds of Related Indemnity Claims:
>
> (a) indemnity claims against SFC in respect of Shareholder Claims against the auditors and the Underwriters; and
> (b) indemnity claims against SFC in respect of the defence costs of the auditors and the Underwriters in connection with defending themselves against Shareholder Claims.

Disposition

96 In the result, an order shall issue that the claims against SFC resulting from the ownership, purchase or sale of equity interests in SFC, including, without limitation, the claims by or on behalf of current or former shareholders asserted in the proceedings listed in Schedule "A" are "equity claims" as defined in s. 2 of the CCAA, being claims in respect of monetary losses resulting from the ownership, purchase or sale of an equity interest. It is noted that counsel for the class action plaintiffs did not contest this issue.

97 In addition, an order shall also issue that any indemnification claim against SFC related to or arising from the Shareholders Claims, including, without limitation, by or on behalf of any of the other defendants to the proceedings listed in Schedule "A" are "equity claims" under the CCAA, being claims for contribution or indemnity in respect of a claim that is an equity claim. However, I feel it is premature to determine whether this order extends to the aspect of the Related Indemnity Claims that corresponds to the defence costs of the Underwriters and the auditors in connection with defending themselves against the Shareholder Claims.

98 A direction shall also issue that these orders are made without prejudice to SFC's rights to apply for a similar order with respect to (i) any claims in the statement of claim that are in respect of securities other than shares and (ii) any indemnification claims against SFC related thereto.

G.B. MORAWETZ J.

cp/e/qlmdl/qlpmg/qlana/qlgpr

TAB 26

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

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 set-

tle 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.

In this case, the basic conditions for a class action are met and efficiency and fairness favour permitting it to proceed. The defendants' contentions against the suit were unpersuasive. While differences exist among investors, the fact remains that the investors raise essentially the same claims requiring resolution of the same facts. If material differences emerge, the court can deal with them when the time comes. Further, a class action should not be foreclosed on the ground that there is uncertainty as to the resolution of issues common to all class members. If it is determined that the investors must show individual reliance to establish breach of fiduciary duty, the court may then consider whether the class action should continue. The same applies to the contention that different defences will be raised with respect to different class members. Simply asserting this possibility does not negate a class action. If and when different defences are asserted, the court may solve the problem or withdraw leave to proceed as a class.

Finally, to allow individualized discovery at this stage of the proceedings would be premature. The defendants should be allowed to examine the representative plaintiffs as of right but examination of other class members should be available only by order of the court, upon the defendants showing reasonable necessity.

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Distinguished: General Motors of Canada Ltd. v. Naken, [1983] 1 S.C.R. 72; referred to: 353850 Alberta Ltd. v. Horne & Pitfield Foods Ltd., [1989] A.J. No. 652 (QL); Shaw v. Real Estate Board of Greater Vancouver (1972), 29 D.L.R. (3d) 774; Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959; Korte v. Deloitte, Haskins & Sells (1993), 8 Alta. L.R. (3d) 337; Oregon Jack Creek Indian Band v. Canadian National Railway Co., [1989] 2 S.C.R. 1069; Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574; Hodgkinson v. Simms, [1994] 3 S.C.R. 377; Chancey v. May (1722), Prec. Ch. 592, 24 E.R. 265; City of London v. Richmond (1701), 2 Vern. 421, 23 E.R. 870; Wallworth v. Holt (1841), 4 My. & Cr. 619, 41 E.R. 238; Duke of Bedford v. Ellis, [1901] A.C. 1; Taff Vale Railway Co. v. Amalgamated Society of Railway Servants, [1901] A.C. 426; Markt & Co. v. Knight Steamship Co., [1910] 2 K.B. 1021; Bell v. Wood, [1927] 1 W.W.R. 580; Langley v.

North West Water Authority, [1991] 3 All E.R. 610, leave denied [1991] 1 W.L.R. 711n; Newfoundland Association of Public Employees v. Newfoundland (1995), 132 Nfld. & P.E.I.R. 205; Ranjoy Sales and Leasing Ltd. v. Deloitte, Haskins and Sells, [1984] 4 W.W.R. 706; International Capital Corp. v. Schafer (1995), 130 Sask. R. 23; Guarantee Co. of North America v. Caisse populaire de Shippagan Ltée (1988), 86 N.B.R. (2d) 342; Lee v. OCCO Developments Ltd. (1994), 148 N.B.R. (2d) 321; Van Audenhove v. Nova Scotia (Attorney General) (1994), 134 N.S.R. (2d) 294; Horne v. Canada (Attorney General) (1995), 129 Nfld. & P.E.I.R. 109; Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172; Drummond-Jackson v. British Medical Association, [1970] 1 All E.R. 1094.

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Code of Civil Procedure, R.S.Q., c. C-25, Book IX, arts. 1003, 1039.
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APPEAL and CROSS-APPEAL from a judgment of the Alberta Court of Appeal (1998), 73 Alta. L.R. (3d) 227, 228 A.R. 188, 188 W.A.C. 188, 30 C.P.C. (4th) 1, [1998] A.J. No. 1364 (QL), 1998 ABCA 392, dismissing an appeal from a decision of the Court of Queen's Bench (1996), 41 Alta. L.R. (3d) 412, 191 A.R. 265, 3 C.P.C. (4th) 329, [1996] A.J. No. 1165 (QL). Appeal dismissed and cross-appeal allowed.

Barry R. Crump, Brian Beck and David C. Bishop, for the appellants/respondents on cross-appeal.
Hervé H. Durocher and Eugene J. Erler, for the respondents/appellants on cross-appeal.

[Quicklaw note: Please see complete list of solicitors appended at the end of the judgment.]

The judgment of the Court was delivered by

1 **McLACHLIN C.J.**-- This appeal requires us to decide when a class action may be brought. While the class action has existed in one form or another for hundreds of years, its importance has increased of late. Particularly in complicated cases implicating the interests of many people, the class action may provide the best means of fair and efficient resolution. Yet absent legislative direction, there remains considerable uncertainty as to the conditions under which a court should permit a class action to be maintained.

2 The claimants wanted to immigrate to Canada. To qualify, they invested money in Western Canadian Shopping Centres Inc. ("WCSC"), under the Canadian government's Business Immigration Program. They lost money and brought a class action. The defendants (appellants) claim the class action is inappropriate and ask the Court to strike it out. For the following reasons, I conclude that the claimants may proceed as a class.

I. Facts

3 The representative plaintiffs Muh-Min Lin and Hoi-Wah Wu, together with 229 other investors, became participants in the government's Business Immigration Program of Employment and Immigration Canada by purchasing debentures in WCSC. WCSC was incorporated by Joseph Dutton, its

sole shareholder, for the purpose of "facilitat[ing] the qualification of the Investors, their spouses, and their never-married children as Canadian permanent residents."

4 WCSC solicited funds through two offerings "to invest in land located in the Province of Saskatchewan for the purpose of developing commercial, non-residential, income-producing properties". The offering memoranda provided that the subscription proceeds would be deposited with an escrow agent, later designated as The Royal Trust Company ("Royal Trust"), and would be released to WCSC upon conditions, subsequently amended.

5 The dispute arises from events after the investors' funds had been deposited with Royal Trust. In May 1990, WCSC entered into a Purchase and Development Agreement ("PDA") with Claude Resources Inc. ("Claude") under which WCSC purchased from Claude, for $5,550,000, the rights to a Crown surface lease adjacent to Claude's "Seabee" gold deposits in northern Saskatchewan. WCSC also agreed to commit a further $16.5 million for surface improvements and for the construction of a gold mill, which would be owned by WCSC. A lease agreement executed in tandem with the PDA leased the not-yet-constructed gold mill and related facilities, together with the surface lands, back to Claude. The payments required of Claude under that lease agreement matched the semi-annual interest payments required of WCSC with respect to the investors.

6 To finance WCSC's obligations under the PDA with Claude, Dutton directed Royal Trust to issue debentures in an aggregate principal amount of $22,050,000 to a subset of the investors who had subscribed by that point. Royal Trust did so by issuing "Series A" debentures to 142 investors. After the debentures were issued, WCSC distributed an update letter to its investors, describing the investment in Claude.

7 In a separate series of transactions executed around the same time, Dutton and Claude entered into an agreement by which (1) Dutton effectively conveyed to Claude 49 percent of his shares in WCSC; (2) Claude paid Dutton $1.6 million in cash; (3) Claude advanced Dutton a $1.6 million non-recourse loan; (4) Dutton entered into an employment contract with Claude for a salary of $50,000 per year; and (5) Claude and Dutton's management company, J.M.D. Management Ltd., entered into a management contract for $200,000 per year. It appears that WCSC did not distribute an update letter to its investors describing this series of transactions.

8 Over the next months, Dutton advanced more funds to Claude and directed Royal Trust to issue corresponding debentures. Of particular relevance to the instant dispute are the Series E debentures issued in December 1990 (aggregate principal of $2.56 million), and the Series F debentures issued in May 1991 (aggregate principal of $9.45 million). When the Series E debentures were issued, the Series A and E debentures were pooled, so that investors in those series became entitled to a pro rata claim on the total security pledged with respect to the two series. When the Series F debentures were issued, the security for that series was pooled with the security that had been pledged with respect to the Series A and E debentures. WCSC apparently distributed investor update letters after the issuance of the Series E and F debentures, just as it had done after the issuance of the Series A debentures.

9 In December 1991, Claude announced that it could not pay the interest due on the Series A, E, and F debentures and Muh-Min Lin and Hoi-Wah Wu commenced this action. The gravamen of the complaint is that Dutton and various affiliates and advisors of WCSC breached fiduciary duties to the investors by mismanaging or misdirecting their funds.

II. Statutory Provisions

10 Alberta Rules of Court, Alta. Reg. 390/68

> 42 Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.
>
> 129(1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that
>
> (a) it discloses no cause of action or defence, as the case may be, or
> (b) it is scandalous, frivolous or vexatious, or
> (c) it may prejudice, embarrass or delay the fair trial of the action, or
> (d) it is otherwise an abuse of the process of the court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly.
>
> (2) No evidence shall be admissible on an application under clause (a) of subrule (1).
> (3) This Rule, so far as applicable, applies to an originating notice and a petition.
>
> 187 A person for whose benefit an action is prosecuted or defended or the assignor of a chose in action upon which the action is brought, shall be regarded as a party thereto for the purposes of discovery of documents.
>
> 201 A member of a firm which is a party and a person for whose benefit an action is prosecuted or defended shall be regarded as a party for the purposes of examination.

