Court of Appeal File Number: M42404
Superior Court File No. CV-12-9667-00CL

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 OR ARRANGEMENT OF SINO-FOREST CORPORATION

Court of Appeal File Number: M42404
Superior Court File No. CV-11-431153-00CP

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA and THE TRUSTEES OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 793 PENSION PLAN FOR OPERATING ENGINEERS IN ONTARIO

Plaintiffs

-and-

SINO-FOREST CORPORATION, ERNST & YOUNG LLP, ALLEN T.Y. CHAN, W. JUDSON MARTIN, KAI KIT POON, DAVID J. HORSLEY, WILLIAM E. ARDELL, JAMES P. BOWLAND, JAMES M.E. HYDE, EDMUN 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. and MAISON PLACEMENTS CANADA INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

RESPONDING BOOK OF AUTHORITIES OF SINO-FOREST CORPORATION

(Motion for Directions)

Dated: April 25, 2013

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Tab 1

Indexed as:

Resurgence Asset Management LLC v. Canadian Airlines Corp.

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

[2000] A.J. No. 1028

2000 ABCA 238

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2000 CarswellAlta 919

Docket: 00-08901

Alberta Court of Appeal
Calgary, Alberta

Wittmann J.A.
(In Chambers)

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

(57 paras.)

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

Counsel:

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

MEMORANDUM OF DECISION NO. 2

WITTMANN J.:--

INTRODUCTION

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

BACKGROUND

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

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

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

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

6 Canadian came to the conclusion that it must conclude its debt restructuring to permit the completion of a full merger between Canadian and Air Canada. On February 1, 2000, to secure liquidity to continue operating until debt restructuring was achieved, Canadian announced a moratorium on payments to lessors and lenders. CAIL, Air Canada and lessors of 59 aircraft reached an agreement in principle on a restructuring plan. They also reached agreement with other secured creditors and several major unsecured creditors with respect to restructuring.

7 Canadian still faced threats of proceedings by secured creditors. It commenced proceedings under the CCAA on March 24, 2000. Pricewaterhouse Coopers Inc. was appointed as Monitor by court order.

8 Arrangements with various aircraft lessors, lenders and conditional vendors which would benefit Canadian by reducing rates and other terms were approved by court orders dated April 14, 2000 and May 10, 2000.

9 On April 25, 2000, in accordance with the March 24 court order, Canadian filed the Plan which was described as having three principal objectives:

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

10 The Plan generally provided for stakeholders by category as follows:

(a) Affected unsecured creditors, which included unsecured noteholders, aircraft claimants, executory contract claimants, tax claimants and various litigation claimants, would receive 12 cents per dollar (later changed to 14 cents per dollar) of approved claims;
(b) Affected secured creditors, the senior secured noteholders, would receive 97 per cent of the principal amount of their claim plus interest and costs in respect of their secured claim, and a deficiency claim as unsecured creditors for the remainder;
(c) Unaffected unsecured creditors, which included Canadian's employees, customers and suppliers of goods and services, would be unaffected by the Plan;
(d) Unaffected secured creditor, the Royal Bank, CAIL's operating lender, would not be affected by the Plan.

11 The Plan also proposed share capital reorganization by having all CAIL common shares held by CAC converted into a single retractable share, which would then be retracted by CAIL for $1.00, and all CAIL preferred shares held by 853350 converted into CAIL common shares. The Plan provided for amendments to CAIL's articles of incorporation to effect the proposed reorganization.

12 On May 26, 2000, in accordance with the orders and directions of the court, two classes of creditors, the senior secured noteholders and the affected unsecured creditors voted on the Plan as amended. Both classes approved the Plan by the majorities required by ss. 4 and 5 of the CCAA.

13 On May 29, 2000, by notice of motion, Canadian sought court sanction of the Plan under s. 6 of the CCAA and an order for reorganization pursuant to s. 185 of the Business Corporations Act (Alberta), S.A. 1981, c. B-15 as amended ("ABCA"). Resurgence was among those who opposed the Plan. Its application, along with that of four shareholders of CAC, was ordered to be tried during a hearing to consider the fairness and reasonableness of the Plan ("the fairness hearing").

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

15 The fairness hearing lasted two weeks during which viva voce evidence of six witnesses was heard, including testimony of the chief financial officers of Canadian and Air Canada. Submissions by counsel were made on behalf of the federal government, the Calgary and Edmonton airport authorities, unions representing employees of Canadian and various creditors of Canadian. The court also received two special reports from the Monitor.

16 As part of assessing the fairness of the Plan, the learned chambers judge received a liquidation analysis of CAIL, prepared by the Monitor, in order to estimate the amounts that might be recovered by CAIL's creditors and shareholders in the event that CAIL's assets were disposed of by a receiver or trustee. The Monitor concluded that liquidation would result in a shortfall to certain secured creditors, that recovery by unsecured creditors would be between one and three cents on the dollar, and that there would be no recovery by shareholders.

17 The learned chambers judge stated that she agreed with the parties opposing the Plan that it was not perfect, but it was neither illegal, nor oppressive, and therefore, dismissed the requested declarations and relief sought by Resurgence. Further, she held that the Plan was the only alternative to bankruptcy as ten years of struggle and failed creative attempts at restructuring clearly demonstrated. She ruled that the Plan was fair and reasonable and deserving of the sanction of the court. She granted the order sanctioning the Plan, and the application pursuant to s. 185 of the ABCA to reorganize the corporation.

LEAVE TO APPEAL UNDER THE CCAA

18 The CCAA provides for appeals to this Court as follows:

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

19 As set out in Resurgence Asset Management LLC v. Canadian Airlines Corporation, 2000 ABCA 149 (Online: Alberta Courts)("Resurgence No. 1"), a decision on a leave application sought earlier in this action, and as conceded by all the parties to this application, the criterion to be applied in an application for leave to appeal is that there must be serious and arguable grounds that are of real and significant interest to the parties. This criterion subsumes four factors to be considered by the court:

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

20 The respondents argue that apart from the test for leave, mootness is an additional overriding factor in the present case which is dispositive against the granting of leave to appeal.

MOOTNESS

21 In Galcor Hotel Managers Ltd. v. Imperial Financial Services Ltd. (1993), 81 B.C.L.R. (2) 142 (C.A.), an order authorizing the distribution of substantially all the assets of a limited partnership had been fully performed. The appellants appealed, seeking to have the order vacated. The appellants had unsuccessfully applied for a stay of the order. In deciding whether to allow the appeal to be presented, Gibbs, J.A., for the court, said there was no merit, substance or prospective benefit that could accrue to the appellants, and that the appeal was therefore moot.

22 In Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342, Sopinka, J. for the court, held that where there is no longer a live controversy or concrete dispute, an appeal is moot.

23 No stay of the June 27 order was obtained or even sought. In reliance on that order, most of the transactions contemplated by the Plan have been completed. According to the Affidavit of Paul Brotto, sworn July 6, 2000, filed July 7, 2000, the following occurred:

5. The transactions contemplated by the Plan have been completed in reliance upon the Sanction Order. The completion of the transactions has involved, among other things, the following steps:

   (a) Effective July 4, 2000, all of the depreciable property of CAIL was transferred to a wholly-owned subsidiary of CAIL and leased back from such subsidiary by CAIL;
   (b) Articles of Reorganization of CAIL, being Schedule "D" to the Plan (which is Exhibit "A" to the Sanction Order), were filed and a Certificate of Amendment and Registration of Restated Articles was issued by the Registrar of Corporations pursuant to the Sanction Order, and in accordance with sections 185 and 255 of the Business Corporations Act (Alberta) (the "Certificate") on July 5, 2000. Pursuant to the Articles of Reorganization, the common shares of CAIL formerly held by CAC were converted to retractable preferred shares and the same were retracted. All preferred shares of CAIL held by 853350 Alberta Ltd. ("853350") were converted into CAIL common shares;
   (c) The "Section 80.04 Agreement" referred to in the Plan between CAIL and CAC, pursuant to which certain forgiveness of debt obligations under s. 80 of the Income Tax Act were transferred from CAIL to CAC, has been entered into as of July 5, 2000;
   (d) Payment of $185,973,411 (US funds) has been made to the Trustee on behalf of all holders of Senior Secured Notes as provided for in the Plan and 853350 has acquired the Amended Secured Intercompany Note; and

(e) Payments have been made to Affected Unsecured Creditors holding Unsecured Proven Claims and further payments will be made upon the resolution of disputed claims by the Claims officer; and

(f) It is expected that payment will be made within several days of the date of this Affidavit to the Trustee, on behalf of the Unsecured Notes, in the amount 14 percent of approximately $160,000,000.

24 In Norcan Oils Ltd. v. Fogler, [1965] S.C.R. 36, it was held that the Alberta Supreme Court Appellate Division could not set aside or revoke a certificate of amalgamation after the registrar of companies had issued the certificate in accordance with a valid court order and the corporations legislation. A notice appealing the order had been served but no stay had been obtained. Absent express legislative authority to reverse the process once the certificate had been issued, the majority of the Supreme Court of Canada held the amalgamation could not be unwound and therefore, an appellate court ought not to make an order which could have no effect.

25 Courts following Norcan have recognized that any right to appeal will be lost if a party does not obtain a stay of the filing of an amalgamation approval order: Re Universal Explorations Ltd. and Petrol Oil & Gas Company Limited (1982), 35 A.R. 71 (Q.B.) and Re Gibbex Mines Ltd. et al., [1975] 2 W.W.R. 10 (B.C.S.C.).

26 Norcan applies to bind this Court in the present action where CAIL's articles of reorganization were filed with the Registrar of Corporations on July 5, 2000 and pursuant to the provisions of the ABCA, a certificate amending the articles was issued. The certificate cannot now be rescinded. There is no provision in the ABCA for reversing a reorganization.

27 The respondents point out that there are other irreversible changes which have occurred since the date of the June 27, 2000 order. They include changes in share structure, changes in management personnel, implementation of a restructuring plan that included a repayment agreement with its principal lender and other creditors and payments to third parties. [Affidavit of Paul Brotto, paras. 6, 7, 8, 9, 10, 11, 12.]

28 The applicant relies on Re Blue Range Resource Corp. (1999), 244 A.R. 103, (C.A.), to argue that leave to appeal can be granted after a CCAA plan has been implemented. In that case, as noted by Fruman, J.A. at 106, a plan was in place and an appeal of the issues which were before her would not unduly hinder the progress of restructuring.

29 In this case, however, the proposed appeal by Resurgence would interfere with the restructuring since the remedies it seeks requires that the Plan be set aside. One proposed ground of appeal attacks the fairness and reasonableness of the Plan itself when the Plan has been almost fully implemented. It cannot be said that the proposed appeal would not unduly hinder the progress of restructuring.

30 If the proposed appeal were allowed, this Court cannot rewrite the Plan; nor could it remit the matter back to the CCAA supervising judge for such purpose. It must either uphold or set aside the approval of the Plan granted by the court below. In effect, if Resurgence succeeded on appeal, the Plan would be vacated. However, that remedy is no longer possible, at minimum, because the certificate issued by the Registrar cannot be revoked. As stated in Norcan, an appellate court cannot order a remedy which could have no effect. This Court cannot order that the Plan be undone in its entirety.

31 Similarly, the other ground of Resurgence's proposed appeal, oppression under s. 234 of the ABCA, cannot be allowed since that remedy must be granted within the context of the CCAA proceedings. As recognized by the learned chambers judge, allegations of oppression were considered in the test for fairness when seeking judicial sanction of the Plan. As she discussed at paragraphs 140-145 of her reasons, the starting point in any determination of oppression under the ABCA requires an understanding of the rights, interests and reasonable expectations which must be objectively assessed. In this action, the rights, interests and reasonable expectations of both shareholders and creditors must be considered through the lens of CCAA insolvency legislation. The complaints of Resurgence, that its rights under its trust indenture have been ignored or eliminated, are to be seen as the function of the insolvency, and not of oppressive conduct. As a consequence, even if Resurgence were to successfully appeal on the ground of oppression, the remedy would not be to give effect to the terms of the trust indenture. This Court could only hold that the fairness test for the court's sanction was not met and therefore, the approval of the Plan should be set aside. Again, as explained above, reversing the Plan is no longer possible.

32 The applicant was unable to point to any issue where this Court could grant a remedy and yet leave the Plan unaffected. It proposed on appeal to seek a declaration that it be declared an unaffected unsecured creditor. That is not a ground of appeal but is rather a remedy. As the respondents argued, the designation of Resurgence as an affected unsecured creditor was part of the Plan. To declare it an unaffected unsecured creditor requires vacating the Plan. On every ground proposed by the applicant, it appears that the response of this Court can only be to either uphold or set aside the approval of the court below. Setting aside the approval is no longer possible since essential elements of the Plan have been implemented and are now irreversible. Thus, the applicant cannot be granted the remedy it seeks. No prospective benefit can accrue to the applicant even if it succeeded on appeal. The appeal, therefore, is moot.

DISCRETION TO HEAR MOOT APPEALS

33 Even if an appeal could provide no benefit to the applicants, should leave be granted?

34 In Borowski, supra, Sopinka, J. described the doctrine of mootness at 353. He said that, as an aspect of a general policy or practice, a court may decline to decide a case which raises merely a hypothetical or abstract questions and will apply the doctrine when the decision of the court will have no practical effect of resolving some controversy affecting the rights of parties.

35 After discussing the principles involved in deciding whether an issue was moot, Sopinka, J. continued at 358 to describe the second stage of the analysis by examining the basis upon which a court should exercise its discretion either to hear or decline to hear a moot appeal. He examined three underlying factors in the rationale for the exercise of discretion in departing from the usual practice. The first is the requirement of an adversarial context which helps guarantee that issues are well and fully argued when resolving legal disputes. He suggested the presence of collateral consequences may provide the necessary adversarial context. Second is the concern for judicial economy which requires that special circumstances exist in a case to make it worthwhile to apply scare judicial resources to resolve it. Third is the need for the court to demonstrate a measure of awareness of its proper law-making function as the adjudicative branch in the political framework. Judgments in the absence of a dispute may be viewed as intruding into the role of the legislative branch. He concluded at 363:

> In exercising its discretion in an appeal which is moot, the court should consider the extent to which each of the three basic rationalia for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third and vice versa.

36 The third factor underlying the rationale does not apply in this case. As for the first criterion, the circumstances of this case do not reveal any collateral consequences, although, it may be assumed that the necessary adversarial context could be present. However, there are no special circumstances making it worthwhile for this Court to ration scarce judicial resources to the resolution of this dispute. This outweighs the other two factors in concluding that the mootness doctrine should be enforced.

37 On the ground of mootness, leave to appeal should not be granted.

38 I am supported in this conclusion by similar cases before the British Columbia Court of Appeal, Sparling v. Northwest Digital Ltd. (1991), 47 C.P.C. (2d) 124 and Galcor, supra.

39 In Sparling, a company sought to restructure its financial basis and called a special meeting of shareholders. A court order permitted the voting of certain shares at the shareholders' meeting. A director sought to appeal that order. On the basis of the initial order, the meeting was held, the shares were voted and some significant changes to the company occurred as a result. Hollinrake, J.A. for the court described these as substantial changes which are irreversible. He found that the appeal was moot because there was no longer a live controversy. After considering Borowski, he also concluded that the court should not exercise its discretion to depart from the usual practice of declining to hear moot appeals.

40 In Galcor, as stated earlier, an order authorizing the distribution of certain monies to limited partners was appealed. A stay was sought but the application was dismissed. An injunction to restrain the distribution of monies was also sought and refused. The monies were distributed. The B.C. Court of Appeal held there was no merit, no substance and no prospective benefit to the appellants nor could they find any merit in the argument that there would be a collateral advantage if the appeal were heard and allowed. None of the criteria in Borowski were of assistance as there was no issue of public importance and no precedent value to other cases. Gibbs, J.A. was of the opinion it would not be prudent to use judicial time to hear a moot case as the rationing of scarce judicial resources was of importance and concern to the court.

APPLICATION OF THE CRITERIA FOR LEAVE

41 In any event, consideration of the usual factors in granting leave to appeal does not result in the granting of leave.

42 In particular, the applicant has not established prima facie meritorious grounds. The issue in the proposed appeal must be whether the learned chambers judge erred in determining that the Plan was fair and reasonable. As discussed in Resurgence No. 1, regard must be given to the standard of review this Court would apply on appeal when considering a leave application. The applicant has been unable to point to an error on a question of law, or an overriding and palpable error in the findings of fact, or an error in the learned chambers judge's exercise of discretion.

43 Resurgence submits that serious and arguable grounds surround the following issues: (a) Should Resurgence be treated as an unaffected creditor under the Plan? and (b) Should the Plan have been sanctioned under s. 6 of the CCAA? The applicant cannot show that either issue is based on an appealable error.

44 On the second issue, the main argument of the applicant is that the learned chambers judge failed to appreciate that the vote in favour of the Plan was not fair. At bottom, most of the submissions Resurgence made on this issue are directed at the learned chambers judge's conclusion that shareholders and creditors of Canadian would not be better off in bankruptcy than under the Plan. To appeal this conclusion, based on the findings of fact and exercise of discretion, Resurgence must establish that it has a prima facie meritorious argument that the learned chambers judge's error was overriding and palpable, or created an unreasonable result. This, it has not done.

45 Resurgence also argues that the acceptance of the valuations given by the Monitor to certain assets, in particular, Canadian Regional Airlines Limited ("CRAL"), the pension surplus and the international routes was in error. The Monitor did not attribute value to these assets when it prepared the liquidation analysis. Resurgence argued that the learned chambers judge erred when she held that the Monitor was justified in making these omissions.

46 Resurgence argued that CRAL was worth as much as $260 million to Air Canada. The Monitor valued CRAL on a distressed sale basis. It assumed that without CAIL's national and international network to feed traffic and considering the negative publicity which the failure of CAIL would cause, CRAL would immediately stop operations.

47 The learned chambers judge found that there was no evidence of a potential purchaser for CRAL. She held that CRAL had a value to CAIL and could provide value of Air Canada, but this was attributable to CRAL's ability to feed traffic to and take traffic from the national and international service of CAIL. She held that the Monitor properly considered these factors. The $260 million dollar value was based on CRAL as a going concern which was a completely different scenario than a liquidation analysis. She accepted the liquidation analysis on the basis that if CAIL were to cease operations, CRAL would be obliged to do so as well and that would leave no going concern for Air Canada to acquire.

48 CRAL may have some value, but even assuming that, Resurgence has not shown that it has a prima facie meritorious argument that the learned chambers judge committed an overriding and palpable error in finding that the Monitor was justified in concluding CRAL would not have any value assuming a windup of CAIL. She found that there was no evidence of a market for CRAL as a going concern. Her preference for the liquidation analysis was a proper exercise of her discretion and cannot be said to have been unreasonable.

