Court of Appeal File No.: C56961
Court of Appeal File No.: M42453
S.C.J Court File No: CV-12-9667-00-CL

COURT OF APPEAL FOR ONTARIO

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 OF SINO-FOREST CORPORATION

Court of Appeal File No.: C56961
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COURT OF APPEAL FOR ONTARIO

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)

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Court of Appeal File No.:
Court of Appeal File No.: M42404
Court of Appeal File No.: M42399
S.C.J. Court File No.: CV-12-9667-00CL

COURT OF APPEAL FOR ONTARIO

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Court of Appeal File No.:
Court of Appeal File No.: M42404
Court of Appeal File No.: M42399
S.C.J. Court File No.: CV-11-431153-00CP

COURT OF APPEAL FOR ONTARIO

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Proceeding under the *Class Proceedings Act, 1992*

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INDEX

TAB 1

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IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF a Plan of Compromise and Arrangement involving Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 4446372 Canada Inc. and 6932819 Canada Inc., Trustees of the Conduits Listed In Schedule "A" Hereto

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[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. Re-calculated 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 -- including 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 contractual level -- may have had some involvement with the particular dispute. Here, however, the disputes that are the subject-matter of the impugned releases are not simply "disputes between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

83 Nor is the decision of this Court in the *NBD Bank* case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly-owned subsidiary of Dofasco. The Bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma

CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors." Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the Bank. On appeal, he argued that since the Bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process -- in short, he was personally protected by the CCAA release.

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

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

TAB 2

Case Name:

Cavanaugh v. Grenville Christian College

Between
Lisa Cavanaugh, Andrew Hale-Byrne, Richard Van Dusen, Margaret Granger and Tim Blacklock, Appellants, and Grenville Christian College, the Incorporated Synod of the Diocese of Ontario, Charles Farnsworth, Betty Farnsworth, Judy Hay the Executrix for the Estate of J. Alastair Haig and Mary Haig, Respondents

[2013] O.J. No. 1007

2013 ONCA 139

32 C.P.C. (7th) 1

2013 CarswellOnt 2500

Docket: C55627

Ontario Court of Appeal
Toronto, Ontario
D.R. O'Connor A.C.J.O.,[1] D.H. Doherty and

R.A. Blair JJ.A.

Heard: December 20, 2012.
Judgment: March 8, 2013.

(95 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Certification -- Procedure -- Pleadings -- Striking out pleadings or allegations -- Grounds -- Failure to disclose a cause of action or defence -- Appeals -- Courts -- Jurisdiction -- Provincial and territorial courts -- Superior courts -- Courts of appeal -- Appeal by the plaintiffs from a motion judge's refusal to certify their action as a class action dismissed -- The plaintiffs alleged they had been abused at a residential religious school operated by the defendants -- Appeal from motion judge's dismissal of plaintiffs' claim against the Diocese on grounds the pleading failed to disclose a cause of action

was properly before the Court of Appeal -- However, the appeal from the motion judge's refusal to certify the action against the remaining defendants on grounds a class proceeding was not the preferable procedure should have been brought before the Divisional Court.

Tort law -- Negligence -- Duty and standard of care -- Duty of care -- Fiduciary duty -- Appeal by the plaintiffs from a motion judge's decision dismissing their action against the defendant Diocese dismissed -- The plaintiffs alleged they had been abused at a residential religious school operated by the defendants -- Motion judge dismissed their claim against the Diocese, finding the pleadings failed to disclose a cause of action -- The pleading was devoid of any material facts substantiating the allegations the Diocese was liable in negligence or breach of fiduciary duty for the actions of the school's headmasters, who also happened to be priests.

Appeal by the plaintiffs from a motion judge's refusal to certify their class action against the defendants and dismissal of their action against the defendant Diocese. The plaintiffs had all been students at Grenville Christian College, a private religious school. The plaintiffs alleged they and other residential students at the school were physically and psychologically abused. They brought actions in negligence, assault, battery, intentional infliction of mental suffering and breach of fiduciary duty against the school, its two headmasters (who were Anglican priests) and the Incorporated Synod of the Diocese of Ontario. The Diocese was responsible for the administration of Anglican churches and related activities in the area in which the school was located. The motion judge found the claim against the Diocese did not reveal a cause of action and ordered the action against the Diocese dismissed. With respect to the other defendants, the motion judge found the appellants failed to show a class proceeding was the preferable procedure and dismissed the motion to certify with leave to apply to continue the proceedings in an amended form. The plaintiffs appealed both parts of the motion judge's order. A preliminary issue related to the court's jurisdiction to hear the appeal, as the appeal of the refusal to certify the proceedings against the defendants, other than the Diocese, was to the Divisional Court, not the Court of Appeal. The parties argued the court should exercise its discretion to join the appeal against the other defendants with the appeal against the Diocese.

HELD: Appeal from the refusal to certify the action against the remaining respondents was transferred to the Divisional Court; appeal from the order dismissing the action against the Diocese dismissed. The motion judge's decision to dismiss the action against the Diocese was not grounded in the Class Proceedings Act but rather was grounded in the court's inherent power to dismiss an action when the claim did not disclose a reasonable cause of action. The appeal from that decision was properly before the Court of Appeal as opposed to the Divisional Court. Regarding the claims against the Diocese itself, the pleading failed to show any cause of action in negligence or breach of fiduciary duty. The diocese's relationship to its priests did not automatically create a duty of care by the diocese to persons who engaged with those priests. The existence of any duty had to be determined by reference to the specific facts of the case. Here, the pleadings were devoid of material facts substantiating the allegations the Diocese was liable for the actions of the school's

headmasters, who also happened to be priests. There was no allegation of a direct relationship between the Diocese and the plaintiffs, between the Diocese and the school, or between the Diocese and the headmasters insofar as the operation of the school was concerned. Given the facts as pleaded failed to disclose a duty of care to the plaintiffs in negligence, it followed the fiduciary duty claim also failed. No material facts were pleaded to suggest the plaintiffs were in any way under the Diocese's power or discretion while attending the school. With respect to the motion judge's refusal to certify the action against the remaining defendants, the parties did not make out a case for joinder of the appeals. The appeals raised distinct issues. The appeal from the dismissal of the claim against the Diocese raised a straightforward pleadings issue. Although that issue arose in the context of a certification proceeding, it was not a certification issue in the sense it engaged any law or procedure particular to certification of class proceedings. On the other hand, the issues raised on the appeal brought against the other defendants engaged the very core of the certification process. There was no risk of inconsistent results and very little overlap in the matters to be addressed on the two appeals.

Statutes, Regulations and Rules Cited:

Class Proceedings Act 1992, S.O. 1992, c. 6, s. 5(1), s. 5(1)(a), s. 5(1)(d), s. 6(1)(b), s. 6(2), s. 7, s. 30, s. 30(1), s. 30(2), ss. 30(6)-(11)

Courts of Justice Act, R.S.O. 1990, c. C.43

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 21, Rule 21.01(1)(b)

Appeal From:

On appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated May 23, 2012, with reasons reported at 2012 ONSC 2995.

Counsel:

Kirk Baert, Russell Raikes, Sean O'Donnell, Michael Saelhof Loretta Merritt and Christopher Haber, for the appellants.

Steven Steiber and Linda Phillips-Smith, for the respondent the Incorporated Synod of the Diocese of Ontario.

Geoffrey Adair and Alexa Suzenko, for the respondents
Grenville Christian College, Charles Farnsworth and Judy Hay
the Executrix for the Estate of J. Alastair Haig.

The judgment of the Court was delivered by

D.H. DOHERTY J.A.:--

I

OVERVIEW

1 The appellants brought a motion to certify their action against the respondents as a class proceeding pursuant to the *Class Proceedings Act 1992*, S.O. 1992, c. 6 ("*CPA*"). The motion judge refused to certify the action against any of the respondents. In respect of one of the respondents, the Incorporated Synod of the Diocese of Ontario (the "Diocese"), the motion judge held that the claim as framed did not reveal a cause of action. He ordered the action against the Diocese "immediately dismissed". With respect to the other respondents, the motion judge found that the appellants failed to show that a class proceeding was the preferable procedure and dismissed the motion to certify with leave to apply under s. 7 of the *CPA* to continue the proceedings in an amended form.

2 The appellants appealed from both parts of the motion judge's order.

3 Appellate jurisdiction in proceedings under the *CPA* is divided between the Court of Appeal and the Divisional Court. Some appeals go to the Divisional Court under s. 30 of the *CPA* and others go to this court. The general appeal power provisions in the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*") are also relevant when the specific provisions of s. 30 have no application.

4 All parties to this appeal agreed that the appeal from the order refusing to certify the proceedings as against the respondents other than the Diocese was properly to the Divisional Court under s. 30(1) of the *CPA*. The parties also agreed, however, that this court did have jurisdiction under s. 6(1)(b) of the *CJA* to hear the appeal from the order dismissing the claim against the Diocese. The parties submitted that the court should exercise its discretion under s. 6(2) of the *CJA* to join the appeal against the other respondents with the appeal against the Diocese.

5 After hearing oral argument on the jurisdictional issues, the court reserved on the question of whether it had jurisdiction to hear the appeal from the order dismissing the claim against the Diocese. The court further indicated that, assuming it did have jurisdiction to hear that appeal, it would not exercise its jurisdiction under s. 6(2) to hear the appeal against the refusal to certify the claim against the other respondents. The court ordered that appeal transferred to the Divisional Court. The court then heard the merits of the appeal from the order dismissing the claim against the Diocese and reserved judgment.

6 For the reasons that follow, I would hold that this court does have jurisdiction to hear the appeal from the order dismissing the action against the Diocese. I would dismiss that appeal.

7 I will also, in accordance with the court's endorsement during the oral hearing, provide reasons

for declining to exercise our jurisdiction in favour of hearing the appeal from the refusal to certify the claim against the other respondents.

II

THE PROCEEDINGS IN THE SUPERIOR COURT

8 Lisa Cavanaugh, Andrew Hale-Byrne, Richard Van Dusen, Margaret Granger and Tim Blacklock (the "appellants") were all students at Grenville Christian College, a private religious school in Brockville, Ontario. The school is no longer in operation. They allege that they and other residential students at the school were physically and psychologically abused over a period spanning several decades. They brought actions in negligence, assault, battery, intentional infliction of mental suffering and breach of fiduciary duty against Grenville Christian College, Charles Farnsworth ("Father Farnsworth"), the estate of J. Alastair Haig ("Father Haig") and the Diocese (collectively the "respondents").[2] Both Father Farnsworth and Father Haig were headmasters at the school. The Diocese is responsible for the administration of Anglican churches and related activities in the Brockville area.

9 The appellants moved to certify the action under the *CPA* as a class proceeding. The motion judge dismissed the motion against all the respondents. He did so, however, for two quite different reasons and he made two very different orders. He refused to certify the action against the Diocese because the claim as pleaded did not allege a cause of action as required under s. 5(1)(a) of the *CPA*. In contrast, he refused to certify the claim against the other respondents because in his view the appellants had not demonstrated that a class proceeding was "the preferable procedure" as required under s. 5(1)(d) of the *CPA*.

10 The different reasons for refusing to certify the action against the Diocese compared with the other respondents are reflected in the terms of the order. In para. 1 of his order, the motion judge "immediately dismissed the action" against the Diocese. In paras. 2 and 3, he dismissed the appellants' application for certification against the other respondents, but allowed the appellants to apply for an order under s. 7 of the *CPA* for a continuation of the action.

III

THE APPEAL AGAINST THE DIOCESE

A. THE JURISDICTIONAL ISSUE

11 Appeals are creatures of statute: see *R. v. Meltzer*, [1989] 1 S.C.R. 1764, at p. 1773; *Canadian Broadcasting Corporation v. Ontario*, 2011 ONCA 624, 107 O.R. (3d) 161, at para. 16. This court can hear only appeals authorized by statute.

12 In civil matters, most appeals are brought to this court under s. 6(1)(b) of the *CJA*. Section

6(1)(b) provides that:

> An appeal lies to the Court of Appeal from, a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19(1)(a) or an order from which an appeal lies to the Divisional Court under another Act[.]

13 The order dismissing the action against the Diocese is a final order. It is not an order "referred to in clause 19(1)(a)". Consequently, an appeal lies to this court from the order dismissing the action against the Diocese unless "an appeal lies to the Divisional Court under another Act". The *CPA* is the only other Act of possible application.

14 Section 30 of the *CPA* contains various appeal provisions governing appeals in the class action context. Under s. 30, most appeals go to the Divisional Court, but some come to this court. Sections 30(1) and (2) specifically address orders made granting or refusing a motion for certification as a class proceeding. For present purposes, s. 30(1) is relevant. It provides in part:

> A party may appeal to the Divisional Court from an order refusing to certify a proceeding as a class proceeding and from an order decertifying a proceeding.

15 A motion judge must refuse certification unless the statutory preconditions to certification set out in s. 5(1) of the *CPA* are met. Section 5(1) provides that:

> The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
> (c) the claims or defences of the class members raise common issues;
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. [Emphasis added.]

16 The motion judge refused to certify the action against the respondents other than the Diocese because the appellants failed to show that a class proceeding was "the preferable procedure" as

required by s. 5(1)(d). His order dismissing the motion for certification against these respondents is clearly appealable to the Divisional Court under s. 30(1) of the *CPA*.

17 With respect to the Diocese, the motion judge also refused to certify the action, albeit because the claim as pleaded did not reveal a cause of action as required by s. 5(1)(a). If the motion judge's order in respect of the Diocese is properly characterized as a refusal to certify a class proceeding, the appeal lies to the Divisional Court. However, the motion judge's order does much more than simply refuse to certify the action as a class proceeding against the Diocese. The order dismisses the claim "immediately". The motion judge's order goes well beyond a determination that the Diocese will not be part of any class proceeding. Under that order, the appellants are barred not only from proceeding against the Diocese by way of a class action proceeding, but are precluded from proceeding against the Diocese entirely. If that order stands, the appellants' action against the Diocese is over.

18 I read nothing in the remedial powers available on a motion for certification under the *CPA* that empowers a judge to dismiss the action in its entirety. To the extent that the *CPA* speaks to the inadequacy of pleadings, s. 7 authorizes the judge who refuses to certify the proceeding as a class proceeding to order the amendment of the pleadings or to make any other order deemed appropriate. Section 7 does not authorize the motion judge to dismiss the action. In my view, the motion judge's order dismissing the action against the Diocese could not have had its genesis in the powers granted in the *CPA* to judges hearing a motion for certification.

19 A Superior Court has the inherent power to dismiss an action when the claim does not disclose a reasonable cause of action: see *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 968. That power is most commonly exercised on a motion brought under Rule 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to strike a pleading on the basis that it does not disclose a reasonable cause of action. The Diocese could have brought a motion under Rule 21.01(1)(b) and joined that motion with the appellants' motion for certification. Had the Diocese followed that procedure, the motion judge would clearly have had the power to dismiss the action against the Diocese under Rule 21.01(1)(b). Any appeal from that order would have been to this court pursuant to s. 6(1)(b) of the *CJA*.

20 In *Menegon v. Philip Services Corp.* (2001), 23 B.L.R. (3d) 151 (Ont. S.C.), aff'd 167 O.A.C. 277 (C.A.), the defendant did bring a motion under Rule 21 to dismiss for failure to disclose a cause of action. That motion was heard with the certification motion and appealed to the Divisional Court: *Menegon v. Philip Services Corp.* (2002), 155 O.A.C. 365 (Div. Ct.). In holding that the Divisional Court had no jurisdiction to hear the appeal from the order dismissing the action for failure to disclose a cause of action, Farley J. stated, at p. 366:

> Although an appeal from a refusal to certify an action as a class proceeding is to the Divisional Court, the refusal here was based on the failure of Menegon in his statement of claim to disclose a cause of action. However, that same failure is the

> foundation of the determination of Gans J., to dismiss the action and refuse leave to amend. The action having been dismissed, the question of its certification as a class proceeding is moot; in order to have certification of the action, the judgment dismissing the action would have to be put aside. The dismissal of the action, as discussed, is a final order, an appeal from which only lies to the Court of Appeal in these circumstances of the thrust of the claim being for more than $25,000. ...[3] [Emphasis added.]

21 This court has also heard appeals from orders dismissing claims made under Rule 21.01(1)(b) when that motion was brought in conjunction with a motion for certification under the *CPA*: see e.g., *Drady v. Canada (Minister of Health)*, 2008 ONCA 659, 270 O.A.C. 1; *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445, 111 O.R. (3d) 745. The jurisdiction of this court to hear the appeals was not raised in either case.[4]

22 I do not think that the absence of a Rule 21.01(1)(b) motion is determinative on the jurisdiction question. The appropriate appellate forum should be determined by the substance of the order made. The fact that a motion judge dismissed an action in the absence of a motion under Rule 21.01(1)(b) may give rise to procedural fairness arguments on appeal. Those arguments must, however, be made in the appropriate forum.

23 The language of the motion judge's order could not be clearer. The action against the Diocese was "immediately dismissed". If there is no power in s. 30 of the *CPA* to appeal the dismissal of the action against the Diocese to the Divisional Court, then under the terms of s. 6(1)(b) of the *CJA*, the appeal is to this court.