III. Decisions

11 The appellants applied to the Court of Queen's Bench of Alberta (1996), 41 Alta. L.R. (3d) 412 for a declaration and order striking that portion of the Amended Statement of Claim in which the individual plaintiffs purport, pursuant to Rule 42 of the Alberta Rules of Court, to represent a class of 231 investors. The chambers judge identified four issues: (1) whether the court had the power under Rule 42 to strike the investors' claim to sue in a representative capacity; (2) whether the court was restricted to considering only the Amended Statement of Claim filed; (3) the standard of proof required to compel the court to exercise its discretion to strike the representative claim; and (4) whether, in this case, this standard was met.

12 On the first issue, the chambers judge relied on the decision of Master Funduk in 353850 Alberta Ltd. v. Horne & Pitfield Foods Ltd., [1989] A.J. No. 652 (QL), to conclude that the court has the power, under Rule 42, to strike a claim made by plaintiffs to sue in a representative capacity.

13 On the second issue, the chambers judge held that the court need not limit its inquiry to the pleadings, relying on 353850 Alberta, supra, and on the decision of the British Columbia Supreme Court in Shaw v. Real Estate Board of Greater Vancouver (1972), 29 D.L.R. (3d) 774. He con-

cluded, however, that resolution of the case before him did not require resort to the affidavit evidence.

14 On the third issue, the chambers judge concluded that the court should strike a representative claim under Rule 42 only if it is "entirely clear" or "beyond doubt" or "plain and obvious" that the claim is deficient -- the standard applied to applications to strike pleadings for disclosing no reasonable claim: Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959.

15 On the final issue, the chambers judge, applying the "plain and obvious" rule, concluded that the Amended Statement of Claim was not deficient under Rule 42 and met the requirements set out in Korte v. Deloitte, Haskins & Sells (1993), 8 Alta. L.R. (3d) 337 (C.A.): (1) that the class be capable of clear and definite definition; (2) that the principal issues of law and fact be the same; (3) that one plaintiff's success would necessarily mean success for all members of the plaintiff class; and (4) that the resolution of the dispute not require any individual assessment of the claims of individual class members. However, he left the matter open to review by the trial judge.

16 The Alberta Court of Appeal, per Russell J.A. (for the majority), dismissed the appeal, Picard J.A., dissenting: (1998), 73 Alta. L.R. (3d) 227. The majority rejected the argument that the chambers judge should have conclusively resolved the Rule 42 issue rather than left it open to the trial judge, citing Oregon Jack Creek Indian Band v. Canadian National Railway Co., [1989] 2 S.C.R. 1069, in which this Court left to the trial judge the issue of whether the plaintiffs were authorized to sue on behalf of a broader class. The majority also rejected the argument that the investors must show individual reliance to succeed. However, it granted the defendants the right to discovery from each of the 231 plaintiffs on the grounds that Rule 201, read with Rule 187, allows discovery from any person for whose benefit an action is prosecuted or defended and that the defendants should not be barred from developing an argument based on actual reliance merely because it was speculative.

17 Picard J.A., would have allowed the appeal. In her view, the Chambers judge erred in deferring the matter to the trial judge because, unlike Oregon Jack Creek, the case was narrow and "a great deal of relevant evidence was available to the court to allow it to make a decision" (p. 235). The need to show individual reliance was only one of many problems that the investors would face if allowed to proceed as a class. Citing this Court's decisions in Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, and Hodgkinson v. Simms, [1994] 3 S.C.R. 377, she concluded that "[t]he extent of fiduciary duties in a particular case requires a meticulous examination of the facts, particularly of any contract between the parties" (p. 237). She concluded that "[t]his responsibility of proof by the [investors] cannot possibly be met by a representative action nor by giving a right of discovery of the 229 other parties to the action" (p. 237).

IV. Issues

18 1. Did the courts below apply the proper standard in determining whether the investors had satisfied the requirements for a class action under Rule 42?

2. Did the courts below err in denying defendants' motion to strike under Rule 42?
3. If the class action is allowed, should the defendants have the right to full oral and documentary discovery of all class members?

V. Analysis

A. The History and Functions of Class Actions

19 The class action originated in the English courts of equity in the late seventeenth and early eighteenth centuries. The courts of law focussed on individual questions between the plaintiff and the defendant. The courts of equity, by contrast, applied a rule of compulsory joinder, requiring all those interested in the subject matter of the dispute to be made parties. The aim of the courts of equity was to render "complete justice" -- that is, to "arrang[e] all the rights, which the decision immediately affects": F. Calvert, A Treatise Upon the Law Respecting Parties to Suits in Equity (2nd ed. 1847), at p. 3; see also C. A. Wright, A. R. Miller and M. K. Kane, Federal Practice and Procedure (2nd ed. 1986), at s. 1751; J. Story, Equity Pleadings (10th ed. 1892), at s. 76a. The compulsory-joinder rule "allowed the Court to examine every facet of the dispute and thereby ensure that no one was adversely affected by its decision without first having had an opportunity to be heard": J. A. Kazanjian, "Class Actions in Canada" (1973), 11 Osgoode Hall L.J. 397, at p. 400. The rule possessed the additional advantage of preventing a multiplicity of duplicative proceedings.

20 The compulsory-joinder rule eventually proved inadequate. Applied to conflicts between tenants and manorial lords or between parsons and parishioners, it closed the door to the courts where interested parties in such cases were too numerous to be joined. The courts of equity responded by relaxing the compulsory-joinder rule where strict adherence would work injustice. The result was the representative action. For example, in Chancey v. May (1722), Prec. Ch. 592, 24 E.R. 265, members of a partnership were permitted to sue on behalf of themselves and some 800 other partners for misapplication and embezzlement of funds by the partnership's former treasurer and manager. The court allowed the action because "it was in behalf of themselves, and all others the proprietors of the same undertaking, except the defendants, and so all the rest were in effect parties," and because "it would be impracticable to make them all parties by name, and there would be continual abatements by death and otherwise, and no coming at justice, if all were to be made parties" (p. 265); see also Kazanjian, supra, at p. 401; G. T. Bispham, The Principles of Equity (9th ed. 1916), at para. 415; S. C. Yeazell, "Group Litigation and Social Context: Toward a History of the Class Action" (1977), 77 Colum. L. Rev. 866, at pp. 867 and 872; J. K. Bankier, "Class Actions for Monetary Relief in Canada: Formalism or Function?" (1984), 4 Windsor Y.B. Access Just. 229, at p. 236.

21 The representative or class action proved useful in pre-industrial English commercial litigation. The modern limited-liability company had yet to develop, and collectives of business people had no independent legal existence. Satisfying the compulsory-joinder rule would have required a complainant to bring before the court each member of the collective. The representative action provided the solution to this difficulty: see Kazanjian, supra, at p. 401; Yeazell, supra, at p. 867; City of London v. Richmond (1701), 2 Vern. 421, 23 E.R. 870 (allowing the plaintiff to sue trustees for rent owed, though the beneficiaries of the trust were not joined).

22 The class action required a common interest between the class members. Many of the early representative actions were brought in the form of "bills of peace", which could be maintained where the interested individuals were numerous, all members of the group possessed a common interest in the question to be adjudicated, and the representatives could be expected fairly to advocate the interests of all members of the group: see Wright, Miller and Kane, supra, at para. 1751; Z. Chafee, Some Problems of Equity (1950), at p. 201, T. A. Roberts, The Principles of Equity (3rd ed. 1877), at pp. 389-92; Bispham, supra, at para. 417.

23 The courts of equity applied a liberal and flexible approach to whether a class action could proceed. They "continually sought a proper balance between the interests of fairness and effi-

ciency": Kazanjian, supra, at p. 411. As stated in Wallworth v. Holt (1841), 4 My. & Cr. 619, 41 E.R. 238, at p. 244, "it [is] the duty of this Court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy".

24 This flexible and generous approach to class actions prevailed until the fusion of law and equity under the Supreme Court of Judicature Act, 1873 (U.K.), 36 & 37 Vict., c. 66, and the adoption of Rule 10 of the Rules of Procedure:

> 10. Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorised by the Court to defend in such action, on behalf or for the benefit of all parties so interested.

While early cases under the new rules maintained a liberal approach to class actions (see, e.g., Duke of Bedford v. Ellis, [1901] A.C. 1 (H.L.); Taff Vale Railway Co. v. Amalgamated Society of Railway Servants, [1901] A.C. 426 (H.L.)), later cases sometimes took a restrictive approach (see, e.g., Markt & Co. v. Knight Steamship Co., [1910] 2 K.B. 1021 (C.A.)). This, combined with the widespread use of limited-liability companies, resulted in fewer class actions being brought.

25 The class action did not forever languish, however. Conditions emerged in the latter part of the twentieth century that once again invoked its utility. Mass production and consumption revived the problem that had motivated the development of the class action in the eighteenth century -- the problem of many suitors with the same grievance. As in the eighteenth century, insistence on individual representation would often have precluded effective litigation. And, as in the eighteenth century, the class action provided the solution.

26 The class action plays an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs have all contributed to its growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the alleged wrongdoer. Sometimes, the complainants are identically situated vis-à-vis the defendants. In other cases, an important aspect of their claim is common to all complainants. The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties.

27 Class actions offer three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times): see W. K. Branch, Class Actions in Canada (1998), at para. 3.30; M. A. Eizenga, M. J. Peerless and C. M. Wright, Class Actions Law and Practice (1999), at para. 1.6; Bankier, supra, at pp. 230-31; Ontario Law Reform Commission, Report on Class Actions (1982), at pp. 118-19.

28 Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied: see Branch, supra, at para. 3.40; Eizenga, Peerless and Wright, supra, at para. 1.7; Bankier, supra, at pp. 231-32; Ontario Law Reform Commission, supra, at pp. 119-22.

29 Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation: see "Developments in the Law -- The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives" (2000), 113 Harv. L. Rev. 1806, at pp. 1809-10; see Branch, supra, at para. 3.50; Eizenga, Peerless and Wright, supra, at para. 1.8; Bankier, supra, at p. 232; Ontario Law Reform Commission, supra, at pp. 11 and 140-46.