49 Resurgence also argued that the pension plan surplus must be given value and included in the liquidation analysis because the surplus may revert to the company depending upon the terms of the plan. There was some evidence that in the two pension plans, with assets over $2 billion, there may be a surplus of $40 million. The Monitor attributed no value because of concerns about contingent liabilities which made the true amount of any available surplus indefinite and also because of the uncertainty of the entitlement of Canadian to any such amount.

50 The learned chambers judge found that no basis had been established for any surplus being available to be withdrawn from an ongoing pension plan. She also found that the evidence showed the potential for significant contingencies. Upon termination of the plan, further reductions for con-

tingent benefits payable in accordance with the plans, any wind up costs, contribution holidays and litigation costs would affect a determination of whether there was a true surplus. The evidence before the learned chambers judge included that of the unionized employees who expected to dispute all the calculations of the pension plan surplus and the entitlement to the surplus. The learned chambers judge observed also that the surplus could quickly disappear with relatively minor changes in the market value of the securities held or in the calculation of liabilities. She concluded that given all variables, the existence of any surplus was doubtful at best and held that ascribing a zero value was reasonable in the circumstances.

51 In addition to the evidence upon which the learned chambers judge based her conclusion, she is also supported by the case law which demonstrates that even if a pension surplus existed and was accessible, entitlement is a complex question: Schmidt v. Air Products of Canada Ltd., [1994] 2 S.C.R. 611 (S.C.C.).

52 Resurgence argued that the international routes of Canadian should have been treated as valuable assets. The Monitor took the position that the international routes were unassignable licences in control of the Government of Canada and not property rights to be treated as assets by the airlines. Resurgence argues that the Monitor's conclusion was wrong because there was evidence that the international routes had value. In December 1999, CAIL sold its Toronto - Tokyo route to Air Canada for $25 million. Resurgence also pointed to statements made by Canadian's former president and CEO in mid-1999 that the value of its international routes was $2 billion. It further noted that in the United States, where the government similarly grants licences to airlines for international routes, many are bought and sold.

53 The learned chambers judge found the evidence indicated that the $25 million paid for the Toronto-Tokyo route was not an amount derived from a valuation but was the amount CAIL needed for its cash flow requirements at the time of the transaction in order to survive. She found that the statements that CAIL's international routes were worth $2 billion reflected the amount CAIL needed to sustain liquidity without its international routes and was not the market value of what could realistically be obtained from an arm's length purchaser. She found there was no evidence of the existence of an arm's length purchaser. As the respondents pointed out, the Canadian market cannot be compared to the United States. Here in Canada, there is no other airline which would purchase international routes, except Air Canada. Air Canada argued that it is pure speculation to suggest it would have paid for the routes when it could have obtained the routes in any event if Canadian went into liquidation.

54 Even accepting Resurgence's argument that those assets should have been given some value, the applicant has not established a prima facie meritorious argument that the learned chambers judge was unreasonable to have accepted the valuations based on a liquidation analysis rather than a market value or going concern analysis nor that she lacked any evidence upon which to base her conclusions. She found that the evidence was overwhelming that all other options had been exhausted and have resulted in failure. As described above, she had evidence upon which to accept the Monitor's valuations of the disputed assets. It is not the role of this Court to review the evidence and substitute its opinion for that of the learned chambers judge. She properly exercised her discretion and she had evidence upon which to support her conclusions. The applicant, therefore, has not established that its appeal is prima facie meritorious.

55 On the first issue, Resurgence argues that it should be an unaffected creditor to pursue its oppression remedy. As discussed above, the oppression remedy cannot be considered outside the

context of the CCAA proceedings. The learned chambers judge concluded that the complaints of Resurgence were the result of the insolvency of Canadian and not from any oppressive conduct. The applicant has not established any prima facie error committed by the learned chambers judge in reaching that conclusion.

56 Thus, were this appeal not moot, leave would not be granted as the applicant has not met the threshold for leave to appeal.

CONCLUSION

57 The application for leave to appeal is dismissed because it is moot, and in any event, no serious and arguable grounds have been established upon which to found the basis for granting leave.

WITTMANN J.A.

cp/i/qljpn/qlcal

Tab 2

Case Name:

Smith v. Sino-Forest Corp.

Between
Douglas Smith and Zhongjun Goa, Plaintiffs, and
Sino-Forest Corporation, Allen T.Y. Chan, James M.E. Hyde, Edmund Mak, W. Judson Martin, Simon Murray, Peter D.H. Wang, David J. Horsley, Ernst & Young LLP, BDO 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., and Maison Placements Canada Inc., Defendants
PROCEEDING UNDER the Class Proceedings Act, 1992
And between
The Trustees of the Labourers' Pension Fund of Central and Eastern Canada and the Trustees of the International Union of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario, Plaintiffs, and
Sino-Forest Corporation, Ernst & Young LLP, Allen T.Y. Chan, W. Judson Martin, Kai Kit Poon, David J. Horsley, William E. Ardell, Kai Kit Poon, David J. Horsley, 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., and Maison Placements Canada Inc., Defendants
PROCEEDING UNDER the Class Proceedings Act, 1992
And between
Northwest & Ethical Investments L.P., Comité Syndical National de Retraite Bâtirente Inc., Plaintiffs, and
Sino-Forest Corporation, Allen T.Y. Chan, W. Judson Martin, Kai Kit Poon, David J. Horsley, Hua Chen, Wei Mao Zhao, Alfred C.T. Hung, Albert Ip, George Ho, Thomas M. Maradin, William E. Ardell, James M.E. Hyde, Simon Murray, Garry J. West, James P. Bowland, Edmund Mak, Peter Wang, Kee Y. Wong, The Estate of John Lawrence, Simon Yeung, Ernst & Young LLP, BDO Limited, Pöyry Forest Industry PTE Limited, Pöyry (Beijing) Consulting Company Limited, JP Management Consulting (Asia-Pacific) PTE

Ltd., Dundee Securities Corporation, UBS Securities Canada Inc., Haywood Securities Inc., Credit Suisse Securities (Canada), Inc., TD Securities Inc., RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada, Inc. Canaccord Financial Ltd., Maison Placements Canada Inc., Morgan Stanley & Co. Incorporated, Credit Suisse Securities (USA), LLC, Merrill Lynch, Pierce, Fenner & Smith, Inc., Defendants
PROCEEDING UNDER the Class Proceedings Act, 1992

[2012] O.J. No. 88

2012 ONSC 24

Court File Nos. 11-CV-428238CP, 11-CV-431153CP, 11-CV-435826CP

Ontario Superior Court of Justice

P.M. Perell J.

Heard: December 20 and 21, 2011.
Judgment: January 6, 2012.

(332 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Certification -- Class counsel -- Definition of class -- Members of class or sub-class -- Representative plaintiff -- Motions by law firms for carriage of class action -- Carriage awarded to law firm acting in Labourers v. Sino-Forest -- There were three proposed class actions against Sino-Forest to recover alleged losses arising from crash in value of its shares and notes -- Determinative factors were characteristics of representative plaintiffs, definition of class membership, definition of class period, theory of case, causes of action, joinder of defendants and prospects of certification -- Neutral or non-determinative factors were attributes of class counsel; retainer, legal and forensic resources; funding; conflicts of interest; and plaintiff and defendant correlation.

Motions by law firms for carriage of a class action. Sino-Forest was a forestry plantation company. There were three proposed class actions against it to recover alleged losses arising from the crash in value of its shares and notes. The proposed class actions were Labourers v. Sino-Forest, Smith v. Sino-Forest and Northwest v. Sino-Forest. The proposed representative plaintiffs for Labourers v. Sino-Forest were three pension funds and two individuals. The proposed representative plaintiffs for Smith v. Sino-Forest were two individuals. The proposed representative plaintiffs for Northwest v. Sino-Forest were an investment management company, a non-profit financial services firm and a partnership that managed portfolios and investment funds. Labourers v. Sino-Forest included as class members shareholders and noteholders who purchased in Canada, but excluded non-Canadians who purchased in a foreign marketplace. Smith v. Sino-Forest included sharehold-

ers, but not bondholders. Northwest v. Sino-Forest included both, with no geographic limits. All proposed actions focused primarily on claims of negligence and negligent misrepresentation, but Northwest v. Sino-Forest also claimed fraudulent misrepresentation against all defendants. The law firms, in advancing their respective merits for carriage, made arguments raising as issues the characteristics of the representative plaintiffs; definition of class membership; definition of class period; theory of the case; causes of action; joinder of defendants; prospects of certification; attributes of class counsel; retainer, legal and forensic resources; funding; conflicts of interest; and the plaintiff and defendant correlation.

HELD: Carriage awarded to the law firm acting in Labourers v. Sino-Forest; stay of the other two proposed actions. The determinative factors were the characteristics of the representative plaintiffs, definition of class membership, definition of class period, theory of the case, causes of action, joinder of defendants and prospects of certification. The expertise and participation of the institutional candidates for representative plaintiffs, as investors in the securities marketplace, could contribute to the successful prosecution of the lawsuit on behalf of the class members. The institutional candidates were pursuing access to justice in a way that ultimately benefited other class members should their actions be certified as a class proceeding. The individual candidates might not be the best voice for their fellow class members. The institutional candidates could not opt out, which advanced judicial economy. They were already to a large extent representative plaintiffs as they were, practically speaking, suing on behalf of their own members, who numbered in the hundreds of thousands. Labourers v. Sino-Forest had the further advantage of individual investors who could give voice to the interests of similarly situated class members. The bondholders should be included as class members. They had essentially the same misrepresentation claims as the shareholders and it made sense to have their claims litigated in the same proceeding. This conclusion hurt the case for Smith v. Sino-Forest, even though it had the best class period. Reliance on fraudulent misrepresentation as a cause of action in Northwest v. Sino-Forest was a substantial weakness. That cause of action was less desirable than those used in the other two proposed actions. It added needless complexity and costs. It was far more difficult to prove. The class members were best served by the approach in Labourers v. Sino-Forest. Neutral or non-determinative factors for purposes of carriage were the attributes of class counsel; retainer, legal and forensic resources; funding; conflicts of interest; and the plaintiff and defendant correlation. There was little difference among the law firms in terms of their suitability for bringing a proposed class action against Sino-Forest. The fact that the three institutional candidates for representative plaintiffs in Northwest v. Sino-Forest made their investments on behalf of others did not create a conflict of interest. Nor did allegations that they, having been involved in corporate governance matters associated with Sino-Forest, failed to properly evaluate the risks of investing in it. There was no conflict of interest based on the fact that Labourers' auditor was an international associate of a defendant. There was no conflict of interest between the bondholders and shareholders merely because the bondholders, unlike the shareholders, also had a cause in action in debt.

Statutes, Regulations and Rules Cited:

Act Respecting the Distribution of Financial Products and Services, R.S.Q., chapter D-9.2,

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 50(14)

Canada Business Corporations Act, R.S.C. 1985, c. C-44,

Class Proceedings Act, 1982, S.O. 1992, c. 6, s. 12, s. 13, s. 35

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

Courts of Justice Act, R.S.O. 1990, c. 43, s. 138

National Instrument 51-102,

Ontario Securities Act, R.S.O. 1990, c. S.5, s. 1(1), s. 138.1, s. 138.5, s. 138.14, Part XVIII, Part XXIII, Part XXIII.1, Part XXX.1

Private Securities Litigation Reform Act of 1995 (U.S.),

Public Sector Pension Plans Act,

Rules of Civil Procedure, S.O. 1992, c. 6, Rule 1.04, Rule 6

Counsel:

J.P. Rochon, J. Archibald and S. Tambakos, for the Plaintiffs in 11-CV-428238CP.

K.M. Baert, J. Bida, and C.M. Wright for the Plaintiffs in 11-CV-431153CP.

J.C. Orr, V. Paris, N. Mizobuchi, and A. Erfan for the Plaintiffs in 11-CV-435826CP.

M. Eizenga, for the defendant Sino-Forest Corporation.

P. Osborne and S. Roy, for the defendant Ernst & Young LLP.

E. Cole, for the defendant Allen T.Y. Chan.

J. Fabello, for the defendant underwriters.

[Editor's note: A corrigendum was released by the Court January 27, 2012; the corrections have been made to the text and the corrigendum is appended to this document.]

REASONS FOR DECISION

P.M. PERELL J.:--

A. INTRODUCTION

1 This is a carriage motion under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. In this particular carriage motion, four law firms are rivals for the carriage of a class action against Sino-Forest Corporation. There are currently four proposed Ontario class actions against Sino-Forest to recover losses alleged to be in the billions of dollars arising from the spectacular crash in value of its shares and notes.

2 Practically speaking, carriage motions involve two steps. First, the rival law firms that are seeking carriage of a class action extoll their own merits as class counsel and the merits of their client as the representative plaintiff. During this step, the law firms explain their tactical and strategic plans for the class action, and, thus, a carriage motion has aspects of being a casting call or rehearsal for the certification motion.

3 Second, the rival law firms submit that with their talent and their litigation plan, their class action is the better way to serve the best interests of the class members, and, thus, the court should

choose their action as the one to go forward. No doubt to the delight of the defendants and the defendants' lawyers, which have a watching brief, the second step also involves the rivals hardheartedly and toughly reviewing and criticizing each other's work and pointing out flaws, disadvantages, and weaknesses in their rivals' plans for suing the defendants.

4 The law firms seeking carriage are: Rochon Genova LLP; Koskie Minsky LLP; Siskinds LLP; and Kim Orr Barristers P.C., all competent, experienced, and veteran class action law firms.

5 For the purposes of deciding the carriage motions, I will assume that all of the rivals have delivered their Statements of Claim as they propose to amend them.

6 Koskie Minsky and Siskinds propose to act as co-counsel and to consolidate two of the actions. Thus, the competition for carriage is between three proposed class actions; namely:

* *Smith v. Sino-Forest Corp.* (11-CV-428238CP) ("*Smith v. Sino-Forest*") with Rochon Genova as Class Counsel
* *The Trustees of Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.* (11-CV-431153CP) ("*Labourers v. Sino-Forest*") with Koskie Minsky and Siskinds as Class Counsel (This action would be consolidated with "*Grant. v. Sino Forest*" (CV-11-439400-00CP)
* *Northwest & Ethical Investments L.P. v. Sino-Forest Corp.* (11-CV-435826CP) ("*Northwest v. Sino-Forest*") with Kim Orr as Class Counsel.

7 It has been a very difficult decision to reach, but for the reasons that follow, I stay *Smith v. Sino-Forest* and *Northwest v. Sino-Forest,* and I grant carriage to Koskie Minsky and Siskinds in *Labourers v. Sino-Forest.*

8 I also grant leave to the plaintiffs in *Labourers v. Sino-Forest* to deliver a Fresh as Amended Statement of Claim, which may include the joinder of the plaintiffs and the causes of action set out in *Grant v. Sino-Forest, Smith v. Sino-Forest,* and *Northwest v. Sino-Forest,* as the plaintiffs may be advised.

9 This order is without prejudice to the rights of the Defendants to challenge the Fresh as Amended Statement of Claim as they may be advised. In any event, nothing in these reasons is intended to make findings of fact or law binding on the Defendants or to be a pre-determination of the certification motion.

B. METHODOLOGY

10 To explain my reasons, first, I will describe the jurisprudence about carriage motions. Second, I will describe the evidentiary record for the carriage motions. Third, I will describe the factual background to the claims against Sino-Forest, which is the principal but not the only target of the various class actions. Fourth, deferring my ultimate conclusions, I will analyze the rival actions that are competing for carriage under twelve headings and describe the positions and competing arguments of the law firms competing for carriage. Fifth, I will culminate the analysis of the competing actions by explaining the carriage order decision. Sixth and finally, I will finish with a concluding section.

11 Thus, the organization of these Reasons for Decision is as follows:

* Introduction
* Methodology
* Carriage Orders Jurisprudence
* Evidentiary Background
* Factual Background to the Claims against Sino-Forest
* Analysis of the Competing Class Actions

    * The Attributes of Class Counsel
    * Retainer, Legal and Forensic Resources, and Investigations
    * Proposed Representative Plaintiffs
    * Funding
    * Conflicts of Interest
    * Definition of Class Membership
    * Definition of Class Period
    * Theory of the Case against the Defendants
    * Joinder of Defendants
    * Causes of Action
    * The Plaintiff and the Defendant Correlation
    * Prospects of Certification

* Carriage Order

    * Introduction
    * Neutral or Non-Determinative Factors
    * Determinative Factors

* Conclusion

C. CARRIAGE ORDERS JURISPRUDENCE

12 There should not be two or more class actions that proceed in respect of the same putative class asserting the same cause(s) of action, and one action must be selected: *Vitapharm Canada Ltd. v. F. Hoffman-Laroche Ltd.*, [2000] O.J. No. 4594 (S.C.J.) at para. 14. See also *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2001] O.J. No. 3682 (S.C.J.), aff'd [2002] O.J. No. 2010 (C.A.). When counsel have not agreed to consolidate and coordinate their actions, the court will usually select one and stay all other actions: *Lau* v. *Bayview Landmark,* [2004] O.J. No. 2788 (S.C.J.) at para. 19.

13 Where two or more class proceedings are brought with respect to the same subject matter, a proposed representative plaintiff in one action may bring a carriage motion to stay all other present or future class proceedings relating to the same subject matter: *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 (S.C.J.) at paras. 9-11; *Ricardo v. Air Transat A.T. Inc.*, [2002] O.J. No. 1090 (S.C.J.), leave to appeal dismissed [2002] O.J. No. 2122 (S.C.J.).

14 The *Class Proceedings Act, 1992,* confers upon the court a broad discretion to manage the proceedings. Section 13 of the Act authorizes the court to "stay any proceeding related to the class proceeding," and s. 12 authorizes the court to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination." Section 138 of

the *Courts of Justice Act*, R.S.O. 1990, c. 43 directs that "as far as possible, multiplicity of legal proceedings shall be avoided." See: *Setterington v. Merck Frosst Canada Ltd.*, *supra,* at paras. 9-11.

15 The court also has its normal jurisdiction under the *Rules of Civil Procedure*. Section 35 of the *Class Proceedings Act, 1992,* provides that the rules of court apply to class proceedings. Among the rules that are available is Rule 6, the rule that empowers the court to consolidate two or more proceedings or to order that they be heard together.

16 In determining carriage of a class proceeding, the court's objective is to make the selection that is in the best interests of class members, while at the same time being fair to the defendants and being consistent with the objectives of the *Class Proceedings Act, 1992*: *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, [2000] O.J. No. 4594 (S.C.J.) at para. 48; *Setterington v. Merck Frosst Canada Ltd.*, *supra,* at para. 13 (S.C.J.); *Sharma v. Timminco Ltd.* (2009), 99 O.R. (3d) 260 (S.C.J.) at para. 14. The objectives of a class proceeding are access to justice, behaviour modification, and judicial economy for the parties and for the administration of justice.