24 The provisions in s. 30 of the *CPA* which direct appeals to the Divisional Court refer to "an order refusing to certify a proceeding" (s. 30(1)), "an order certifying a proceeding as a class proceeding" (s. 30(2)), and orders "determining an individual claim" (s. 30(6)-(11)). None of the provisions that create appellate jurisdiction in the Divisional Court under s. 30 refer to orders dismissing an action. A plain reading of s. 30 of the *CPA* does not give the Divisional Court the jurisdiction to hear appeals from orders dismissing claims even though the order is made in the context of a class proceeding motion. Instead, s. 6(1)(b) of the *CJA* gives this court jurisdiction over this appeal.

25 My reading of the interaction between the rights of appeal peculiar to class proceedings created in s. 30 of the *CPA* and the more general rights of appeal in s. 6(1)(b) of the *CJA* is reinforced by the analysis in two cases in which this court has addressed that relationship. Neither case, however, deals with the problem raised here.

26 In *Dabbs v. Sun Life Assurance Company of Canada* (1998), 41 O.R. (3d) 97 (C.A.), a member of a class who was not a party to the class proceeding sought to appeal an order certifying an action as a class proceeding and approving a settlement agreement entered into between the representative plaintiff and the defendants. The *CPA* limited any right of appeal to a party to the

proceeding. In holding that the appellant could not rely on s. 6(1)(b) of the *CJA* to give him a right of appeal, this court stated, at p. 102:

> The intent of the Act [*CPA*] is clear that the rights of appeal to this court are conferred on parties, not class members. A class member requires leave under s. 30(5) to act as a representative party for the purpose of bringing an appeal under s. 30(3). If ... a class member has a right of appeal under s. 6(1)(b) of the *Courts of Justice Act*, that intent would be defeated. [Emphasis added.]

27 The result in *Dabbs* flows from a reading of the *CPA* as creating a specific right of appeal applicable to the circumstances before the court and limited to a party. The court held that when a statute creates a specific right of appeal, another statute providing a more general right of appeal, like the *CJA*, cannot be used to create a different right of appeal than that set out in the specific legislation.

28 *Dabbs* is consistent with the language of s. 6(1)(b) of the *CJA*. Because *Dabbs* interpreted the relevant part of the *CPA* as creating a specific right of appeal applicable in the circumstances of the case and limited to parties, s. 6(1)(b) could not be used to expand that right of appeal to entities who were not parties. *Dabbs* is distinguishable from this case because, for the reasons set out above, I do not read the appeal provisions in s. 30 of the *CPA* as speaking to an appeal from an order dismissing an action.

29 In *Locking v. Armtec Infrastructure Inc.*, 2012 ONCA 774, the court considered an appeal from an order granting certain plaintiffs carriage of a class action proceeding. The court held that none of the appeal powers in s. 30 of the *CPA* applied to an appeal from a carriage order. The court stated, at para. 8:

> Where the Act [*CPA*] does not specifically address the rights and avenues of appeal, s. 6(1)(b) of the *Courts of Justice Act* governs appeal to the Court of Appeal in class proceedings.

30 I agree with the above observation. Of course, whether the Act does or does not "specifically address rights and avenues of appeal" will be a matter of statutory interpretation.

31 *Obiter dicta* in *Locking*, at para. 10, also speaks directly to the issue raised on this appeal:

> So, for example, an appeal in a class proceeding from an order striking out a statement of claim as disclosing no reasonable cause of action is appealable to the Court of Appeal.

32 In summary, the order as it relates to the Diocese is an order dismissing the action. It is not an order granting or refusing certification. Under the terms of s. 6(1)(b) of the *CJA*, the order dismissing the action against the Diocese is appealable to this court unless there is an appeal to the

Divisional Court. If there is an appeal to the Divisional Court, it must be found within the terms of s. 30 of the *CPA*. None of the provisions in that section directing appeals to the Divisional Court have any application to an order dismissing the action. Therefore, there is no appeal from that order to the Divisional Court. The appeal is to this court.

33 Finally, I see no practical difficulties in holding that this court is the appropriate appellate forum. Experience shows that in most cases in which the defendant intends to challenge the adequacy of the pleadings on a certification motion, an appropriate Rule 21 motion will be brought in conjunction with the certification motion. If the Rule 21 motion is brought, everyone accepts that the appeal comes to this court. My conclusion that the appeal still comes to this court even when there is no formal Rule 21 motion does nothing to complicate the appellate landscape. The distinction between orders referable to certification, which is a procedural issue, and orders dismissing a claim is not difficult to make. That distinction determines the appropriate appellate forum.

B. THE MERITS OF THE APPEAL

(a) The absence of a motion to dismiss

34 As indicated above, at para. 19, the motion judge had jurisdiction to dismiss the claim for failure to disclose a cause of action even absent a formal motion to dismiss. Clearly, however, it would have been better had the Diocese brought a formal motion to dismiss under Rule 21.01(1)(b). It would also have been better had the judge managing the proceedings required the Diocese to bring that motion upon being advised that the Diocese would take the position that the claim did not plead a proper cause of action against the Diocese. A helpful example of the proper procedure is found in *Drady*. The defendants, who contended that the claim did not reveal a cause of action, with the permission of the case management judge, brought a Rule 21.01(1)(b) motion to be heard immediately before the certification motion by the same judge who was to hear the certification motion: see also *Kang v. Sun Life Assurance Company of Canada*, 2013 ONCA 118, at paras. 25-27, aff'g 2011 ONSC 6335, 4 C.C.L.I. (5th) 86.

35 I am satisfied, however, that the appellants were not prejudiced by the Diocese's failure to bring a formal motion to dismiss. There is no reason to think that the appellants' arguments or the motion judge's analysis and conclusion would have been any different had the Diocese brought that motion.

36 In holding that the appellants are not prejudiced by the absence of a formal motion, I do not ignore the appellants' submission that they were not given a proper opportunity to amend their pleadings before the motion judge. The merits of that submission, however, do not depend on whether there was a formal motion brought under Rule 21.01(1)(b). The appellants have argued that they should have been given the opportunity to amend by the motion judge and that they can amend now if so required. This court can fully address the merits of that argument.

(b) The Claims against the Diocese

37 There are no facts at this stage of the proceeding, only allegations in the Amended Amended Statement of Claim (the "Claim"). Those allegations are assumed to be true for present purposes: *R. v. Imperial Tobacco Canada Limited*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 34.

38 In the Claim, the appellants allege that the respondents Father Farnsworth and Father Haig founded Grenville Christian College in 1969. They had been operating the school for about nine years when they were ordained as Anglican ministers in 1977. Father Farnsworth and Father Haig ran Grenville Christian College together until 1983 when Father Farnsworth became the sole headmaster. He operated the school until 1997. The appellants acknowledge that the Diocese has no liability for anything that occurred at the school before the ordination of Father Farnsworth and Father Haig.

39 The appellants, and the class members they would represent, were all students at Grenville Christian College at various times between 1973 and 1997. They allege various forms of physical, psychological, emotional and spiritual abuse at the hands of Father Farnsworth, Father Haig and others at the school.

40 The appellants' claim against the Diocese is founded in negligence and a breach of fiduciary duty. The relevant allegations against the Diocese can be summarized as follows:

* The Diocese is responsible for the "training, ordination and supervision of Fathers Farnsworth and Haig" (Claim, at para. 9).
* The Diocese is "affiliated with Grenville Christian College" (Claim, at para. 9).
* Following the ordination of Father Farnsworth and Father Haig in 1977, they were "licensed by the Bishop of Ontario and/or the Dioceses of Ontario to act as Anglican clergy at Grenville Christian College" (Claim, at para. 18).
* Following the ordination of Father Farnsworth and Father Haig, "Grenville Christian College held itself out as an Anglican private school where children who attended would be taught in the Anglican faith and with Anglican values" (Claim, at para. 22).
* The Diocese was required to "educate the Plaintiffs in accordance with Anglican faith and values" (Claim, at para. 26).

41 In respect of the negligence claim, the appellants further allege that the Diocese breached its duty to the appellants by failing to:

* undertake adequate investigation into the background of Father Farnsworth and Father Haig (Claim, at para. 33(k));
* provide adequate education, training and supervision of Father Farnsworth

and Father Haig (Claim, at para. 33(l)); and

* ensure that the teachings and practices at Grenville Christian College promoted the Anglican faith and values (Claim, at para. 33(m)).

42 The appellants also allege that the Diocese knew or should have known of the misconduct of Father Farnsworth and Father Haig, and knew or should have known that as a consequence of the mistreatment, students would suffer significant sexual, physical, emotional, psychological and spiritual harm resulting in various forms of damage: Claim, at paras. 42, 43.

43 The pleadings alleging breach of fiduciary duty do not distinguish the Diocese from the other respondents. Those pleadings allege that the students were "entirely within the power and control of the Defendants": Claim, at para. 27. The pleadings further allege that the respondents' control over the students gave rise to a "fiduciary obligation to the Plaintiffs consistent with the obligations of a parent": Claim, at para. 28.

(c) The Duty of Care Analysis

44 The appellants' main ground of appeal arises from the motion judge's finding that on the facts as pleaded, the Diocese did not owe the appellants a duty of care. I will set the framework for my review of the motion judge's reasons and the appellants' arguments by describing the approach to be taken when deciding whether for the purposes of a claim in negligence a defendant owes a duty of care to a plaintiff. The approach is well established in the case law and was recently examined in detail by this court in *Taylor v. Canada (Attorney General)*, 2012 ONCA 479, 111 O.R. (3d) 161. The approach was applied by the motion judge and is not a matter of contention between the parties. I can be brief.

45 The duty of care inquiry proceeds through two stages. When the inquiry is made at the pleadings stage, the first stage involves a determination of whether the facts as pleaded disclose a sufficiently close relationship between the defendant and the plaintiff to establish a *prima facie* duty of care. To answer this question, one must first decide whether the facts as pleaded bring the claim, either directly or by analogy, within a category of cases in which the courts have previously recognized a *prima facie* duty of care. If the case falls within a recognized category of cases, the court will assume that a *prima facie* duty of care exists and move to the second stage of the duty of care inquiry. If, however, the facts do not place the case within an established category, the court must determine whether a new duty of care should be recognized in the circumstances. This determination is guided by the twin principles of foreseeability of harm and proximity of relationship.

46 If the court determines that the pleadings do not reveal a *prima facie* duty of care, the inquiry is over and the negligence claim must fail. If, however, the court concludes that a *prima facie* duty of care has been made out, the court must go on to the second stage of the inquiry. At that stage, the court asks whether there are any residual policy considerations that justify negating the duty of care and denying liability.

47 This case is not concerned with the second stage of the inquiry. The motion judge did not reach that stage. Nor do I.

(d) The Motion Judge's Reasons

48 The motion judge began, at paras. 64-67 of his reasons, by referencing and summarizing the well-known law surrounding the "plain and obvious" criterion against which the adequacy of the pleadings must be measured. He then turned to the negligence allegation.

49 The motion judge first considered whether the claim fell within a recognized or analogous category. He characterized the claim as the failure by the Diocese to use its connection with Grenville Christian College to intervene and stop the wrongdoing at the school: at para. 89. The motion judge concluded that this claim was not within or analogous to any recognized class of negligence claims: at para. 89.

50 The motion judge then turned his attention to the questions of foreseeability and proximity. He determined that neither existed on the facts as pleaded by the appellants. With respect to foreseeability, he stated, at para. 91:

> [I]n my opinion it is not foreseeable that the Diocese would have a duty of care to the students of the school based on the circumstances that the private school conducted Anglican religious services, described itself as Anglican, and had headmasters ordained as Anglican ministers nine years after they had established the school as an independently-owned and operated school.

51 In considering the relationship between the appellants and the Diocese, the motion judge stated, at para. 92:

> The students have an indirect relationship with the Diocese. Moreover, the relationship or connection between the school and the Diocese, upon which the indirect relationship is built, is also remote, at least legally speaking. The Diocese did not own or contract with the school. There is no employee-employer relationship between the Diocese and Fathers Haig and Farnsworth. The Diocese has no control over the school's operations. There were no corporate or organizational connections. The Diocese was not relied upon for operational advice, and no parent asked for or received advice from the Diocese about enrolling their children in the school. The Diocese had no legal right or legal duty to control or intervene in the operation of the school.

52 The motion judge concluded his analysis of the negligence claim, at para. 97:

> [I]t is not the case that the Diocese was involved in the management, operation, supervision and staffing of the school. The most that can be said is that the

> Bishop of the Diocese ordained Fathers Haig and Farnsworth as Anglican ministers and Fathers Haig and Farnsworth performed Anglican services and celebrations at the school. It is plain and obvious that the pleaded claim against the Diocese, even if factually proven, does not constitute a reasonable cause of action because there is no duty of care.

53 The motion judge next examined the breach of fiduciary duty claim. After summarizing the essential elements of that cause of action and referring to the relevant parts of the Claim, the motion judge observed, at paras. 110-11:

> The Diocese had no power or influence over the students. The students were not vulnerable or dependent upon the Diocese. The Diocese did not have any direct contact with the students, and the Diocese did not take advantage or betray the students. The Diocese did not undertake to act with loyalty to the students.
>
> Indeed, for some students who had faith, other than Anglican, it is doubtful that there was any relationship at all between the student and the Diocese.

54 The motion judge concluded that the pleadings did not reveal a cause of action for breach of fiduciary duty.[5]

(e) The Parties' Arguments

(i) The appellants

55 The claims against the Diocese focus on the ordination of Father Farnsworth and Father Haig in 1977. The appellants argue that the ordination and the "licens[ing]" of Father Farnsworth and Father Haig to "act as Anglican clergy" at Grenville Christian College created a duty of care owed by the Diocese to all students who attended the school after the ordination in 1977. The appellants contend that the duty extended to the proper training and supervision of Father Farnsworth and Father Haig, as well as to ensuring that the students received an education that accorded with the "Anglican faith and values".

56 The appellants submit that the case law has recognized that a diocese owes a duty of care to persons who, by virtue of a task or responsibility assigned to a priest by a diocese, come under the influence, direction or authority of that priest. The appellants referred to several cases in which a diocese has been held liable in negligence to victims who were abused by priests in that diocese. The appellants cite these as examples of the category of case into which they contend these pleadings put this case. The appellants argue that on a proper approach to the duty of care analysis, the motion judge should have found that this case fell within an established category and thus a *prima facie* duty of care existed.

57 Alternatively, the appellants argue that if the claim does not fall within a category of cases in which a duty of care has been recognized, the facts as pleaded demonstrate sufficient foreseeability of harm and proximity between the Diocese and the appellants to warrant a finding of a duty of care, or at least a finding that it was not "plain and obvious" that no such duty existed.

58 The breach of fiduciary duty claim, like the negligence claim, relies heavily on the ordination of Father Farnsworth and Father Haig and their "licens[ing]" to serve as Anglican clergy at Grenville Christian College. The appellants contend that on the facts as pleaded, Father Farnsworth and Father Haig were in a fiduciary relationship with the students and that the Diocese's power to supervise and direct Father Farnsworth and Father Haig placed the Diocese in that same relationship with the students. The appellants further submit that the Diocese's licensing of Father Farnsworth and Father Haig to "act as Anglican clergy" at Grenville Christian College constituted an implied undertaking to the students by the Diocese that it would properly train, monitor and supervise Father Farnsworth and Father Haig. The appellants argue that the Diocese breached that undertaking to the appellants.

(ii) The Diocese

59 The Diocese responds to the appellants' submissions primarily by relying on the reasons of the motion judge. The Diocese submits that the case law does not establish a category of cases recognizing a duty of care owed by a diocese to persons harmed by priests ordained by and working within the diocese. The Diocese contends that the cases relied on by the appellants involve fact situations in which the relationship between the diocese and the priest was very different than the relationship alleged in the appellants' pleadings. The Diocese argues that the duty of care established in those cases flowed from the nature of the relationship, not from the mere fact that the priests were ordained by and worked in the diocese.

60 The Diocese contends that the motion judge properly identified foreseeability and proximity as the principles to guide his duty of care analysis. The Diocese, relying particularly on the proximity analysis, submits that the motion judge came to the right conclusion.

61 Insofar as the breach of fiduciary duty claim is concerned, the Diocese emphasizes that the appellants did not plead any material facts capable of supporting the bald assertions in the Claim. Nor, according to the Diocese, do the appellants distinguish in their breach of fiduciary duty claim between the Diocese and the other respondents, despite the obviously very different relationship that the other respondents had with the appellants and other students. The Diocese asserts that the mere ordaining of Father Farnsworth and Father Haig as clergy could no more create a duty of care to the students, much less a fiduciary relationship, than could the Law Society's licensing of a lawyer create a duty of care or fiduciary relationship between the Law Society and subsequent clients of the lawyer: see *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562.

(f) Analysis

(i) The negligence claim

62 Liability in negligence is premised in part on the existence of a duty owed by the defendant to the plaintiff to take reasonable care in the circumstances. Absent that duty, there can be no liability for negligent conduct: see *Taylor*, at para. 65.