B. The Test for Class Actions

30 In recognition of the modern importance of representative litigation, many jurisdictions have enacted comprehensive class action legislation. In the United States, Federal Rules of Civil Procedure, 28 U.S.C.A. para. 23 (introduced in 1938 and substantially amended in 1966) addressed aspects of class action practice, including certification of litigant classes, notice, and settlement. The English procedural rules of 1999 include detailed provisions governing "Group Litigation": United Kingdom, Civil Procedure Rules 1998, SI 1998/3132, rr. 19.10-19.15. And in Canada, the provinces of British Columbia, Ontario, and Quebec have enacted comprehensive statutory schemes to govern class action practice: see British Columbia Class Proceedings Act, R.S.B.C. 1996, c. 50; Ontario Class Proceedings Act, 1992, S.O. 1992, c. 6; Quebec Code of Civil Procedure, R.S.Q., c. C-25, Book IX. Yet other Canadian provinces, including Alberta and Manitoba, are considering enacting such legislation: see Manitoba Law Reform Commission, Report #100, Class Proceedings (January 1999); Alberta Law Reform Institute, Final Report No. 85, Class Actions (December 2000); see also R. Rogers, "A Uniform Class Actions Statute", Appendix O to the Proceedings of the 1995 Meeting of The Uniform Law Conference of Canada.

31 Absent comprehensive codes of class action procedure, provincial rules based on Rule 10, Schedule, of the English Supreme Court of Judicature Act, 1873 govern. This is the case in Alberta, where class action practice is governed by Rule 42 of the Alberta Rules of Court:

> 42 Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

The intention of the Alberta legislature is clear. Class actions may be brought. Details of class action practice, however, are largely left to the courts.

32 Alberta's Rule 42 does not specify what is meant by "numerous" or by "common interest". It does not say when discovery may be made of class members other than the representative. Nor does it specify how notice of the suit should be conveyed to potential class members, or how a court

should deal with the possibility that some potential class members may desire to "opt out" of the class. And it does not provide for costs, or for the distribution of the fund should an action for money damages be successful.

33 Clearly, it would be advantageous if there existed a legislative framework addressing these issues. The absence of comprehensive legislation means that courts are forced to rely heavily on individual case management to structure class proceedings. This taxes judicial resources and denies the parties ex ante certainty as to their procedural rights. One of the main weaknesses of the current Alberta regime is the absence of a threshold "certification" provision. In British Columbia, Ontario, and Quebec, a class action may proceed only after the court certifies that the class and representative meet certain requirements. In Alberta, by contrast, courts effectively certify ex post, only after the opposing party files a motion to strike. It would be preferable if the appropriateness of the class action could be determined at the outset by certification.

34 Absent comprehensive legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them: Bell v. Wood, [1927] 1 W.W.R. 580 (B.C.S.C.), at pp. 581-82; Langley v. North West Water Authority, [1991] 3 All E.R. 610 (C.A.), leave denied [1991] 1 W.L.R. 711n (H.L.); Newfoundland Association of Public Employees v. Newfoundland (1995), 132 Nfld. & P.E.I.R. 205 (Nfld. S.C.T.D.); W. A. Stevenson and J. E. Côté, Civil Procedure Guide, 1996, at p. 4. However desirable comprehensive legislation on class action practice may be, if such legislation has not been enacted, the courts must determine the availability of the class action and the mechanics of class action practice.

35 Alberta courts moved to fill the procedural vacuum in Korte, supra. Korte prescribed four conditions for a class action: (1) the class must be capable of clear and definite definition; (2) the principal issues of fact and law must be the same; (3) success for one of the plaintiffs must mean success for all; and (4) no individual assessment of the claims of individual plaintiffs need be made.

36 The Korte criteria loosely parallel the criteria applied in other Canadian jurisdictions in which comprehensive class-action legislation has yet to be enacted: see, e.g., Ranjoy Sales and Leasing Ltd. v. Deloitte, Haskins and Sells, [1984] 4 W.W.R. 706 (Man. Q.B.); International Capital Corp. v. Schafer (1995), 130 Sask. R. 23 (Q.B.); Guarantee Co. of North America v. Caisse populaire de Shippagan Ltée (1988), 86 N.B.R. (2d) 342 (Q.B.); Lee v. OCCO Developments Ltd. (1994), 148 N.B.R. (2d) 321 (Q.B.); Van Audenhove v. Nova Scotia (Attorney General) (1994), 134 N.S.R. (2d) 294 (S.C.), at para. 7; Horne v. Canada (Attorney General) (1995), 129 Nfld. & P.E.I.R. 109 (P.E.I.S.C.), at para. 24.

37 The Korte criteria also bear resemblance to the class-certification criteria in the British Columbia, Ontario, and Quebec class action statutes. Under the British Columbia and Ontario statutes, an action will be certified as a class proceeding if (1) the pleadings or the notice of application disclose a cause of action; (2) there is an identifiable class of two or more persons that would be represented by the class representative; (3) the claims or defences of the class members raise common issues (in British Columbia, "whether or not those common issues predominate over issues affecting only individual members"); (4) a class proceeding would be the preferable procedure for the resolution of common issues; and (5) the class representative would fairly represent the interests of the class, has advanced a workable method of advancing the proceeding and notifying class members, and does not have, on the common issues for the class, an interest in conflict with other class members: see Ontario Class Proceedings Act, 1992, s. 5(1); British Columbia Class Proceedings Act, s. 4(1). Under the Quebec statute, an action will be certified as a class proceeding if (1) the recourses

of the class members raise identical, similar, or related questions of law or fact; (2) the alleged facts appear to warrant the conclusions sought; (3) the composition of the group makes joinder impracticable; and (4) the representative is in a position to adequately represent the interests of the class members: see Quebec Code of Civil Procedure, art. 1003.

38 While there are differences between the tests, four conditions emerge as necessary to a class action. First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria: see Branch, supra, at paras. 4.190-4.207; Friedenthal, Kane and Miller, Civil Procedure (2nd ed. 1993), at pp. 726-27; Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172 (Ont. Ct. (Gen. Div.)), at paras. 10-11.

39 Second, there must be issues of fact or law common to all class members. Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.

40 Third, with regard to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests.

41 Fourth, the class representative must adequately represent the class. In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class: see Branch, supra, at paras. 4.210-4.490; Friedenthal, Kane and Miller, supra, at pp. 729-32.

42 While the four factors outlined must be met for a class action to proceed, their satisfaction does not mean that the court must allow the action to proceed. Other factors may weigh against allowing the action to proceed in representative form. The defendant may wish to raise different defences with respect to different groups of plaintiffs. It may be necessary to examine each class

member in discovery. Class members may raise important issues not shared by all members of the class. Or the proposed class may be so small that joinder would be a better solution. Where such countervailing factors exist, the court has discretion to decide whether the class action should be permitted to proceed, notwithstanding that the essential conditions for the maintenance of a class action have been satisfied.

43 The class action codes that have been adopted by British Columbia and Ontario offer some guidance as to factors that would generally not constitute arguments against allowing an action to proceed as a representative one. Both state that certification should not be denied on the grounds that: (1) the relief claimed includes a demand for money damages that would require individual assessment after determination of the common issues; (2) the relief claimed relates to separate contracts involving different members of the class; (3) different class members seek different remedies; (4) the number of class members or the identity of every class member is unknown; or (5) the class includes subgroups that have claims or defences that raise common issues not shared by all members of the class: see Ontario Class Proceedings Act, 1992, s. 6; British Columbia Class Proceedings Act, s. 7; see also Alberta Law Reform Institute, supra, at pp. 75-76. Common sense suggests that these factors should no more bar a class action suit in Alberta than in Ontario or British Columbia.

44 Where the conditions for a class action are met, the court should exercise its discretion to disallow it for negative reasons in a liberal and flexible manner, like the courts of equity of old. The court should take into account the benefits the class action offers in the circumstances of the case as well as any unfairness that class proceedings may cause. In the end, the court must strike a balance between efficiency and fairness.

45 The need to strike a balance between efficiency and fairness belies the suggestion that a class action should be struck only where the deficiency is "plain and obvious", as the Chambers judge held. Unlike Rule 129, which is directed at the question of whether the claim should be prosecuted at all, Rule 42 is directed at the question of how the claim should be prosecuted. The "plain and obvious" standard is appropriate where the result of striking is to forever end the action. It recognizes that a plaintiff "should not be 'driven from the judgment seat' at this very early stage unless it is quite plain that his alleged cause of action has no chance of success": Drummond-Jackson v. British Medical 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 Ontario Class Proceedings Act, 1992, s. 25; British Columbia Class Proceedings Act, s. 27; Quebec Code of Civil Procedure, art. 1039.

51 The diversity of class actions makes it difficult to anticipate all of the procedural complexities that may arise. In the absence of comprehensive class-action legislation, courts must address procedural complexities on a case-by-case basis. Courts should approach these issues as they do the question of whether a class action should be allowed: in a flexible and liberal manner, seeking a balance between efficiency and fairness.

C. Whether the Investors Have Satisfied Rule 42

52 The four conditions to the maintenance of a class action are satisfied here. First, the class is clearly defined. The respondents Lin and Wu represent themselves and "[229 other] immigrant investors ... who each invested at least the sum of $150,000.00 into a fund totalling $34,065,000.00, the said sum to be managed, administered and secured by ... Western Canadian Shopping Centres Inc.". Who falls within the class can be ascertained on the basis of documentary evidence that the parties have put before the court. Second, common issues of fact and law unite all members of the class. The essence of the investors' complaint is that the defendants owed them fiduciary duties

which they breached. While the investors' Amended Statement of Claim alludes to claims in negligence and misrepresentation, counsel for the investors undertook in argument before this Court to abandon all but the fiduciary duty claims. Third, at this stage of the proceedings, it appears that resolving one class member's breach of fiduciary claim would effectively resolve the claims of every class member. As a result of security-pooling agreements effected by WCSC, each investor now has an interest, proportional to his or her investment, in the same underlying security. Finally, the representative plaintiffs are appropriate.

53 The defendants argue that the proposed suit is not amenable to prosecution as a class action because: (1) there are in fact multiple classes of plaintiffs; (2) the defendants will raise multiple defences to different causes of action advanced against different defendants; and (3) in order to prevail, the investors must show actual reliance on the part of each class member. I find these arguments unpersuasive.

54 The defendants' contention that there are multiple classes of plaintiffs is unconvincing. No doubt, differences exist. Different investors invested at different times, in different jurisdictions, on the basis of different offering memoranda, through different agents, in different series of debentures, and learned about the underlying events through different disclosure documents. Some investors may possess rescissionary rights that others do not. The fact remains, however, that the investors raise essentially the same claims requiring resolution of the same facts. While it may eventually emerge that different subgroups of investors have different rights against the defendants, this possibility does not necessarily defeat the investors' right to proceed as a class. If material differences emerge, the court can deal with them when the time comes.