17 Courts generally consider seven non-exhaustive factors in determining which action should proceed: (1) the nature and scope of the causes of action advanced; (2) the theories advanced by counsel as being supportive of the claims advanced; (3) the state of each class action, including preparation; (4) the number, size and extent of involvement of the proposed representative plaintiffs; (5) the relative priority of the commencement of the class actions; (6) the resources and experience of counsel; and (7) the presence of any conflicts of interest: *Sharma v. Timminco Ltd.*, *supra* at para. 17.

18 In these reasons, I will examine the above factors under somewhat differently-named headings and in a different order and combination. And, I will add several more factors that the parties made relevant to the circumstances of the competing actions in the cases at bar, including: (a) funding; (b) definition of class membership; (c) definition of class period; (d) joinder of defendants; (e) the plaintiff and defendant correlation; and, (f) prospects of certification.

19 In addition to identifying relevant factors, the carriage motion jurisprudence provides guidance about how the court should determine carriage. Although the determination of a carriage motion will decide which counsel will represent the plaintiff, the task of the court is not to choose between different counsel according to their relative resources and expertise; rather, it is to determine which of the competing actions is more, or most, likely to advance the interests of the class: *Tiboni v. Merck Frosst Canada Ltd.*, [2008] O.J. No. 2996 (S.C.J.), sub. nom *Mignacca v. Merck Frosst Canada Ltd.*, leave to appeal granted [2008] O.J. No. 4731 (S.C.J.), aff'd [2009] O.J. No. 821 (Div. Ct.), application for leave to appeal to C.A. ref'd May 15, 2009, application for leave to appeal to S.C.C. ref'd [2009] S.C.C.A. No. 261.

20 On a carriage motion, it is inappropriate for the court to embark upon an analysis as to which claim is most likely to succeed unless one is "fanciful or frivolous": *Setterington v. Merck Frosst Canada Ltd.*, *supra,* at para. 19.

21 In analysing whether the prohibition against a multiplicity of proceedings would be offended, it is not necessary that the multiple proceedings be identical or mirror each other in every respect; rather, the court will look at the essence of the proceedings and their similarities: *Setterington v. Merck Frosst Canada Ltd.*, *supra,* at para. 11.

22 Where there is a competition for carriage of a class proceeding, the circumstance that one competitor joins more defendants is not determinative; rather, what is important is the rationale for the joinder and whether or not it is advantageous for the class to join the additional defendants: *Joel v Menu Foods Gen-Par Limited*, [2007] B.C.J. No. 2159 (B.C.S.C.); *Genier v. CCI Capital Canada Ltd.*, [2005] O.J. No. 1135 (S.C.J.); *Setterington v. Merck Frosst Canada Ltd., supra.*

23 In determining which firm should be granted carriage of a class action, the court may consider whether there is any potential conflict of interest if carriage is given to one counsel as opposed to others: *Joel v. Menu Foods Gen-Par Limited, supra* at para. 16; *Vitapharm Canada Ltd. v. F. Hoffman-Laroche Ltd.*, [2000] O.J. No. 4594 (S.C.J.) and [2001] O.J. No. 3673 (S.C.J.).

D. EVIDENTIARY BACKGROUND

Smith v. Sino-Forest

24 In support of its carriage motion in *Smith v. Sino-Forest*, Rochon Genova delivered affidavits from:

* Ken Froese, who is Senior Managing Director of Froese Forensic Partners Ltd., a forensic accounting firm
* Vincent Genova, who is the managing partner of Rochon Genova
* Douglas Smith, the proposed representative plaintiff

Labourers v. Sino-Forest

25 In support of their carriage motion in *Labourers v. Sino-Forest,* Koskie Minsky and Siskinds delivered affidavits from:

* Dimitri Lascaris, who is a partner at Siskinds and the leader of its class action team
* Michael Gallagher, who is the Chair of the Board of Trustees of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario ("Operating Engineers Fund"), a proposed representative plaintiff
* David Grant, a proposed representative plaintiff
* Richard Grottheim, who is the Chief Executive Officer of Sjunde AP-Fonden, a proposed representative plaintiff
* Joseph Mancinelli, who is the Chair of the Board of Trustees of The Trustees of the Labourers' Pension Fund of Central and Eastern Canada ("Labourers' Fund"), a proposed representative plaintiff. He also holds senior positions with the Labourers International Union of North America, which has more than 80,000 members in Canada
* Ronald Queck, who is Director of Investments of the Healthcare Employee Benefits Plans of Manitoba ("Healthcare Manitoba"), which would be a prominent class member in the proposed class action
* Frank Torchio, who is a chartered financial analyst and an expert in finance and economics who was retained to opine, among other things, about the damages suffered under various proposed class periods by Sino-Forest shareholders and noteholders under s. 138.5 of the *Ontario Securities Act*

* Robert Wong, who is a proposed representative plaintiff
* Mark Zigler, who is the managing partner of Koskie Minsky

Northwest v. Sino-Forest

26 In support of its carriage motion in *Northwest v. Sino-Forest*, Kim Orr delivered affidavits from:

* Megan B. McPhee, a principal of the firm
* John Mountain, who is the Senior Vice President, Legal and Human Resources, the Chief Compliance Officer and Corporate Secretary of Northwest Ethical Investments L.P. ("Northwest"), a proposed representative plaintiff
* Zachary Nye, a financial economist who was retained to respond to Mr. Torchio's opinion
* Daniel Simard, who is General Co-Ordinator and a non-voting ex-officio member of the Board of Directors and Committees of Comité syndical national de retraite Bâtirente inc. ("Bâtirente"), a proposed representative plaintiff
* Michael C. Spencer, a lawyer qualified to practice in New York, California, and Ontario, who is counsel to Kim Orr and a partner and member of the executive committee at the American law firm of Milberg LLP
* Brian Thomson, who is Vice-President, Equity Investments for British Columbia Investment Management Corporation ("BC Investment"), a proposed representative plaintiff

E. FACTUAL BACKGROUND TO THE CLAIMS AGAINST SINO-FOREST

27 The following factual background is largely an amalgam made from the unproven allegations in the Statements of Claim in the three proposed class actions and unproven allegations in the motion material delivered by the parties.

28 The Defendant, Sino-Forest is a Canadian public company incorporated under the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44 with its registered office in Mississauga, Ontario, and its head office in Hong Kong. Its shares have traded on the Toronto Stock Exchange ("TSX") since 1995. It is a forestry plantation company with operations centered in the People's Republic of China. Its trading of securities is subject to the regulation of the *Ontario Securities Act,* R.S.O. 1990, c. S.5, under which it is a "reporting issuer" subject to the continuous disclosure provisions of Part XVIII of the Act and a "responsible issuer" subject to civil liability for secondary market misrepresentation under Part XXIII.1 of the Act.

29 The Defendant, Ernst & Young LLP ("E&Y") has been Sino-Forest's auditor from 1994 to date, except for 1999, when the now-defunct Arthur Andersen LLP did the audit, and 2005 and 2006, when the predecessor of what is now the Defendant, BDO Limited ("BDO") was Sino-Forest's auditor. BDO is the Hong Kong member of BDO International Ltd., a global accounting and audit firm.

30 E&Y and BDO are "experts" within the meaning of s. 138.1 of the *Ontario Securities Act.*

31 From 1996 to 2010, in its financial statements, Sino-Forest reported only profits, and it appeared to be an enormously successful enterprise that substantially outperformed its competitors in the forestry industry. Sino-Forest's 2010 Annual Report issued in May 2011 reported that Si-

no-Forest had net income of $395 million and assets of $5.7 billion. Its year-end market capitalization was $5.7 billion with approximately 246 million common shares outstanding.

32 It is alleged that Sino-Forest and its auditors E&Y and BDO repeatedly misrepresented that Sino-Forest's financial statements complied with GAAP ("generally accepted accounting principles").

33 It is alleged that Sino-Forest and its officers and directors made other misrepresentations about the assets, liabilities, and performance of Sino-Forest in various filings required under the *Ontario Securities Act*. It is alleged that these misrepresentations appeared in the documents used for the offerings of shares and bonds in the primary market and again in what are known as Core Documents under securities legislation, which documents are available to provide information to purchasers of shares and bonds in the secondary market. It is also alleged that misrepresentations were made in oral statements and in Non-Core Documents.

34 The Defendant, Allen T.Y. Chan was Sino-Forest's co-founder, its CEO, and a director until August 2011. He resides in Hong Kong.

35 The Defendant, Kai Kit Poon, was Sino-Forest's co-founder, a director from 1994 until 2009, and Sino-Forest's President. He resides in Hong Kong.

36 The Defendant, David J. Horsley was a Sino-Forest director (from 2004 to 2006) and was its CFO. He resides in Ontario.

37 The Defendants, William E. Ardell (resident of Ontario, director since 2010), James P. Bowland (resident of Ontario, director since 2011), James M.E. Hyde (resident of Ontario, director since 2004), John Lawrence (resident of Ontario, deceased, director 1997 to 2006), Edmund Mak (resident of British Columbia, director since 1994), W. Judson Martin (resident of Hong Kong, director since 2006, CEO since August 2011), Simon Murray (resident of Hong Kong, director since 1999), Peter Wang (resident of Hong Kong, director since 2007) and Garry J. West (resident of Ontario, director since 2011) were members of Sino-Forest's Board of Directors.

38 The Defendants, Hua Chen (resident of Ontario), George Ho (resident of China), Alfred C.T. Hung (resident of China), Alfred Ip (resident of China), Thomas M. Maradin (resident of Ontario), Simon Yeung (resident of China) and Wei Mao Zhao (resident of Ontario) are vice presidents of Sino-Forest. The defendant Kee Y. Wong was CFO from 1999 to 2005.

39 Sino-Forest's forestry assets were valued by the Defendant, Pöyry (Beijing) Consulting Company Limited, ("Pöyry"), a consulting firm based in Shanghai, China. Associated with Pöyry are the Defendants, Pöyry Forest Industry PTE Limited ("Pöyry-Forest") and JP Management Consulting (Asia-Pacific) PTE Ltd. ("JP Management"). Each Pöyry Defendant is an expert as defined by s. 138.1 of the *Ontario Securities Act*.

40 Pöyry prepared technical reports dated March 8, 2006, March 15, 2007, March 14, 2008, April 1, 2009, and April 23, 2010 that were filed with SEDAR (the System of Electronic Document Analysis and Retrieval) and made available on Sino-Forest's website. The reports contained a disclaimer and a limited liability exculpatory provision purporting to protect Pöyry from liability.

41 In China, the state owns the forests, but the Chinese government grants forestry rights to local farmers, who may sell their lumber rights to forestry companies, like Sino-Forest. Under Chinese law, Sino-Forest was obliged to maintain a 1:1 ratio between lands for forest harvesting and lands for forest replantation.

42 Sino-Forest's business model involved numerous subsidiaries and the use of authorized intermediaries or "AIs" to assemble forestry rights from local farmers. Sino-Forest also used authorized intermediaries to purchase forestry products. There were numerous AIs, and by 2010, Sino-Forest had over 150 subsidiaries, 58 of which were formed in the British Virgin Islands and at least 40 of which were incorporated in China.

43 It is alleged that from at least March 2003, Sino-Forest used its business model and non-arm's length AIs to falsify revenues and to facilitate the misappropriation of Sino-Forest's assets.

44 It is alleged that from at least March 2004, Sino-Forest made false statements about the nature of its business, assets, revenue, profitability, future prospects, and compliance with the laws of Canada and China. It is alleged that Sino-Forest and other Defendants misrepresented that Sino-Forest's financial statements complied with GAPP ("generally accepted accounting principles"). It is alleged that Sino-Forest misrepresented that it was an honest and reputable corporate citizen. It is alleged that Sino-Forest misrepresented and greatly exaggerated the nature and extent of its forestry rights and its compliance with Chinese forestry regulations. It is alleged that Sino-Forest inflated its revenue, had questionable accounting practices, and failed to pay a substantial VAT liability. It is alleged that Sino-Forest and other Defendants misrepresented the role of the AIs and greatly understated the risks of Sino-Forest utilizing them. It is alleged that Sino-Forest materially understated the tax-related risks from the use of AIs in China, where tax evasion penalties are severe and potentially devastating.

45 Starting in 2004, Sino-Forest began a program of debt and equity financing. It amassed over $2.1 billion from note offerings and over $906 million from share issues.

46 On May 17, 2004, Sino-Forest filed its Annual Information Form for the 2003 year. It is alleged in *Smith v. Sino-Forest* that the 2003 AIF contains the first misrepresentation in respect of the nature and role of the authorized intermediaries, which allegedly played a foundational role in the misappropriation of Sino-Forest's assets.

47 In August 2004, Sino-Forest issued an offering memorandum for the distribution of 9.125% guaranteed senior notes ($300 million (U.S.)). The Defendant, Morgan Stanley & Co. Incorporated ("Morgan") was a note distributor that managed the note offering in 2004 and purchased and resold notes.

48 Under the Sino-Forest note instruments, in the event of default, the trustee may sue to collect payment of the notes. A noteholder, however, may not pursue any remedy with respect to the notes unless, among other things, written notice is given to the trustee by holders of 25% of the outstanding principal asking the trustee to pursue the remedy and the trustee does not comply with the request. The notes provide that no noteholder shall obtain a preference or priority over another noteholder. The notes contain a waiver and release of Sino-Forest's directors, officers, and shareholders from all liability "for the payment of the principal of, or interest on, or other amounts in respect of the notes or for any claim based thereon or otherwise in respect thereof." The notes are all governed by New York law and include non-exclusive attornment clauses to the jurisdiction of New York State and United States federal courts.

49 On March 19, 2007, Sino-Forest announced its 2006 financial results. The appearance of positive results caused a substantial increase in its share price which moved from $10.10 per share to $13.42 per share ten days later, a 33% increase.

50 In May 2007, Sino-Forest filed a Management Information Circular that represented that it maintained a high standard of corporate governance. It indicated that its Board of Directors made compliance with high governance standards a top priority.

51 In June 2007, Sino-Forest made a share prospectus offering of 15.9 million common shares at $12.65 per share ($201 million offering). Chan, Horsley, Martin, and Hyde signed the prospectus. The underwriters (as defined by s. 1. (1) of the *Ontario Securities Act*) were the Defendants, CIBC World Markets Inc. ("CIBC"), Credit Suisse Securities Canada (Inc.) ("Credit Suisse"), Dundee Securities Corporation ("Dundee"), Haywood Securities Inc. ("Haywood"), Merrill Lynch Canada, Inc. ("Merrill") and UBS Securities Canada Inc. ("UBS").

52 In July 2008, Sino-Forest issued a final offering memorandum for the distribution of 5% convertible notes ($345 million (U.S)) due 2013. The Defendants, Credit Suisse Securities (USA), LLC ("Credit Suisse (USA)"), and Merrill Lynch, Fenner & Smith Inc. ("Merrill-Fenner") were note distributors.

53 In June 2009, Sino-Forest made a share prospectus offering of 34.5 million common shares at $11.00 per share ($380 million offering). Chan, Horsley, Martin, and Hyde signed the prospectus. The underwriters (as defined by s. 1. (1) of the *Ontario Securities Act*) were Credit Suisse, Dundee, Merrill, the Defendant, Scotia Capital Inc. ("Scotia"), and the Defendant, TD Securities Inc. ("TD").

54 In June 2009, Sino-Forest issued a final offering memorandum for the exchange of senior notes for new guaranteed senior 10.25% notes ($212 million (U.S.) offering) due 2014. Credit Suisse (USA) was the note distributor.

55 In December 2009, Sino-Forest made a share prospectus offering of 22 million common shares at $16.80 per share ($367 million offering). Chan, Horsley, Martin, and Hyde signed the prospectus. The underwriters (as defined by s. 1. (1) of the *Ontario Securities Act*) were Credit Suisse, the Defendant, Canaccord Financial Ltd. ("Canaccord"), CIBC, Dundee, the Defendant, Maison Placements Canada Inc. ("Maison"), Merrill, the Defendant, RBC Dominion Securities Inc. ("RBC"), Scotia, and TD.

56 In December 2009, Sino-Forest issued an offering memorandum for 4.25% convertible senior notes ($460 million (U.S.) offering) due 2016. The note distributors were Credit Suisse (USA), Merrill-Fenner, and TD.

57 In October 2010, Sino-Forest issued an offering memorandum for 6.25% guaranteed senior notes ($600 million (U.S.) offering) due 2017. The note distributors were Banc of America Securities LLC ("Banc of America") and Credit Suisse USA.

58 Sino-Forest's per-share market price reached a high of $25.30 on March 31, 2011.

59 It is alleged that all the financial statements, prospectuses, offering memoranda, MD&As (Management Discussion and Analysis), AIFs (Annual Information Forms) contained misrepresentations and failures to fully, fairly, and plainly disclose all material facts relating to the securities of Sino-Forest, including misrepresentations about Sino-Forest's assets, its revenues, its business activities, and its liabilities.

60 On June 2, 2011, Muddy Waters Research, a Hong Kong investment firm that researches Chinese businesses, released a research report about Sino-Forest. Muddy Waters is operated by Carson Block, its sole full-time employee. Mr. Block was a short-seller of Sino-Forest stock. His Report alleged that Sino-Forest massively exaggerates its assets and that it had engaged in extensive

related-party transactions since the company's TSX listing in 1995. The Report asserted, among other allegations, that a company-reported sale of $231 million in timber in Yunnan Province was largely fabricated. It asserted that Sino-Forest had overstated its standing timber purchases in Yunnan Province by over $800 million.

61 The revelations in the Muddy Waters Report had a catastrophic effect on Sino-Forest's share price. Within two days, $3 billion of market capitalization was gone and the market value of Sino-Forest's notes plummeted.

62 Following the release of the Muddy Waters Report, Sino-Forest and certain of its officers and directors released documents and press releases and made public oral statements in an effort to refute the allegations in the Report. Sino-Forest promised to produce documentation to counter the allegations of misrepresentations. It appointed an Independent Committee of Messrs. Ardell, Bowland and Hyde to investigate the allegations contained in the Muddy Waters Report. After these assurances, Sino-Forest's share price rebounded, trading as high as 60% of its previous day's close, eventually closing on June 6, 2011 at $6.16, approximately 18% higher from its previous close.

63 On June 7, the Independent Committee announced that it had appointed Pricewaterhouse-Coopers ("PWC") to assist with the investigation. Several law firms were also hired to assist in the investigation.

64 However, bad news followed. Reporters from the *Globe and Mail* travelled to China, and on June 18 and 20, 2011, the newspaper published articles that reported that Yunnan Province forestry officials had stated that their records contradicted Sino-Forest's claim that it controlled almost 200,000 hectares in Yunnan Province.