63 If, even on a generous reading of the material facts as pleaded by the plaintiff, the defendant could not be found to owe a duty of care to the plaintiff, the pleading must be struck subject to allowing the plaintiff an opportunity to amend that pleading: see *Eliopoulos (Litigation Trustee of) v. Ontario (Minister of Health and Long-Term Care)* (2006), 82 O.R. (3d) 321 (C.A.), at paras. 8ff; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, at paras. 21ff; *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at paras. 14ff; and *Imperial Tobacco Canada Limited*, at paras. 17ff.

64 I begin with the appellants' submission that their claim falls within an established class of cases in which a duty of care has been recognized. The appellants refer to several cases in which a diocese was held liable in negligence for its failure to prevent abuse by priests who were working under the auspices of the diocese: *John Doe v. Bennett*, 2002 NFCA 47, 218 D.L.R. (4th) 276, aff'd 2004 SCC 17, [2004] 1 S.C.R. 436; *Swales v. Glendenning* (2004), 237 D.L.R. (4th) 304 (Ont. S.C.); and *W.K. v. Pornbacher* (1997), 32 B.C.L.R. (3d) 360 (S.C.). None of the cases relied on by the appellants engaged in any duty of care analysis, although the courts clearly found a duty of care since they found the diocese liable in negligence.

65 I do not read these cases as broadly as do the appellants. In my view, those cases do not create a category of cases recognizing a duty of care owed in all circumstances by a diocese to persons who are abused by priests ordained by and working in the diocese. In the cases relied on by the appellants, the relationship between the diocese and the priest went well beyond ordination and assignment of the priest. For example, in *John Doe* (S.C.C.), at para. 15, the bishop (found to be legally synonymous with the diocese) was responsible for the "direction, control and discipline" of priests in the diocese. This very broad authority over the priest who perpetrated the abuse, combined with the bishop's knowledge of the abusive conduct, was held to justify a finding of negligence against the diocese.

66 In *Swales*, at paras. 207-8, the diocese acknowledged that it owed a duty of care to the victims, but argued that it had not breached that duty. The trial judge, relying primarily on the location where the abuse had occurred (in the priest's room in the actual seminary), concluded that the conduct ought to have caused the diocese to appreciate the risk of wrongdoing and make appropriate inquiries. The combination of the acknowledged duty of care and the failure by the diocese to make inquiries when fixed with knowledge of conduct that did not conform to accepted practices was sufficient to impose liability in negligence.

67 In *W.K.*, at para. 54, the trial judge found that the relationship between the diocese and the priest had "all of the common law indicia of the employer/employee relationship". Given that finding, it is hardly surprising that there was little dispute that the Bishop owed a duty of care to the young parishioner who was assaulted by the priest.

68 In my view, the cases relied on by the appellants do not demonstrate that the relationship of a diocese to its priests automatically creates a duty of care owed by the diocese to persons who engage with those priests. Rather, the cases demonstrate that the existence of any duty must be determined by reference to the specific facts of the case, particularly the nature of the relationship that exists between the diocese, the priests and those affected by the conduct of the priests. The impact of the relationship on the existence of any duty of care owed by a diocese to those harmed by priests in that diocese must be examined using the first principles of foreseeability of harm and proximity of relationship.

69 The concepts of foreseeability of harm and proximity are used to characterize the nature of the relationship between a plaintiff and a defendant for the purpose of determining whether that relationship gives rise to a duty of care. In *Imperial Tobacco Canada Limited*, at para. 41, McLachlin C.J. stated:

> Proximity and foreseeability are two aspects of one inquiry -- the inquiry into whether the facts disclose a relationship that gives rise to a *prima facie* duty of care at common law. Foreseeability is the touchstone of negligence law. However, not every foreseeable outcome will attract a commensurate duty of care. Foreseeability must be grounded in a relationship of sufficient closeness, or proximity, to make it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other.

70 The motion judge used foreseeability in two different ways in his reasons. He referred to foreseeability of harm to the appellants (at paras. 81, 90), but he also referred to foreseeability of the existence of a duty of care (at paras. 91-92). Only foreseeability of harm to the plaintiff is relevant to the duty of care inquiry: *Hill v. Hamilton Wentworth Regional Police Services*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 22.

71 The Claim contains two allegations against the Diocese that are germane to foreseeability:

* The Diocese was aware that Father Farnsworth and Father Haig were adherents of a religious group known as the Community of Jesus and followed its teachings and practices at Grenville Christian College (Claim, at paras. 19-21, 30); and
* The Diocese was aware of or should have been aware of the misconduct of the individual respondents and staff at Grenville Christian College, but took no steps to report the abuse to appropriate authorities or parents (Claim, at para. 42).

72 The first allegation does not assist the appellants in establishing foreseeability of harm. The pleadings contain no description of the teachings or practices of the Community of Jesus. Without more, the allegation in the pleading adds nothing.

73 The allegation that the Diocese knew or should have known of the ongoing abuse at the school goes directly to foreseeability of harm to students at the school. The pleading is, however, devoid of any material facts substantiating the allegation that the Diocese knew or ought to have known of the abuse. A bald assertion of foreseeability cannot suffice to establish foreseeability for the purposes of the duty of care inquiry. The material facts upon which the assertion that the Diocese knew or ought to have known should be pleaded.

74 In any event, even if the foreseeability pleading could be cured by pleading material facts to substantiate the allegation, the pleading also fails to establish sufficient proximity in the relationship between the Diocese and the appellants to warrant the imposition of a duty of care.

75 The pleading does not allege any direct relationship between the Diocese and the appellants. The appellants do not plead that the Diocese made any representations or did anything that the appellants in any way relied on at any time either before or while they were students at Grenville Christian College. Indeed, the pleadings do not allege any conduct of any kind by the Diocese toward the appellants, or any contact in any way between the Diocese and the appellants or their parents. The absence of any direct relationship between a plaintiff and a defendant is certainly not determinative of the existence of a duty of care. It is, however, an important factor which can point strongly away from a finding of proximity: *Hill*, at para. 30.

76 Not only does the pleading not allege any direct relationship between the Diocese and the appellants, it says virtually nothing about any relationship between the Diocese and Grenville Christian College. There is no allegation that the Diocese had any control over or involvement with the school's property, finances, staff, enrollment, curriculum or day-to-day management. Nor does the pleading allege a more general supervisory power as might reside in a Board of Governors. The Claim pleads only an undefined "affiliation" with Grenville Christian College (at para. 9), and a "licens[ing]" of Father Farnsworth and Father Haig to act as Anglican clergy at the school (at para. 18). Neither allegation speaks to any supervisory authority over the operation of the school. Upon reading the pleadings, one is left wondering what exactly, if anything, the Diocese had to do with the operation of the school.

77 Similarly, the pleadings do not say much about the relationship between the Diocese on the one hand, and Father Farnsworth and Father Haig on the other insofar as the operation of Grenville Christian College is concerned. There is no allegation of anything approaching an employer/employee relationship. There is no allegation that the Diocese had any power to dismiss or otherwise discipline Father Farnsworth or Father Haig in respect of their operation of the school. There is no allegation that the ordination of Father Farnsworth and Father Haig changed anything about the operation of Grenville Christian College.

78 For the reasons set out above, I agree with the conclusion of the motion judge that the relationship between the Diocese and the appellants was not such as to impose a duty of care on the Diocese. The negligence claim was properly struck.

(ii) The fiduciary duty claim

79 In my view, if, as I would hold, the motion judge was correct in concluding that the facts as pleaded did not support a finding that the Diocese owed a duty of care to the appellants in negligence, it must follow that the fiduciary duty claim fails. If the facts as pleaded do not demonstrate sufficient proximity to warrant the imposition of a duty of care, I do not see how they could warrant the finding of a fiduciary relationship.

80 There can be no fiduciary relationship unless the alleged fiduciary is in a position to exercise unilaterally some discretion or power that will affect the putative beneficiary's legal or practical interests: see *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 83. The only allegation in the Claim that touches on this component of a fiduciary duty claim is found at para. 27:

> The Plaintiffs state that, at all material times, the children who attended the school were entirely within the power and control of the Defendants, and were subject to the unilateral exercise of the Defendants' power or discretion.

81 Unlike with the other respondents, there is nothing in the rest of the Claim that supports the conclusory statement in para. 27 as it relates to the Diocese. There are no material facts pleaded to suggest that the appellants were in any way under the power or discretion of the Diocese while attending Grenville Christian College. The pleading fails to show any cause of action for breach of fiduciary duty against the Diocese.

(iii) Should the appellants be given an opportunity to amend their pleading?

82 It does not appear from the motion judge's reasons that he considered the possibility of an amendment of the pleadings and it is not clear that he was asked to consider an amendment. During oral argument in this court, counsel for the appellants indicated that the appellants could and would, if necessary, amend their pleadings. However, counsel did not put forward any additional material facts, other than those already pleaded, that could form the basis of a negligence or fiduciary duty claim against the Diocese. No proposed amended pleading was placed before the court.

83 This proceeding is five years old and is still at the pleadings stage. The weaknesses in the statement of claim as it relates to the action against the Diocese have been an issue since the commencement of the certification proceedings. The appellants have had ample opportunity to address those weaknesses and put forward any amendments available to them that would cure the deficiencies identified in the pleadings. No amendments have been offered. Absent any concrete proposed amendments, I see no point in extending the proceedings against the Diocese further by

allowing leave to amend. I would not grant leave to amend.

IV

SECTION 6(2) OF THE *CJA*

84 As indicated above, the court determined, after hearing oral argument, that it would not exercise its jurisdiction under s. 6(2) of the *CJA* even if it had jurisdiction to hear the appeal from the dismissal of the action against the Diocese. These are our reasons for refusing to exercise that jurisdiction.

85 Section 6(2) of the *CJA* provides:

> The Court of Appeal has jurisdiction to hear and determine an appeal that lies to the Divisional Court ... if an appeal in the same proceeding lies to and is taken to the Court of Appeal.

86 Section 6(2) recognizes that multiple appeals to different courts in the same proceeding can potentially generate inconsistent results and will inevitably increase the costs of litigation to the parties and impair the efficient use of judicial resources. In most cases, especially as here when all parties agree, the interests of justice will favour joinder.

87 The jurisdiction to join appeals in s. 6(2) is, however, discretionary and not mandatory. There will be cases when factors relevant to the administration of justice are sufficiently strong to override the wishes of the parties to the appeal and any efficiencies achieved by joinder. This is one such case.

88 First of all, I see little to be gained by joinder. The Divisional Court will no doubt await the result of this appeal. These reasons address only the adequacy of the pleadings against the Diocese, an entirely distinct issue from that arising out of the refusal to certify the action against the other respondents. Just as this court had no need to address the certification issues on this appeal, the Divisional Court will have no need to address the adequacy of the pleadings as against the Diocese. Whatever combination of results might have occurred on the two appeals, there is no risk of inconsistent results and very little overlap in the matters to be addressed on the two appeals.

89 Lastly, and most importantly, I think the very different nature of the issues raised on the two appeals contraindicates joinder. The appeal to this court from the dismissal of the claim against the Diocese raises a straightforward pleadings issue. That issue, while it arises in a certification proceeding because of s. 5(1)(a) of the *CPA*, is not a certification issue in the sense that it engages any law or procedure particular to certification of class proceedings. The issue before this court could just as easily have arisen, and usually does arise, in litigation that has nothing to do with class proceedings.

90 The issues raised on the appeal brought against the other respondents do engage the very core of the certification process and the judicial management of that process. Those "nuts and bolts" issues require evaluations best made by those with experience in the practical management of class action proceedings.

91 Section 30 of the *CPA* directs appeals granting or refusing certification to the Divisional Court. Members of the Divisional Court, who as Superior Court judges also preside over class action proceedings, have experience in class action matters which members of this court do not have. By directing appeals in respect of certification to the Divisional Court, I think the legislature must be taken as having determined that the practical experience of those judges is important in resolving the difficult and often unique problems that arise in the context of certification applications. The legislature seeks to take advantage of that expertise by directing initial appeals to the Divisional Court while maintaining this court's ultimate jurisprudential responsibility by allowing a further appeal to this court with leave: *CJA*, s. 6(1)(a).

92 Joinder of an appeal properly taken to the Divisional Court which raises certification-related issues, with an appeal in this court that has nothing to do with issues unique to certification, would circumvent the clear legislative choice as to the appropriate appellate forum reflected in s. 30 of the *CPA*.

93 The parties did not make out a case for joinder of these appeals.

V

CONCLUSIONS

94 For the reasons above, I would dismiss the appeal from the order dismissing the action against the Diocese. The remainder of the appeal has been transferred to the Divisional Court.

95 The parties have not had an opportunity to make submissions about costs. The appellants should file written submissions of no more than 6 pages within 20 days of the release of these reasons. The Diocese and the other respondents may file submissions of no more than 3 pages within 30 days of the release of these reasons.

D.H. DOHERTY J.A.
R.A. BLAIR J.A.:-- I agree.

cp/e/qlacx/qlpmg/qlmll/qljac

1 O'Connor A.C.J.O. took no part in the judgment.

2 Actions against Betty Farnsworth (the spouse of Father Farnsworth) and Mary Haig (the spouse of Father Haig) were discontinued: *Cavanaugh v. Grenville Christian College*, 2012 ONSC 2398.

3 This court's decision dismissing the appeal is found at (2003), 167 O.A.C. 277 (C.A.). The jurisdictional issue is not discussed.

4 This court has also heard an appeal from a dismissal of an action for failure to disclose a cause of action made in the context of a certification application when there was no Rule 21.01(1)(b) motion: see *Attis v. Canada (Minister of Health)*, 2008 ONCA 660, 93 O.R. (3d) 35. Recently, in *Brown v. Canada (Attorney General)*, 2013 ONCA 18, the motion judge purported to "conditionally" certify a class proceeding subject to the appropriate amendments to the statement of claim so that it would allege a cause of action. The defendant had brought a Rule 21.01(1)(b) motion to dismiss the action. An appeal was taken to the Divisional Court under s. 30 of the *CPA*, and then to this court with leave. Jurisdictional questions were not raised in either *Attis* or *Brown*.

5 The motion judge also dismissed what he described as a vicarious liability claim against the Diocese: at paras. 99-105. It is not clear to me that there was a freestanding vicarious liability claim against the Diocese: see Claim, at para. 35. In any event, the appellants have not relied on a vicarious liability claim in advancing the appeal and I will not address that part of the motion judge's reasons.

TAB 3

Indexed as:

Dabbs v. Sun Life Assurance Co. of Canada

Between
Paul Dabbs, plaintiff (respondent) moving party, and
Sun Life Assurance Company of Canada, defendant (respondent),
and
Jack Maclean, class member (appellant)

[**1998] O.J. No. 3622**

41 O.R. (3d) 97

165 D.L.R. (4th) 482

113 O.A.C. 307

7 C.C.L.I. (3d) 38

27 C.P.C. (4th) 243

[1999] I.L.R. I-3629

82 A.C.W.S. (3d) 638

Docket Nos. C30326, M22971 and M23028

Ontario Court of Appeal
Toronto, Ontario

Laskin, Charron and O'Connor JJ.A.

Heard: August 26, 1998.
Judgment: September 14, 1998.

(9 pp.)

Practice -- Persons who can sue and be sued -- Individuals and corporations, status or standing -- Class actions, members of class -- Status to appeal from approval of settlement -- Statutes -- Operation and effect -- Effect on earlier statutes -- Contrariety or conflict between statutes --

General and special statutes.

This was a motion by Dabbs to quash an appeal from an order that this action be certified as a class action and a motion for leave to appeal by Maclean from the certification order. Dabbs was a representative plaintiff in a class proceedings against the defendant Sun Life Assurance Company. The parties entered into a settlement agreement. Maclean, a member of the class, participated in the settlement approval proceedings. He did not ask for party status. Maclean objected to the approval of the settlement. The agreement affected 400,000 class members across Canada and had been approved by British Columbia and Quebec courts. The trial judge approved the settlement pursuant to the Class Proceedings Act and found it to be fair, reasonable and in the best interest of those affected by it. Dabbs argued that Maclean had no standing to bring an appeal.

HELD: The motion by Dabbs was allowed and the motion by Maclean was dismissed. The appeal was quashed. Maclean had no right of appeal pursuant to section 30(3) of the Act as he was not a party and had not applied to be a representative plaintiff or to intervene as an added party. As well, he had no right of appeal under section 6(1)(b) of the Courts of Justice Act, which permitted appeals from final orders of a judge of the Ontario Court (General Division). Section 30(3) took precedence over section 6(1)(b) as section 30(3) was the more recent enactment and specifically addressed the rights of appeal in class proceedings. It was not appropriate to grant Maclean leave to act as a representative party under section 30(5) of the Act for the purpose of allowing him to appeal. There was nothing indicating that Maclean would adequately represent the interests of the class on an appeal. The wishes of one class member was not to govern the interests of the entire class. As well, Maclean could opt out of the class and pursue his claim against Sun Life personally.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 5, 8(3), 9, 10(1), 12, 14, 16(1), 18, 19, 25, 29, 30(3), 30(5).
Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 6(1)(b), 134.
Ontario Rules of Civil Procedure, Rule 13.