55 The defendants' contention that the investors should not be permitted to sue as a class because each must show actual reliance to establish breach of fiduciary duty also fails to convince. In recent decades fiduciary obligations have been applied in new contexts, and the full scope of their application remains to be precisely defined. The fiduciary duty issues raised here are common to all the investors. A class action should not be foreclosed on the ground that there is uncertainty as to the resolution of issues common to all class members. If it is determined that the investors must show individual reliance, the court may then consider whether the class action should continue.

56 The same applies to the contention that different defences will be raised with respect to different class members. Simply asserting this possibility does not negate a class action. If and when different defences are asserted, the court may solve the problem or withdraw leave to proceed as a class.

57 I conclude that the basic conditions for a class action are met and that efficiency and fairness favour permitting it to proceed.

D. Cross-Appeal

58 The investors take issue on cross-appeal with the Court of Appeal's allowance of individualized discovery from each class member. The Court of Appeal held that the defendants are entitled, under Rules 187 and 201, to examination and discovery of each member of the class. The investors argue that the question of whether discovery should be allowed from each class member is a question best left to a case management judge appointed pursuant to the Alberta Rules of Court Binder, Practice Note No. 7.

59 I agree that allowing individualized discovery at this stage of the proceedings would be premature. One of the benefits of a class action is that discovery of the class representatives will usually suffice and make unnecessary discovery of each individual class member. Cases where individual discovery is required of all class members are the exception rather than the rule. Indeed, the necessity of individual discovery may be a factor weighing against allowing the action to proceed in representative form.

60 I would allow the defendants to examine the representative plaintiffs as of right. Thereafter, examination of other class members should be available only by order of the court, upon the defendants showing reasonable necessity.

VI. Conclusion

61 For the foregoing reasons, I would dismiss the appeal and allow the investors to proceed as a class. I would allow the cross-appeal.

62 Costs of the appeal and cross-appeal are to the respondents.

Solicitors for the appellant/respondent on cross-appeal The Royal Trust Company: Burnet, Duckworth & Palmer, Calgary.
Solicitors for the appellants/respondents on cross-appeal James G. Engdahl, William R. MacNeill, Jon R. MacNeill, Gary L. Billingsley, R. Byron Henderson: McLennan Ross, Edmonton.
Solicitors for the appellant/respondent on cross-appeal C. Michael Ryer: Peacock Linder & Halt, Calgary.
Solicitors for the appellant/respondent on cross-appeal Peter K. Gummer: Brownlee Fryett, Edmonton.
Solicitors for the appellants/respondents on cross-appeal Ernst & Young and Alan Lundell: Parlee McLaws, Edmonton.

Solicitors for the appellants/respondents on cross-appeal Bennett Jones Verchere and Garnet Schulhauser: Gowling Lafleur Henderson, Calgary.
Solicitors for the appellant/respondent on cross-appeal Arthur Andersen & Co.: Lucas Bowker & White, Edmonton.
Solicitors for the respondents/appellants on cross-appeal: Durocher Simpson, Edmonton.

cp/e/qllls

TAB 27

THE OXFORD ENGLISH DICTIONARY

SECOND EDITION

Prepared by

J. A. SIMPSON *and* E. S. C. WEINER

VOLUME VII

Hat–Intervacuum

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1989

Uncontaminated, uncorrupted, pure.

a 1695 Wood *Ath. Oxon., F. Junius* (1721) II. 603 Whose Inhabitants use the antient and intaminated Frisic Language.

intangibility (ɪnˌtændʒɪ'bɪlɪtɪ). [f. next + -ITY. Cf. mod.F. *intangibilité* (Littré).] a. The quality of being intangible.

1847 in Craig. 1848 *Fraser's Mag.* XXXVII. 99 There is an intangibility about all the charges that are made against her. 1885 Clodd *Myths & Dr.* II. vii. 184 Its [his shadow's] intangibility feeds his awe and wonder.

b. Inviolability.

1783 C. J. Fox *Memorials & Corr.* (1853) II. 102, I beg of gentlemen to be aware of the lengths to which their arguments upon the intangibility of this charter may be carried. 1929 *Times* 13 Aug. 10/2 There has been too much talk .. of the intangibility of the Young Plan.

intangible (ɪn'tændʒɪb(ə)l), *a.* and *sb.* [ad. med.L. *intangibil-is*, f. *in-* (IN-[3]) + L. *tangibilis* TANGIBLE: cf. F. *intangible* (1508 in Godef. *Compl.*).] A. *adj.* a. Not tangible; incapable of being touched; not cognizable by the sense of touch; impalpable.

1640 Wilkins *New Planet* II. (1684) 148 A Man should be still in danger of knocking his head against every Wall and Pillar; unless it were also intangible, as some of the Peripateticks affirm. 1717 Clarke *Leibnitz Papers* Reply iv. §45. 151 The Means by which Two Bodies attract each other, may be invisible and intangible. 1845 McCulloch *Taxation* III. iii. (1852) 476 The proportion of monied and other moveable and all but intangible property .. has increased ten-fold, since the accession of George I. 1871 Tyndall *Frogm. Sc.* (1879) I. iii. 76 The assumption of this wonderful intangible aether. 1880 Muirhead *Gaius* II. §14 Incorporeal [things] are those that are intangible .. such as an inheritance, a usufruct.

b. *fig.* That cannot be grasped mentally.

1880 *Mem. John Legge* 127 To the irreligious man all this is intangible, unintelligible. 1898 Ramsay *Was Christ born in Bethlehem?* 20 This abstract and rather intangible argument must yield to the demonstration of hard facts.

B. *sb.* Anything intangible; spec. (in *pl.*) = *intangible assets*, i.e. assets (e.g. goodwill, rights, etc.) which cannot easily or precisely be measured.

1914 *Cycl. Amer. Govt.* III. 496/1 The term 'personal property' .. includes .. visible property and intangibles. 1930 *Economist* 29 Mar. 710/1 Net tangible assets may be defined as total assets less 'intangibles' (goodwill, patents, etc.), current liabilities, and funded debt. 1933 *Discovery* Oct. 313/2 Scientific changes were coming in so thick and fast that other factors in social life—the intangibles of credit, the improvements in political and international ideas—were unequal to the task of accommodating them. 1949 *Here & Now* (N.Z.) Oct. 30/3 The intangibles—the many local developments—being not reducible to statistics, the food of all bureaucracy, count for nothing. 1957 *Economist* 19 Oct. (Suppl.) 1/2 The success of individual motor producers will depend mainly upon intangibles such as the success of their design policy.

Hence **in'tangibleness**; **in'tangibly** *adv.*, so as to be intangible.

1678 Cudworth *Intell. Syst.* I. v. 769 That which is extended also, but penetrably and intangibly which is space or vacuum. 1828 Webster, *Intangibleness*, the quality of being intangible. 1887 E. F. Byrne *Heir without Heritage* II. v. 91 The most intangibly delicate sense of duty.

in'tangle, -ment, obs. ff. ENTANGLE, -MENT.

†in'tangle, *a. Obs. rare*[−1]. [IN-[1].] In a tangle; entangled.

1642 Howell *For. Trav.* 40 His observations will lye confusedly huddled up, like a skeine of intangle silk.

in'tarissable, *a. rare.* [a. F. *intarissable* (Cotgr.), f. *in-* (IN-[3]) + *tarissable*, f. *tarir*, *tarissant* to dry up.] Not to be dried up, inexhaustible.

1656-81 Blount *Glossogr.*, *Intarissable*, not to be withered or dryed up. 1859 Mrs. Schimmelpenninck *Princ. Beauty* IV. v. §6 That intarissable fountain of gushing joy.

intarsia (ɪn'tɑːsɪə). Also -io. [It. *intarsio*.] = TARSIA. Also *attrib.*, *transf.* and *fig.* So **intarsiatore** (ɪnˌtɑːsɪə'tɔəreɪ), a worker in intarsia; **intarsiatura** (ɪnˌtɑːsɪə'tʊərə), pl. -e, = INTARSIA.

1863 A. Jameson *Legends of Monastic Orders* (ed. 3) 275 The fine intarsiatura in the Choir of San Francesco di Assisi. 1867 *Ecclesiologist* XXVIII. 216 Hidden under the intarsio pavement. 1868 C. C. Perkins *Italian Sculptors* 262 A celebrated wood-carver and 'intarsiatore' named Luchino Bianchini .. helped them to carve the presses for the sacristy. *Ibid.*, Luchino Bianchini .. made the woodwork about its great portal, as well as the intaglios and intarsiature of the choir at San Lodovico. 1892 A. M. Clerke *Familiar Stud. Homer* x. 266 Some rusty dagger-blades .. skilfully ornamented in coloured metallic intarsiatura. 1894 *Daily News* 6 Dec. 5/2 Humorous intarsia showing Polyphemus .. feeling the backs of the sheep. 1896 *Q. Rev.* Oct. 471 The intarsias of the choir-stalls of S. Maria Maggiore at Bergamo. 1906 *Westm. Gaz.* 4 July 2/1 The Brunellesse looked critically at the intarsia chests of drawers. 1913 Mrs. H. Ward *Mating of Lydia* IV. xix. 389 The gleaming reflections on lacquer and intarsia, on ebony or Sèvres. 1919 H. F. Jones *Samuel Butler* II. 67 The seats of the stalls in the church of Santa Maria Maggiore at Bergamo are ornamented with intarsia work. 1945 *Burlington Mag.* Aug. two or more colours... (2) A motif design in stitch and/or colour. 1958 *Listener* 11 Sept. 388/3 Of the poems, with their tessellated intarsia of natural scenery, natural passion and liturgical imagery, perhaps the most revealing on the subject of Zhivago's destiny is the first. 1970 *Times* 28 Feb. (Sat. Suppl.) p. vii/4 The most startling form of marquetry was perspective picture making in wood, known as intarsia. 1973 *Guardian* 10 Apr. 13/3 Sweater with intarsia thistle motif.

†in'tastable, *a. Obs. rare*[−1]. [IN-[3].] Incapable of being tasted.

a 1711 Grew (J.), Something which is invisible, intastable, and intangible .. existing only in the fancy, may produce a pleasure superiour to that of sense.

†in'taxable, *a. Obs. rare.* [IN-[3].] That cannot be taxed or charged with something.

1631 I. Craven *God's Tribunall* 16 The Lord of Hosts, whose .. iustice [is] intaxable, anger intollerable.

intechnı'cality. *rare.* [IN-[3].] Want of technicality; something not technically correct.