65 On August 26, 2011, the Ontario Securities Commission ("OSC") issued an order suspending trading in Sino-Forest's securities and stated that: (a) Sino-Forest appears to have engaged in significant non-arm's length transactions that may have been contrary to Ontario securities laws and the public interest; (b) Sino-Forest and certain of its officers and directors appear to have misrepresented in a material respect, some of its revenue and/or exaggerated some of its timber holdings in public filings under the securities laws; and (c) Sino-Forest and certain of its officers and directors, including its CEO, appear to be engaging or participating in acts, practices or a course of conduct related to its securities which it and/or they know or reasonably ought to know perpetuate a fraud.

66 The OSC named Chan, Ho, Hung, Ip, and Yeung as respondents in the proceedings before the Commission. Sino-Forest placed Messrs. Hung, Ho and Yeung on administrative leave. Mr. Ip may only act on the instructions of the CEO.

67 Having already downgraded its credit rating for Sino-Forest's securities, Standard & Poor withdrew its rating entirely, and Moody's reduced its rating to "junk" indicating a very high credit risk.

68 On September 8, 2011, after a hearing, the OSC continued its cease-trading order until January 25, 2012, and the OSC noted the presence of evidence of conduct that may be harmful to investors and the public interest.

69 On November 10, 2011, articles in the *Globe and Mail* and the *National Post* reported that the RCMP had commenced a criminal investigation into whether executives of Sino-Forest had defrauded Canadian investors.

70 On November 13, 2011, at a cost of $35 million, Sino-Forest's Independent Committee released its Second Interim Report, which included the work of the committee members, PWC, and three law firms. The Report refuted some of the allegations made in the Muddy Waters Report but indicated that evidence could not be obtained to refute other allegations. The Committee reported that it did not detect widespread fraud, and noted that due to challenges it faced, including resistance from some company insiders, it was not able to reach firm conclusions on many issues.

71 On December 12, 2011, Sino-Forest announced that it would not file its third-quarter earnings' figures and would default on an upcoming interest payment on outstanding notes. This default may lead to the bankruptcy of Sino-Forest.

72 The chart attached as Schedule "A" to this judgment shows Sino-Forest's stock price on the TSX from January 1, 2004, to the date that its shares were cease-traded on August 26, 2011.

F. ANALYSIS OF THE COMPETING CLASS ACTIONS

1. The Attributes of Class Counsel

Smith v. Sino-Forest

73 Rochon Genova is a boutique litigation firm in Toronto focusing primarily on class action litigation, including securities class actions. It is currently class counsel in the CIBC subprime litigation, which seeks billions in damages on behalf of CIBC shareholders for the bank's alleged non-disclosure of its exposure to the U.S. subprime residential mortgage market. It is currently the lawyer of record in *Fischer v. IG Investment Management Ltd* and *Frank v. Farlie Turner,* [2011] O.J. No. 5567, both securities cases, and it is acting for aggrieved investors in litigation involving two multi-million dollar Ponzi schemes. It acted on behalf of Canadian shareholders in relation to the Nortel securities litigation, as well as, large scale products liability class actions involving Baycol, Prepulsid, and Maple Leaf Foods, among many other cases.

74 Rochon Genova has a working arrangement with Lieff Cabrasser Heimann & Bernstein, one of the United States' leading class action firms.

75 Lead lawyers for *Smith v. Sino-Forest* are Joel Rochon and Peter Jervis, both senior lawyers with considerable experience and proficiency in class actions and securities litigation.

Labourers v. Sino-Forest

76 Koskie Minsky is a Toronto law firm of 43 lawyers with a diverse practice including bankruptcy and insolvency, commercial litigation, corporate and securities, taxation, employment, labour, pension and benefits, professional negligence and insurance litigation.

77 Koskie Minsky has a well-established and prominent class actions practice, having been counsel in every sort of class proceeding, several of them being landmark cases, including *Hollick v Toronto (City), Cloud v The Attorney General of Canada,* [2004] O.J. No. 4924, and *Caputo v Imperial Tobacco*. It is currently representative counsel on behalf of all former Canadian employees in the multi-billion dollar Nortel insolvency.

78 Siskinds is a London and Toronto law firm of 70 lawyers with a diverse practice including bankruptcy and insolvency, business law, and commercial litigation. It has an association with the Québec law firm Siskinds, Desmeules, avocats.

79 At its London office, Siskinds has a team of 14 lawyers that focus their practice on class actions, in some instances exclusively. The firm has a long and distinguished history at the class actions bar, being class counsel in the first action certified as a class action, *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734, and it has almost a monopoly on securities class actions, having filed approximately 40 of this species of class actions, including 24 that advance claims under Part XXX.1 of the *Ontario Securities Act.*

80 As mentioned again later, for the purposes of *Labourers' Fund v. Sino-Forest*, Koskie Minsky and Siskinds have a co-operative arrangement with the U.S. law firm, Kessler Topaz Meltzer & Check LLP ("Kessler Topaz"), which is a 113-lawyer law firm specializing in complex litigation with a very high profile and excellent reputation as counsel in securities class action lawsuits in the United States.

81 Lead lawyers for *Labourers' v. Sino-Forest* are Kirk M. Baert, Jonathan Ptak, Mark Ziegler, and Michael Mazzuca of Koskie Minsky and A. Dimitri Lascaris of Siskinds, all senior lawyers with considerable experience and proficiency in class actions and securities litigation.

Northwest v. Sino-Forest

82 Kim Orr is a boutique litigation firm in Toronto focusing primarily on class action litigation, including securities class actions. It also has considerable experience on the defence side of defending securities cases.

83 As I described in *Sharma v. Timminco Ltd., supra*, where I choose Kim Orr in a carriage competition with Siskinds in a securities class action, Kim Orr has a fine pedigree as a class action firm and its senior lawyers have considerable experience and proficiency in all types of class actions. It was comparatively modest in its self-promotional material for the carriage motion, but I am aware that it is currently class counsel in substantial class actions involving claims of a similar nature to those in the case at bar.

84 Kim Orr has an association with Milberg, LLP, a prominent class action law firm in the United States. It has 75 attorneys, most of whom devote their practice to representing plaintiffs in complex litigations, including class and derivative actions. It has a large support staff, including investigators, a forensic accountant, financial analysts, legal assistants, litigation support analysts, shareholder services personnel, and information technology specialists.

85 Michael Spencer, who is a partner at Milberg and called to the bar in Ontario, offers counsel to Kim Orr.

86 Lead lawyers for *Northwest v. Sino-Forest* are James Orr, Won Kim, and Mr. Spencer.

2. Retainer, Legal and Forensic Resources, and Investigations

Smith v. Sino-Forest

87 Following the release of the Muddy Waters Report, on June 6, 2011, Mr. Smith contacted Rochon Genova. Mr. Smith, who lost much of his investment fortune, was one of the victims of the wrongs allegedly committed by Sino-Forest. Rochon Genova accepted the retainer, and two days later, a notice of action was issued. The Statement of Claim in *Smith v. Sino-Forest* followed on July 8, 2011.

88 Following their retainer by Mr. Smith, Rochon Genova hired Mr. X (his name was not disclosed), as a consultant. Mr. X, who has an accounting background, can fluently read, write, and

speak English, Cantonese, and Mandarin. He travelled to China from June 19 to July 3, 2011and again from October 31 to November 18, 2011. The purpose of the trips was to gather information about Sino-Forest's subsidiaries, its customers, and its suppliers. While in China, Mr. X secured approximately 20,000 pages of filings by Sino-Forest with the provincial branches of China's State Administration for Industry and Commerce (the "SAIC Files").

89 In August 2011, Rochon Genova retained Froese Forensic Partners Ltd., a Toronto-based forensic accounting firm, to analyze the SAIC files.

90 Rochon Genova also retained HAIBU Attorneys at Law, a full service law firm based in Shenzhen, Guangdong Province, China, to provide a preliminary opinion about Sino-Forest's alleged violations of Chinese accounting and taxation laws.

91 Exclusive of the carriage motion, Rochon Genova has already incurred approximately $350,000 in time and disbursements for the proposed class action.

Labourers v. Sino-Forest

92 On June 3, 2011, the day after the release of the Muddy Waters Report, Siskinds retained the Dacheng Law Firm in China to begin an investigation of the allegations contained in the report. Dacheng is the largest law firm in China with offices throughout China and Hong Kong and also offices in Los Angeles, New York, Paris, Singapore, and Taiwan.

93 On June 9, 2011, Guining Liu, a Sino-Forest shareholder, commenced an action in the Québec Superior Court on behalf of persons or entities domiciled in Québec who purchased shares and notes. Siskinds' Québec affiliate office, Siskinds, Desmeules, avocats, is acting as class counsel in that action.

94 On June 20, 2011, Koskie Minsky, which had a long standing lawyer-client relationship with the Labourers' Fund, was retained by it to recover its losses associated with the plummet in value of its holdings in Sino-Forest shares. Koskie Minsky issued a notice of action in a proposed class action with Labourers' Fund as the proposed representative plaintiffs.

95 The June action, however, is not being pursued, and in July 2011, Labourers' Fund was advised that Operating Engineers Fund, another pension fund, also had very significant losses, and the two funds decided to retain Koskie Minsky and Siskinds to commence a new action, which followed on July 20, 2011, by notice of action. The Statement of Claim in *Labourers v. Sino-Forest* was served in August, 2011.

96 Before commencing the new action, Koskie Minsky and Siskinds retained private investigators in Southeast Asia and received reports from them, along with information received from the Dacheng Law Firm. Koskie Minsky and Siskinds also received information from an unnamed expert in Suriname about the operations of Sino-Forest in Suriname and the role of Greenheart Group Ltd., which is a significant aspect of its Statement of Claim in *Labourers v. Sino-Forest*.

97 On November 4, 2011, Koskie Minsky and Siskinds served the Defendants in *Labourers v. Sino-Forest* with the notice of motion for an order granting leave to assert the causes of action under Part XXIII.1 of the *Ontario Securities Act.*

98 On October 26, 2011, Robert Wong, who had lost a very large personal investment in Sino-Forest shares, retained Koskie Minsky and Siskinds to sue Sino-Forest for his losses, and the firms decided that he would become another representative plaintiff.

99 On November 14, 2011, Koskie Minsky and Siskinds commenced *Grant v. Sino-Forest Corp.*, which, as already noted above, they intend to consolidate with *Labourers v. Sino-Forest.*

100 *Grant v. Sino-Forest* names the same defendants as in *Labourers v. Sino-Forest,* except for the additional joinder of Messrs. Bowland, Poon, and West, and it also joins as defendants, BDO, and two additional underwriters, Banc of America and Credit Suisse Securities (USA).

101 Koskie Minsky and Siskinds state that *Grant v. Sino-Forest* was commenced out of an abundance of caution to ensure that certain prospectus and offering memorandum claims under the *Ontario Securities Act,* and under the equivalent legislation of the other Provinces, will not expire as being statute-barred.

102 Exclusive of the carriage motion, Koskie Minsky has already incurred approximately $350,000 in time and disbursements for the proposed class action, and exclusive of the carriage motion, Siskinds has already incurred approximately $440,000 in time and disbursements for the proposed class action.

Northwest v. Sino-Forest

103 Immediately following the release of the Muddy Waters Report, Kim Orr and Milberg together began an investigation to determine whether an investor class action would be warranted. A joint press release on June 7, 2011, announced the investigation.

104 For the purposes of the carriage motion, apart from saying that their investigation included reviewing all the documents on SEDAR and the System for Electronic Disclosure for Insiders (SEDI), communicating with contacts in the financial industry, and looking into Sino-Forest's officers, directors, auditors, underwriters and valuation experts, Kim Orr did not disclose the details of its investigation. It did indicate that it had hired a Chinese forensic investigator and financial analyst, a market and damage consulting firm, Canadian forensic accountants, and an investment and market analyst and that its investigations discovered valuable information.

105 Meanwhile, lawyers at Milberg contacted Bâtirente, which was one of its clients and also a Sino-Forest shareholder, and Won Kim of Kim Orr contacted Northwest, another Sino-Forest shareholder. Bâtirente already had a retainer with Milberg to monitor its investment portfolio on an ongoing basis to detect losses due to possible securities violations.

106 Northwest and Bâtirente agreed to retain Kim Orr to commence a class action, and on September 26, 2011, Kim Orr commenced *Northwest v. Sino-Forest.*

107 In October 2011, BC Investments contacted Kim Orr about the possibility of it becoming a plaintiff in the class proceeding commenced by Northwest and Bâtirente, and BC Investments decided to retain the firm and the plan is that BC Investments is to become another representative plaintiff.

108 Exclusive of the carriage motion, Kim Orr and Milberg have already incurred approximately $1,070,000 in time and disbursement for the proposed class action.

3. Proposed Representative Plaintiffs

Smith v. Sino-Forest

109 In *Smith v. Sino-Forest*, the proposed representative plaintiffs are Douglas Smith and Frederick Collins.

110 Douglas Smith is a resident of Ontario, who acquired approximately 9,000 shares of Sino-Forest during the proposed class period. He is married, 48 years of age, and employed as a director of sales. He describes himself as a moderately sophisticated investor that invested in Sino-Forest based on his review of the publicly available information, including public reports and filings, press releases, and statements released by or on behalf of Sino-Forest. He lost $75,345, which was half of his investment fortune.

111 Frederick Collins is a resident of Nanaimo, British Columbia. He purchased shares in the primary market. His willingness to act as a representative plaintiff was announced during the reply argument of the second day of the carriage motion, and nothing was discussed about his background other than he is similar to Mr. Smith in being an individual investor. He was introduced to address a possible *Ragoonanan* problem in *Smith v. Sino-Forest;* namely, the absence of a plaintiff who purchased in the primary market, of which alleged problem I will have more to say about below.

Labourers v. Sino-Forest

112 In *Labourers v. Sino-Forest*, the proposed representative plaintiffs are: David Grant, Robert Wong, The Trustees of the Labourers' Pension Fund of Central and Eastern Canada ("Labourers' Fund"), the Trustees of the International Union of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario ("Operating Engineers Fund"), and Sjunde AP-Fonden.

113 David Grant is a resident of Alberta. On October 21, 2010, he purchased 100 Guaranteed Senior Notes of Sino-Forest at a price of $101.50 ($U.S.), which he continues to hold.

114 Robert Wong, a resident of Ontario, is an electrical engineer. He was born in China, and in addition to speaking English, he speaks fluent Cantonese. He was a substantial shareholder of Sino-Forest from July 2002 to June 2011. Before making his investment, he reviewed Sino-Forest's Core Documents, and he also made his own investigations, including visiting Sino-Forest's plantations in China in 2005, where he met a Sino-Forest vice-president.

115 Mr. Wong's investment in Sino-Forest comprised much of his net worth. In September 2008, he owned 1.4 million Sino-Forest shares with a value of approximately $26.1 million. He purchased more shares in the December 2009 prospectus offering. Around the end of May 2011, he owned 518,700 shares, which, after the publication of the Muddy Waters Report, he sold on June 3, 2011 and June 10, 2011, for $2.8 million.

116 The Labourers' Fund is a multi-employer pension fund for employees in the construction industry. It is registered with the Financial Services Commission in Ontario and has 52,100 members in Ontario, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland and Labrador. It is a long-time client of Koskie Minsky.

117 Labourers' Fund manages more than $2.5 billion in assets. It has a fiduciary and statutory responsibility to invest pension monies on behalf of thousands of employees and pensioners in Ontario and in other provinces.

118 Labourer's Fund acted as representative plaintiff in a U.S. class actions against Fortis, Pitney Bowes Inc., Synovus Financial Corp., and Medea Health Solutions, Inc. Those actions involved allegations of misrepresentation in the statements and filings of public issuers.

119 The Labourers' Fund purchased Sino-Forest shares on the TSX during the class period, including 32,300 shares in a trade placed by Credit Suisse under a prospectus. Most of its purchases of Sino-Forest shares were made in the secondary market.

120 On June 1, 2011, the Labourers' Fund held a total of 128,700 Sino-Forest shares with a market value of $2.3 million, and it also had an interest in pooled funds that had $1.4 million invested in Sino-Forest shares. On June 2 and 3, 2011, the Labourers' Fund sold its holdings in Sino-Forest for a net recovery of $695,993.96. By June 30, 2011, the value of the Sino-Forest shares in the pooled funds was $291,811.

121 The Operating Engineers Fund is a multi-employer pension fund for employed operating engineers and apprentices in the construction industry. It is registered with the Financial Services Commission in Ontario, and it has 20,867 members. It is a long-time client of Koskie Minsky.

122 The Operating Engineers Fund manages $1.5 billion in assets. It has a fiduciary and statutory responsibility to invest pension monies on behalf of thousands of employees and pensions in Ontario and in other provinces.

123 The Operating Engineers Fund acquired shares of Sino-Forest on the TSX during the class period. The Operating Engineers Fund invested in Sino-Forest shares through four asset managers of a segregated fund. One of the managers purchased 42,000 Sino-Forest shares between February 1, 2011, and May 24, 2011, which had a market value of $764,820 at the close of trading on June 1, 2011. These shares were sold on June 21, 2011 for net $77,170.80. Another manager purchased 181,700 Sino-Forest shares between January 20, 2011 and June 1, 2011, which had a market value of $3.3 million at the close of trading on June 1, 2011. These shares were sold and the Operating Engineers Fund recovered $1.5 million. Another asset manager purchased 100,400 Sino-Forest shares between July 5, 2007 and May 26, 2011, which had a market value of $1.8 million at the close of trading on June 1, 2011. Many of these shares were sold in July and August, 2011, but the Operating Engineers Fund continues to hold approximately 37,350 shares. Between June 15, 2007 and June 9, 2011, the Operating Engineers Fund also purchased units of a pooled fund managed by TD that held Sino-Forest shares, and it continues to hold these units. The Operating Engineers Fund has incurred losses in excess of $5 million with respect to its investment in Sino-Forest shares.

124 Sjunde AP-Fonden is the Swedish Nation Pension Fund, and part of Sweden's national pension system. It manages $15.3 billion in assets. It has acted as lead plaintiff in a large securities class action and a large stockholder class action in the United States.

125 In addition to retaining Koskie Minsky and Siskinds, Sjunde AP-Fonden also retained the American law firm Kessler Topaz to provide assistance, if necessary, to Koskie Minsky and Siskinds.

126 Sjunde AP-Fonden purchased Sino-Forest shares on the TSX from outside Canada between April 2010 and January 2011. It was holding 139,398 shares with a value of $2.5 million at the close of trading on June 1, 2011. It sold 43,095 shares for $188,829.36 in August 2011 and holds 93,303 shares.

127 Sjunde AP-Fonden is prepared to be representative plaintiff for a sub-class of non-Canadian purchasers of Sino-Forest shares who purchased shares in Canada from outside of Canada.