Counsel:

Michael S. Deverett, for the appellant.
H. Lorne Morphy, Q.C. and Patricia D.S. Jackson, for the respondent, Sun Life.
Michael A. Eizenga and Michael J. Peerless, for the plaintiff, respondent.

The judgment of the Court was delivered by

1 O'CONNOR J.A.:-- These reasons deal with two motions. The first is a motion by the representative plaintiff in this class proceeding, Paul Dabbs, to quash an appeal brought by a class member, Jack Maclean. The second is a motion by Maclean for leave to appeal.

THE MOTION TO QUASH

2 Maclean seeks to appeal the judgment of Sharpe J. dated July 3, 1998 in which he ordered that this action be certified as a class proceeding and that a settlement agreement entered into between Dabbs and others as proposed representatives of the plaintiff class and the defendant Sun Life Assurance Company of Canada ("Sun Life") be approved under s. 29 of the Class Proceedings Act, 1992, S.O. 1992, c. 6 (the "Act").

3 Maclean is a member of the class and had been permitted under s. 14 of the Act to participate in the settlement approval proceedings. He did not ask for and was not granted party status. Maclean objected to the approval of the settlement, raising essentially the same arguments as he makes in the material filed with this court.

4 Sharpe J. rejected those arguments, approved the settlement and found it to be fair, reasonable and in the best interest of those affected by it. The courts in British Columbia and Quebec have also approved the settlement agreement. In all, it affects the interests of an estimated 400,000 class members across Canada.

5 Maclean's notice of appeal raises issues relating to procedural rulings made by Sharpe J. and to the fairness and adequacy of the settlement agreement. Dabbs moves under s. 134 of the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended, to quash the appeal primarily on the basis that Maclean is not a party to the proceeding and therefore has no standing to bring the appeal. Sun Life supports the motion. For the reasons set out below, I agree with their position.

6 One of the objects of the Act is to achieve the efficient handling of potentially complex cases of mass wrongs. See Abdool et al. v. Anaheim Management Limited et al. (1995), 21 O.R. (3d) 453 (Div. Ct.), per O'Brien J. at p. 455. This efficiency is accomplished, in part, by the court appointment of one or more class members under s. 5 to be representative plaintiffs or defendants as the case may be. The criteria for appointment include the ability to fairly and adequately represent the interests of the class. A representative plaintiff or defendant is a party to the proceeding and has the specific rights and responsibilities for the carriage of the litigation on behalf of the class that are set out in the Act.

7 The Act makes a clear distinction between the role of a party and that of a class member.[1] Section 14 gives the court a broad discretion to permit class members to participate in a proceeding and to provide for the manner and terms upon which the participation is permitted. Not surprisingly, s. 14 does not provide that class members who are permitted to participate thereby become parties to the proceeding. The section does not restrict participation to those class members who are able to fairly and adequately represent the class. Indeed, the court may permit participation by those who

oppose the manner in which the party representing the class is conducting the proceeding and who assert positions that differ from those of the majority of the class. While the court may consider it useful to hear from these class members and to permit them to participate in a limited manner, it could frustrate the orderly and efficient management of the proceeding if they became parties simply because of their participation.

8 If class members are dissatisfied with the conduct of a proceeding or do not wish to be bound by the result, they may opt out under s. 9 and pursue their claims or defences in a personal capacity.

9 The rights of appeal to the Court of Appeal in class proceedings are set out in s. 30(3) of the Act. It provides:

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

10 These rights are conferred on parties. Section 30(5) permits class members in certain circumstances to move for leave to act as representative parties for purposes of bringing an appeal under s. 30(3). It provides:

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

Absent leave, class members have no standing to bring an appeal to this court under the Act.

11 Maclean is not a party to this proceeding. He did not apply to be a representative plaintiff nor did he apply to intervene as an added party under Rule 13.[2] He participated in the settlement approval proceedings as a class member not as a party. He therefore has no right of appeal under s. 30(3).

12 Maclean argues that because Sharpe J.'s judgment is a final order of the Ontario Court (General Division), he has a right of appeal under s. 6(1)(b) of the Courts of Justice Act, R.S.O. 1990, c. C.4. Section 6(1)(b) provides:

> 6(1) An appeal lies to the Court of Appeal from,
>
> ...
>
> (b) a final order of a judge of the Ontario Court (General Division), except an order referred to in clause 19(1)(a) or an order from which an appeal lies to

the Divisional Court under another Act.

He argues that if the Act does not provide him with a right of appeal, either because he is not a party to the class proceeding or because s. 30(3) does not provide for a right of appeal from a judgment approving a settlement[3], then s. 6(1)(b) operates to confer a right where the Act has failed to do so. I do not accept that argument.

13 In my view, s. 30(3), which grants specific rights of appeal to this court in class proceedings, takes precedence over and excludes provisions of general application such as s. 6(1)(b) of the Courts of Justice Act. Two rules of statutory interpretation assist in determining the intention of the Legislature. First, a "general statute is made to 'yield' by regarding the special statute as an exception to the general."[4] Second, a more recent statute takes precedence over prior legislation because "the more recent expression of the will of the legislature should be retained."[5] In this case, the Act is the more recent enactment and specifically addresses the rights of appeal in class proceedings. The Courts of Justice Act was enacted earlier and is of more general ambit. These rules support the conclusion that the appeal provisions in s. 30(3) of the Act take precedence over s. 6(1)(b).

14 This conclusion is consistent with the dicta of Doherty J.A. in 792266 Ontario Ltd. v. Monarch Trust Co. (Liquidation) (1996), 94 O.A.C. 384 (C.A.). At p. 389, he said:

> ... I would, however, observe that this court has held that statutory provisions granting a specific right of appeal take precedence over and exclude provisions of more general application: Overseas Missionary Fellowship v. 578369 Ontario Ltd. (1990), 73 O.R. (2d) 73 at 75 (C.A.). that conclusion is consistent with the well-recognized principle of statutory interpretation which provides that where a statutory provision in specific legislation appears to conflict with a provision in a general statutory scheme, the former is seen as an exception to the latter: R. v. Greenwood (1992), 7 O.R. (3d) 1 at 6-7 (C.A.), leave to appeal to S.C.C. refused, [1992] 1 S.C.R. viii.

I agree with that statement.

15 The logic of this interpretation is apparent in this case. The intent of the Act is clear that the rights of appeal to this court are conferred on parties, not class members. A class member requires leave under s. 30(5) to act as a representative party for the purpose of bringing an appeal under s. 30(3). If, as Maclean argues, a class member has a right of appeal under s. 6(1)(b) of the Courts of Justice Act, that intent would be defeated. Further, assuming, as Dabbs and Sun Life argue, that s. 30(3) does not confer a right to appeal a judgment approving a settlement, it would make no sense for the Legislature to have provided for specific limited rights of appeal in s. 30(3) if the general right of appeal in s. 6(1)(b) was also to apply. Section 30(3) would be redundant and whatever limits result from its specific wording would be frustrated.

16 Relying upon the case of Re O'Donohue and Silva et al. (1995), 27 O.R. (3d) 162 (C.A.), Maclean argues that the right of appeal in s. 6(1)(b) can only be excluded by express statutory provision. In that case, the court considered appeal rights under the Municipal Elections Act, R.S.O. 1990, c. M.53, as amended, which provides for an appeal from a judicial recount to a judge of the Ontario Court (General Division). The Municipal Elections Act does not provide for a further appeal. The court found that in the absence of an express statutory exclusion of an appeal from a final order of a General Division judge, the Legislature could not be deemed to have limited the jurisdiction granted to the Court of Appeal by s. 6(1)(b). Significantly, there was no right of appeal to the Court of Appeal set out in the Municipal Elections Act. It is the inclusion of the specific appeal provisions in the Act which, in my view, operate to exclude the jurisdiction under s. 6(1)(b) for proceedings under the Act.

17 In summary I am of the view that s. 30(3) of the Act provides the rights of appeal to this court for class proceedings and that s. 6(1)(b) of the Courts of Justice Act does not supplement those rights.

MACLEAN'S MOTION

18 Maclean brought a motion for leave, if necessary, to appeal the judgment of Sharpe J. During the course of argument he requested that the court consider this motion as a motion for leave under s. 30(5) of the Act to permit him to act as a representative party for purposes of bringing his appeal under s. 30(3). The court indicated that it was prepared to deal with the motion on this basis. In my view, this is not an appropriate case for leave.

19 The court's discretion to grant leave under s. 30(5) is guided by the best interests of the class and in particular by a consideration whether the class member applying would fairly and adequately represent the interests of the class. There is nothing in the record which indicates that Maclean would adequately represent the interests of this class by bringing an appeal which seeks to set aside the settlement agreement. Courts in three jurisdictions have approved the agreement. Maclean is the only class member of an estimated 400,000 who now seeks to set it aside. The wishes of one class member ought not to govern the interests of the entire class.

20 Importantly, if Maclean is dissatisfied with this settlement, he has the opportunity under the terms of Sharpe J.'s judgment and s. 9 of the Act to opt out of the class and pursue his claim against Sun Life in his personal capacity.

21 I would therefore dismiss the motion brought by Maclean under s. 30(5) of the Act. For the reasons above, I would allow the motion under s. 134 of the Courts of Justice Act and quash the appeal. Because the motions involved a novel point raised by an individual class member, I would make no order as to costs.

O'CONNOR J.A.
LASKIN J.A. -- I agree.

CHARRON J.A. -- I agree.

cp/d/ln/mii/DRS

1 See ss. 8(3), 10(1), 12, 16(1), 18, 19 and 25.

2 Section 35 of the Act provides that the rules of court apply to class proceedings.

3 Dabbs and Sun Life argued that even if Maclean is a party, s. 30(3) does not confer a right of appeal from a judgment approving a settlement under s. 29 of the Act.

4 Elmer Driedger, Construction of Statutes, 2nd ed. (1983), at p. 227.

5 Pierre-André Côté, The Interpretation of Legislation in Canada, 2nd ed. (1991), at p. 301.

TAB 4

Case Name:

Haddad v. Kaitlin Group Ltd.

PROCEEDING UNDER the Class Proceedings Act, 1992
Between
Jean-Marc Haddad and Robert Phippard, Plaintiffs, and
The Kaitlin Group Ltd. and 1138337 Ontario Inc., Defendants

[2012] O.J. No. 3718

2012 ONSC 4515

Court File No. 07-CV-345642CP

Ontario Superior Court of Justice

P.M. Perell J.

Heard: July 30, 2012.
Judgment: August 7, 2012.

(24 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Common interests and issues -- Motion by defendants in class action, which alleged misrepresentation in elimination of advertised golf course from subdivision, to have claim dismissed as statute-barred under Limitations Act dismissed -- Defendants did not show there was no genuine issue for trial about when limitation time began to run for each class member -- Class members purchased homes at different times and start of limitation period could not be determined together -- Motion for summary judgment was also not available because whether class members' claims were statute-barred was not certified common issue and could not be because it wanted for commonality.

Civil litigation -- Limitation of actions -- Time -- When time begins to run -- Motion by defendants in class action, which alleged misrepresentation in elimination of advertised golf course from subdivision, to have claim dismissed as statute-barred under Limitations Act dismissed -- Defendants did not show there was no genuine issue for trial about when limitation time began to run for each class member -- Class members purchased homes at different times and start of limitation period could not be determined together -- Motion for summary judgment was also not available because whether class members' claims were statute-barred was not certified common

issue and could not be because it wanted for commonality.

Tort law -- Fraud and misrepresentation -- Particular relationships -- Sale of land -- Motion by defendants in class action, which alleged misrepresentation in elimination of advertised golf course from subdivision, to have claim dismissed as statute-barred under Limitations Act dismissed -- Defendants did not show there was no genuine issue for trial about when limitation time began to run for each class member -- Class members purchased homes at different times and start of limitation period could not be determined together -- Motion for summary judgment was also not available because whether class members' claims were statute-barred was not certified common issue and could not be because it wanted for commonality.

Motion by the defendants in a class action that alleged misrepresentation in the elimination of a golf course from a subdivision to have the claim dismissed for being statute-barred under the Limitations Act. The class action alleged that the defendants promoted the subdivision, where the plaintiffs bought homes, as including a golf course and that the representations were false, negligent, and deceitful as the course had not been built. The defendants argued the misrepresentation claim was out of time because all or some of the class knew or ought to have discovered their claim by no later than around January 10, 2005, which made the claim 11 months too late. The defendants stated that on January 10, 2005 they had announced at a public meeting that no golf course would be built. The meeting involved another developer and a signed posted on the property and written notice of the meeting said nothing about the golf course. There was evidence that two people who lived in the subdivision attended the meeting. A local newspaper reported on the meeting and gold club on January 12 and 19. The representative plaintiffs to the class action said that they did not learn about the cancellation of the golf course until June 2007, when there were meetings of the municipality, and the statement of claim followed six months later. The defendants relied on ss. 11 and 12 of the Class Proceedings Act for jurisdiction to make the motion.

HELD: Motion dismissed. The defendants' motion for a summary judgment failed for two reasons. As a matter of substance, when a class member discovered or ought to have discovered a misrepresentation claim was factually idiosyncratic, and the defendants did not show there was no genuine issue for trial about when each and every class member had made/ought to have made the discovery. The class members purchased their homes at different times and the determination of when they discovered that they had a claim for misrepresentation could not be determined all together. Notice of a public meeting and a rezoning sign would not have alerted class members that they had been deceived about the plans for a golf course. An individual class member who attended at the public meeting might know there was a claim, but apart from two people, it was not known who attended. Similarly, it was not known who, if any, of the class members read the newspaper. Procedurally, the defendants' motion for a summary judgment against the class members was not available. Whether the class members' claims were statute-barred was not a certified common issue and could not be because it wanted for commonality. There was no jurisdiction for a summary judgment motion against the class members based on a limitation period defence. Sections 11 and

12 of the Class Proceedings Act did not provide jurisdiction and such an interpretation was inconsistent with s. 27(3) of the Act.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 11, s. 12, s. 14(1), s. 15(2), s. 27(3), s. 31(2)

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

Counsel:

Alan A. Farrer, for the Plaintiffs.

Michael A. Cohen, for the Defendants.

REASONS FOR DECISION

1 **P.M. PERELL J.**:-- This is a motion in a certified class action to have one of the claims advanced in the action dismissed against all or some of the class members for being statute-barred under the *Limitations Act, 2002,* S.O. 2002, c. 24, Sched. B.

2 The Defendant 1138337 Ontario Inc. was the owner and developer of a subdivision known as the Port of Newcastle located in the City of Clarington. The Defendant Kaitlin Group Ltd., an associated developer, was the marketing agent for the subdivision.

3 In this certified class action, the Representative Plaintiffs, Jean-Marc Haddad and Robert Phippard represent the class members, all of whom purchased homes in the subdivision.

4 The essence of the class action is that the Defendants promoted the subdivision as a golf course community with a nine-hole executive golf course within the community and represented to purchasers that they would receive a free lifetime transferable membership to a recreational clubhouse. Mr. Haddad and Mr. Phippard allege that the representations about the golf course and the clubhouse were false, negligent, and deceitful.

5 The Defendants bring this summary motion based on the argument that the misrepresentation claim about the golf course is out of time because the class action was commenced on December 17, 2007, but all or some of the class knew or ought to have discovered their claim by no later than around January 10, 2005, which means that suing in December 2007 was approximately 11 months too late.

6 The Defendants submit that the limitation period for the misrepresentation claim began to run on January 10, 2005 because they announced at a public meeting of the Clarington Council at the Clarington Town Hall that no golf course would be built.

7 The public meeting had been called because Kylemore Homes, another developer that was selling lots in the subdivision, wished to obtain a rezoning and to have the plan of subdivision amended. The City gave written notice of the public meeting to persons within 120 metres of Kylemore Home's property and a sign was posted on that property about the rezoning. The written notice says nothing about the golf course.

8 The written notice was not sent to Mr. Haddad or Mr. Phippard. They did not attend the public meeting. The late Maxine Hoos, who lived in the subdivision, attended the public meeting and complained about the elimination of the plans for a golf course. There is some evidence that Flo Shrives and her husband, other residents of the subdivision, were at the meeting but did not speak during the meeting.

9 On January 12, 2005, the *Orono Weekly Times*, a local paper, published a front-page article reporting that Maxine Hoos in the Port of Newcastle spoke at Monday's public meeting, displeased with the elimination of the nine-hole golf course from the development. On January 19th, 2005, another article described as "disappearing golf course" was published on the front page of the *Orono Weekly Times*. Mr.Haddad and Mr. Phippard were not readers of the *Orono Weekly Times*.

10 The representative plaintiffs said that they did not learn about the cancellation of plans to build any golf course until June of 2007, when there were committee meetings and council meetings of the municipality.

11 On June 18, 2007, Mr. Phippard and a group of Class Members attended a meeting of the General Purpose and Administration Committee of the Municipality of Clarington to discuss the development of a hotel on other lands in the community, and at this meeting, Kelvin Whelan of the Kaitlin Group advised City Council that the Defendants were no longer planning to develop a golf course within the community. Mr. Phippard said that this was the first time he became aware that a golf course would not be proceeding. The Statement of Claim in the proposed class action followed six months later.