1821 *New Monthly Mag.* I. 618 Every power must be for ever on the alert, to detect intechnicalities, to fence with witnesses, to puzzle or persuade phlegmatic jurors.

†'integent, *a. Obs. rare*[−1]. [ad. L. *integent-em*, pr. pple. of *integĕre*, f. *in-* (IN-[2]) + *tegĕre* to cover.] That covers; covering.

1661 Lovell *Hist. Anim. & Min.* 319 As for the parts, they are dissimilar, *sc.* the basis and point, or similars external, as the fat, integent membran.

integer ('ɪntɪdʒə(r)), *a.* and *sb.* [a. L. *integer* untouched, intact, entire, f. *in-* (IN-[3]) + *tag-*, *teg-*, root of *tangĕre* to touch. Cf. F. *intègre* (1567 in Hatz.-Darm.), and ENTIRE.]

A. *adj.* (Now *rare* or *Obs.*)

†1. Having no part taken away or wanting; whole, entire: = INTEGRAL A. 3. *Obs.*

a 1509 Wolsey *Let. to Hen. VII* in *Lett. Rich. III* (Rolls) I. App. 443 Wher I seyd that the emperors m... he dote of thre hunderyth thousan .. should .. have the seyd integyr dote in effect and equyvalen .. [*MS. imperf.*]

†2. Marked by moral integrity; honest, upright. *Obs.*

1644 Vicars *God in Mount* 108 The face of their best and most integer proceedings.

3. *Math.* Denoting a whole thing or number of whole things; denoted by a whole number; 'whole', not fractional: = INTEGRAL A. 4 a. Now *rare* or *Obs.*

1660 Boyle *New Exp. Phys. Mech.* xii, I had .. found that .. 14 and 1 be the nearest of small integer numbers that express the proportion between the specifick gravities of quicksilver and water. 1806 Hutton *Course Math.* I. 52 A whole or integer number may be expressed like a fraction, by writing 1 below it, as a denominator. 1833 Herschel *Astron.* ii. 79 To keep the reckoning of the integer days correct .. is the object of the calendar.

B. *sb.* 1. *Math.* A number or quantity denoting one or more whole things or units; a whole number or undivided quantity. Opp. to *fraction*.

1571 Digges *Pantom.* IV. v. Vij b, The containing circles Semidimetient being very nighe 11½ for exactly nether by integer nor fraction it can be expressed. 1675 Ogilby *Brit.* Pref. 4 Not regarding the Fractional Parts of a Mile, but taking the lesser Integer. 1831 Carlyle *Sart. Res.* III. xi, The Fraction will become .. an Integer. 1875 Todhunter *Alg.* (ed. 7) lii, Theory of Numbers. Throughout the present Chapter the word *number* is used as an abbreviation for *positive integer*.

2. A particular quantity of any kind (as money, weight, length, etc.) taken as the unit of measurement. Now *rare* or *Obs.*

1822 J. Flint *Lett. Amer.* 50 The dollar is the integer of money in the United States. 1827 Faraday *Chem. Manip.* iii. 67 Two integers .. the pint and the cubic inch. 1868 Seyd *Bullion* (1880) 146 The Carat serves as the Integer.

3. *gen.* (often with allusion to 1): A whole or entire thing or entity, either as complete in itself, or as the sum of its parts or elements.

a 1848 R. W. Hamilton *Rew. & Punishm.* v. (1853) 202 The soul is the integer of the man. 1859 Helps *Friends in C.* Ser. II. II. viii. 150 You would never amongst you all make up the noble integer. 1875 E. White *Life in Christ* I. iii. (1878) 23 Death is followed by the speedy dissipation of the combined elements which formed the organism .. The Integer, the Animal which resulted from the former combination, is no more. 1899 R. C. Temple *Univ. Gram.* 4 Functionally a word is either—(1) An integer, or a sentence in itself.

ˌintegra'bility. [f. next: see -ITY.] The fact or character of being integrable; capability of being integrated.

1816 *Edin. Rev.* XXVII. 93 The theorem, which is called the *Criterion of Integrability*. 1816 tr. *Lacroix's Diff. & Int. Calculus* 337 Ascertaining whether the proposed equation satisfies the condition of integrability. 1882 *Nature* XXVI. 310 This definition .. satisfies as well the condition of integrability as the differential equation of motion.

1747-41 Chambers *Cycl.* s.v. *Calculus*, The differential quantity to be integrated .. must .. be reduced to an integrable finite, or an infinite series. 1809 Ivory in *Phil. Trans.* XCIX. 349 The expressions .. are all integrable with respect to one of the variable quantities they contain. 1882 J. B. Stallo *Concepts Mod. Physics* 107 *note*, When their equations are integrable.

b. *gen.*: see INTEGRATE *v.* 2.

1855 H. Spencer *Princ. Psychol.* (1870) I. 298 Dispersed atoms of integrable matter. *Ibid.* (1872) I. III. vi. 330 To the lowest living things, the integrable matter is everywhere present.

integral ('ɪntɪgrəl), *a.* and *sb.* [ad. late L. *integrāl-is*, f. *integer*, *integr-*: see INTEGER and -AL[1]. Cf. F. *intégral* (Oresme, 14th c.); It. *integrale* 'entire, consisting of entirenesse' (Florio).

'*Integralis pars*', and '*partium integralium*, quæ si conveniant, totum exstat', occur in a 6th c. Comment. on Cicero *de Invent. Rhet.*, in Suringar *Hist. Crit. Scholiast. Latin.* (1834) pp. 248, 222.]

A. *adj.*

1. Of or pertaining to a whole. Said of a part or parts: Belonging to or making up an integral whole; constituent, component; *spec.* necessary to the completeness or integrity of the whole; forming an intrinsic portion or element, as distinguished from an adjunct or appendage. (Cf. INTEGRANT.) (Formerly distinguished from *essential*: see quots. 1697, 1727.)

1551 T. Wilson *Logike* 39 b, The integral partes, which make perfect the whole, and cause the bignesse thereof. *a* 1639 W. Whateley *Prototypes* II. xxvi. (1640) 43 The parts integrall, viz. as the severall members of the matter, head, heart, &c. in man. 1651 N. Bacon *Disc. Govt. Eng.* II. xv. (1739) 79 In a mixt Commonwealth they [kings] are integral Members. 1697 Locke *2nd Vind. Reas. Chr.* 247 (Seager) Integral parts .. are contradistinguished to essential; and signify such parts, as the thing can be without, but without them will not be so complete and entire as with them. 1727-41 Chambers *Cycl.*, *Integral*, or *Integrant*, is applied by the schoolmen, to those parts which are necessary to the integrity of a whole... In which sense they stand contradistinguished from *essential* parts... The arms, legs, etc. are *integral* parts; body and soul *essential* parts of a man. 1786 Burke *W. Hastings* Wks. 1842 II. 220 Forming no legal or integral part of the government. 1862 Goulburn *Pers. Relig.* III. x. (1873) 238 Recreation must form an integral part of human life. 1867 Freeman *Norm. Conq.* I. ii. 69 A dependency of the British Crown .. not an integral part of the United Kingdom. 1923 Glazebrook *Dict. Appl. Physics* V. 165/1 This cylinder has an open-ended steel barrel with integral fins. 1958 *Chambers's Techn. Dict.* 987/1 *Integral stiffeners*, the stiffening ridges left when an aircraft skin panel is machined from a solid billet. 1968 *Gloss. Formwork Terms* (*B.S.I.*) 16 *Integral facing*, a special facing concrete or mortar cast simultaneously with the backing concrete so as to be monolithic with it. 1972 [see INTEGRALLY *adv.* b].

2. Made up of component parts which together constitute a unity; in *Logic*, said of a whole consisting of or divisible into parts external to each other, and therefore actually (not merely mentally) separable. Now *rare* or *Obs.* exc. in technical use.

1588 Fraunce *Lawiers Log.* I. vi. 33 The whole Integrall cannot bee affirmed of any one of his parts, for a part is not the whole. 1628 T. Spencer *Logick* 203 An Integrall whole is not in each part, neither according to their whole essence, nor vertue, and therefore it is no wayes predicated of the singular parts. 1649 Jer. Taylor *Gt. Exemp.* II. vi. §19 In every Christian there are three parts concerning this integral Constitution, body and soul, and Spirit. 1725 Watts *Logic* I. vi. §10 As an integral Whole is distinguish'd into its several Parts by Division, so the Word Distribution is most properly used when we distinguish an universal Whole into its several Kinds of Species. *Ibid.*, Logicians have sometimes given a mark or sign to distinguish when it is an integral whole, that is, divided into its parts and members, or when it is a genus, an universal whole, that is, distributed into its species and individuals. 1836-7 Sir W. Hamilton *Metoph.* xxxvii. (1859) II. 340 The Integral or, as it ought to be called Integrate whole (*totum integratum*), is composed of integrant parts (*partes integrantes*) which are either homogeneous, or heterogeneous. 1864 Bowen *Logic* iv. 67 *note*, The Essential or Physical whole is that which consists of Matter and Form, or substance and accident, as its essential parts. 'The characteristic of this whole is that, as its parts do not exist out of each other, they cannot be separated except in Thought .. The Mathematical or Integral whole, on the other hand, has parts which are external to each other, so that they can be divided asunder. 1945 H. D. Smyth *Gen. Acct. Devel. Atomic Energy Mil. Purposes* xii. 132 Two 'integral experiments' (experiments on assembled or integrated systems comprising fissionable material, reflector, and perhaps moderator also) may be described. 1953 C. Wallace *Photographer's Pocket-Bk.* 112 In modern colour materials the colours are achieved by building up on a suitable base .. an 'integral tri-pack' of three separate emulsions.

3. a. Having no part or element separated, taken away, or lacking; unbroken, whole, entire, complete. Now somewhat *rare*. [= mod.F. *intégral*.]

1611 Florio, *Integrale*, whole or integrall. 1626 Bacon *Sylva* §344 All Locall Motion keepeth Bodies Integrall, and their Parts together. 1651 Biggs *New Disp.* 238 Thorow the integral porous pelt. 1659 D. Pell *Impr. Sea* 484 Their hearts are not integral, and entire in prayer. 1794 Mathias *Purs. Lit.* (1798) 157 Excerpta of Writers whose integral works are lost for ever. 1862 Lytton *Str. Story* II. 15 Who

could expect that every link in a madman's tale would be found integral and perfect?

b. Of things immaterial.