128 Messrs. Mancinelli, Gallagher, and Grottheim each deposed that Labourers' Fund, the Operating Engineers Fund, and Sjunde AP-Fonden respectively sued because of their losses and because of their concerns that public markets remain healthy and transparent.

129 Although it does not seek to be a representative plaintiff, the Healthcare Employee Benefits Plans of Manitoba ("Healthcare Manitoba") is a major class member that supports carriage being granted to Koskie Minsky and Siskinds, and its presence should also be mentioned here because it actively supports the appointment of the proposed representative plaintiffs in *Labourers v. Sino-Forest*.

130 Healthcare Manitoba provides pensions and other benefits to eligible healthcare employees and their families throughout Manitoba. It has 65,000 members. It is a long-time client of Koskie Minsky. It manages more than $3.9 billion in assets.

131 Healthcare Manitoba, invested in Sino-Forest shares that were purchased by one of its asset managers in the TSX secondary market. Between February and May, 2011, it purchased 305,200 shares with a book value of $6.7 million. On June 24, 2011, the shares were sold for net proceeds of $560,775.48.

Northwest v. Sino-Forest

132 In *Northwest v. Sino-Forest*, the proposed representative plaintiffs are: British Columbia Investment Management Corporation ("BC Investment"); Comité syndical national de retraite Bâtirente inc. ("Bâtirente") and Northwest & Ethical Investments L.P. ("Northwest").

133 BC Investment, which is incorporated under the British Columbia *Public Sector Pension Plans Act*, is owned by and is an agent of the Government of British Columbia. It manages $86.9 billion in assets. Its investment activities help to finance the retirement benefits of more than 475,000 residents of British Columbia, including public service employees, healthcare workers, university teachers, and staff. Its investment activities also help to finance the WorkSafeBC insurance fund that covers approximately 2.3 million workers and over 200,000 employers in B.C., as well as, insurance funds for public service long term disability and credit union deposits.

134 BC Investment, through the funds it managed, owned 334,900 shares of Sino-Forest at the start of the Class Period, purchased 6.6 million shares during the Class Period, including 50,200 shares in the June 2009 offering and 54,800 shares in the December 2009 offering; sold 5 million shares during the Class Period; disposed of 371,628 shares after the end of the Class Period; and presently holds 1.5 million shares.

135 Bâtirente is a non-profit financial services firm initiated by the Confederation of National Trade Unions to establish and promote a workplace retirement system for affiliated unions and other organizations. It is registered as a financial services firm regulated in Quebec by the Autorité des marchés financiers under *the Act Respecting the Distribution of Financial Products and Services*, R.S.Q., chapter D-9.2. It has assets of about $850 million.

136 Bâtirente, through the funds it managed, did not own any shares of Sino-Forest before the class period, purchased 69,500 shares during the class period, sold 57,625 shares during the class period, and disposed of the rest of its shares after the end of the class period.

137 Northwest is an Ontario limited partnership, owned 50% by the Provincial Credit Unions Central and 50% by Federation des caisses Desjardin du Québec. It is registered with the British Columbia Securities Commission as a portfolio manager, and it is registered with the OSC as a portfolio manager and as an investment funds manager. It manages about $5 billion in assets.

138 Northwest, through the funds it managed, did not own any shares of Sino-Forest before the class period, purchased 714,075 shares during the class period, including 245,400 shares in the De-

cember 2009 offering, sold 207,600 shares during the class period, and disposed of the rest of its shares after the end of the class period.

139 Kim Orr touts BC Investment, Bâtirente, and Northwest as candidates for representative plaintiff because they are sophisticated "activist shareholders" that are committed to ethical investing. There is evidence that they have all raised governance issues with Sino-Forest as well as other companies. Mr. Mountain of Northwest and Mr. Simard of Bâtirente are eager to be actively involved in the litigation against Sino-Forest.

4. Funding

140 Koskie Minsky and Siskinds have approached Claims Funding International, and subject to court approval, Claims Funding International has agreed to indemnify the plaintiffs for an adverse costs award in return for a percentage of any recovery from the class action.

141 Koskie Minsky and Siskinds state that if the funding arrangement with Claims Funding International is refused, they will, in any event, proceed with the litigation and will indemnify the plaintiffs for any adverse costs award.

142 Similarly, Kim Orr has approached Bridgepoint Financial Services, which subject to court approval, has agreed to indemnify the plaintiffs for an adverse costs award in return for a percentage of any recovery in the class action. If this arrangement is not approved, Kim Orr intends to apply to the Class Proceedings Fund, which would be a more expensive approach to financing the class action.

143 Kim Orr states that if these funding arrangements are refused, it will, in any event, proceed with the litigation and it will indemnify the plaintiffs for any adverse costs award.

144 Rochon Genova did not mention in its factum whether it intends to apply to the Class Proceedings Fund on behalf of Messrs. Smith and Collins, but for the purposes of the discussion later about the carriage order, I will assume that this may be the case. I will also assume that Rochon Genova has agreed to indemnify Messrs. Smith and Collins for any adverse costs award should funding not be granted by the Fund.

5. Conflicts of Interest

145 One of the qualifications for being a representative plaintiff is that the candidate does not have a conflict of interest in representing the class members and in bringing an action on their behalf. All of the candidates for representative plaintiff in the competing class actions depose that they have no conflicts of interest. Their opponents disagree.

146 Rochon Genova submits that there are inherent conflicts of interests in both *Labourers v. Sino-Forest* and in *Northwest v. Sino-Forest* because the representative plaintiffs bring actions on behalf of both shareholders and noteholders. Rochon Genova submits that these conflicts are exacerbated by the prospect of a Sino-Forest bankruptcy.

147 Relying on *Casurina Ltd. Partnership v. Rio Algom Ltd.* [2004] O.J. No. 177 (C.A.) at paras. 35-36, aff'g [2002] O.J. No. 3229 (S.C.J.), leave to appeal to the S.C.C. denied, [2004] S.C.C.A. No. 105 and *Amaranth LLC. v. Counsel Corp.,* [2003] O.J. No. 4674 (S.C.J.), Rochon Genova submits that a class action by the bondholders is precluded by the pre-conditions in the bond instruments, but if it were to proceed, it might not be in the best interests of the bondholders, who might prefer to have Sino-Forest capable of carrying on business. Further still, Rochon Genova

submits that, in any event, an action by the bondholders' trustee may be the preferable way for the noteholders to sue on their notes. Further, Rochon Genova submits that if there is a bankruptcy, the bondholders may prefer to settle their claims in the context of the bankruptcy rather than being connected in a class action to the shareholder's claims over which they would have priority in a bankruptcy.

148 Further still, Rochon Genova submits that a bankruptcy would bring another conflict of interest between bondholders and shareholders because under s. 50(14) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, and 5.1(2) of the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 the claims of creditors against directors that are based on misrepresentation or oppression may not be compromised through a plan or proposal. In contrast, *Allen-Vanguard Corp., Re*, 2011 ONSC 5017 (S.C.J.) at paras. 48-52 is authority that shareholders are not similarly protected, and, therefore, Rochon Genova submits that the noteholders would have a great deal more leverage in resolving claims against directors than would the shareholder members of the class in a class action.

149 Kim Orr denies that there is a conflict in the representative plaintiffs acting on behalf of both shareholders and bondholders. It submits that while boldholders may have an additional claim in contract against Sino-Forest for repayment of the debt outside of the class action, both shareholders and bondholders share a misrepresentation claim against Sino-Forest and there is no conflict in advancing the misrepresentation claim independent of the debt repayment claim.

150 Koskie Minsky and Siskinds also deny that there is any conflict in advancing claims by both bondholders and shareholders. They say that the class members are on common ground in advancing misrepresentation, tort, and the various statutory causes of action. Koskie Minsky and Siskinds add that if there was a conflict, then it is manageable because they have a representative plaintiff who was a bondholder, which is not the case for the representative plaintiffs in *Northwest v. Sino-Forest*. It submits that, if necessary, subclasses can be established to manage any conflicts of interest among class members.

151 Leaving the submitted shareholder and bondholder conflicts of interest, Rochon Genova submits that Labourers' Fund has a conflict of interest because BDO Canada is its auditor. Rochon Genova submits that Koskie Minsky also has a conflict of interest because it and BDO Canada have worked together on a committee providing liaison between multi-employer pension plans and the Financial Services Commission of Ontario and have respectively provided services as auditor and legal counsel to the Union Benefits Alliance of Construction Trade Unions. Rochon Genova submits that it is telling that these conflicts were not disclosed and that BDO, which is an entity that is an international associate with BDO Canada was a late arrival as a defendant in *Labourers v. Sino-Forest*, although this can be explained by changes in the duration of the class period.

152 For their part, Koskie Minsky and Siskinds raise a different set of conflicts of interest. They submit that Northwest, Bâtirente, and BC Investments have a conflict of interest with the other class members who purchased Sino-Forest securities because of their role as investment managers.

153 Koskie Minsky and Siskinds' argument is that as third party financial service providers, BC Investment, Bâtirente, and Northwest did not suffer losses themselves but rather passed the losses on to their clients. Further, Koskie Minsky and Siskinds submit that, in contrast to BC Investment, Bâtirente, and Northwest, their clients, Labourers' Fund and Operating Engineers Fund, are acting

as fiduciaries to recover losses that will affect their members' retirements. This arguably makes Koskie Minsky and Siskinds better representative plaintiffs.

154 Further still, Koskie Minsky and Siskinds submit that the class members in *Northwest v. Sino-Forest* may question whether Northwest, Bâtirente, and BC Investments failed to properly evaluate the risks of investing in Sino-Forest. Koskie Minsky and Siskinds point out that the Superior Court of Québec in *Comité syndical national de retraite Bâtirente inc. c. Société financière Manuvie*, 2011 QCCS 3446 at paras. 111-119 disqualified Bâtirente as a representative plaintiff because there might be an issue about Bâtirente's investment decisions. Thus, Koskie, Minsky and Siskinds attempt to change Northwest, Bâtirente, and BC Investments' involvement in encouraging good corporate governance at Sino-Forest from a positive attribute into the failure to be aware of ongoing wrongdoing at Sino-Forest and a negative attribute for a proposed representative plaintiff.

6. Definition of Class Membership

Smith v. Sino-Forest

155 In *Smith v. Sino-Forest*, the proposed class action is: (a) on behalf of all persons who purchased shares of Sino-Forest from May 17, 2004 to August 26, 2011 on the TSX or other secondary market; and (b) on behalf of all persons who acquired shares of Sino-Forest during the offering distribution period relating to Sino-Forest's share prospectus offerings on June 1, 2009 and December 10, 2009 excluding the Defendants, members of the immediate families of the Individual Defendants, or the directors, officers, subsidiaries and affiliates of the corporate Defendants.

156 Both Koskie Minsky and Siskinds and Kim Orr challenge this class membership as inadequate for failing to include the bondholders who were allegedly harmed by the same misconduct that harmed the shareholders.

Labourers v. Sino-Forest

157 In *Labourers v. Sino-Forest*, the proposed class action is on behalf of all persons and entities wherever they may reside who acquired securities of Sino-Forest during the period from and including March 19, 2007 to and including June 2, 2011 either by primary distribution in Canada or an acquisition on the TSX or other secondary markets in Canada, other than the defendants, their past and present subsidiaries, affiliates, officers, directors, senior employees, partners, legal representatives, heirs, predecessors, successors and assigns, and any individual who is an immediate member of the family of an individual defendant.

158 The class membership definition in *Labourers v. Sino-Forest* includes non-Canadians who purchased shares or notes in Canada but excludes non-Canadians who purchased in a foreign marketplace.

159 Challenging this definition, Kim Orr submits that it is wrong in principle to exclude persons whose claims will involve the same facts as other class members and for whom it is arguable that Canadian courts may exercise jurisdiction and provide access to justice.

Northwest v. Sino-Forest,

160 In *Northwest v. Sino-Forest*, the proposed class action is on behalf of purchasers of shares or notes of Sino-Forest during the period from August 17, 2004 through June 2, 2011, except: Sino-Forest's past and present subsidiaries and affiliates; the past and present officers and directors of Sino-Forest and its subsidiaries and affiliates; members of the immediate family of any excluded

person; the legal representatives, heirs, successors, and assigns of any excluded person or entity; and any entity in which any excluded person or entity has or had a controlling interest.

161 Challenging this definition, Koskie Minsky and Siskinds submit that the proposed class in *Northwest* has no geographical limits and, therefore, will face jurisdictional and choice of law challenges that do not withstand a cost benefit analysis. It submits that Sino-Forest predominantly raised capital in Canadian capital markets and the vast majority of its securities were either acquired in Canada or on a Canadian market, and, in this context, including in the class non-residents who purchased securities outside of Canada risks undermining and delaying the claims of the great majority of proposed class members whose claims do not face such jurisdictional obstacles.

7. Definition of Class Period

Smith v. Sino-Forest

162 In *Smith v. Sino-Forest,* the class period is May 17, 2004 to August 26, 2011. This class period starts with the release of Sino-Forest's release of its 2003 Annual Information Form, which indicated the use of authorized intermediaries, and it ends on the day of the OSC's cease-trade order.

163 For comparison purposes, it should be noted that this class period has the earliest start date and the latest finish date. *Labourers v. Sino-Smith* and *Northwest v. Sino-Forest* both use the end date of the release of the Muddy Waters Report.

164 In making comparisons, it is helpful to look at the chart found at Schedule A of this judgment.

165 Rochon Genova justifies its extended end date based on the argument that the Muddy Waters Report was a revelation of Sino-Forest's misrepresentation but not a corrective statement that would end the causation of injuries because Sino-Forest and its officers denied the truth of the Muddy Waters Report.

166 Kim Orr's criticizes the class definition in *Smith v. Sino-Forest* and submits that purchasers of shares or notes after the Muddy Waters Report was published do not have viable claims and ought not be included as class members.

167 Koskie Minsky and Siskinds' submission is similar, and they regard the extended end date as problematic in raising the issues of whether there were corrective disclosures and of how Part XXIII.1 of the *Ontario Securities Act* should be interpreted.

Labourers v. Sino-Forest

168 In *Labourers v. Sino-Forest*, the class period is March 19, 2007 to June 2, 2011.

169 This class period starts with the date Sino-Forest's 2006 financial results were announced, and it ends on the date of the publication of the Muddy Waters Report.

170 The March 19, 2007, commencement date was determined using a complex mathematical formula known as the "multi-trader trading model." Using this model, Mr. Torchio estimates that 99.5% of Sino-Forest's shares retained after June 2, 2011, had been purchased after the March 19, 2007 commencement date. Thus, practically speaking, there is almost nothing to be gained by an earlier start date for the class period.

171 The proposed class period covers two share offerings (June 2009 and December 2009). This class period does not include time before the coming into force of Part XXIII.1 of the *Ontario*

Securities Act (December 31, 2005), and, thus, Koskie Minsky and Siskinds submit that this aspect of their definition avoids problems about the retroactive application, if any, of Part XXIII.1 of the Act.

172 For comparison purposes, the *Labourers* class period has the latest start date and shares the finish date used in the *Northwest v. Sino-Forest* action, which is sooner than the later date used in *Smith v. Sino-Forest*. It is the most compressed of the three definitions of a class period.

173 Based on Mr. Torchio's opinion, Koskie Minsky and Siskinds submit that there are likely no damages arising from purchases made during a substantial portion of the class periods in *Smith v. Sino-Forest* and in *Northwest v. Sino-Forest.* Koskie Minsky and Siskinds submit that given that the average price of Sino's shares was approximately $4.49 in the ten trading days after the Muddy Waters report, it is likely that any shareholder that acquired Sino-Forest shares for less than $4.49 suffered no damages, particularly under Part XXIII.1 of the *Ontario Securities Act.*

174 In part as a matter of principle, Kim Orr submits that Koskie Minsky and Siskinds' approach to defining the class period is unsound because it excludes class members who, despite the mathematical modelling, may have genuine claims and are being denied any opportunity for access to justice. Kim Orr submits it is wrong in principle to abandon these potential class members.

175 Rochon Genova also submits that Koskie Minsky and Siskinds' approach to defining the class period is wrong. It argues that Koskie Minsky and Siskinds' reliance on a complex mathematical model to define class membership is arbitrary and unfair to share purchasers with similar claims to those claimants to be included as class members. Rochon Genova criticizes Koskie Minsky and Siskinds' approach as being the condemned merits based approach to class definitions and for being the sin of excluding class members because they may ultimately not succeed after a successful common issues trial.

176 Relying on what I wrote in *Fischer v. IG Investment Management Ltd.*, 2010 ONSC 296 at para. 157, Rochon Genova submits that the possible failure of an individual class member to establish an individual element of his or her claim such as causation or damages is not a reason to initially exclude him or her as a class member. Rochon Genova submits that the end date employed in *Labourers v. Sino-Forest* and *Northwest v. Sino-Forest* is wrong.

Northwest v. Sino-Forest

177 In *Northwest v. Sino-Forest*, the class period is August 17, 2004 to June 2, 2011.

178 This class period starts from the day Sino-Forest closed its public offering of long-term notes that were still outstanding at the end of the class period and ends on the date of the Muddy Waters Research Report. This period covers three share offerings (June 2007, June 2009, and December 2009) and six note offerings (August 2004, July 2008, July 2009, December 2009, February 2010, and October 2010).

179 For comparison purposes, the *Northwest v. Sino-Forest* class period begins 3 months later and ends three months sooner than the class period in *Smith v. Sino-Forest.* The *Northwest v. Sino-Forest* class period begins approximately two-and-a-half years earlier and ends at the same time as the class period in *Labourers v. Sino-Forest.*

180 Kim Orr submits that its start date of August 17, 2004 is satisfactory, because on that date, Sino-Forest shares were trading at $2.85, which is below the closing price of Sino-Forest shares on the TSX for the ten days after June 3, 2011 ($4.49), which indicates that share purchasers before

August 2004 would not likely be able to claim loss or damages based on the public disclosures on June 2, 2011.

181 However, Koskie Minsky and Siskinds point out that Kim Orr's submission actually provides partial support for the theory for a later start date (March 19, 2007) because, there is no logical reason to include in the class persons who purchased Sino-Forest shares between May 17, 2004, the start date of the *Smith Action* and December 1, 2005, because with the exception of one trading day (January 24, 2005), Sino-Forest's shares never traded above $4.49 during that period.

8. Theory of the Case against the Defendants

Smith v. Sino-Forest

182 In *Smith v. Sino-Forest,* the theory of the case rests on the alleged non-arms' length transfers between Sino-Forest and its subsidiaries and authorized intermediaries, that purported to be suppliers and customers. Rochon Genova's investigations and analysis suggest that there are numerous non-arms length inter-company transfers by which Sino-Forest misappropriated investors' funds, exaggerated Sino-Forest's assets and revenues, and engaged in improper tax and accounting practices.