12 In my opinion, the Defendants' motion for a summary judgment fails for two mutually independent reasons, one substantive and the other procedural.

13 First, as a matter of substance, when a class member discovered or ought to have discovered that he or she had a misrepresentation claim is factually idiosyncratic to each class member, and the Defendants did not meet the burden of showing, as they must, on a motion for summary judgment, that there is no genuine issue for trial about when each and every class member discovered or ought to have discovered they had a misrepresentation claim.

14 In the case at bar, the class members purchased their homes at different times, and the determination of when they discovered that they had a claim for misrepresentation against the Defendants cannot be determined all together.

15 The fact that some members of the class received notice of the public meeting and that a rezoning sign was posted on Kylemore Homes lands would not alert class members that they had been deceived about the plans for a golf course. The fact that the rezoning application concerned lands originally selected for a golf course would not inform a class member that he or she had been deceived. If he or she thought about it at all, the class member might think that the golf course was going to be built somewhere else in the subdivision, and in any event, a class member was under no obligation to pursue a line of inquiry to satisfy himself or herself that the earlier alleged representations remained true.

16 An individual class member who attended at the public meeting might know that he or she had a claim against the Defendants, but apart from Maxine Hoos and the Shrives it cannot be said who was at the public meeting. Similarly, it is not known who, if any, of the class members read the *Orono Weekly Times*. Put somewhat differently, there remains a genuine issue requiring a trial about when each class member knew about a misrepresentation claim. The Defendants have not proven on any class-wide basis that the class members' claims are statute-barred. This is not a case like a train crash, where all the class members would know or ought to have known that they had a claim.

17 Second, procedurally, the Defendants' motion for a summary judgment against the class members is not available. The issue of whether the class members' claims are statute-barred is not a certified common issue and, indeed, in the circumstances of this case, could never have been a common issue because it wants for commonality.

18 Class members are not parties to litigation in the normal sense. Under s. 14 (1) of the *Class Proceedings Act, 1992*, a class member may only participate in the proceeding with court permission. Under s. 15 (2) of the Act, they may only be examined for discovery, if the court grants leave. Under s. 31 (2), class members, other than the representative party, are not liable for costs except with respect to the determination of their own individual claims.

19 Most significantly, a class member is not bound by the principles of *res judicata* or issue estoppel. Under s. 27 (3) of the Act, a class member is only bound by the judgment on the common issues set out in the certification order. Subsection 27 (3) states:

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

(b) relate to claims or defences described in the certification order; and
(c) relate to relief sought by or from the class or subclass as stated in the certification order.

20 Thus, in the case at bar, in addition to the Defendants' evidentiary failure to prove that all the class members knew or ought to have known to bring actions against the Defendants, there is no jurisdiction for a summary judgment motion against the class members based on an limitation period defence. That defence is an individual issue to be resolved at an individual issues trial.

21 The Defendants relied on sections 11 and 12 of the Act as the source of jurisdiction for their motion for summary judgment against the class. These sections state:

Stages of class proceedings

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

(a) common issues for a class shall be determined together;
(b) common issues for a subclass shall be determined together; and
(c) individual issues that require the participation of individual class members shall be determined individually in accordance with sections 24 and 25.

Separate judgments

(2) The court may give judgment in respect of the common issues and separate judgments in respect of any other issue.

Court may determine conduct of proceeding

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

22 I do not read either section as providing the court with jurisdiction for a summary judgment motion binding against class members without the question having been certified. The interpretation sought by the Defendants is inconsistent with s. 27 (3) of the Act. The only binding judgments against a class member is a judgment at an individual issues trial or a judgment on a common issues set out in the certification order.

23 It follows, therefore, that this summary judgment motion should be dismissed.

24 If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the submissions of the Representative Plaintiffs within 20 days of the release of these Reasons for Decision followed by the Defendants' submissions within a further 20 days.

P.M. PERELL J.

cp/e/qlmdl/qlpmg

TAB 5

Case Name:

Hemosol 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 Hemosol Corp. and Hemosol LP

[2007] O.J. No. 687

2007 ONCA 124

31 C.B.R. (5th) 83

155 A.C.W.S. (3d) 496

2007 CarswellOnt 1083

Docket: (C46598) M34712/M34754

Ontario Court of Appeal
Toronto, Ontario

J. Labrosse, R.J. Sharpe and R.A. Blair JJ.A.

Heard: February 22, 2007.
Judgment: February 26, 2007.

(10 paras.)

Insolvency law -- Practice -- Proceedings in bankruptcy -- Appeal -- Motion to quash appeal of order made relating to company under CCAA protection allowed -- Leave was required for appeal -- Motion for leave to appeal dismissed -- Company seeking to assert rights under memorandum of understanding with parent of bankrupt did not seek extension of agreement, so its rights were extinguished.

Motion by Catalyst to quash the appeal of a numbered company from an order staying proceedings against Hemosol. The numbered company brought a cross-motion for leave to appeal from the

order. Hemosol sought protection under the Companies' Creditors Arrangement Act. The numbered company sought to enforce a Memorandum of Understanding against the parent corporation and first secured creditor of Hemosol. The Memorandum related to a conditional offer by the numbered company to purchase the assets of Hemosol, and provided the company was to fund Hemosol during the CCAA process, this funding being subordinate to the security of the parent. The parent later sold its debt position to Catalyst, who assumed all obligations of the parent under the Memorandum of Understanding. A judge made an order determining the rights of the parties. The judge rejected the numbered company's claim it was entitled to complete the Memorandum of Understanding. He found the Memorandum was no longer in effect as the company had not sought to extend it beyond its termination date. The judge rejected the submission the parent waived the deadline, but did not explicitly deal with the implications of the parent's silence in the face of the numbered company's continued payments under the Memorandum.

HELD: Motion allowed, the appeal was quashed, and the cross-motion for leave to appeal was dismissed. Leave was required for the numbered company's appeal, as the decision from which it appealed was rendered under the CCAA. There was no reason to interfere with the judge's findings regarding the numbered company's failure to obtain an extension for the termination date. A court would be reluctant to find the parent waived its legal rights in the circumstances.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 13

Appeal from:

On appeal from the order of Justice Colin L. Campbell of the Superior Court of Justice, dated January 22, 2007.

Counsel:

Paul J. Pape and John N. Birch for 2092248 Ontario Inc.

Robert S. Harrison and R. Graham Phoenix for MDS Inc.

David C. Moore for Catalyst Capital Group Inc. and Catalyst Fund Limited Partnership II, on behalf of its General Partner, Catalyst Fund General Partner II Inc.

Justin Forgarty and Gavin Finlayson for ProMetic Biosciences Inc.

Julia Falevich and Alan Mersky for the Interim Receiver and Monitor of Hemosol Corp. and Hemosol LP.

The following judgment was delivered by

1 THE COURT:-- The order at issue was made in the context of a proposed plan of arrangement of Hemosol Corp. and Hemosol L.P. (Hemosol) under the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA). The appellant, 2092248 (209), sought to enforce a Memorandum of Agreement (MOA) against MDS Inc. and its assignee Catalyst Capital Group Inc. MDS was the parent corporation and the first-ranking secured creditor of Hemosol. The MOA relates to a conditional offer by 209 to purchase the assets of Hemosol and provides that 209 is to fund Hemosol during the CCAA process, this funding being subordinate to MDS's security. MDS later sold its debt position to Catalyst and Catalyst assumed all obligations of MDS under the MOA.

Motion to Quash

2 The respondents move to quash the appeal on the ground that the order was made under the CCAA and that leave to appeal is required by CCAA, s. 13.

3 In our view, the proceeding before the motion judge and the decision under appeal were conducted and rendered under the CCAA within the meaning of s. 13 and therefore leave to appeal is required. The notice of motion and the reasons of the motion judge explicitly state that the matter is a CCAA proceeding. Directions were sought, amongst other things, to determine rights and requirements of voting in relation to the proposed plan of arrangement. There was no independent originating process to justify any other conclusion. The order determined rights arising under an agreement that arose out of and that was related entirely to the CCAA proceeding. We agree that the order finally determines the rights of the parties, but we do not accept the submission that this characterization removes it from the ambit of the CCAA, s. 13 and the requirement for leave to appeal. Accordingly, there is no appeal as of right and, unless leave to appeal is granted, the appeal must be quashed.

Motion for leave to appeal

4 In the event we decide leave to appeal is required, 209 brought a cross-motion for leave to appeal.

5 It is common ground that the test for leave to appeal is:

(a) whether the point on appeal is of significance to the practice;
(b) whether the point is of significance to the action;
(c) whether the appeal is prima facie meritorious or frivolous;
(d) whether the appeal will unduly hinder the progress of the action.

(see *Re Country Style Food Services Inc.* [2002] O.J. No. 1377 (C.A.) at para. 15; *Re Stelco* [2005] O.J. No. 4883 (C.A.) at para. 15-16.

6 209's agreement to purchase the assets of Hemosol was conditional upon 209 reaching a satisfactory agreement with ProMetic Biosciences Inc. (ProMetic) as to Hemosol's licence to use certain intellectual property. MDA agreed to extend the deadline in the MOA to September 18, 2006, but 209 failed to reach agreement with ProMedic by that date. On September 21, 209 waived the ProMetic condition and asserted its right to conclude the MOA and purchase the assets of Hemosol.

7 Central to the motion judge's decision rejecting 209's claim that it was entitled to complete the MOA is a finding that 209 made a deliberate decision not to contact MDS to request an extension of the MOA beyond the September 18 termination date and that 209 knew that MDS had not agreed to an extension. The motion judge found that 209's failure to seek an extension was fatal and that the MOA was no longer in effect after the last deadline agreed to by MDS ended on September 18. The motions judge considered and rejected 209's claim that MDS had waived the September 18 deadline or was estopped from relying on it. He did not, however, explicitly deal with the principal submission advanced before us, namely that MDS's silence in the face of 209's continued payment under the MOA implies that MDS elected to waive 209's breech.

8 We see no basis upon which to interfere with the motion judge's findings that by failing to obtain an extension from MDS prior to the termination date, 209's right to under the MOA to purchase the assets of Hemosol expired. Nor do we see any basis to interfere with his findings as to estoppel. While the motions judge did not deal explicitly with the implied election point, in our view, that argument would be difficult to maintain in the face if his explicit finding that 209 was made aware that MDS was insisting upon the September 21 deadline and had not agreed to any extension. These are sophisticated commercial parties acting to maximize their commercial interests and the question of the deadline and the implications of MDS not agreeing to extend the deadline on 209's rights were very much on the on the table. In these circumstances, a court would be reluctant to imply that one party waived any of its legal rights.

9 However, even assuming that 209 does raise an arguable ground of appeal on the election point, we are not persuaded that 209 can meet the test for leave to appeal. 209's argument rests on well accepted legal principles. The only issue is whether 209 can bring the facts of this case within those legal principles. In our view, there is no point that transcends the interests of these parties and the point on appeal has insufficient significance to the practice to warrant granting leave to appeal.

Conclusion

10 Accordingly, the motion for leave to appeal is dismissed and the appeal is quashed with costs to Catalyst and MDS fixed in the agreed amount of $2,500 each, all inclusive.

J. LABROSSE J.A.
R.J. SHARPE J.A.
R.A. BLAIR J.A.

cp/e/qlhjk/qlpwb

TAB 6

Case Name:

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

[2010] O.J. No. 1232

2010 ONSC 1708

63 C.B.R. (5th) 44

81 C.C.P.B. 56

2010 CarswellOnt 1754

Court File No. 09-CL-7950

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: March 3-5, 2010.
Judgment: March 26, 2010.

(106 paras.)

Bankruptcy and insolvency law -- Property of bankrupt -- Pensions and benefits -- Motion by the applicant Nortel corporations for approval of a settlement agreement dismissed -- The settlement agreement contained a clause that stating that no party was precluded from arguing the applicability of any amendment to the Bankruptcy and Insolvency Act that changed the priority of claims -- The clause was not fair and reasonable -- The clause resulted in an agreement that did not provide certainty and did not provide finality of a fundamental priority issue -- Companies'

Creditors Arrangement Act, s. 5.1(2).

Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Sanction by court -- Motion by the applicant Nortel corporations for approval of a settlement agreement dismissed -- The settlement agreement contained a clause that stating that no party was precluded from arguing the applicability of any amendment to the Bankruptcy and Insolvency Act that changed the priority of claims -- The clause was not fair and reasonable -- The clause resulted in an agreement that did not provide certainty and did not provide finality of a fundamental priority issue -- Companies' Creditors Arrangement Act, s. 5.1(2).

Motion by the applicant Nortel corporations for approval of a settlement agreement. The settlement agreement provided for the termination of pension payments and the termination of benefits paid through Nortel's Health and Welfare Trust (HWT). The applicants were granted a stay of proceedings on January 14, 2009, pursuant to the Companies' Creditors Arrangement Act, but had continued to provide the HWT benefits and had continued contributions and special payments to the pension plans. The opposing long-term disability employees opposed the settlement agreement, principally as a result of the inclusion of a release of Nortel and its successors, advisors, directors and officers, from all future claims regarding the pension plans and the HWT in the absence of fraud. The Official Committee of Unsecured Creditors of Nortel Networks Inc. ("UCC"), and the informal Nortel Noteholder Group (the "Noteholders") opposed Clause H.2 of the settlement agreement. Clause H.2 stated that no party was precluded from arguing the applicability of any amendment to the Bankruptcy and Insolvency Act that changed the priority of claims. The Monitor supported the Settlement Agreement, submitting that it was necessary to allow the Applicants to wind down operations and to develop a plan of arrangement. The CAW and Board of Directors of Nortel also supported the settlement agreement.

HELD: Motion dismissed. Cause H.2 was not fair and reasonable. Clause H.2 resulted in an agreement that did not provide certainty and did not provide finality of a fundamental priority issue. The third party releases were necessary and connected to a resolution of the claims against the applicants, benefited creditors generally and were not overly broad or offensive to public policy.

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. 5.1(2)

Counsel:

Derrick Tay, Jennifer Stam and Suzanne Wood, for the Applicants.

Lyndon Barnes and Adam Hirsh, for the Nortel Directors.

Benjamin Zarnett, Gale Rubenstein, C. Armstrong and Melaney Wagner, for Ernst & Young Inc., Monitor.

Arthur O. Jacques, for the Nortel Canada Current Employees.

Deborah McPhail, for the Superintendent of Financial Services (non-PBGF).

Mark Zigler and Susan Philpott, for the Former and Long-Term Disability Employees.

Ken Rosenberg and M. Starnino, for the Superintendent of Financial Services in its capacity as Administrator of the Pension Benefit Guarantee Fund.

S. Richard Orzy and Richard B. Swan, for the Informal Nortel Noteholder Group.

Alex MacFarlane and Mark Dunsmuir, for the Unsecured Creditors' Committee of Nortel Networks Inc.

Leanne Williams, for Flextronics Inc.

Barry Wadsworth, for the CAW-Canada.

Pamela Huff, for the Northern Trust Company, Canada.

Joel P. Rochon and Sakie Tambakos, for the Opposing Former and Long-Term Disability Employees.

Robin B. Schwill, for the Nortel Networks UK Limited (In Administration).

Sorin Gabriel Radulescu, In Person.

Guy Martin, In Person, on behalf of Marie Josee Perrault.

Peter Burns, In Person.

Stan and Barbara Arnelien, In Person.

ENDORSEMENT

G.B. MORAWETZ J.:--

INTRODUCTION

1 On January 14, 2009, Nortel Networks Corporation ("NNC"), Nortel Networks Limited "(NNL"), Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation (collectively, the "Applicants") were granted a stay of proceedings pursuant to the *Companies' Creditors Arrangement Act* ("CCAA") and Ernst & Young Inc. was appointed as Monitor.

2 The Applicants have historically operated a number of pension, benefit and other plans (both funded and unfunded) for their employees and pensioners, including:

(i) Pension benefits through two registered pension plans, the Nortel Networks Limited Managerial and Non-Negotiated Pension Plan and the Nortel Networks Negotiated Pension Plan (the "Pension Plans"); and
(ii) Medical, dental, life insurance, long-term disability and survivor income and transition benefits paid, except for survivor termination benefits, through Nortel's Health and Welfare Trust (the "HWT").

3 Since the CCAA filing, the Applicants have continued to provide medical, dental and other benefits, through the HWT, to pensioners and employees on long-term disability ("Former and LTD Employees") and active employees ("HWT Payments") and have continued all current service contributions and special payments to the Pension Plans ("Pension Payments").

4 Pension Payments and HWT Payments made by the Applicants to the Former and LTD Employees while under CCAA protection are largely discretionary. As a result of Nortel's insolvency and the significant reduction in the size of Nortel's operations, the unfortunate reality is that, at some point, cessation of such payments is inevitable. The Applicants have attempted to address this situation by entering into a settlement agreement (the "Settlement Agreement") dated as of February 8, 2010, among the Applicants, the Monitor, the Former Employees' Representatives (on their own behalf and on behalf of the parties they represent), the LTD Representative (on her own behalf and on behalf of the parties she represents), Representative Settlement Counsel and the CAW-Canada (the "Settlement Parties").