1651 JER. TAYLOR *Serm. for Year* I. iv. 51 Repent with an integral, a holy and excellent repentance. 1656 EARL MONM. *Advt. fr. Parnäss* 281 They are thought by them to merit their Princes integral love. 1847 R. W. HAMILTON *Sabbath* v. (1848) 181 It is felt that, if we would retain Christianity, we must hold fast the full, the integral, sabbath.

†c. *Gram.* Applied by Wilkins to a word or part of speech denoting a complete notion; see B. 3. *Obs.*

1668 WILKINS *Real Char.* 305 They supply the room either, 1. Of some Integral word, as Pronouns, or 2. Of some Sentence or complex part of it, as Interjections.

4. *Math.* a. That is, or is denoted by, an integer, or involves only integers; consisting of a whole number or undivided quantity; not fractional, or not involving a fraction.

1658 PHILLIPS s.v., In Arithmetick integral numbers are opposed to fraction[s]. 1674 JEAKE *Arith.* (1696) 15 To express the true content of any Number Integral. 1812 J. SMYTH *Pract. of Customs* (1821) 286 The fractional part of a foot..is to be given up in favour of the importer, and the duties to be charged only upon the integral feet. 1816 tr. *Lacroix's Diff. & Int. Calculus* 185 *Q* being a rational and integral function of *x*. 1875 TODHUNTER *Algebra* (ed. 7) xxxvi. §516 When *n* has any value positive or negative, integral or fractional.

b. Relating to or involving integrals (see B. 4); obtained by, belonging to, or proceeding by integration.

integral calculus: the calculus of integrals (see B. 4); that branch of the infinitesimal calculus which deals with the finding and properties of integrals of functions (in this restricted sense, the inverse of the differential calculus, and corresponding to the 'inverse method of fluxions' in the Newtonian calculus), also used to include the solution of differential equations, and parts of the theory of functions and other branches of the higher mathematics. *integral sign* = *sign of integration*: see B. 4 a, and INTEGRATION 2.

1727-41 CHAMBERS *Cycl.* s.v. *Calculus*, The *integral Calculus*..is the inverse of the differential one. *Ibid.*, Suppose ∫ the sign of the sum, or integral quantity. 1802 WOODHOUSE in *Phil. Trans.* XCII. 95 Expressions deduced from the true integral equations. 1875 C. P. BUCKINGHAM *Diff. & Int. Calc.* (1880) §157 The..problem of the integral calculus is to pass from a given differential of a function to the function itself. 1881 MAXWELL *Electr. & Magn.* I. 21 In the expression under the integral sign only the finite values ..are to be considered. 1887 R. A. ROBERTS *Int. Calc.* 1 The principal object of the Integral Calculus is to find the value of a function of a single variable when its differential coefficient is given.

c. Applied to the entire or total amount of a continuous quantity (*e.g.* curvature) taken between definite limits, and thus expressible by a definite integral (see B. 4 a).

1879 THOMSON & TAIT *Nat. Phil.* I. I. §10 The *integral curvature*, or *whole change of direction* of an arc of a plane curve, is the angle through which the tangent has turned as we pass from one extremity to the other.

d. *integral domain*: see DOMAIN *sb.* 4 d.

B. *sb.*

1. Something entire or undivided; a whole, either as wanting no part, or as made up of parts: see A. 2, 3. *Obs.* exc. as *transf.* from 4 = total sum.

1620 T. GRANGER *Div. Logike* 177 A tree, a body, an house ..are totall Integrals, whose integritie, or wholenesse..is made of their parts. 1657 TOMLINSON *Renou's Disp.* 9 In the third genus are contained all Animals whether Integrals or In-parts. 1784 J. BARRY in *Lect. Paint.* iv. (Bohn 1848) 152 Any other conjunction of parts forming an integral or whole. 1834 LANDOR *Exam. Shaks.* Wks. 1846 II. 299/2 No more.. than breaking an eggshell is breaking an egg, the shell being a part, and the egg being an integral. 1881 *Nature* No. 625. 582 What is seen in a sun-spot is the integral, as it were, of all that is taking place..in many thousand miles of solar atmosphere.

†2. An integral part or element; a constituent, component: see A. 1. *Obs.*

1658-9 *Burton's Diary* (1828) III. 557 We must, therefore, be very circumspect in the materials of the other House. Let us, therefore, look to the integrals in this building. *a*1677 HALE *Prim. Orig. Man.* I. i. 21 Anatomy can give us the Position..of all the several Integrals of the Body of Man or Beast. *Ibid.* IV. viii. 372 They all make up a most magnificent and stately Temple, and every Integral thereof full of wonder. 1680 BAXTER *Answ. Stillingfl.* 82 Doth not every good Law and Rule distinguish between *Essentials*, *Integrals*, and *Accidents*, and make more Accidents than are Integrals, and Integrals, than are Essentials? 1685—— *Paraphr. N.T., 1 Cor.* xii. 14 So wise, as besides the Essentials of Christianity, to know all the Integrals.

†3. *Gram.* Applied by Wilkins to those words or parts of speech which of themselves express a distinct notion, as distinct from those which express relations between notions. *Obs.*

1668 WILKINS *Real Char.* III. i. §2 By Integrals or Principal words, I mean such as signifie some entire thing or notion. 1688 R. HOLME *Armoury* III. 251/2. 1845 STODDART *Gram.* in *Encycl. Metrop.* I. 124/1 Wilkins includes under the term *integral* both the noun and the verb.

4. *Math.* a. (of a function): That quantity of which the given function is the differential or differential coefficient (corresponding to the fluent of a given fluxion in Newton's method); so called because it may be regarded as the whole sum of a series of consecutive values assumed by an infinitesimal function (differential) of the variable while the latter changes continuously from any one value to any other. When such *limits* of variation are fixed or determinate, it is called a *definite integral*: see quot. 1877. An integral is denoted by the sign ∫ (originally a long *s*, for L. *summa* sum); in a definite integral the inferior and superior limits are indicated at the bottom and top of the sign, thus $\int_a^b$. (Formerly sometimes applied to the quantity from which a given 'finite difference' or 'increment' is derived, as in quot. 1763; cf. quot. 1831 s.v. INTEGRATE *v.* 3.) b. (of a differential equation, or a system of such equations): An equation or system of equations from which the given equation or system can be derived by differentiation. (In relation to a system of equations, any quantity which that system makes constant is sometimes called its integral.)

1727-41 CHAMBERS *Cycl.* s.v. *Calculus*, *fydx* will denote the sum, or integral of the differential *ydx*. 1763 EMERSON *Increments* p. vii, Some Increments have no integrals, but what infinite series afford. 1802 WOODHOUSE in *Phil. Trans.* XCII. 90 The integral or fluent of *Px* is that function from which *Px* is derived. 1877 B. WILLIAMSON *Int. Calc.* (ed. 2) vi. §91 The expression $\int_{x_0}^{X} \phi(x)dx$ is called the *definite integral* of $\phi(x)dx$ between the limits x_0 and X, and represents the limit of the sum of the infinitely small elements $\phi(x)dx$, taken between the proposed limits... In contradistinction, the name *indefinite integrals* is often applied to integrals..in which the form of the function is merely taken into account, without regard to any assigned limits. 1881 MAXWELL *Electr. & Magn.* I. 27 The double integrals destroy each other.

integralism (ɪn'tegrəlɪz(ə)m). [f. INTEGRAL *a.* 1 + -ISM.] A name sometimes adopted for a philosophical or political, etc., doctrine or theory which involves the concept of an integral whole.

1871 S. P. ANDREWS *Primary Synoptis Universology* xii. 178 Integralism is the new and final philosophy; the all-sided and complete reconciliation of all possible sectarian divisions in all spheres; not as extinguishing individual differences, but as softening, co-ordinating, and utilizing them. 1939 *Times* 18 Feb. 17/4 The counterpart of the Nazi movement—Integralism—has its supporters. 1964 D. G. MACRAE in J. H. Plumb *Crisis in Humanities* 127 By 'integralism' is meant a set of beliefs that involve one in claiming that social structures form a 'seamless web' in which every institution and social position is linked to every other and is part of a unique, interconnected configuration. 1969 D. M. SMITH *Italy* (ed. 2) VII. xxi. 255 The Rome party congress of 1906 had recorded a victory for 'integralism'.. yet revolutionary socialism continued to spread.

integralist (ɪn'tegrəlɪst), *sb.* [f. INTEGRAL *a.* 1 + -IST.] One who favours a policy or doctrine of integralism. Also *attrib.* or as *adj.* Cf. INTEGRIST.

1907 I. ZANGWILL *Ghetto Comedies* 412 Russia is to be saved..by the Integralists, who alone maintain the purity of the Social Revolutionary programme. 1922 *Glasgow Herald* 23 Jan. 11 The so-called 'integralists' who held that every good Catholic should see eye to eye with the Holy Father in everything. 1930 *Times Educ. Suppl.* 3 May 197/2 The schools or coteries of the last few decades—the symbolists, ..integralists,..and so forth. 1938 *Sun* (Baltimore) 12 May 1/1 To smash completely the outlawed integralist Greenshirt organization. 1967 C. SETON-WATSON *Italy from Liberalism to Fascism* vii. 267 His [*sc.* Ferri's] contribution to the restoration of party unity was..inspired by the 'integralist' formula of 'Neither to right nor to left, but straight ahead'. *Ibid.* xi. 437 So far from being an integralist, he had during his years at Bologna come under suspicion of modernist sympathies. 1968 R. K. MERTON *Social Theory* (rev. ed.) III. xv. 529 He [*sc.* Sorokin] adopts an 'integralist' conception of truth.

integrality (ɪntɪ'grælɪtɪ). [prob. ad. med.L. **integrālitās*, f. *integrālis* INTEGRAL: see -ITY; cf. F. *integralité* (Cotgr.), It. *integralità* 'a whole entire masse' (Florio, 1611).] The condition of being integral (see prec. A. 3); wholeness, entirety, completeness: = INTEGRITY 1.

1611 COTGR., *Integralité*, integralitie, wholeness. 1627 DONNE *Serm.* cviii. IV. 476 Here is the latitude, the Totality, the Integrality of the means of salvation. 1651 BIGGS *New Disp.* 239 What God made and ordained in its integrality. 1728 EARBERY tr. *Burnet's State Dead* I. 87 There the Integrality that gives Denomination to the Species is to be found. 1838 GLADSTONE *State in Rel. Ch.* (1839) 173 Establishing the independence and integrality of the nation as a collective body. 1853 *Tait's Mag.* XX. 265 The maintenance of the Empire of the Sultans in its integrality is necessary.

integrally ('ɪntɪgrəlɪ), *adv.* [f. as prec. + -LY². Cf. med.L. *integrāliter* entirely, wholly.] a. In an integral manner; as a whole, in its entirety; completely, entirely, wholly.