183 Mr. Smith alleges that Sino-Forest's quarterly interim financial statements, audited annual financial statements, and management's discussion and analysis reports, which are Core Documents as defined under the *Ontario Securities Act,* misrepresented its revenues, the nature and scope of its business and operations, and the value and composition of its forestry holdings. He alleges that the Core Documents failed to disclose an unlawful scheme of fabricated sales transactions and the avoidance of tax and an unlawful scheme through which hundreds of millions of dollars in investors' funds were misappropriated or vanished.

184 Mr. Smith submits that these misrepresentations and failures to disclose were also made in press releases and in public oral statements. He submits that Chan, Hyde, Horsley, Mak, Martin, Murray, and Wang authorized, permitted or acquiesced in the release of Core Documents and that Chan, Horsley, Martin, and Murray made the misrepresentations in public oral statements.

185 In *Smith v. Sino-Forest*, Mr. Smith (and Mr. Collins) brings different claims against different combinations of Defendants; visualize:

* misrepresentation in a prospectus under Part XXIII of the *Ontario Securities Act*, against all the Defendants
* subject to leave being granted, misrepresentation in secondary market disclosure under Part XXIII.1 of the Ontario *Securities Act* as against the defendants: Sino-Forest, Chan, Horsley, Hyde, Mak, Martin, Murray, Wang, BDO and E&Y
* negligent, reckless, or fraudulent misrepresentation against Sino-Forest, Chan, Horsley, Hyde, Mak, Martin, Murray, and Wang. This claim would appear to cover sales of shares in both the primary and secondary markets.

186 It is to be noted that *Smith v. Sino-Forest* does not make a claim on behalf of noteholders, and, as described and explained below, it joins the fewest number of defendants.

187 *Smith* also does not advance a claim on behalf of purchasers of shares through Sino-Forest's prospectus offering of June 5, 2007, because of limitation period concerns associated

with the absolute limitation period found in 138.14 of the *Ontario Securities Act*. See: *Coulson v. Citigroup Global Markets Canada Inc.*, 2010 ONSC 1596 at paras. 98-100.

Labourers v. Sino-Forest

188 The theory of *Labourers v. Sino-Forest* is that Sino-Forest, along with its officers, directors, and certain of its professional advisors, falsely represented that its financial statements complied with GAAP, materially overstated the size and value of its forestry assets, and made false and incomplete representations regarding its tax liabilities, revenue recognition, and related party transactions.

189 The claims in *Labourers v. Sino-Forest* are largely limited to alleged misrepresentations in Core Documents as defined in the *Ontario Securities Act* and other Canadian securities legislation. Core Documents include prospectuses, annual information forms, information circulars, financial statements, management discussion & analysis, and material change reports.

190 The representative plaintiffs advance statutory claims and also common law claims that certain defendants breached a duty of care and committed the torts of negligent misrepresentation and negligence. There are unjust enrichment, conspiracy, and oppression remedy claims advanced against certain defendants.

191 In *Labourers v. Sino-Forest*, different combinations of representative plaintiffs advance different claims against different combinations of defendants; visualize:

* Labourers' Fund and Mr. Wong, purchasers of shares in a primary market distribution, advance a statutory claim under Part XXIII of the *Ontario Securities Act* against Sino-Forest, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, E&Y, BDO, CIBC, Canaccord, Credit Suisse, Dundee, Maison, Merrill, RBC, Scotia, TD and Pöyry
* Labourers' Fund and Mr. Wong, purchasers of shares in a primary market distribution, advance a common law negligent misrepresentation claim against Sino-Forest, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, E&Y, BDO, CIBC, Canaccord, Credit Suisse, Dundee, Maison, Merrill, RBC, Scotia, and TD based on the common misrepresentation that Sino-Forest's financial statements complied with GAPP
* Labourers' Fund and Mr. Wong, purchasers of shares in a primary market distribution, advance a common law negligence claim against Sino-Forest, Chan, Hyde, Horsley, Mak, Martin, Murray, Poon, Wang, E&Y, BDO, CIBC, Canaccord, Credit Suisse, Dundee, Maison, Merrill, RBC, Scotia, TD and Pöyry
* Grant, who purchased bonds in a primary market distribution, advances a statutory claim under Part XXIII of the *Ontario Securities Act* against Sino-Forest
* Grant, who purchased bonds in a primary market distribution, advances a common law negligent misrepresentation claim against Sino-Forest, E&Y and BDO based on the common misrepresentation that Sino-Forest's financial statements complied with GAPP

* Grant, who purchased bonds in a primary market distribution, advances a common law negligence claim against Sino-Forest, E&Y, BDO, Banc of America, Credit Suisse USA, and TD
* All the representative plaintiffs, subject to leave being granted, advance claims of misrepresentation in secondary market disclosure under Part XXIII.1 of the *Ontario Securities Act* and, if necessary, equivalent provincial legislation. This claim is against Sino-Forest, Ardell, Bowland, Chan, Hyde, Horsley, Mak, Martin, Murray, Poon, Wang, West, E &Y, BDO, and Pöyry
* All of the representative plaintiffs, who purchased Sino-Forest securities in the secondary market, advance a common law negligent misrepresentation claim against all of the Defendants except the underwriters based on the common misrepresentation contained in the Core Documents that Sino-Forest's financial statements complied with GAAP
* All the representative plaintiffs sue Sino-Forest, Chan, Horsley, and Poon for conspiracy. It is alleged that Sino-Forest, Chan, Horsley, and Poon conspired to inflate the price of Sino-Forest's shares and bonds and to profit by their wrongful acts to enrich themselves by, among other things, issuing stock options in which the price was impermissibly low
* While it is not entirely clear from the Statement of Claim, it seems that all the representative plaintiffs sue Chan, Horsley, Mak, Martin, Murray, and Poon for unjust enrichment in selling shares to class members at artificially inflated prices
* While it is not entirely clear from the Statement of Claim, it seems that all the representative plaintiffs sue Sino-Forest for unjust enrichment for selling shares at artificially inflated prices
* While it is not entirely clear from the Statement of Claim, it seems that all the representative plaintiffs sue Banc of America, Canaccord, CIBC, Credit Suisse, Credit Suisse USA, Dundee, Maison, Merrill, RBC, Scotia, and TD for unjustly enriching themselves from their underwriters fees
* All the representative plaintiffs sue Sino-Forest, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, and Wang for an oppression remedy under the *Canada Business Corporations Act*

192 Koskie Minsky and Siskinds submit that *Labourers v. Sino-Forest* is more focused than *Smith* and *Northwest* because: (a) its class definition covers a shorter time period and is limited to securities acquired by Canadian residents or in Canadian markets; (b) the material documents are limited to Core Documents under securities legislation; (c) the named individual defendants are limited to directors and officers with statutory obligations to certify the accuracy of Sino-Forest's public filings; and (d) the causes of action are tailored to distinguish between the claims of primary market purchasers and secondary market purchasers and so are less susceptible to motions to strike.

193 Koskie Minsky and Siskinds submit that save for background and context, little is gained in the rival actions by including claims based on non-Core Documents, which confront a higher threshold to establish liability under Part XXIII.1 of the *Ontario Securities Act*.

Northwest v. Sino-Forest

194 The *Northwest v. Sino-Forest* Statement of Claim focuses on an "Integrity Representation," which is defined as: "the representation in substance that Sino-Forest's overall reporting of its business operations and financial statements was fair, complete, accurate, and in conformity with international standards and the requirements of the *Ontario Securities Act* and National Instrument 51-102, and that its accounts of its growth and success could be trusted."

195 The *Northwest v. Sino-Forest* Statement of Claim alleges that all Defendants made the Integrity Representation and that it was a false, misleading, or deceptive statement or omission. It is alleged that the false Integrity Representation caused the market decline following the June 2, 2011, disclosures, regardless of the truth or falsity of the particular allegations contained in the Muddy Waters Report.

196 In *Northwest v. Sino-Forest*, the representative plaintiffs advance statutory claims under Parts XXIII and XXIII.1 of the *Ontario Securities Act* and a collection of common law tort claims. Kim Orr submits that to the extent, if any, that the statutory claims do not provide complete remedies to class members, whether due to limitation periods, liability caps, or other limitations, the common law claims may provide coverage.

197 In *Northwest v. Sino-Forest*, the plaintiffs advance different claims against different combinations of defendants; visualize:

* With respect to the June 2009 and December 2009 prospectus, a cause of action for violation of Part XXIII of the *Ontario Securities Act* against Sino-Forest, the underwriter Defendants, the director Defendants, the Defendants who consented to disclosure in the prospectus and the Defendants who signed the prospectus
* Negligent misrepresentation against all of the Defendants for disseminating material misrepresentations about Sino-Forest in breach of a duty to exercise appropriate care and diligence to ensure that the documents and statements disseminated to the public about Sino-Forest were complete, truthful, and accurate.
* Fraudulent misrepresentation against all of the Defendants for acting knowingly and deliberately or with reckless disregard for the truth making misrepresentations in documents, statements, financial statements, prospectus, offering memoranda, and filings issued and disseminated to the investing public including Class Members.
* Negligence against all the Defendants for a breach of a duty of care to ensure that Sino-Forest implemented and maintained adequate internal controls, procedures and policies to ensure that the company's assets were protected and its activities conformed to all legal developments.
* Negligence against the underwriter Defendants, the note distributor Defendants, the auditor Defendants, and the Pöyry Defendants for breach of a duty to the purchasers of Sino-Forest securities to perform their professional responsibilities in connection with Sino-Forest with appropriate care and diligence.
* Subject to leave being granted, a cause of action for violation of Part XXIII.1 of the *Ontario Securities Act* against Sino-Forest, the auditor Defendants, the individual Defendants who were directors and officers of Si-

no-Forest at the time one or more of the pleaded material misrepresentations was made, and the Pöyry Defendants.

198 Kim Orr submits that *Northwest v. Sino-Forest* is more comprehensive than its rivals and does not avoid asserting claims on the grounds that they may take time to litigate, may not be assured of success, or may involve a small portion of the total potential class. It submits that its conception of Sino-Forest's wrongdoing better accords with the factual reality and makes for a more viable claim than does Koskie Minsky and Siskinds' focus on GAAP violations and Rochon Genova's focus on the misrepresentations associated with the use of authorized intermediaries. It denies Koskie Minsky and Siskinds' argument that it has pleaded overbroad tort claims.

199 Koskie Minsky and Siskinds submit that its conspiracy claim against a few defendants is focused and narrow, and it criticizes the broad fraud claim advanced in *Northwest v. Sino-Forest* against all the defendants as speculative, provocative, and unproductive.

200 Relying on *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591 at para. 49; *Corfax Benefits Systems Ltd. v. Fiducie Desjardins Inc.*, [1997] O.J. No. 5005 (Gen. Div.) at paras. 28-36; *Hughes v. Sunbeam Corp. (Canada)*, [2000] O.J. No. 4595 (S.C.J.) at paras. 25 and 38; and *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of)*, [1998] O.J. No. 2637 (Gen. Div.) at para. 477, Koskie Minsky and Siskinds submit that the speculative fraud action in *Northwest v. Sino-Forest* is improper and would not advance the interests of class members. Further, the task of proving that each of some twenty defendants had a fraudulent intent, which will be vehemently denied by the defendants, and the costs sanction imposed for pleading and not providing fraud make the fraud claim a negative and not a positive feature of *Northwest v. Sino-Forest*.

9. Joinder of Defendants

Smith v. Sino-Forest

201 In *Smith v. Sino-Forest*, the Defendants are: Sino-Forest; seven of its directors and officers; namely: Chan, Horsley, Hyde, Mak, Martin, Murray, and Wang; nine underwriters; namely, Canaccord, CIBC, Credit Suisse, Dundee, Maison, Merrill, RBC, Scotia, and TD; and Sino-Forest's two auditors during the Class Period, E &Y and BDO.

202 The *Smith v. Sino-Forest* Statement of Claim does not join Pöyry because Rochon Genova is of the view that the disclaimer clause in Pöyry's reports likely insulates it from liability, and Rochon Genova believes that its joinder would be of marginal utility and an unnecessary complication. It submits that joining Pöyry would add unnecessary expense and delay to the litigation with little corresponding benefit because of its jurisdiction and its potential defences.

Labourers v. Sino-Forest

203 In *Labourers v. Sino-Forest*, the Defendants are the same as in *Smith v. Sino-Forest* with the additional joinder of Ardell, Bowland, Poon, West, Banc of America, Credit Suisse (USA), and Pöyry.

204 The *Labourers v. Sino-Forest* action does not join Chen, Ho, Hung, Ip, Maradin, Wong, Yeung, Zhao, Credit Suisse (USA), Haywood, Merrill-Fenner, Morgan and UBS, which are parties to *Northwest v. Sino-Forest*.

205 Koskie Minsky and Siskinds' explanation for these non-joinders is that the activities of the underwriters added to *Northwest v. Sino-Forest* occurred outside of the class period in *Labourers v.*

Sino-Forest and neither Lawrence nor Wong held a position with Sino-Forest during the proposed class period and the action against Lawrence's Estate is probably statute-barred. (See *Waschkowski v. Hopkinson Estate*, [2000] O.J. No. 470 (C.A.).)

206 Wong left Sino-Forest before Part XXIII.1 of the *Ontario Securities Act* came into force, and Koskie Minsky and Siskinds submit that proving causation against Wong will be difficult in light of the numerous alleged misrepresentations since his departure. Moreover, the claim against him is likely statute-barred.

207 Koskie Minsky and Siskinds submit that Chen, Maradin, and Zhao did not have statutory duties and allegations that they owed common law duties will just lead to motions to strike that hinder the progress of an action.

208 Further, Koskie Minsky and Siskinds submit that it is not advisable to assert claims of fraud against all defendants, which pleading may raise issues for insurers that potentially put available coverage and thus collection for plaintiffs at risk.

209 Kim Orr submits that it is a mistake in *Labourers v. Sino-Forest*, which is connected to the late start date for the class period, which Kim Orr also regards as a mistake, that those underwriters that may be liable and who may have insurance to indemnify them for their liability, have been left out of *Labourers v. Sino-Forest*.

Northwest v. Sino-Forest

210 In *Northwest v. Sino-Forest,* with one exception, the defendants are the same as in *Labourers v. Sino-Forest* with the additional joinder of various officers of Sino-Forest; namely: Chen, Ho, Hung, Ip, The Estate of John Lawrence, Maradin, Wong, Yeung, and Zhao; the joinder of Pöyry Forest and JP Management; and the joinder of more underwriters; namely: Haywood, Merrill- Fenner, Morgan, and UBS.

211 The one exception where *Northwest v. Sino-Forest* does not join a defendant found in *Labourers v. Sino-Forest* is Banc of America.

212 Kim Orr's submits that its joinder of all defendants who might arguably bear some responsibility for the loss is a positive feature of its proposed class action because the precarious financial situation of Sino-Forest makes it in the best interests of the class members that they be provided access to all appropriate routes to compensation. It strongly denies Koskie Minsky and Siskinds' allegation that *Northwest v. Sino-Forest* takes a "shot-gun" and injudicious approach by joining defendants that will just complicate matters and increase costs and delay.

213 Kim Orr submits that Rochon Genova has no good reason for not adding Pöyry, Pöyry Forest, and JP Management as defendants to *Smith v. Sino-Forest* and that Koskie Minsky and Siskinds have no good reason in *Labourers v. Sino-Forest* for suing Pöyry but not also suing its associated companies, all of whom are exposed to liability and may be sources of compensation for class members.

214 While not putting it in my blunt terms, Kim Orr submits, in effect, that Koskie Minsky and Siskinds' omission of the additional defendants is just laziness under the guise of feigning a concern for avoiding delay and unnecessarily complicating an already complex proceeding.

10. Causes of Action

Smith v. Sino-Forest

215 In *Smith v. Sino-Forest,* the causes of action advanced by Mr. Smith on behalf of the class members are:

* misrepresentation in a prospectus under Part XXIII of the *Ontario Securities Act*
* negligent, reckless, or fraudulent misrepresentation
* subject to leave being granted, misrepresentation in secondary market disclosure under Part XXIII.1 of the *Ontario Securities Act* and, if necessary, equivalent provincial legislation

Labourers v. Sino-Forest

216 In *Labourers v. Sino-Forest*, the causes of action advanced by various combinations of plaintiffs against various combinations of defendants are:

* misrepresentation in a prospectus under Part XXIII of the *Ontario Securities Act*
* negligent misrepresentation
* negligence
* subject to leave being granted misrepresentation in secondary market disclosure under Part XXIII.1 of the *Ontario Securities Act* and, if necessary, equivalent provincial legislation
* conspiracy
* unjust enrichment
* oppression remedy.

217 Kim Orr submits that the unjust enrichment claims and oppression remedy claims seemed to be based on and add little to the misrepresentation causes of action. It concedes that the conspiracy action may be a tenable claim but submits that its connection to the disclosure issues that comprise the nucleus of the litigation is unclear.