5 The Applicants have brought this motion for approval of the Settlement Agreement. From the standpoint of the Applicants, the purpose of the Settlement Agreement is to provide for a smooth transition for the termination of Pension Payments and HWT Payments. The Applicants take the position that the Settlement Agreement represents the best efforts of the Settlement Parties to negotiate an agreement and is consistent with the spirit and purpose of the CCAA.

6 The essential terms of the Settlement Agreement are as follows:

(a) until December 31, 2010, medical, dental and life insurance benefits will be funded on a pay-as-you-go basis to the Former and LTD Employees;
(b) until December 31, 2010, LTD Employees and those entitled to receive survivor income benefits will receive income benefits on a pay-as-you-go

basis;

(c) the Applicants will continue to make current service payments and special payments to the Pension Plans in the same manner as they have been doing over the course of the proceedings under the CCAA, through to March 31, 2010, in the aggregate amount of $2,216,254 per month and that thereafter and through to September 30, 2010, the Applicants shall make only current service payments to the Pension Plans, in the aggregate amount of $379,837 per month;

(d) any allowable pension claims, in these or subsequent proceedings, concerning any Nortel Worldwide Entity, including the Applicants, shall rank *pari passu* with ordinary, unsecured creditors of Nortel, and no part of any such HWT claims shall rank as a preferential or priority claim or shall be the subject of a constructive trust or trust of any nature or kind;

(e) proofs of claim asserting priority already filed by any of the Settlement Parties, or the Superintendent on behalf of the Pension Benefits Guarantee Fund are disallowed in regard to the claim for priority;

(f) any allowable HWT claims made in these or subsequent proceedings shall rank *pari passu* with ordinary unsecured creditors of Nortel;

(g) the Settlement Agreement does not extinguish the claims of the Former and LTD Employees;

(h) Nortel and, *inter alia*, its successors, advisors, directors and officers, are released from all future claims regarding Pension Plans and the HWT, provided that nothing in the release shall release a director of the Applicants from any matter referred to in subsection 5.1(2) of the CCAA or with respect to fraud on the part of any Releasee, with respect to that Releasee only;

(i) upon the expiry of all appeals and rights of appeal in respect thereof, Representative Settlement Counsel will withdraw their application for leave to appeal the decision of the Court of Appeal, dated November 26, 2009, to the Supreme Court of Canada on a with prejudice basis;[1]

(j) a CCAA plan of arrangement in the Nortel proceedings will not be proposed or approved if that plan does not treat the Pension and HWT claimants *pari passu* to the other ordinary, unsecured creditors ("Clause H.1"); and

(k) if there is a subsequent amendment to the *Bankruptcy and Insolvency Act* ("BIA") that "changes the current, relative priorities of the claims against Nortel, no party is precluded by this Settlement Agreement from arguing the applicability" of that amendment to the claims ceded in this Agreement ("Clause H.2").

7 The Settlement Agreement does *not* relate to a distribution of the HWT as the Settlement Parties have agreed to work towards developing a Court-approved distribution of the HWT corpus in 2010.

8 The Applicants' motion is supported by the Settlement Parties and by the Board of Directors of Nortel.

9 The Official Committee of Unsecured Creditors of Nortel Networks Inc. ("UCC"), the informal Nortel Noteholder Group (the "Noteholders"), and a group of 37 LTD Employees (the "Opposing LTD Employees") oppose the Settlement Agreement.

10 The UCC and Noteholders oppose the Settlement Agreement, principally as a result of the inclusion of Clause H.2.

11 The Opposing LTD Employees oppose the Settlement Agreement, principally as a result of the inclusion of the third party releases referenced in [6h] above.

THE FACTS

A. Status of Nortel's Restructuring

12 Although it was originally hoped that the Applicants would be able to restructure their business, in June 2009 the decision was made to change direction and pursue sales of Nortel's various businesses.

13 In response to Nortel's change in strategic direction and the impending sales, Nortel announced on August 14, 2009 a number of organizational updates and changes including the creation of groups to support transitional services and management during the sales process.

14 Since June 2009, Nortel has closed two major sales and announced a third. As a result of those transactions, approximately 13,000 Nortel employees have been or will be transferred to purchaser companies. That includes approximately 3,500 Canadian employees.

15 Due to the ongoing sales of Nortel's business units and the streamlining of Nortel's operations, it is expected that by the close of 2010, the Applicants' workforce will be reduced to only 475 employees. There is a need to wind-down and rationalize benefits and pension processes.

16 Given Nortel's insolvency, the significant reduction in Nortel's operations and the complexity and size of the Pension Plans, both Nortel and the Monitor believe that the continuation and funding of the Pension Plans and continued funding of medical, dental and other benefits is not a viable option.

B. The Settlement Agreement

17 On February 8, 2010 the Applicants announced that a settlement had been reached on issues related to the Pension Plans, and the HWT and certain employment related issues.

18 Recognizing the importance of providing notice to those who will be impacted by the Settlement Agreement, including the Former Employees, the LTD Employees, unionized employees, continuing employees and the provincial pension plan regulators ("Affected Parties"), Nortel brought a motion to this Court seeking the approval of an extensive notice and opposition process.

19 On February 9, 2010, this Court approved the notice program for the announcement and disclosure of the Settlement (the "Notice Order").

20 As more fully described in the Monitor's Thirty-Sixth, Thirty-Ninth and Thirty-Ninth Supplementary Reports, the Settlement Parties have taken a number of steps to notify the Affected Parties about the Settlement.

21 In addition to the Settlement Agreement, the Applicants, the Monitor and the Superintendent, in his capacity as administrator of the Pension Benefits Guarantee Fund, entered into a letter agreement on February 8, 2010, with respect to certain matters pertaining to the Pension Plans (the "Letter Agreement").

22 The Letter Agreement provides that the Superintendent will not oppose an order approving the Settlement Agreement ("Settlement Approval Order"). Additionally, the Monitor and the Applicants will take steps to complete an orderly transfer of the Pension Plans to a new administrator to be appointed by the Superintendent effective October 1, 2010. Finally, the Superintendent will not oppose any employee incentive program that the Monitor deems reasonable and necessary or the creation of a trust with respect to claims or potential claims against persons who accept directorships of a Nortel Worldwide Entity in order to facilitate the restructuring.

POSITIONS OF THE PARTIES ON THE SETTLEMENT AGREEMENT

The Applicants

23 The Applicants take the position that the Settlement is fair and reasonable and balances the interests of the parties and other affected constituencies equitably. In this regard, counsel submits that the Settlement:

(a) eliminates uncertainty about the continuation and termination of benefits to pensioners, LTD Employees and survivors, thereby reducing hardship and disruption;
(b) eliminates the risk of costly and protracted litigation regarding Pension Claims and HWT Claims, leading to reduced costs, uncertainty and potential disruption to the development of a Plan;

(c) prevents disruption in the transition of benefits for current employees;
(d) provides early payments to terminated employees in respect of their termination and severance claims where such employees would otherwise have had to wait for the completion of a claims process and distribution out of the estates;
(e) assists with the commitment and retention of remaining employees essential to complete the Applicants' restructuring; and
(f) does not eliminate Pension Claims or HWT Claims against the Applicants, but maintains their quantum and validity as ordinary and unsecured claims.

24 Alternatively, absent the approval of the Settlement Agreement, counsel to the Applicants submits that the Applicants are not required to honour such benefits or make such payments and such benefits could cease immediately. This would cause undue hardship to beneficiaries and increased uncertainty for the Applicants and other stakeholders.

25 The Applicants state that a central objective in the Settlement Agreement is to allow the Former and LTD Employees to transition to other sources of support.

26 In the absence of the approval of the Settlement Agreement or some other agreement, a cessation of benefits will occur on March 31, 2010 which would have an immediate negative impact on Former and LTD Employees. The Applicants submit that extending payments to the end of 2010 is the best available option to allow recipients to order their affairs.

27 Counsel to the Applicants submits that the Settlement Agreement brings Nortel closer to finalizing a plan of arrangement, which is consistent with the sprit and purpose of the CCAA. The Settlement Agreement resolves uncertainties associated with the outstanding Former and LTD Employee claims. The Settlement Agreement balances certainty with clarity, removing litigation risk over priority of claims, which properly balances the interests of the parties, including both creditors and debtors.

28 Regarding the priority of claims going forward, the Applicants submit that because a deemed trust, such as the HWT, is not enforceable in bankruptcy, the Former and LTD Employees are by default *pari passu* with other unsecured creditors.

29 In response to the Noteholders' concern that bankruptcy prior to October 2010 would create pension liabilities on the estate, the Applicants committed that they would not voluntarily enter into bankruptcy proceedings prior to October 2010. Further, counsel to the Applicants submits the court determines whether a bankruptcy order should be made if involuntary proceedings are commenced.

30 Further, counsel to the Applicants submits that the court has the jurisdiction to release third parties under a Settlement Agreement where the releases (1) are connected to a resolution of the debtor's claims, (2) will benefit creditors generally and (3) are not overly broad or offensive to public policy. See *Re Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d)

513 (C.A.), [*Metcalfe*] at para. 71, leave to appeal refused, [2008] S.C.C.A. No. 337 and *Re Grace* [2008] O.J. No. 4208 (S.C.J.) [*Grace 2008*] at para. 40.

31 The Applicants submit that a settlement of the type put forward should be approved if it is consistent with the spirit and purpose of the CCAA and is fair and reasonable in all the circumstances. Elements of fairness and reasonableness include balancing the interests of parties, including any objecting creditor or creditors, equitably (although not necessarily equally); and ensuring that the agreement is beneficial to the debtor and its stakeholders generally, as per *Re Air Canada*, [2003] O.J. No. 5319 (S.C.J.) [*Air Canada*]. The Applicants assert that this test is met.

The Monitor

32 The Monitor supports the Settlement Agreement, submitting that it is necessary to allow the Applicants to wind down operations and to develop a plan of arrangement. The Monitor submits that the Settlement Agreement provides certainty, and does so with input from employee stakeholders. These stakeholders are represented by Employee Representatives as mandated by the court and these Employee Representatives were given the authority to approve such settlements on behalf of their constituents.

33 The Monitor submits that Clause H.2 was bargained for, and that the employees did give up rights in order to have that clause in the Settlement Agreement; particularly, it asserts that Clause H.1 is the counterpoint to Clause H.2. In this regard, the Settlement Agreement is fair and reasonable.

34 The Monitor asserts that the court may either (1) approve the Settlement Agreement, (2) not approve the Settlement Agreement, or (3) not approve the Settlement Agreement but provide practical comments on the applicability of Clause H.2.

Former and LTD Employees

35 The Former Employees' Representatives' constituents number an estimated 19,458 people. The LTD Employees number an estimated 350 people between the LTD Employee's Representative and the CAW-Canada, less the 37 people in the Opposing LTD Employee group.

36 Representative Counsel to the Former and LTD Employees acknowledges that Nortel is insolvent, and that much uncertainty and risk comes from insolvency. They urge that the Settlement Agreement be considered within the scope of this reality. The alternative to the Settlement Agreement is costly litigation and significant uncertainty.

37 Representative Counsel submits that the Settlement Agreement is fair and reasonable for all creditors, but especially the represented employees. Counsel notes that employees under Nortel are unique creditors under these proceedings, as they are not sophisticated creditors and their personal welfare depends on receiving distributions from Nortel. The Former and LTD Employees assert that

this is the best agreement they could have negotiated.

38 Representative Counsel submits that bargaining away of the right to litigate against directors and officers of the corporation, as well at the trustee of the HWT, are examples of the concessions that have been made. They also point to the giving up of the right to make priority claims upon distribution of Nortel's estate and the HWT, although the claim itself is not extinguished. In exchange, the Former and LTD Employees will receive guaranteed coverage until the end of 2010. The Former and LTD Employees submit that having money in hand today is better than uncertainty going forward, and that, on balance, this Settlement Agreement is fair and reasonable.

39 In response to allegations that third party releases unacceptably compromise employees' rights, Representative Counsel accepts that this was a concession, but submits that it was satisfactory because the claims given up are risky, costly and very uncertain. The releases do not go beyond s. 5.1(2) of the CCAA, which disallows releases relating to misrepresentations and wrongful or oppressive conduct by directors. Releases as to deemed trust claims are also very uncertain and were acceptably given up in exchange for other considerations.

40 The Former and LTD Employees submit that the inclusion of Clause H.2 was essential to their approval of the Settlement Agreement. They characterize Clause H.2 as a no prejudice clause to protect the employees by not releasing any future potential benefit. Removing Clause H.2 from the Settlement Agreement would be not the approval of an agreement, but rather the creation of an entirely new Settlement Agreement. Counsel submits that without Clause H.2, the Former and LTD Employees would not be signatories.

CAW

41 The CAW supports the Settlement Agreement. It characterizes the agreement as Nortel's recognition that it has a moral and legal obligation to its employees, whose rights are limited by the laws in this country. The Settlement Agreement temporarily alleviates the stress and uncertainty its constituents feel over the winding up of their benefits and is satisfied with this result.

42 The CAW notes that some members feel they were not properly apprised of the facts, but all available information has been disclosed, and the concessions made by the employee groups were not made lightly.

Board of Directors

43 The Board of Directors of Nortel supports the Settlement Agreement on the basis that it is a practical resolution with compromises on both sides.

Opposing LTD Employees

44 Mr. Rochon appeared as counsel for the Opposing LTD Employees, notwithstanding that

these individuals did not opt out of having Representative Counsel or were represented by the CAW. The submissions of the Opposing LTD Employees were compelling and the court extends it appreciation to Mr. Rochon and his team in co-ordinating the representatives of this group.

45 The Opposing LTD Employees put forward the position that the cessation of their benefits will lead to extreme hardship. Counsel submits that the Settlement Agreement conflicts with the spirit and purpose of the CCAA because the LTD Employees are giving up legal rights in relation to a $100 million shortfall of benefits. They urge the court to consider the unique circumstances of the LTD Employees as they are the people hardest hit by the cessation of benefits.

46 The Opposing LTD Employees assert that the HWT is a true trust, and submit that breaches of that trust create liabilities and that the claim should not be released. Specifically, they point to a $37 million shortfall in the HWT that they should be able to pursue.

47 Regarding the third party releases, the Opposing LTD Employees assert that Nortel is attempting to avoid the distraction of third party litigation, rather than look out for the best interests of the Former and LTD Employees. The Opposing LTD Employees urge the court not to release the only individuals the Former and LTD Employees can hold accountable for any breaches of trust. Counsel submits that Nortel has a common law duty to fund the HWT, which the Former and LTD Employees should be allowed to pursue.

48 Counsel asserts that allowing these releases (a) is not necessary and essential to the restructuring of the debtor, (b) does not relate to the insolvency process, (c) is not required for the success of the Settlement Agreement, (d) does not meet the requirement that each party contribute to the plan in a material way and (e) is overly broad and therefore not fair and reasonable.

49 Finally, the Opposing LTD Employees oppose the *pari passu* treatment they will be subjected to under the Settlement Agreement, as they have a true trust which should grant them priority in the distribution process. Counsel was not able to provide legal authority for such a submission.

50 A number of Opposing LTD Employees made in person submissions. They do not share the view that Nortel will act in their best interests, nor do they feel that the Employee Representatives or Representative Counsel have acted in their best interests. They shared feelings of uncertainty, helplessness and despair. There is affidavit evidence that certain individuals will be unable to support themselves once their benefits run out, and they will not have time to order their affairs. They expressed frustration and disappointment in the CCAA process.

UCC

51 The UCC was appointed as the representative for creditors in the U.S. Chapter 11 proceedings. It represents creditors who have significant claims against the Applicants. The UCC opposes the motion, based on the inclusion of Clause H.2, but otherwise the UCC supports the Settlement Agreement.

52 Clause H.2, the UCC submits, removes the essential element of finality that a settlement agreement is supposed to include. The UCC characterizes Clause H.2 as a take back provision; if activated, the Former and LTD Employees have compromised nothing, to the detriment of other unsecured creditors. A reservation of rights removes the finality of the Settlement Agreement.

53 The UCC claims it, not Nortel, bears the risk of Clause H.2. As the largest unsecured creditor, counsel submits that a future change to the BIA could subsume the UCC's claim to the Former and LTD Employees and the UCC could end up with nothing at all, depending on Nortel's asset sales.

Noteholders

54 The Noteholders are significant creditors of the Applicants. The Noteholders oppose the settlement because of Clause H.2, for substantially the same reasons as the UCC.

55 Counsel to the Noteholders submits that the inclusion of H.2 is prejudicial to the non-employee unsecured creditors, including the Noteholders. Counsel submits that the effect of the Settlement Agreement is to elevate the Former and LTD Employees, providing them a payout of $57 million over nine months while everyone else continues to wait, and preserves their rights in the event the laws are amended in future. Counsel to the Noteholders submits that the Noteholders forego millions of dollars while remaining exposed to future claims.