1471 RIPLEY *Comp. Alch.* II. v. in Ashm. (1652) 136 When the Erth ys integrally yncynerat. 1649 JER. TAYLOR *Gt. Exemp.* II. Disc. viii. 74 We should choose vertue..and pursue it integrally and make it the businesse of our lives. 1816 BENTHAM *Chrestom.* App. ii. Wks. 1843 VIII. 188 The only part of speech which is perfectly simple in its import, and at the same time integrally significant, is the noun-substantive. 1850 LYNCH *Theo. Trin.* x. 200 The more an individual is integrally a man, the more may he know of man.

b. As an integral whole: see INTEGRAL A. 1.

*a*1680 CHARNOCK *Attrib. God, God a Spirit* (1682) 116 Whatsoever is compounded of many parts, depends either essentially or integrally upon those parts. 1936 COLVIN & STANLEY *Turning & Boring Pract.* ix. 131 Gisholt lathes have been materially changed in design and construction: Headstocks are now cast integrally with the bed. 1952 S. E. RUSINOFF *Forging & Forming Metals* iv. 55 Small steam hammers have the anvil and frame cast integrally, but large hammers have a separate anvil. 1972 *Sci. Amer.* Jan. 49/2 (Advt.), An integral peak-reading meter lets you optimize record level without using a scope. Options include a 5 to 30 foot loop adaptor, an interrupting voice channel, and an inverter for 12 or 28 VDC..all integrally mounted.

integrand ('ɪntɪgrænd). *Math.* [ad. L. *integrand-us*, gerundive of *integrāre* (see INTEGRATE *v.*): see -AND².] An expression that is to be integrated.

1897 H. F. BAKER *Abel's Theorem* xviii. 561 The integrand of the Abelian integral *u*, is single-valued on the Riemann surface. 1937 *Proc. Cambr. Philos. Soc.* XXXIII. 374 It is natural to approximate by expanding the integrand in powers of *x*. 1968 FOX & MAYERS *Computing Methods for Scientists & Engineers* ix. 178 We illustrate this process..by considering the computation of the integral $I = \int_0^1 (0{\cdot}92 \cosh x - \cos x)\,dx$... Table 9.3 gives the tabulated values of the integrand and its differences.

integrant ('ɪntɪgrənt), *a.* (*sb.*) [ad. L. *integrānt-em*, pr. pple. of *integrāre*: see INTEGRATE *v.* Cf. F. *intégrant* (1690 in Hatz.-Darm.).]

Of parts: Making up or contributing to make up a whole, constituent, component; essential to the completeness of the whole: = INTEGRAL A. 1.

integrant parts, in F. *parties intégrantes*, is etymologically more correct than the usual *integral parts*.

1637 GILLESPIE *Eng. Pop. Cerem.* III. viii. 186 The Church consisteth of two integrant parts, *viz.* Pastors and Sheepe. 1651 CHARLETON *Ephes. & Cimm. Matrons* II. (1668) 38 An Appendix, or rather an integrant part of his fellow. 1727 [see INTEGRAL A. 1]. 1773 HORSLEY in *Phil. Trans.* LXIV. 246 Imagine the integrant particles of A to be equal in quantity of matter and bulk..to the integrant particles of B severally. 1794 BURKE *Rep. Lords' Jrnls.* Wks. 1842 II. 598 These judges..are no integrant and necessary part of that court. 1836-7 [see INTEGRAL A. 2]. 1849 KEMBLE *Saxons in Eng.* II. II. vi. 235 There is no reason to suppose that the ceorls did not form an integrant part of the shire-moot. 1875 H. C. WOOD *Therap.* (1879) 91 Iron constitutes a necessary integrant portion of the red blood-corpuscles.

B. *sb.* That which integrates; a component.

1824 COLERIDGE *Aids Refl.* (1848) I. 261 It is the differentia of immortality, of which the assimilative power of faith and love is the integrant, and the life in Christ the integration. 1827 COLEBROOKE *Misc. Ess.* (1837) I. 389 The aggregate and its integrants are utterly different.

integraph ('ɪntɪgrɑ:f, -æ-). [ad. F. *intégraphe* (B. Abdank-Abakanowicz 1885, in *La Lumière électr.* 17 Oct. 111/1), f. *intégral* INTEGRAL *a.* and *sb.*, *intégrer* to INTEGRATE *v.*: see -GRAPH.] Any of various kinds of apparatus which mechanically draw a curve representing the variation in the integral of some given curve or function as a limit or parameter varies.

1885 *Min. Proc. Inst. Civil Engin.* LXXXII. 162 The machines that he [*sc.* B. Abdank-Abakanowicz] had called briefly 'Integraphs' traced these curves mechanically. 1902 *Encycl. Brit.* XXX. 582/1 While an integrator determines the value of a definite integral, hence a mere constant, an integraph gives the value of an indefinite integral, which is a function of *x*. 1927 *Jrnl. Franklin Inst.* CCIII. 64 Mechanical integrators usually evaluate the definite integral between given fixed limits... The present machine, which we have called an integraph, since it records the result of an integration in the form of a plot or graph, has therefore been developed to evaluate $F(x)$ against x from the expression $F(x) = \int_a^x f_1(x)f_2(x)dx$ where f_1 and f_2 are known functions, formal or empirical. 1931 *Ibid.* CCXII. 77 The Photo-Electric Integraph..extends the range of practical solution of mathematical problems through its usefulness in the evaluation of integrals having a variable parameter within the integrand. 1961 S. FIFER *Analogue Computation* IV. xxv. 968 The development of the harmonic analyzer is closely associated with the development of two devices, (1) the planimeter,..and (2) the integraph, which draws a graph of the indefinite integral of a function.

integrate ('ɪntɪgrət), *a.* [ad. L. *integrāt-us*, pa. pple. of *integrāre*: see next.] 1. Made up, as a whole, of separate (integrant) parts, composite; belonging to such a whole; complete, entire, perfect: = INTEGRAL A. 2, 3.

1485 [implied in INTEGRATELY]. 1599 B. JONSON *Cynthia's Rev.* II. iv, Exceeding wittie and integrate [said of a joke]. 1697 tr. *Burgersdicius his Logick* I. xiv. 46-7 An Integral Whole is that which has Part out of Part... This Whole termed Mathematical; because Quantity is of Mathematical Consideration: Vulgarly, Integral, more properly Integrate. 1836-7 [see INTEGRAL A. 2]. 1837-8 SIR W. HAMILTON *Logic* iii. (1866) III. 51 We may consider Logic either as a universal, or as an integrate whole. 1888 J. T. GULICK in *Linn. Soc. Jrnl.* XX. 249/2 A transition from Integrate Fecundity to Segregate Fecundity usually takes place at a point in the history of evolution intermediate between the formation of an incipient variety and a strongly marked species. 1898 *Daily News* 20 Apr. 5/5 The people of Spain are for the war to keep integrate their possessions in Cuba.

2. *Psychol.* Of, pertaining to, or designating people with strong eidetic imagery (particularly in the theories of Jaensch).

1930 O. OESER tr. *Jaensch's Eidetic Imagery* III. 93 In these individuals functions that later are separate still interpenetrate one another to a high degree and influence each other. That is why we call them 'integrate'. The

TAB 28

WORDS & PHRASES

Judicially Defined in Canadian Courts and Tribunals
Termes et locutions définis par les tribunaux canadiens

VOLUME 4
F-I

CARSWELL

As I have said, the BPQ itself is the prerequisite to obtaining the annual licence and quota; without being allotted a BPQ the farmer is prohibited from producing tobacco on any land. A farmer wishing to produce tobacco would therefore have first to acquire a BPQ. Furthermore, in the course of commerce BPQ's are "traded"; they are transferred for valuable consideration from one farmer to another as a thing of commercial value. If that type of transaction takes place in the market, although the "thing" bought and sold does not fit into the ordinary concept of property (because it appears to be unique), the common law is quite capable of embracing it as a form of property; the categories of property are not perpetually closed. It is a state of eligibility which entitles the holder to apply for the annual licence and (as of 1978) the marketing quota.

The character of the BPQ is clouded by reason of the fact that the regulations do not contemplate that the "owner" of the BPQ can transfer it to a purchaser. The owner must apply to the local board, jointly with the purchaser, to allot the BPQ to the purchaser. Clearly the owner does not possess full rights of ownership; he can only apply to the local board to cancel his BPQ and to allot the same thing or its counterpart to the purchaser. Again, however, on well-settled principles, so long as the conditions specified in the regulations are met, I am in no doubt that the vendor and the purchaser could obtain an order from the Court compelling the local board to comply. Nevertheless I view this right as a form of chose in action which is personal property of the purchaser once enforced. There is no evidence that the local board has in practice capriciously refused to effect the transfer upon proper application and this result is fortified by the fact that BPQ's are regularly and successfully traded in the market.

I conclude, therefore, that the BPQ is a form of personalty, albeit of an unusual kind. In my opinion it falls within the definition of "intangible" in the *Personal Property Security Act* and s. 2 of the Act embraces it.

(Personal Property Security)

National Trust Co. v. Bouckhuyt (1987), 44 R.P.R. 264 at 292, 293, 39 D.L.R. (4th) 60, 7 P.P.S.A.C. 113, 59 O.R. (2d) 556 (H.C.) Henry J.

♦ The basic issue is whether or not there can be a security interest in the R.R.S.P. or the letter of direction or the money deposited in the R.R.S.P. (all sometimes collectively referred to as the "item").

. . .

The item is not a document of title because the item does not purport to cover goods. It is not an instrument because it is either money itself or is not an item that in the ordinary course of business is transferred by delivery. It is not a security because it is not one of the items clearly defined in s. 1(w) [of the *Personal Property Security Act*, R.S.O. 1970, c. 344]. It is not chattel paper because it does not refer to specific goods.

The definition of "intangible" [in *Personal Property Security Act*, R.S.O. 1970, c. 344, s. 1(m)] is wide enough to include all of the items including the money itself.

(Personal Property Security)

Berman, Re (1979), 30 C.B.R. (N.S.) 164 at 166, 167, 24 O.R. (2d) 79, 8 B.L.R. 134 at 137, 97 D.L.R. (3d) 379 (H.C.) Steele J.