Northwest v. Sino-Forest

218 In *Northwest v. Sino-Forest*, the causes of action are:

* misrepresentation in a prospectus in violation of Part XXIII the *Ontario Securities Act*
* misrepresentation in an offering memorandum in violation of Part XXIII the *Ontario Securities Act*
* negligent misrepresentation
* fraudulent misrepresentation
* negligence
* subject to leave being granted misrepresentation in secondary market disclosure under Part XXIII.1 of the *Ontario Securities Act* and, if necessary, equivalent provincial legislation

219 The following chart is helpful in comparing and contrasting the joinder of various causes of action and the joinder of defendants in *Smith v. Sino-Forest*, *Labourers v. Sino-Forest* and *Northwest v. Sino-Forest.*

Cause of Action	*Smith v. Sino-Forest,*	*Labourers v. Sino-Forest,*	*Northwest v. Sino-Forest,*
Part XXIII of the *Ontario Securities Act* – primary market shares	Sino-Forest, Chan, Horsley, Hyde, Mak, Martin, Murray, Wang, Canaccord, CIBC, Credit Suisse, Dundee, Maison, Merrill, RBC, Scotia, TD, E&Y, BDO	Sino-Forest, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, Canaccord, CIBC, Credit Suisse, Dundee, Maison, Merrill, RBC, Scotia, TD, E&Y, BDO, Pöyry	Sino-Forest, Ardell, Bowland, Chan Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, West, Canaccord, CIBC Credit Suisse, Credit Suisse (USA), Dundee, Haywood, Maison, Merrill, Merrill-Fenner Morgan, RBC, Scotia, TD, UBS, E&Y, BDO, Pöyry, Pöyry Forest, JP Management [for June 2009 and Dec. 2009 prospectus]
Part XXIII of the *Ontario Securities Act* – primary market bonds		Sino-Forest [two bond issues]	Sino-Forest [six bond issues]
Negligent misrepresentation – primary market shares	Sino-Forest, Chan, Horsley, Hyde, Mak, Martin, Murray, Wang, E&Y, BDO	Sino-Forest, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, Canaccord, CIBC, Credit Suisse, Dundee, Maison, Merrill, RBC, Scotia, TD, E&Y, BDO, Pöyry	Sino-Forest, Ardell, Bowland, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, West, Chen, Ho, Hung, Ip, Lawrence Estate, Maradin, Wong, Yeung, Zhao, Canaccord, CIBC, Credit Suisse, Credit Suisse (USA), Dundee, Haywood, Maison, Merrill, Merrill-Fenner, Morgan, RBC, Scotia, TD, UBS, E&Y, BDO, Pöyry, Pöyry Forest, JP Management,
Negligent misrepresentation – primary market bonds		Sino-Forest, E&Y, BDO	Sino-Forest, Ardell, Bowland, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, West, Chen, Ho, Hung, Ip, Lawrence Estate, Maradin, Wong, Yeung, Zhao, Canaccord, CIBC, Credit Suisse, Credit Suisse (USA), Dundee, Haywood, Maison, Merrill, Merrill-Fenner, Morgan, RBC, Scotia, TD, UBS, E&Y, BDO, Pöyry, Pöyry Forest, JP Management
Negligence – primary market shares		Sino-Forest, Chan, Hyde, Horsley, Mak, Martin, Murray, Poon, Wang, E &Y, BDO, CIBC, Canaccord, Credit Suisse, Dundee, Maison, Merrill, RBC, Scotia, TD, Pöyry,	[see negligence, professional negligence]
Negligence – primary market bonds		Sino-Forest, E&Y, BDO, Banc of America, Credit Suisse USA, TD	[See negligence, professional negligence]
Negligence			Sino-Forest, Ardell, Bowland, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, West, Chen, Ho, Hung, Ip, Lawrence Estate, Maradin, Wong, Yeung, Zhao,

			Canaccord, CIBC, Credit Suisse, Credit Suisse (USA), Dundee, Haywood, Maison, Merrill, Merrill-Fenner, Morgan, RBC, Scotia, TD, UBS, E&Y, BDO, Pöyry, Pöyry Forest, JP Management
Professional Negligence			Canaccord, CIBC, Credit Suisse, Credit Suisse (USA), Dundee, Haywood, Maison, Merrill, Merrill-Fenner, Morgan, RBC, Scotia, TD, UBS, E&Y, BDO, Pöyry, Pöyry Forest, JP Management
Part XXIII.1 of the *Ontario Securities Act* – secondary market shares	Sino-Forest, Chan, Horsley, Hyde, Mak, Martin, Murray, Wang, E&Y, BDO	Sino-Forest, Ardell, Bowland, Chan, Hyde, Horsley, Mak, Martin, Murray, Poon, Wang, West, E &Y, BDO, Pöyry	Sino-Forest, Ardell, Bowland, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, West, Chen, Ho, Hung, Ip, Lawrence Estate, Maradin, Wong, Yeung, Zhao, Canaccord, CIBC, Credit Suisse, Credit Suisse (USA), Dundee, Haywood, Maison, Merrill, Merrill-Fenner, Morgan, RBC, Scotia, TD, UBS, E&Y, BDO, Pöyry, Pöyry Forest, JP Management
Part XXIII.1 of the *Ontario Securities Act* – secondary market bonds		Sino-Forest, Ardell, Bowland, Chan, Hyde, Horsley, Mak, Martin, Murray, Poon, Wang, West, E &Y, BDO, Pöyry	Sino-Forest, Ardell, Bowland, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, West, Chen, Ho, Hung, Ip, Lawrence Estate, Maradin, Wong, Yeung, Zhao, Canaccord, CIBC, Credit Suisse, Credit Suisse (USA), Dundee, Haywood, Maison, Merrill, Merrill-Fenner, Morgan, RBC, Scotia, TD, UBS, E&Y, BDO, Pöyry, Pöyry Forest, JP Management
Negligent misrepresentation – secondary market shares	Sino-Forest, Chan, Horsley, Hyde, Mak, Martin, Murray, Wang, E&Y, BDO	Sino-Forest, Ardell, Bowland, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, E&Y, BDO, Pöyry	Sino-Forest, Ardell, Bowland, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, West, Chen, Ho, Hung, Ip, Lawrence Estate, Maradin, Wong, Yeung, Zhao, Canaccord, CIBC, Credit Suisse, Credit Suisse (USA), Dundee, Haywood, Maison, Merrill, Merrill-Fenner, Morgan, RBC, Scotia, TD, UBS, E&Y, BDO, Pöyry, Pöyry Forest, JP Management
Negligent misrepresentation – secondary market bonds		Sino-Forest, Ardell, Bowland, Chan, Horsley,	Sino-Forest, Ardell, Bowland, Chan, Horsley,

		Hyde, Mak, Martin, Murray, Poon, Wang, E&Y, BDO, Pöyry	Hyde, Mak, Martin, Murray, Poon, Wang, West, Chen, Ho, Hung, Ip, Lawrence Estate, Maradin, Wong, Yeung, Zhao, Canaccord, CIBC, Credit Suisse, Credit Suisse (USA), Dundee, Haywood, Maison, Merrill, Merrill-Fenner, Morgan, RBC, Scotia, TD, UBS, E&Y, BDO, Pöyry, Pöyry Forest, JP Management
Negligence - secondary market shares		Sino-Forest, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, Canaccord, CIBC, Credit Suisse, Dundee, Maison, Merrill, RBC, Scotia, TD, E&Y, BDO, Pöyry	[see negligence, professional negligence]
Conspiracy		Sino-Forest, Chan, Horsley, Poon,	
Fraudulent Misrepresentation - Bonds, shares			Sino-Forest, Ardell, Bowland, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, West, Chen, Ho, Hung, Ip, Lawrence Estate, Maradin, Wong, Yeung, Zhao, Canaccord, CIBC, Credit Suisse, Credit Suisse (USA), Dundee, Haywood, Maison, Merrill, Merrill-Fenner, Morgan, RBC, Scotia, TD, UBS, E&Y, BDO, Pöyry, Pöyry Forest, JP Management
Unjust Enrichment		Chan, Horsley, Mak, Martin, Murray, Poon,	
Unjust Enrichment		Sino-Forest,	
Unjust Enrichment		Banc of America, Canaccord, CIBC, Credit Suisse, Credit Suisse USA, Dundee, Maison, Merrill, RBC, Scotia, TD	
Oppression Remedy		Sino-Forest, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang	

11. The Plaintiff and Defendant Correlation

220 In class actions in Ontario, for every named defendant there must be a named plaintiff with a cause of action against that defendant: *Ragoonanan v. Imperial Tobacco Canada Ltd.*, [2000] O.J.

No. 4597 (S.C.J.) at para. 55 (S.C.J.); *Hughes v. Sunbeam Corp. (Canada)* (2002), 61 O.R. (3d) 433 (C.A.) at para. 18.

221 As an application of the *Ragoonanan* rule, a purchaser in the secondary market cannot be the representative plaintiff for a class member who purchased in the primary market: *Menegon v. Philip Services Corp.*, [2001] O.J. No. 5547 (S.C.J.) at paras. 28-30 aff'd [2003] O.J. No. 8 (C.A.).

222 Where the class includes non-resident class members, they must be represented by a representative plaintiff that is a non-resident: *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591 at paras. 109, 117 and 184; *Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321 at para. 30 (C.A.).

223 Koskie Minsky and Siskinds submit that *Labourers v. Sino-Forest* has no *Ragoonanan* problems. However, they submit that the other actions have problems. For example, until Mr. Collins volunteered, there was no representative plaintiff in *Smith v. Sino-Forest* who had purchased shares in the primary market, and at this juncture, it is not clear that Mr. Collins purchased in all of the primary market distributions. Mr. Smith and Mr. Collins may have timing-of-purchase issues. Mr. Smith made purchases during periods when some of the Defendants were not involved; viz. BDO, Canaccord CIBC, Credit Suisse, Dundee, Maison, Merrill, RBC, Scotia, and TD.

224 Koskie Minsky and Siskinds submit that none of the representative plaintiffs in *Northwest v. Sino-Forest* purchased notes in the primary market for the 2007 prospectus offering and that the plaintiffs in *Northwest* may have timing issues with respect to their claims against Wong, Lawrence, JP Management, UBS, Haywood and Morgan.

225 Rochon Genova's and Kim Orr's response is that there are no *Ragoonanan* problems or no irremediable *Ragoonanan* problems.

12. Prospects of Certification

226 Koskie Minsky and Siskinds framed part of their argument in favour of their being selected for carriage in terms of the comparative prospects of certification of the rival actions. They submitted that *Labourers v. Sino-Forest* was carefully designed to avoid the typical road blocks placed by defendants on the route to certification and to avoid inefficiencies and unproductive claims or claims that on a cost-benefit analysis would not be in the interests of the class to pursue. One of the typical roadblocks that they referred to was challenges to the jurisdiction of the Ontario Court over foreign class members and foreign defendants who have not attorned to the Ontario Superior Court of Justice's territorial jurisdiction.

227 Koskie Minsky and Siskinds submitted that their representative plaintiffs focus their claims on a single misrepresentation to avoid the pitfalls of seeking to certify a negligent misrepresentation claim with multiple misrepresentations over a long period of time. Such a claim apparently falls into a pit because it is often not certified. Koskie Minsky and Siskinds say it is better to craft a claim that has higher prospects of certification and leave some claims behind. They submit that the Supreme Court of Canada accepted that a representative plaintiff is entitled to restrict their causes of action to make their claims more amenable to class proceedings: *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 at para. 30.

228 Although *Smith v. Sino-Forest* is even more focused that *Labourers v. Sino-Forest,* Koskie Minsky and Siskinds still submit that their approach is better because *Smith v. Sino-Forest* goes too

far in cutting out the bondholders' claims and then loses focus by extending its claims beyond the release of the Muddy Waters Report.

229 In any event, Koskie Minsky and Siskinds submit that *Labourers v. Sino-Forest* is better because the named plaintiffs are able to advance statutory and common law claims against all of the named defendants, which arguably is not the case for the plaintiffs in the other actions, who may have *Ragoonanan* problems or no tenable claims against some of the named defendants. Further, *Labourers* arguably is better because of a more focussed approach to maximize class recovery while avoiding the costs and delays inevitably linked with motions to strike.

230 Kim Orr submits that its more comprehensive approach, where there are more defendant parties and expansive tort claims, is preferable to *Labourers v. Sino-Forest* and *Smith v. Sino-Forest.* Kim Orr submits that it does not shirk asserting claims because they may be difficult to litigate and it does not abandon class members who may not be assured of success or who comprise a small portion of the class.

231 Kim Orr submits that *Northwest v. Sino-Forest* is comprehensive and also cohesive and corresponds to the factual reality. It submits that the theories of the competing actions do not capture the wrongdoing at Sino-Forest for which many are culpable and who should be held responsible. It submits that its approach will meet the challenges of certification and yield an optimum recovery for the class.

232 Rochon Genova submits that *Smith v. Sino-Forest* is much more cohesive that the other actions. It submits that the more expansive class definitions and causes of action in *Labourers v. Sino-Forest* and *Northwest v. Sino-Forest* will present serious difficulties relating to manageability, preferability, and potential conflicts of interest amongst class members that are not present in *Smith v. Sino-Forest.* Rochon Genova submits that it has developed a solid, straightforward theory of the case and made a great deal of progress in unearthing proof of Sino-Forest's wrongdoing.

G. CARRIAGE ORDER

1. Introduction

233 With the explanation that follows, I stay *Smith v. Sino-Forest* and *Northwest v. Sino-Forest*, and I award carriage to Koskie Minsky and Siskinds in *Labourers v. Sino-Forest.* In the race for carriage of an action against *Sino-Forest*, I would have ranked Rochon Genova second and Kim Orr third.

234 This is not an easy decision to make because class members would probably be well served by any of the rival law firms. Success in a carriage motion does not determine which is the best law firm, it determines that having regard to the interests of the plaintiffs and class members, to what is fair to the defendants, and to the policies that underlie the class actions regime, there is a constellation of factors that favours selecting one firm or group of firms as the best choice for a particular class action.

235 Having regard to the constellation of factors, in the circumstances of this case, several factors are neutral or non-determinative of the choice for carriage. In this group are: (a) attributes of class counsel; (b) retainer, legal, and forensic resources; (c) funding; (d) conflicts of interest; and (e) the plaintiff and defendant correlation.

236 In the case at bar, the determinative factors are: definition of class membership, definition of class period, theory of the case, causes of action, joinder of defendants, and prospects of certification.

237 Of the determinative factors, the attributes of the representative plaintiffs is a standalone factor. The other determinative factors are interrelated and concern the rival conceptualizations of what kind of class action would best serve the class members' need for access to justice and the policies of fairness to defendants, behaviour modification, and judicial economy.

238 Below, I will first discuss the neutral or non-determinative factors. Then, I will discuss the determinative factors. After discussing the attributes of the representative plaintiffs, I will discuss the related factors in two groups. One group of related factors is about class membership, and the second group of factors is about the claims against the defendants.

2. Neutral or Non-Determinative Factors

(a) Attributes of Class Counsel

239 In the circumstances of the cases at bar, the attributes of the competing law firms along with their associations with prestigious and prominent American class action firms is not determinative of carriage, since there is little difference among the rivals about their suitability for bringing a proposed class action against Sino-Forest.

240 With respect to the attributes of the law firms, although one might have thought that Mr. Spencer's call to the bar would diminish the risk, Koskie and Minsky and Siskinds, particularly Siskinds, raised a question about whether Milberg might cross the line of what legal services a foreign law firm may provide to the Ontario lawyers who are the lawyers of record, and Siskinds alluded to the spectre of violations of the rules of professional conduct and perhaps the evil of champerty and maintenance. It suggested that it was unfair to class members to have to bear this risk associated with the involvement of Milberg.

241 However, at this juncture, I have no reason to believe that any of the competing law firms, all of which have associations with notable American class action firms, will shirk their responsibilities to control the litigation and not to condone breaches of the rules of professional conduct or tortious conduct.

(b) Retainer, Legal, and Forensic Resources

242 The circumstances of the retainers and the initiative shown by the law firms and their efforts and resources expended by them are also not determinative factors in deciding the carriage motions in the case at bar, although it is an enormous shame that it may not be possible to share the fruits of these efforts once carriage is granted to one action and not the others.

243 As I have already noted above, the aggregate expenditure to develop the tactical and strategic plans for litigation not including the costs of preparing for the carriage motion are approximately $2 million. It seems that this effort by the respective law firms has been fruitful and productive. All of the law firms claim that their respective efforts have yielded valuable information to advance a claim against Sino-Forest and others.

244 All of the law firms were quickly out of the starting blocks to initiate investigations about the prospects and merits of a class action against Sino-Forest. For different reasonable reasons, the statements of claim were filed at different times.

245 In the case at bar, I do not regard the priority of the commencement of the actions as a meaningful factor, given that from the publication of the Muddy Waters Report, all the firms responded immediately to explore the merits of a class action and given that all the firms plan to amend their original pleadings that commenced the actions. In any event, I do not think that a carriage motion should be regarded as some sort of take home exam where the competing law firms have a deadline for delivering a statement of claim, else marks be deducted.

(c) Funding

246 In my opinion, another non-determinative factor is the circumstances that: (a) the representative plaintiffs in *Labourers v. Sino-Forest* may apply for court approval for third-party funding; (b) the plaintiffs in *Northwest v. Sino-Forest* may apply for court approval for third-party funding or they may apply to the Class Proceedings Fund to be protected from an adverse costs award; (c) Messrs. Smith and Collins in *Smith v. Sino-Forest* may apply to the Class Proceedings Fund to be protected from an adverse costs award; and (d) each of the law firms have respectively undertaken with their respective clients to indemnify them from an adverse costs award.

247 In the future, the court or the Ontario Law Foundation may have to deal with the funding requests, but for present purposes, I do not see how these prospects should make a difference to deciding carriage, although I will have something more to say below about the significance of the state of affairs that clients with the resources of Labourers' Fund, Operating Engineers Fund, Sjunde AP-Fonden, BC Investment, Bâtirente, and Northwest would seek an indemnity from their respective class counsel.

248 In any event, in my opinion, standing alone, the funding situation is not a determinative factor to carriage, although it may be relevant to other factors that are discussed below.

(d) Conflicts of Interest

249 In the circumstances of the case at bar, I also do not regard conflicts of interest as a determinative factor.

250 I do not see how the fact that Northwest, Bâtirente, and BC Investments made their investments on behalf of others and allegedly suffered no losses themselves creates a conflict of interest. It appears to me that they have the same fiduciary responsibilities to their members as do Labourers' Fund, Operating Engineers Fund, Sjunde AP-Fonden, and Healthcare Manitoba.

251 Northwest, Bâtirente, and BC Investments were the investors in the securities of Sino-Forest and although there may be equitable or beneficial owners, under the common law, they suffered the losses, just like the other investors in Sino-Forest securities suffered losses. The fact that Northwest, Bâtirente, and BC Investments held the investments in trust for their members does not change the reality that they suffered the losses.

252 It is alleged that Northwest, Bâtirente, and BC Investments, who were involved in corporate governance matters associated with Sino-Forest, failed to properly evaluate the risks of invest-

ing in Sino-Forest. Based on these allegations, it is submitted that they have a conflict of interest. I disagree.

253 Having regard to the main allegation being that Sino-Forest was engaged in a corporate shell game that deceived everyone, it strikes me that it is almost a spuriously speculative allegation to blame another victim as being at fault. However, even if the allegation is true, the other class members have no claim against Northwest, Bâtirente, and BC Investments. If there were a claim, it would be by the members of Northwest, Bâtirente, and BC Investments, who are not members of the class suing Sino-Forest. The actual class members have no claim against Northwest, Bâtirente, and BC Investments but have a common interest in pursuing Sino-Forest and the other defendants.

254 Further, it is arguable that Koskie Minsky and Siskinds are incorrect in suggesting that in *Comité syndical national de retraite Bâtirente inc. c. Société financière Manuvie*, 2011 QCCS 3446, the Superior Court of Québec disqualified Bâtirente as a representative plaintiff because there might be an issue about Bâtirente's investment decisions.

255 It appears to me that Justice Soldevida did not appoint Bâtirente as a representative plaintiff for a different reason. The action in Québec was a class action. There were some similarities to the case at bar, insofar as it was an action against a corporation, Manulife, and its officers and directors for misrepresentations and failure to fulfill disclosure obligations under securities law. In that action, the personal knowledge of the investors was a factor in their claims against Manulife, and Justice Soldevida felt that sophisticated investors, like Bâtirente, could not be treated on the same footing as the average investor. It was in that context that she concluded that there was an appearance of a conflict of interest between Bâtirente and the class members.