56 The Noteholders assert that a proper settlement agreement must have two elements: a real compromise, and resolution of the matters in contention. In this case, counsel submits that there is no resolution because there is no finality in that Clause H.2 creates ambiguity about the future. The very object of a Settlement Agreement, assert the Noteholders, is to avoid litigation by withdrawing claims, which this agreement does not do.

Superintendent

57 The Superintendent does not oppose the relief sought, but this position is based on the form of the Settlement Agreement that is before the Court.

Northern Trust

58 Northern Trust, the trustee of the pension plans and HWT, takes no position on the Settlement Agreement as it takes instructions from Nortel. Northern Trust indicates that an oversight left its name off the third party release and asks for an amendment to include it as a party released by the Settlement Agreement.

LAW AND ANALYSIS

A. Representation and Notice Were Proper

59 It is well settled that the Former Employees' Representatives and the LTD Representative

(collectively, the "Settlement Employee Representatives") and Representative Counsel have the authority to represent the Former Employees and the LTD Beneficiaries for purposes of entering into the Settlement Agreement on their behalf: *see Grace 2008*, *supra* at para. 32.

60 The court appointed the Settlement Employee Representatives and the Representative Settlement Counsel. These appointment orders have not been varied or appealed. Unionized employees continue to be represented by the CAW. The Orders appointing the Settlement Employee Representatives expressly gave them authority to represent their constituencies "for the purpose of settling or compromising claims" in these Proceedings. Former Employees and LTD Employees were given the right to opt out of their representation by Representative Settlement Counsel. After provision of notice, only one former employee and one active employee exercised the opt-out right.

B. Effect of the Settlement Approval Order

61 In addition to the binding effect of the Settlement Agreement, many additional parties will be bound and affected by the Settlement Approval Order. Counsel to the Applicants submits that the binding nature of the Settlement Approval Order on all affected parties is a crucial element to the Settlement itself. In order to ensure all Affected Parties had notice, the Applicants obtained court approval of their proposed notice program.

62 Even absent such extensive noticing, virtually all employees of the Applicants are represented in these proceedings. In addition to the representative authority of the Settlement Employee Representatives and Representative Counsel as noted above, Orders were made authorizing a Nortel Canada Continuing Employees' Representative and Nortel Canada Continuing Employees' Representative Counsel to represent the interests of continuing employees on this motion.

63 I previously indicated that "the overriding objective of appointing representative counsel for employees is to ensure that the employees have representation in the CCAA process": *Re Nortel Networks Corp.*, [2009] O.J. No. 2529 at para. 16. I am satisfied that this objective has been achieved.

64 The Record establishes that the Monitor has undertaken a comprehensive notice process which has included such notice to not only the Former Employees, the LTD Employees, the unionized employees and the continuing employees but also the provincial pension regulators and has given the opportunity for any affected person to file Notices of Appearance and appear before this court on this motion.

65 I am satisfied that the notice process was properly implemented by the Monitor.

66 I am satisfied that Representative Counsel has represented their constituents' interests in accordance with their mandate, specifically, in connection with the negotiation of the Settlement Agreement and the draft Settlement Approval Order and appearance on this Motion. There have

been intense discussions, correspondence and negotiations among Representative Counsel, the Monitor, the Applicants, the Superintendent, counsel to the Board of the Applicants, the Noteholder Group and the Committee with a view to developing a comprehensive settlement. NCCE's Representative Counsel have been apprised of the settlement discussions and served with notice of this Motion. Representatives have held Webinar sessions and published press releases to inform their constituents about the Settlement Agreement and this Motion.

C. Jurisdiction to Approve the Settlement Agreement

67 The CCAA is a flexible statute that is skeletal in nature. It has been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *Re Nortel,* [2009] O.J. No. 3169 (S.C.J.) at paras. 28-29, citing *Metcalfe, supra,* at paras. 44 and 61.

68 Three sources for the court's authority to approve pre-plan agreements have been recognized:

(a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;
(b) the power of the court to make an order "on such terms as it may impose" pursuant to s. 11(4) of the CCAA; and
(c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects: see *Re Nortel,* [2009] O.J. No. 3169 (S.C.J.) at para. 30, citing *Re Canadian Red Cross Society,* [1998] O.J. No. 3306 (Gen. Div.) [*Canadian Red Cross*] at para. 43; *Metcalfe, supra* at para. 44.

69 In *Re Stelco Inc.*, (2005), 78 O.R. (3d) 254 (C.A.), the Ontario Court of Appeal considered the court's jurisdiction under the CCAA to approve agreements, determining at para. 14 that it is not limited to preserving the *status quo*. Further, agreements made prior to the finalization of a plan or compromise are valid orders for the court to approve: *Grace 2008, supra* at para. 34.

70 In these proceedings, this court has confirmed its jurisdiction to approve major transactions, including settlement agreements, during the stay period defined in the Initial Order and prior to the proposal of any plan of compromise or arrangement: see, for example, *Re Nortel,* [2009] O.J. No. 5582 (S.C.J.); *Re Nortel* [2009] O.J. 5582 (S.C.J.) and *Re Nortel,* 2010 ONSC 1096 (S.C.J.).

71 I am satisfied that this court has jurisdiction to approve transactions, including settlements, in the course of overseeing proceedings during a CCAA stay period and prior to any plan of arrangement being proposed to creditors: see *Re Calpine Canada Energy Ltd.,* [2007] A.J. No. 917 (C.A.) [*Calpine*] at para. 23, affirming [2007] A.J. No. 923 (Q.B.); *Canadian Red Cross, supra*; *Air Canada, supra*; *Grace 2008, supra,* and *Re Grace Canada* [2010] O.J. No. 62 (S.C.J.) [*Grace 2010*], leave to appeal to the C.A. refused February 19, 2010; *Re Nortel,* 2010 ONSC 1096 (S.C.J.).

D. Should the Settlement Agreement Be Approved?

72 Having been satisfied that this court has the jurisdiction to approve the Settlement Agreement, I must consider whether the Settlement Agreement *should* be approved.

73 A Settlement Agreement can be approved if it is consistent with the spirit and purpose of the CCAA and is fair and reasonable in all circumstances. What makes a settlement agreement fair and reasonable is its balancing of the interests of all parties; its equitable treatment of the parries, including creditors who are not signatories to a settlement agreement; and its benefit to the Applicant and its stakeholders generally.

i) Sprit and Purpose

74 The CCAA is a flexible instrument; part of its purpose is to allow debtors to balance the conflicting interests of stakeholders. The Former and LTD Employees are significant creditors and have a unique interest in the settlement of their claims. This Settlement Agreement brings these creditors closer to ultimate settlement while accommodating their special circumstances. It is consistent with the spirit and purpose of the CCAA.

ii) Balancing of Parties' Interests

75 There is no doubt that the Settlement Agreement is comprehensive and that it has support from a number of constituents when considered in its totality.

76 There is, however, opposition from certain constituents on two aspects of the proposed Settlement Agreement: (1) the Opposing LTD Employees take exception to the inclusion of the third party releases; (2) the UCC and Noteholder Groups take exception to the inclusion of Clause H.2.

Third Party Releases

77 Representative Counsel, after examining documentation pertaining to the Pension Plans and HWT, advised the Former Employees' Representatives and Disabled Employees' Representative that claims against directors of Nortel for failing to properly fund the Pension Plans were unlikely to succeed. Further, Representative Counsel advised that claims against directors or others named in the Third Party Releases to fund the Pension Plans were risky and could take years to resolve, perhaps unsuccessfully. This assisted the Former Employees' Representatives and the Disabled Employees' Representative in agreeing to the Third Party Releases.

78 The conclusions reached and the recommendations made by both the Monitor and Representative Counsel are consistent. They have been arrived at after considerable study of the issues and, in my view, it is appropriate to give significant weight to their positions.

79 In *Grace 2008, supra,* and *Grace 2010, supra,* I indicated that a Settlement Agreement entered into with Representative Counsel that contains third party releases is fair and reasonable where the

releases are necessary and connected to a resolution of claims against the debtor, will benefit creditors generally and are not overly broad or offensive to public policy.

80 In this particular case, I am satisfied that the releases are necessary and connected to a resolution of claims against the Applicants.

81 The releases benefit creditors generally as they reduces the risk of litigation against the Applicants and their directors, protect the Applicants against potential contribution claims and indemnity claims by certain parties, including directors, officers and the HWT Trustee; and reduce the risk of delay caused by potentially complex litigation and associated depletion of assets to fund potentially significant litigation costs.

82 Further, in my view, the releases are not overly broad or offensive to public policy. The claims being released specifically relate to the subject matter of the Settlement Agreement. The parties granting the release receive consideration in the form of both immediate compensation and the maintenance of their rights in respect to the distribution of claims.

Clause H.2

83 The second aspect of the Settlement Agreement that is opposed is the provision known as Clause H.2. Clause H.2 provides that, in the event of a bankruptcy of the Applicants, and notwithstanding any provision of the Settlement Agreement, if there are any amendments to the BIA that change the current, relative priorities of the claims against the Applicants, no party is precluded from arguing the applicability or non-applicability of any such amendment in relation to any such claim.

84 The Noteholders and UCC assert that Clause H.2 causes the Settlement Agreement to not be a "settlement" in the true and proper sense of that term due to a lack of certainty and finality. They emphasize that Clause H.2 has the effect of undercutting the essential compromises of the Settlement Agreement in imposing an unfair risk on the non-employee creditors of NNL, including NNI, after substantial consideration has been paid to the employees.

85 This position is, in my view, well founded. The inclusion of the Clause H.2 creates, rather than eliminates, uncertainty. It creates the potential for a fundamental alteration of the Settlement Agreement.

86 The effect of the Settlement Agreement is to give the Former and LTD Employees preferred treatment for certain claims, notwithstanding that priority is not provided for in the statute nor has it been recognized in case law. In exchange for this enhanced treatment, the Former Employees and LTD Beneficiaries have made certain concessions.

87 The Former and LTD Employees recognize that substantially all of these concessions could be clawed back through Clause H.2. Specifically, they acknowledge that future Pension and HWT

Claims will rank *pari passu* with the claims of other ordinary unsecured creditors, but then go on to say that should the BIA be amended, they may assert once again a priority claim.

88 Clause H.2 results in an agreement that does not provide certainty and does not provide finality of a fundamental priority issue.

89 The Settlement Parties, as well as the Noteholders and the UCC, recognize that there are benefits associated with resolving a number of employee-related issues, but the practical effect of Clause H.2 is that the issue is not fully resolved. In my view, Clause H.2 is somewhat inequitable from the standpoint of the other unsecured creditors of the Applicants. If the creditors are to be bound by the Settlement Agreement, they are entitled to know, with certainty and finality, the effect of the Settlement Agreement.

90 It is not, in my view, reasonable to require creditors to, in effect, make concessions in favour of the Former and LTD Employees today, and be subject to the uncertainty of unknown legislation in the future.

91 One of the fundamental purposes of the CCAA is to facilitate a process for a compromise of debt. A compromise needs certainty and finality. Clause H.2 does not accomplish this objective. The inclusion of Clause H.2 does not recognize that at some point settlement negotiations cease and parties bound by the settlement have to accept the outcome. A comprehensive settlement of claims in the magnitude and complexity contemplated by the Settlement Agreement should not provide an opportunity to re-trade the deal after the fact.

92 The Settlement Agreement should be fair and reasonable in all the circumstances. It should balance the interests of the Settlement Parties and other affected constituencies equitably and should be beneficial to the Applicants and their stakeholders generally.

93 It seems to me that Clause H.2 fails to recognize the interests of the other creditors of the Applicants. These creditors have claims that rank equally with the claims of the Former Employees and LTD Employees. Each have unsecured claims against the Applicants. The Settlement Agreement provides for a transfer of funds to the benefit of the Former Employees and LTD Employees at the expense of the remaining creditors. The establishment of the Payments Charge crystallized this agreed upon preference, but Clause H.2 has the effect of not providing any certainty of outcome to the remaining creditors.

94 I do not consider Clause H.2 to be fair and reasonable in the circumstances.

95 In light of this conclusion, the Settlement Agreement cannot be approved in its current form.

96 Counsel to the Noteholder Group also made submissions that three other provisions of the Settlement Agreement were unreasonable and unfair, namely:

(i) ongoing exposure to potential liability for pension claims if a bankruptcy order is made before October 1, 2010;
(ii) provisions allowing payments made to employees to be credited against employees' claims made, rather than from future distributions or not to be credited at all; and
(iii) lack of clarity as to whether the proposed order is binding on the Superintendent in all of his capacities under the *Pension Benefits Act* and other applicable law, and not merely in his capacity as Administrator on behalf of the Pension Benefits Guarantee Fund.

97 The third concern was resolved at the hearing with the acknowledgement by counsel to the Superintendent that the proposed order would be binding on the Superintendent in all of his capacities.

98 With respect to the concern regarding the potential liability for pension claims if a bankruptcy order is made prior to October 1, 2010, counsel for the Applicants undertook that the Applicants would not take any steps to file a voluntary assignment into bankruptcy prior to October 1, 2010. Although such acknowledgment does not bind creditors from commencing involuntary bankruptcy proceedings during this time period, the granting of any bankruptcy order is preceded by a court hearing. The Noteholders would be in a position to make submissions on this point, if so advised. This concern of the Noteholders is not one that would cause me to conclude that the Settlement Agreement was unreasonable and unfair.

99 Finally, the Noteholder Group raised concerns with respect to the provision which would allow payments made to employees to be credited against employees' claims made, rather than from future distributions, or not to be credited at all. I do not view this provision as being unreasonable and unfair. Rather, it is a term of the Settlement Agreement that has been negotiated by the Settlement Parties. I do note that the proposed treatment with respect to any payments does provide certainty and finality and, in my view, represents a reasonable compromise in the circumstances.

DISPOSITION

100 I recognize that the proposed Settlement Agreement was arrived at after hard-fought and lengthy negotiations. There are many positive aspects of the Settlement Agreement. I have no doubt that the parties to the Settlement Agreement consider that it represents the best agreement achievable under the circumstances. However, it is my conclusion that the inclusion of Clause H.2 results in a flawed agreement that cannot be approved.

101 I am mindful of the submission of counsel to the Former and LTD Employees that if the Settlement Agreement were approved, with Clause H.2 excluded, this would substantively alter the Settlement Agreement and would, in effect, be a creation of a settlement and not the approval of one.

102 In addition, counsel to the Superintendent indicated that the approval of the Superintendent was limited to the proposed Settlement Agreement and would not constitute approval of any altered agreement.

103 In *Grace 2008, supra*, I commented that a line-by-line analysis was inappropriate and that approval of a settlement agreement was to be undertaken in its entirety or not at all, at para. 74. A similar position was taken by the New Brunswick Court of Queen's Bench in *Wandlyn Inns Limited (Re)* (1992), 15 C.B.R. (3d) 316. I see no reason or basis to deviate from this position.

104 Accordingly, the motion is dismissed.

105 In view of the timing of the timing of the release of this decision and the functional funding deadline of March 31, 2010, the court will make every effort to accommodate the parties if further directions are required.

106 Finally, I would like to express my appreciation to all counsel and in person parties for the quality of written and oral submissions.

G.B. MORAWETZ J.

cp/e/qlrxg/qlpxm/qlaxw/qlced/qljyw

1 On March 25, 2010, the Supreme Court of Canada released the following: *Donald Sproule et al. v. Nortel Networks Corporation et al.* (Ont.) (Civil) (By Leave) (33491) (The motions for directions and to expedite the application for leave to appeal are dismissed. The application for leave to appeal is dismissed with no order as to costs./La requête en vue d'obtenir des directives et la requête visant à accélérer la procédure de demande d'autorisation d'appel sont rejetées. La demande d'autorisation d'appel est rejetée; aucune ordonnance n'est rendue concernant les dépens.):
<http://scc.lexum.umontreal.ca/en/news_release/2010/10-03-25.3 a/10-03-25.3a.html>

TAB 7

Case Name:

Sandhu v. MEG Place LP Investment Corp.

Between
Darcy Sandhu, 934608 Alberta Ltd. and 587901 Alberta Ltd., Applicants, (Plaintiffs), and
MEG Place LP Investment Corporation, Safeguard Real Estate Investment Fund V Limited Partnership and Concrete Associates IV Investment Corporation, Respondents, (Defendants)

[2012] A.J. No. 270

2012 ABCA 91

Docket: 1201-0022-AC

Registry: Calgary

Alberta Court of Appeal
Calgary, Alberta

M.S. Paperny J.A.

Heard: March 6, 2012.
Judgment: March 16, 2012.

(22 paras.)

Bankruptcy and insolvency law -- Administration of estate -- Administrative officials and appointees -- Trustees -- Trustees in bankruptcy -- Duties and powers -- Proofs of claim or security -- Disallowance -- Application by plaintiffs for declaration that leave was not required, or for leave, to appeal from order holding that trustee was obliged to serve agent other than that specified on proof of claim with disallowance allowed in part -- Leave was required because final order giving rise to claims was made in CCAA proceedings -- Question of whether trustee was required to satisfy self as to proper address for service of notices of disallowance, and question of whether knowledge of proper address for service could be inferred, were meritorious and of importance to profession -- Leave to appeal was granted -- Bankruptcy and Insolvency Act, ss. 135, 187, 193.