Saskatchewan

♦ . . . an account is not a type of collateral mentioned in s. 24 [of *The Personal Property Security Act*, S.S. 1979-80, c. P-6.1]. This is understandable considering all the collateral referred to falls into the category of tangibles. An account is intangible. Moreover, s. 2(b) and (v) define "account" and "intangible" respectively, so these words have definite meanings. Had the legislature intended s. 24 to include these items, precise terminology would have been used.

(Personal Property Security)

Triple T Enterprises (1986) Ltd. (Trustee of) v. Sherwood Credit Union (1989), 74 C.B.R. (N.S.) 240 at 242, 9 P.P.S.A.C. 106, 78 Sask. R. 288 (Q.B.) Halvorson J.

INTANGIBLE INJURY

See AGGRAVATED DAMAGES.

INTEGRAL

See also ACCESSORY; VITAL.

Alberta

♦ The issue . . . is whether or not the crane units are an integral part of a process [under the *Municipal Tax Act*, R.S.A. 1980, c. M-1, s. 1(n)(iii)], and attachment to the land is only one of several considerations.

. . .

The Shorter Oxford Dictionary defines "integral" as including:

> Of or pertaining to a whole . . . Belonging to or making up an integral whole; constituent . . . necessary to the completeness of the whole . . .

Webster's New Collegiate Dictionary defines "integral" as including:

Essential to completeness; constituent; formed as a unit with another part; lacking nothing essential.

". . . the two cranes in the case before me form an integral part of the operational unit designed for use in processing logs delivered to the storage site . . .

(Taxation; Municipal Law)

British Columbia Forest Products Ltd. v. Alberta (Assessment Appeal Board) (1986), 45 Alta. L.R. (2d) 85 at 88, 89 (Q.B.) Purvis J.

Ontario

♦ In [*Decision No. 921/89* (1990), W.C.A.T.R. 207 (Ont. W.C.A.T.)], the panel argued that "integral" as opposed to "accessory" might not tell us if someone was or was not a worker.

They wrote that . . .

A casual reading of *Decision No. 154* [(1986), 1 W.C.A.T.R. 208 (Ont. W.C.A.T.)] might lead one to conclude that the only question to be asked is whether the person in question is an "integral part" of a business. This, of course, cannot be the case. The Concise Oxford Dictionary of Current English . . . defines "integral" as "of, or necessary to the completeness of, a whole". If one merely asks whether the person's work is an integral part of the business, one has generally provided the answer through the phrasing of the question because the result or answer is a foregone conclusion. It would be a strange business person indeed who retained the services of someone who was not integral to the business. Very few successful entrepreneurs retain the services of persons who are not integral to the business and, if they do so on a regular basis, they are not successful for long. In dealing with relationships within a sophisticated market economy, merely asking whether the work is "integral" is somewhat superficial.

Nor is it sufficient to ask whether the work is "integral" as opposed to "accessory". Attempting to distinguish between "integral" and "accessory" appears to this panel to offer little significant assistance, since "accessory" work may well be necessary to the completeness of the business operation and therefore may fit within the definition of "integral". In most business operations, a service is either necessary, or it is not.

Furthermore, just as "integral" work . . . may be performed by either a "worker" or "independent operator," so "accessory" work may be performed by an "independent operator" or "worker."

(Employment Law)

Decision No. 177/91 (1991), [1992] 19 W.C.A.T.R. 241 at 255 (Ont.) Shartal (concurring)

♦ The Concise Oxford Dictionary of Current English (Oxford: Oxford University Press) defines "integral" as "of, or necessary to the completeness of, a whole". If one merely asks whether the person's work is an integral part of the business, one has generally provided the answer through the phrasing of the question because the result or answer is a foregone conclusion. It would be a strange business person indeed who retained the services of someone who was not integral to the business. Very few successful entrepreneurs retain the services of persons who are not integral to the business, and, if they do so on a regular basis, they are not successful for long. In dealing with relationships within a sophisticated market economy, merely asking whether the work is "integral" is somewhat superficial.

Nor is it sufficient to ask whether the work is "integral" as opposed to "accessory". Attempting to distinguish between "integral" and "accessory" appears to this panel to offer little significant assistance, since "accessory" work may well be necessary to the completeness of the business operation and therefore may fit within the definition of "integral". In most business operations, a service is either necessary, or it is not.

Futhermore, just as "integral" work (such as pizza computer consulting and repairs . . .) may be performed by either a "worker" or "independent operator", so "accessory" work may be performed by an "independent operator" or "worker."

(Employment Law)

Decision No. 921/89 (1990), 14 W.C.A.T.R. 207 at 218 (Ont.) Strachan (Vice-Chair), Cook and Nipshagen

INTEGRAL AND SUBSTANTIAL PART OF THE EMPLOYER'S OPERATION

British Columbia

♦ The four criteria required by s. 85(3) [*Industrial Relations Act*, R.S.B.C. 1979, c.212] were interpreted by the Council in *Lafarge Canada Inc., Western Region* [IRC No. C156/88] . . . as follows (at pp. 9-11):

The third criteria is whether the work is an "integral and substantial part of the employer's operation". The focus of the third criteria is on the nature of the employer's operation and the significance of the work performed by members of the trade union to that operation . . . Once the

TAB 29

BLACK'S LAW DICTIONARY®

Definitions of the Terms and Phrases of
American and English Jurisprudence,
Ancient and Modern

By

HENRY CAMPBELL BLACK, M. A.

SIXTH EDITION

BY

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WEST PUBLISHING CO.
1990

year, and is amortized over the period benefited, not to exceed forty years. *See* Amortization; Intangible property.

Intangible drilling costs. Costs incurred incident to and necessary for the drilling and preparation of oil or gas wells for production that have no salvage value. Under I.R.C. § 263, such costs may be deducted in the year paid rather than capitalized and depreciated.

Intangible property. As used chiefly in the law of taxation, this term means such property as has no intrinsic and marketable value, but is merely the representative or evidence of value, such as certificates of stock, bonds, promissory notes, copyrights, and franchises. *See* Intangible asset. *Compare* Tangible property.

Intangibles. Property that is a "right" such as a patent, copyright, trademark, etc., or one which is lacking physical existence; such as goodwill. *See* Amortization; General intangibles; Intangible asset.

Intangibles tax. In certain states such tax is imposed on every resident for right to exercise following privileges: (a) Signing, executing and issuing intangibles; (b) selling, assigning, transferring, renewing, removing, consigning, mailing, shipping, trading in and enforcing intangibles; (c) receiving income, increase, issues and profits of intangibles; (d) transmitting intangibles by will or gift or under state laws of descent; (e) having intangibles separately classified for taxes.

Intangible value. Nonphysical value of such assets as patents, copyrights, goodwill.

Integer /íntəjər/. Lat. Whole; untouched. *Res integra* /ríyz íntəgrə/ means a question which is new and undecided.

Integral. Term in ordinary usage means part or constituent component necessary or essential to complete the whole. Matczak v. Secretary of Health, Ed. and Welfare, D.C.N.Y., 299 F.Supp. 409, 413.

Integrated agreement. *See* Integrated contract; Integrated writing.

Integrated bar. The act of organizing the bar of a state into an association, membership in which is a condition precedent to the right to practice law. Integration is generally accomplished by enactment of a statute conferring authority upon the highest court of the state to integrate the bar, or by rule of court in the exercise of its inherent power. Integration of Bar Case, 244 Wis. 8, 11 N.W.2d 604.

A "unified bar" or an "integrated bar" is qualitatively different from a "voluntary bar"; membership in a unified or integrated bar is compulsory, whereas membership in a voluntary bar is voluntary, and in effect, one is not at liberty to resign from a unified bar, for, by so doing, one loses the privilege to practice law. Petition of Chapman, 128 N.H. 24, 509 A.2d 753, 756.

Integrated contract. Contract which contains within its four corners the entire agreement of the parties and parol evidence tending to contradict, amend, etc., is inadmissible; the parties having made the contract the final expression of their agreement.

An agreement is integrated where the parties thereto adopt the writing or writings as the final and complete expression of the agreement and an "integration" is the writing or writings so adopted. Wilson v. Viking Corporation, 134 Pa.Super. 153, 3 A.2d 180, 183. *See* Integrated writing.

Partial integration. Such exists where only a certain part of transaction is embodied in writing and the remainder is left in parol. Schwartz v. Shapiro, 299 C.A.2d 238, 40 Cal.Rptr. 189, 197.

Integrated property settlements. Contract commonly made on separation or divorce of spouses wherein the parties intend that the contract become part of the court order, decree or judgment.

Integrated writing. The writing or writings adopted by the parties to an agreement as the final and complete expression of the agreement. Restatement, Second, Contracts, § 209. Pettett v. Cooper, 62 Ohio App. 377, 24 N.E.2d 299, 302. *See also* Integrated contract.

Integration. The act or process of making whole or entire. Bringing together different groups (as races) as equals.

Horizontal integration. Combination of two or more businesses of the same type such as manufacturers of the same type of products. Such combinations may violate antitrust laws under certain conditions. *See also* Merger.

Vertical integration. Combination of two or more businesses on different levels of operation such as manufacturing, wholesaling and retailing the same product. *See also* Merger.

Integrity. As used in statutes prescribing the qualifications of public officers, trustees, etc., this term means soundness or moral principle and character, as shown by one person dealing with others in the making and performance of contracts, and fidelity and honesty in the discharge of trusts; it is synonymous with "probity," "honesty," and "uprightness."

Intelligibility. In pleading, the statement of matters of fact directly (excluding the necessity of inference or argument to arrive at the meaning) and in such appropriate terms, so arranged, as to be comprehensible by a person of common or ordinary understanding. "Each averment of a pleading shall be simple, concise, and direct." Fed.R. Civil P. 8(e).

Intemperance. A lack of moderation. Habitual intemperance is that degree of intemperance from the use of intoxicating liquor which disqualifies the person a great portion of the time from properly attending to business, or which would reasonably inflict a course of great mental anguish upon an innocent party. Habitual or excessive use of liquor. *See* Intoxication.

Intend. To design, resolve, propose. To plan for and expect a certain result. To apply a rule of law in the nature of presumption; to discern and follow the probabilities of like cases. *See also* Intent.

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

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

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

Superior Court File No.: CV-10-414302CP

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, et al.	- and -	SINO-FOREST CORPORATION, et al.
Plaintiffs		Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE OBJECTORS

(Motion for settlement approval returnable February 4, 2013)

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