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters --

Application of Act -- Application by plaintiffs for declaration that leave was not required, or for leave, to appeal from order holding that trustee was obliged to serve agent other than that specified on proof of claim with disallowance allowed in part -- Leave was required because final order giving rise to claims was made in CCAA proceedings -- Question of whether trustee was required to satisfy self as to proper address for service of notices of disallowance, and question of whether knowledge of proper address for service could be inferred, were meritorious and of importance to profession -- Leave to appeal was granted -- Companies' Creditors Arrangement Act, s. 13.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Service -- Application by plaintiffs for declaration that leave was not required, or for leave, to appeal from order holding that trustee was obliged to serve agent other than that specified on proof of claim with disallowance allowed in part -- Leave was required because final order giving rise to claims was made in CCAA proceedings -- Question of whether trustee was required to satisfy self as to proper address for service of notices of disallowance, and question of whether knowledge of proper address for service could be inferred, were meritorious and of importance to profession -- Leave to appeal was granted.

Application by Sandhu and two numbered companies for a declaration that they had a statutory right of appeal pursuant to the Bankruptcy and Insolvency Act, such that leave to appeal under the Companies' Creditors Arrangement Act ("CCAA") was not required. Alternatively, Sandhu and the companies sought leave to appeal from an order holding that a trustee in bankruptcy serving a notice of disallowance of claim could not rely on an address for service set out in a proof of claim where the trustee had information alerting him to the possibility of change in the identity of the claimant's agent. When five general partners of Safeguard and other related entities were placed into CCAA protection, Ernst & Young was appointed monitor and receiver. Investors opposing the receivership order formed a steering committee and argued that a corporation controlled by one investor, Butt, should be allowed to assume the role of general partner. Butt incorporated MEG to this end. Final orders in the CCAA proceedings authorized Ernst & Young to lodge claims in the bankruptcies of Aurora and Humeniuk, two key individuals involved in managing the bankrupt companies, after which Ernst & Young was to be discharged and MEG was to replace the monitor. Counsel for the trustee in the bankruptcies of Aurora and Humeniuk was served with the final order. Ernst & Young submitted proofs of claim to the trustee, providing Ernst & Young's address as the address for service. The trustee couriered notices of disallowance of the claims to Ernst & Young. Ernst & Young emailed these to Bennett Jones, counsel for the steering committee, informing the firm that Ernst & Young had been discharged and would take no steps in relation to the disallowances. Bennett Jones had yet to be retained by MEG. Counsel for the steering committee claimed that he forwarded the notices to Butt, who did not recall receiving them. No one appealed from the notices of disallowance. Aurora and Humeniuk obtained their discharges from bankruptcy in December 2010. Sandhu and the numbered companies filed a statement of claim in March 2011, preserving their claims against MEG, Safeguard and the related companies. A courtesy copy was mailed to Bennett Jones, at which time Butt retained Bennett Jones on behalf of MEG and the

others. The judge found that the notices of disallowance had not been properly served on MEG and the others. She found that once the trustee became aware of the new agent for MEG, service on the new agent needed to be effected. The trustee was not entitled to rely on the address in the proofs of claim to effect proper service.

HELD: Application allowed in part. Leave was required because, although the CCAA proceedings had ended, the claim at issue was made pursuant to the claims process in the final order in the CCAA proceedings. The order required the claim to be resolved in accordance with the claims process. Where the court's jurisdiction emanated from both the CCAA and the BIA, the CCAA applied. Leave to appeal from the order was granted. Sandhu and the numbered companies raised issues of significance to the practice that had merit. The question of the trustee's duty to confirm addresses in order to effect proper service and whether knowledge of a change in agent could be inferred were questions with implications beyond the specific circumstances of the present case.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 135, s. 135(3), s. 187(9), s. 193

Bankruptcy and Insolvency General Rules, CRC, c. 368, Rule 113

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 13

Judicature Act, RSA 2000, c. J-2,

Appeal From:

Application for Leave to Appeal.

Counsel:

M. Marion, M. Lemmens, for the Applicants.

A. Teasdale, for the Respondents.

K. Bourassa, for Hardie & Kelly Inc.

Reasons for Decision

1 M.S. PAPERNY J.A.:-- The applicants, Darcy Sandhu, 934608 Alberta Ltd. and 587901 Alberta Ltd., seek a declaration that they have a statutory right of appeal under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 193 ("BIA") and that leave to appeal under the *Companies'*

Creditors Arrangement Act, RSC 1985, c C-36 ("*CCAA*") is therefore not required. In the alternative, the applicants seek leave to appeal an Order holding that a trustee in bankruptcy serving a notice of disallowance of claim cannot rely on an address for service set out in a proof of claim where he has information alerting him to the possibility of change in the identity of the claimant's agent.

Background

2 On July 29, 2009, the Queen's Bench granted an Initial Order placing the five general partners of the Safeguard Real Estate Investment Fund V Limited Partnership LP V ("LP V") and other related entities (the "Concrete Equities Group") into protection under the *CCAA*. Ernst & Young was appointed as Monitor (under the *CCAA*) and Receiver (under the *BIA* and the *Judicature Act*, RSA 2000, c J-2).

3 Certain investors in the Concrete Equities Group opposed the receivership order, forming a Steering Committee that argued that a corporation controlled by one investor, Mr. Steven Butt, ought instead be allowed to assume the role of general partner of the members of the Concrete Equities Group. Counsel for the Steering Committee was Bennett Jones LLP. On June 4, 2010, Butt incorporated MEG Place LP Investment Corporation ("MEG") so that it might become the new general partner of LP V when the receivership and the *CCAA* proceedings were wound down.

4 Final orders were granted by the Queen's Bench in the *CCAA* proceedings in June, 2010. The Amended Final Order, dated June 29, 2010, authorizes Ernst & Young to lodge claims on behalf of LP V in the bankruptcy proceedings of Aurora and Humeniuk, two key individuals in the management of the Concrete Equities Group. When these and other obligations were fulfilled, Ernst & Young was to be discharged as Monitor and Receiver of the respondents, and MEG was to replace the Monitor *mutatis mutandis*.

5 Counsel for the Trustee in Bankruptcy of Humeniuk and Aurora was served with a copy of the Amended Final Order on June 29, 2010.

6 On July 13, 2010, in accordance with the Amended Final Order, Ernst & Young submitted proofs of claim in the Humeniuk and Aurora bankruptcies on behalf of Concrete IV and LP V. These proofs of claim provided that notices or correspondence with respect to the claims were to be served on counsel for Ernst & Young.

7 On December 13, 2010, the Trustee in Bankruptcy of Humeniuk and Aurora couriered and mailed two Notices of Disallowance of the proofs of claim to counsel for Ernst & Young. Counsel for Ernst & Young e-mailed copies of the disallowances to Bennett Jones on the same date, advising that Ernst & Young had been discharged as the Receiver of all Concrete Equities Group entities but one and would therefore not be taking steps in relation to the disallowances.

8 Butt deposed that at the time the disallowances were sent to Bennett Jones, Bennett Jones (who

had been counsel for the Steering Committee) had not yet been retained as counsel for MEG. Further, while Mr. Yorke-Slader of Bennett Jones advised that he recalled forwarding the disallowances to Butt, Butt deposed that he did not recall receiving them.

9 No one appealed the Notices of Disallowance issued by the Trustee in Bankruptcy for Humeniuk and Aurora. Aurora and Humeniuk were discharged from bankruptcy in December, 2010.

10 The applicants filed a Statement of Claim in Queen's Bench in March, 2011, preserving their claim against the respondents. A courtesy copy of this Statement of Claim was provided to Bennett Jones on March 24, 2011, at which time Butt deposed that he then retained Bennett Jones on behalf of the respondents.

11 The chambers judge held that the Notices of Disallowance had not been properly served on the respondents. She found that once the Trustee in Bankruptcy for Humeniuk and Aurora was aware of the appointment of a new agent for the claimant, service on that new agent must be effected in accordance with section 135(3) of the *BIA* and Rule 113 of the *Bankruptcy and Insolvency General Rules*, CRC, c 368 ("*General Rules*"). In other words, the Trustee could not simply rely on the address provided in the proofs of claim to effect proper service.

12 The applicants seek a declaration from this Court that leave to appeal the chambers judge's Order is not required. In the alternative, the applicants seek leave to appeal.

Grounds of Appeal

13 Should leave to appeal be required, the applicants seek leave on the following questions:

1. Did the chambers judge err in her interpretation of section 135(3) of the *BIA* and Rule 113 of the *General Rules*, by finding that service of notices of disallowance to the address listed in the prescribed Form 31 proof of claim is not always sufficient?
2. Did the chambers judge err in her application of section 135(3) of the *BIA* to the facts of this case?
3. Did the chambers judge err in her interpretation of section 187(9) of the *BIA*, its appropriate criteria, and the meaning of "substantial injustice" pursuant thereto?
4. Did the chambers judge err in the exercise of her discretion under section 187(9) of the *BIA* in her refusal to cure the irregularity in service of the disallowances?
5. Did the chambers judge err in her conclusion that the unserved notices of disallowance have "no further effect"?

Preliminary Issue: Is Leave Required?

14 As a preliminary matter, the applicants seek a declaration that leave of this Court is not needed to appeal the Order of the chambers judge, because her decision was not made "under" the *CCAA* in accordance with section 13 of that *Act*. Section 13 states:

> **Leave to appeal**
>
> 13. Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

15 In my view, leave to appeal is required under section 13 of the *CCAA*. Although the applicant correctly points out that the *CCAA* restructuring process is complete, the claim at issue was made pursuant to the Claims Process prescribed by the Amended Final Order in the *CCAA* action. That Order requires the applicants' claims be resolved in accordance with the Claims Process.

16 In arriving at her decision, the chambers judge placed reliance on her *CCAA* jurisdiction. Her analysis invoked her view of the "fundamental purpose of *CCAA* proceedings in preventing undue manoeuvring for position among creditors". She concluded that the respondents' right to pursue set-off against the plaintiffs (applicants) in the action was a right specifically reserved in the *CCAA* proceedings, and that denying the requested relief - that is, deciding not to cure the irregularity in service - would best balance the equities of all parties. While in the result the plaintiffs (applicants) would lose a right to rely on a disallowance of claim, she concluded that their substantive right to have the claim itself determined, would remain unaffected. Further, she considered that the *CCAA* proceedings had been "complex and unusual", and that the implications of the Notices of Disallowance on later litigation were not readily apparent. Given that *CCAA* considerations informed the decision of and the exercise of discretion by the chambers judge, in my view, it can be fairly said that the order was made "under" the *CCAA* in accordance with section 13 of that *Act*.

17 A recent practice appears to have developed whereby applicants seek to avoid the leave requirements of the *CCAA* by submitting that, in substance, their claims are more akin to claims outside of the *CCAA*. It follows, they submit, that the leave requirement under the *CCAA* ought not apply in the circumstances. This issue was most recently considered by O'Ferrall J.A. in *Aurora v. Safeguard Real Estate Investment Fund LP*, 2012 ABCA 58, where he held that because the decision being appealed was made pursuant to a *CCAA* Claims Process and because the jurisdiction of the chambers judge to hear and decide many issues in the case had emanated from the *CCAA*, leave to appeal was required. In my view, this is the correct approach. To O'Ferrall J.A.'s reasons I would only add that where the jurisdiction of a court emanates from both the *CCAA* and the *BIA*, it is not helpful to parse the proceedings to determine which elements of the case fall under the *CCAA* and therefore require leave. Rather, if a claim is being prosecuted by virtue of or as a result of the

CCAA, section 13 applies. It is inappropriate for parties to rely on the *CCAA* jurisdiction for the preservation and determination of their claims, but seek to avoid its leave requirements for the purpose of an appeal.

Should Leave Be Granted?

18 Having determined that leave is required, I will now address whether leave should be granted.

A. The Test for Leave to Appeal Under the *CCAA*

19 The test for leave to appeal involves a single criterion subsuming four factors. The single criterion is that there must be serious and arguable grounds for the appeal. The four factors used to assess whether this criterion is present are:

(1) Whether the point on appeal is of significance to the practice;
(2) Whether the point raised is of significance to the action itself;
(3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
(4) Whether the appeal will unduly hinder the progress of the action.

See: *Aurora* at para 15; *Liberty Oil & Gas Ltd (Re)*, 2003 ABCA 158, 44 CBR (4th) 96 at paras 15-16, citing *Resurgence Asset Management LLC v Canadian Airlines Corp*, 2000 ABCA 149, 261 AR 120 at paras 6-7 ("*Resurgence*").

B. Appropriate Standard of Review

20 Assessment of these factors requires regard to the standard of review that would govern the appeal, if leave were granted. In reviewing a *CCAA* decision of a supervising judge, the standard of review of correctness applies to errors of law: *Resurgence* at para 29. A standard of review of palpable and overriding error applies to a supervising judge's exercise of discretion or findings of fact: *Aurora* at para 17; *Resurgence* at para 29.

C. Decision on Leave Application

21 The respondents concede that the second and fourth factors listed in the test for leave are satisfied in this case. With regard to factors one and three, I am of the view that this appeal raises issues of general significance to the practice and is *prima facie* meritorious. The proper interpretation of section 135 of the *BIA*, the extent of a trustee's obligations to confirm addresses in order to effect proper service, and whether knowledge of a change in agent can be inferred on the part of a trustee when a claimant has taken no steps to provide that information, are all questions with implications beyond the specific circumstances of this case. Leave is granted on the five grounds of appeal listed in paragraph 13.

Responsibilities of Trustee Pending Appeal

22 Finally, the Trustee in Bankruptcy has asked for confirmation from this Court that it is not required to take any action on any matter related to this appeal pending the hearing of this appeal. I confirm that the Trustee is not required to take any action at all pending appeal.

M.S. PAPERNY J.A.

cp/e/qlcct/qljxr

TAB 8

Indexed as:

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.

[2001] 2 S.C.R. 534

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

2001 SCC 46

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, [page535] which was incorporated by D, its sole shareholder, for the purpose of helping investor-class immigrants qualify as permanent residents in Canada. WCSC solicited funds through two offerings to invest in income-producing properties. After the investors' funds were deposited, WCSC purchased from CRI, for $5,550,000, the rights to a Crown surface lease and also agreed to commit a further $16.5 million for surface improvements. To finance WCSC's obligations to CRI, D directed that the Series A debentures be issued in an aggregate principal amount of $22,050,000 to some of the investors. D advanced more funds to CRI and corresponding debentures were issued, in particular the Series E and F debentures. Eventually, the debentures were pooled. When CRI announced that it could not pay the interest due on the debentures, L and W, the representative plaintiffs, commenced a class action complaining that D and various affiliates and advisors of WCSC breached fiduciary duties to the investors by mismanaging their funds. The defendants applied to the Court of Queen's Bench for a declaration and order striking that portion of the claim in which the individual plaintiffs purport, pursuant to Rule 42 of the Alberta Rules of Court, to represent a class of 231 investors. The chambers judge denied the application. The majority of the Court of Appeal upheld that decision but granted the defendants the right to discovery from each of the 231 plaintiffs. The defendants appealed to this Court, and the plaintiffs cross-appealed taking issue with the Court of Appeal's allowance of individualized discovery from each class member.

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

In Alberta, class-action practice is governed by Rule 42 of the Alberta Rules of Court but, in the absence of comprehensive legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them. Class actions should be allowed to proceed under Rule 42 where the following conditions are met: (1) the class is capable of clear definition; (2) there are issues of law or fact common to all class members; (3) success for one class member means success for all; and (4) the proposed representative adequately represents the interests of the class. If these conditions are met the court must also be satisfied, in the exercise of its discretion, that there are no countervailing considerations that outweigh [page536] 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 [page537] should be available only by order of the court, upon the defendants showing reasonable necessity.

Cases Cited

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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Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 5(1), 6, 25.

[page538]

Code of Civil Procedure, R.S.Q., c. C-25, Book IX, arts. 1003, 1039.
Federal Rules of Civil Procedure, 28 U.S.C.A. para. 23.
Supreme Court of Judicature Act, 1873 (U.K.), 36 & 37 Vict., c. 66, Sch., r. 10.

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[page539]

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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.

[page540]

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 [page541] 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 [page542] 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.

[page543]

> 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 concluded, however, that resolution of the case before him did not require resort to the affidavit evidence.

14 On the third issue, the chambers judge concluded that the court should strike a representative claim under Rule 42 only if it is "entirely clear" or [page544] "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.

[page545]

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 [page546] 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 [page547] 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 efficiency": 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, [page548] 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 [page549] 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; [page550] 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 [page551] 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 [page552] 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 [page553] (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.

[page554]

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 [page555] 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 [page556] 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 [page557] 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 [page558] 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.

[page559]

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 [page560] 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 [page561] 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 [page562] 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.

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[page563]

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cp/e/qllls

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 of Appeal File Nos.: C56961/M42453
S.C.J. Court File Nos.: CV-12-9667-00-CL/ CV-11-431153-00CP

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