256 In the case at bar, however, particularly for the statutory claims where reliance is presumed, there is no reason to differentiate the average investors from the sophisticated ones. I also do not see how the difference between sophisticated and average investors would matter except perhaps at individual issues trials, where reasonable reliance might be an issue, if the matter ever gets that far.

257 Another alleged conflict concerns the facts that BDO Canada, which is not a defendant, is the auditor of Labourers' Fund, and Koskie Minsky and BDO Canada have worked together on several matters. These circumstances are not conflicts of interest. There is no reason to think that Labourers' Fund and Koskie Minsky are going to pull their punches against BDO or would have any reason to do so.

258 Finally, turning to the major alleged conflict between the bondholders and the shareholders, speaking generally, the alleged conflicts of interest between the bondholders that invested in Sino-Forest and the shareholders that invested in Sino-Forest arise because the bondholders have a cause of action in debt in addition to their causes of action based in tort or statutory misrepresentation claims, while, in contrast, the shareholders have only statutory and common law claims based in misrepresentation.

259 There is, however, within the context of the class action, no conflict of interest. In the class action, only the misrepresentation claims are being advanced, and there is no conflict between the bondholders and the shareholders in advancing these claims. Both the bondholders and the shareholders seek to prove that they were deceived in purchasing or holding on to their Sino-Forest securities. That the Defendants may have defences associated with the terms of the bonds is a problem

for the bondholders but it does not place them in a conflict with shareholders not confronted with those special defences.

260 Assuming that the bondholders and shareholders succeed or are offered a settlement, there might be a disagreement between them about how the judgment or settlement proceeds should be distributed, but that conflict, which at this juncture is speculative, can be addressed now or later by constituting the bondholders as a subclass and by the court's supervisory role in approving settlements under the *Class Proceedings Act, 1992*.

261 If there are bondholders that wish only to pursue their debt claims or who wish not to pursue any claim against Sino-Force or who wish to have the bond trustee pursue only the debt claims, these bondholders may opt out of the class proceeding assuming it is certified.

262 If there is a bankruptcy of Sino-Forest, then in the bankruptcy, the position of the shareholders as owners of equity is different than the position of the bondholders as secured creditors, but that is a natural course of a bankruptcy. That there are creditors' priorities, outside of the class action, does not mean that, within the class action, where the bondholders and the shareholders both claim damages, i.e., unsecured claims, there is a conflict of interest.

263 The alleged conflict in the case at bar is different from the genuine conflict of interest that was identified in *Settington v. Merck Frost Canada Ltd.*, [2006] O.J. No. 376 (S.C.J.), where, for several reasons, the Merchant Law Firm was not granted carriage or permitted to be part of the consortium granted carriage in a pharmaceutical products liability class action against Merck.

264 In *Settington,* one ground for disqualification was that the Merchant Law firm was counsel in a securities class action for different plaintiffs suing Merck for an unsecured claim. If the securities class action claim was successful, then the prospects of an unsecured recovery in the products liability class action might be imperiled. In the case at bar, however, within the class action, the bondholders are not pursuing a different cause of action from the shareholders; both are unsecured creditors for the purposes of their damages' claims arising from misrepresentation. If, in other proceedings, the bondholders or their trustee successfully pursue recovery in debt, then the threat to the prospects of recovery by the shareholders arises in the normal way that debt instruments have priority over equity instruments, which is a normal risk for shareholders.

265 Put shortly, although the analysis may not be easy, there are no conflicts of interest between the bondholders and the shareholders within the class action that cannot be handled by establishing a subclass for bondholders at the time of certification or at the time a settlement is contemplated.

(e) The Plaintiff and Defendant Correlation

266 In *Ragoonanan v. Imperial Tobacco Canada Ltd.*, (2000), 51 O.R. (3d) 603 (S.C.J.), in a proposed products liability class action, Mr. Ragoonanan sued Imperial Tobacco, Rothmans, and JTI-MacDonald, all cigarette manufacturers. He alleged that the manufacturers had negligently designed their cigarettes by failing to make them "fire safe." Mr. Ragoonanan's particular claim was against Imperial Tobacco, which was the manufacturer of the cigarette that allegedly caused harm to him when it was the cause of a fire at Mr. Ragoonanan's home. Mr. Ragoonanan did not have a claim against Rothmans or JTI-MacDonald.

267 In *Ragoonanan*, Justice Cumming established the principle in Ontario class action law that there cannot be a cause of action against a defendant without a plaintiff who has that cause of action. Rather, there must be for every named defendant, a named plaintiff with a cause of action against that defendant. The *Ragoonanan* principle was expressly endorsed by the Court of Appeal in *Hughes v. Sunbeam Corp. (Canada) Ltd.* (2002), 61 O.R. (3d) 433 (C.A.) at paras. 13-18, leave to appeal to S.C.C. ref'd (2003), [2002] S.C.C.A. No. 446, 224 D.L.R. (4th) vii.

268 It should be noted, however, that in *Ragoonanan*, Justice Cumming did not say that there must be for every separate cause of action against a named defendant, a named plaintiff. In other words, he did not say that if some class members had cause of action A against defendant X and other class members had cause of action B against defendant X that it was necessary that there be a named representative plaintiff for both the cause of action A v. X and for the cause of action B v. X. It was arguable that if the representative plaintiff had a claim against X, then he or she could represent others with the same or different claims against X.

269 Thus, there is room for a debate about the scope of the *Ragoonanan* principle, and, indeed, it has been applied in the narrow way, just suggested. Provided that the representative plaintiff has his or her own cause of action, the representative plaintiff can assert a cause of action against a defendant on behalf of other class members that he or she does not assert personally, provided that the causes of action all share a common issue of law or of fact: *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 (S.C.J.) at para. 22, leave to appeal granted, [2002] O.J. No. 2135 (S.C.J.), varied (2003), 64 O.R. (3d) 208 (Div. Ct.) at paras. 41, 48, varied [2003] O.J. No. 2218 (C.A.); *Healey v. Lakeridge Health Corp.*, [2006] O.J. No. 4277 (S.C.J.); *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (S.C.J.) at paras. 71-77; *Voutour v. Pfizer Canada Inc.*, [2008] O.J. No. 3070 (S.C.J.); *Dobbie v. Arctic Glacier Income Fund*, 2011 ONSC 25 at para. 37. Thus, a representative plaintiff with damages for personal injury can claim in respect of dependents with derivative claims provided that the statutes that create the derivative causes of action are properly pleaded: *Voutour v. Pfizer Canada Inc., supra*; *Boulanger v. Johnson & Johnson Corp., supra.*

270 As noted above, in the case at bar, Koskie Minsky and Siskinds submit that *Labourers v. Sino-Forest* has no problem with the *Ragoonanan* principle and that *Smith v. Sino-Forest* and especially the more elaborate *Northwest v. Sino-Forest* confront *Ragoonanan* problems.

271 For the purposes of this carriage motion, I do not feel it is necessary to do an analysis about the extent to which any of the rival actions are compliant with *Ragoonanan.*

272 The *Ragoonanan* problem is often easy to fix. The emergence of Mr. Collins in *Smith v. Sino-Forest* to sue for the primary market shareholders is an example, assuming that Mr. Smith's own claims against the defendants do not satisfy the *Ragoonanan* principle. Therefore, I do not regard the plaintiff and defendant correlation as a determinative factor in determining carriage.

273 It is also convenient here to add that I do not see the spectre of challenges to the Superior Court's jurisdiction over foreign class members or over the foreign defendants are a determinative factor to picking one action over another. It may be that *Northwest v. Sino-Forest* has the potential to attract more jurisdictional challenges but standing alone that potential is not a reason for disqualifying *Northwest v. Sino-Forest.*

3. Determinative Factors

(a) Attributes of the Proposed Representative Plaintiffs

274 I turn now to the determinative factors that lead me to the conclusion that carriage should be granted to Koskie Minsky and Siskinds in *Labourers v. Sino-Forest.*

275 The one determinative factor that stands alone is the characteristics of the candidates for representative plaintiff. In the case at bar, this is a troublesome and maybe a profound determinative factor.

276 Kim Orr extolled the virtues of having its clients, Northwest, Bâtirente and BC Investments, which collectively manage $92 billion in assets, as candidates to be representative plaintiffs.

277 Similarly, Koskie Minsky and Siskinds extolled the virtues of having Labourers' Fund, Operating Engineers Fund, and Sjunde AP-Fonden as candidates for representative plaintiff, along with the support of major class member Healthcare Manitoba. Together, these parties to *Labourers v. Sino-Forest* collectively manage $23.2 billion in assets. As noted above, Koskie Minsky and Siskinds submitted that their clients were not tainted by involving themselves in the governance oversight of Sino-Forest, which had been lauded as a positive factor by Kim Orr.

278 As I have already discussed above in the context of the discussion about conflicts of interest, I do not regard Bâtirente's, and Northwest's interest in corporate governance generally or its particular efforts to oversee Sino-Forest as a negative factor.

279 However, what may be a negative factor and what is the signature attribute of all of these candidates for representative plaintiff is that it is hard to believe that given their financial heft, they need the *Class Proceedings Act, 1992* for access to justice or to level the litigation playing field or that they need an indemnity to protect them from exposure to an adverse costs award.

280 Although these candidates for representative plaintiff would seem to have adequate resources to litigate, they seem to be seeking to use a class action as a means to secure an indemnity from class counsel or a third-party funder for any exposure to costs. If they are genuinely serious about pursuing the defendants to obtain compensation for their respective members, they would also seem to be prime candidates to opt out of the class proceeding if they are not selected as a representative plaintiff.

281 Mr. Rochon neatly argued that the class proceedings regime was designed for litigants like Mr. Smith not litigants like Labourers Trust or Northwest. He referred to the *Private Securities Litigation Reform Act of 1995*, legislation in the United States that was designed to encourage large institutions to participate in securities class actions by awarding them leadership of securities actions under what is known as a "leadership order". He told me that the policy behind this legislation was to discourage what are known as "strike suits;" namely, meritless securities class actions brought by opportunistic entrepreneurial attorneys to obtain very remunerative nuisance value payments from the defendants to settle non-meritorious claims.

282 I was told that the American legislators thought that appointing a lead plaintiff on the basis of financial interest would ensure that institutional plaintiffs with expertise in the securities market and real financial interests in the integrity of the market would control the litigation, not lawyers. See: *LaSala v. Bordier et CIE*, 519 F.3d 121 (U.S. Ct App (3rd Cir)) (2008) at p. 128; *Taft v. Ackermans*, (2003), F.Supp.2d, 2003 WL 402789 at 1,2, D.H. Webber, "The Plight of the Individual Investor in Securities Class Actions" (2010) NYU Law and Economics Working Papers, para. 216 at p. 7.

283 Mr. Rochon pointed out that the litigation environment is different in Canada and Ontario and that the provinces have taken a different approach to controlling strike suits. Control is established generally by requiring that a proposed class action go through a certification process and by requiring a fairness hearing for any settlements, and in the securities field, control is established by requiring leave for claims under Part XXIII.1 of the *Ontario Securities Act.* See *Ainslie v. CV Technologies Inc.* (2008) 93 O.R. (3d) 200 (S.C.J.) at paras. 7, 10-13.

284 In his factum, Mr. Rochon eloquently argued that individual investors victimized by securities fraud should have a voice in directing class actions. Mr. Smith lost approximately half of his investment fortune; and according to Mr. Rochon, Mr. Smith is an individual investor who is highly motivated, wants an active role, and wants to have a voice in the proceeding.

285 While I was impressed by Mr. Rochon's argument, it did not take me to the conclusions that the attributes of the institutional candidates for representative plaintiff in *Labourers v. Sino-Forest* and in *Northwest v. Sino-Forest* when compared to the attributes of Mr. Smith should disqualify the institutional candidates from being representative plaintiffs or be a determinative factor to grant carriage to a more typical representative plaintiff like Mr. Smith or Mr. Collins.

286 I think that it would be a mistake to have a categorical rule that an institutional plaintiff with the resources to bring individual proceedings or the means to opt-out of class proceedings and go it alone should be disqualified or discouraged from being a representative plaintiff. In the case at bar, the expertise and participation of the institutional investors in the securities marketplace could contribute to the successful prosecution of the lawsuit on behalf of the class members.

287 Although Mr. Smith and Mr. Collins might lose their voice, they might in the circumstances of this case not be best voice for their fellow class members, who at the end of the day want results not empathy from their representative plaintiff and class counsel.

288 Access to justice is one of the policy goals of the *Class Proceedings Act, 1992* and although it may be the case that the institutional representative plaintiffs want but do not need the access to justice provided by the Act, they are pursuing access to justice in a way that ultimately benefits Mr. Smith and other class members should their actions be certified as a class proceeding.

289 On these matters, I agree with what Justice Rady said in *McCann v. CP Ships Ltd.*, [2009] O.J. No. 5182 (S.C.J.) at paras. 104-105:

> 104. I recognize that access to justice concerns may not be engaged when a class is comprised of large institutions with large claims. Authority for this proposition is found in *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Div. Ct.). Moldaver J. made the following observation at p. 473:
>
> As a rule, certification should have as its root a number of individual claims which would otherwise be economically unfeasible to pursue. While not necessarily fatal to an order for certification, the absence of this important underpinning will certainly weigh in the balance against certification.
>
> 105. Nevertheless, I am satisfied on the basis of the record before me that the individual claims and those of small corporations would likely be economically unfeasible to pursue. Further, there is no good principled reason that a large corporation

should not be able to avail itself of the class proceeding mechanism where the other objectives are met.

290 Another goal of the *Class Proceedings Act, 1992* is judicial economy, and the avoidance of a multiplicity of actions. However, the Act envisions a multiplicity of actions by permitting class members to opt-out and bring their own action against the defendants. However, there is an exception. The only class member that cannot opt out is the representative plaintiff, and in the circumstances of the case at bar, one advantage of granting carriage to one of the institutional plaintiffs is that they cannot opt out, and this, in and of itself, advances judicial economy.

291 Another advantage of keeping the institutional plaintiffs in the case at bar in a class action is that the institutional plaintiffs are already to a large extent representative plaintiffs. They are already, practically speaking, suing on behalf of their own members, who number in the hundreds of thousands. Their members suffered losses by the investments made on their behalf by BC Investments, Bâtirente, Northwest, Labourers' Fund, Operating Engineers Fund, Sjunde AP-Fonden, and Healthcare Manitoba. These pseudo-class members are probably better served by the court case managing the class action, assuming it is certified and by the judicial oversight of the approval process for any settlements.

292 These thoughts lead me to the conclusion that in the circumstances of the case at bar, a determinative factor that favours *Labourers v. Sino-Forest* and *Northwest v. Sino-Forest* is the attributes of their candidates for representative plaintiff. In this regard, *Labourers v. Sino-Forest* has the further advantage that it also has Mr. Grant and Mr. Wong, who are individual investors and who can give voice to the interests of similarly situated class members.

(b) Definition of Class Membership and Definition of Class Period

293 The first group of interrelated determinative factors is: definition of class membership and definition of class period. These factors concern who, among the investors in Sino-Forest shares and bonds, is to be given a ticket to a class action litigation train that is designed to take them to the court of justice.

294 *Smith v. Sino-Forest* offers no tickets to bondholders because it is submitted that (a) the bondholders will fight with the shareholders about sharing the spoils of the litigation, especially because the bondholders have priority over the shareholders and secured and protected claims in a bankruptcy; (b) the bondholders will fight among themselves about a variety of matters including whether it would be preferable to leave it to their bond trustee to sue on their collective behalf to collect the debt rather than prosecute a class action for an unsecured claim for damages for misrepresentation; and (c) a misrepresentation action by the bondholders against some or all of the defendants may be precluded by the terms of the bonds.

295 In my opinion, the bondholders should be included as class members, if necessary, with their own subclass, and, thus, *Smith v. Sino-Forest* does not fare well under this group of interrelated factors. As I explained above, I do not regard the membership of both shareholders and bondholders in the class as raising insurmountable conflicts of interest. The bondholders have essentially the same misrepresentation claims as do the shareholders, and it makes sense, particularly as a matter of judicial economy, to have their claims litigated in the same proceeding as the shareholders' claims.

296 Pragmatically, if the bondholders are denied a ticket to one of the class actions now at the Osgoode Hall station because of a conflict of interest, then they could bring another class action in which they would be the only class members. That class action by the bondholders would raise the same issues of fact and law about the affairs of Sino-Forest. Thus, denying the bondholders a ticket on one of the two class actions that has made room for them would just encourage a multiplicity of litigation. It is preferable to keep the bondholders on board sharing the train with any conflicts being managed by the appointment of separate class counsel for the bondholders, who can form a subclass at certification or later assuming that certification is granted.

297 As already noted above, for those bondholders who do not want to get on the litigation train, they can opt-out of the class action assuming it is certified. That the defendants may have defences to the misrepresentation claims of the bondholders is just a problem that the bondholders will have to confront, and it is not a reason to deny them a ticket to try to obtain access to justice.

298 In *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 (S.C.J.), Justice Winkler, as he then was, noted at para. 39 that there is a difference between restricting the joinder of causes of action in order to make an action more amenable to certification and restricting the number of class members in an action for which certification is being sought. He stated:

> Although *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 holds that the plaintiffs can arbitrarily restrict the causes of action asserted in order to make a proceeding more amenable to certification (at 201), the same does not hold true with respect to the proposed class. Here the plaintiffs have not chosen to restrict the causes of action asserted but rather attempt to make the action more amenable to certification by suggesting arbitrary exclusions from the proposed class. This is diametrically opposite to the approach taken by the plaintiffs in *Rumley*, and one which has been expressly disapproved by the Supreme Court in *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158. There, McLachlin C.J. made it clear that the onus falls on the putative representative to show that the "class is defined sufficiently narrowly" but without resort to arbitrary exclusion to achieve that result....

299 For shareholders, *Smith v. Sino-Forest* is more accommodating; indeed, it is the most accommodating, in offering tickets to shareholders to board the class action train. Without prejudice to the arguments of the defendants, who may impugn any of the class period or class membership definitions, and assuming that the bondholders are also included, the best of the class periods for shareholders is that found in *Smith v. Sino-Forest*.

300 To be blunt, I found the rationales for shorter class periods in *Labourers v. Sino-Forest* and *Northwest v. Sino-Forest* somewhat paranoid, as if the plaintiffs were afraid that the defendants will attack their definitions for over-inclusiveness or for making the class proceeding unmanageable. Those attacks may come, but I see no reason for the plaintiffs in *Labourers* and *Sino-Forest* to leave at the station without tickets some shareholders who may have arguable claims.

301 If Mr. Torchio is correct that almost all of the shareholders would be covered by the shortest class period that is found in *Labourers v. Sino-Forest*, then the defendants may think the fight to shorten the class period may not be worth it. If they are inclined to challenge the class definition on grounds of unmanageability or the class action as not being the preferable procedure, the longer class period definition will likely be peripheral to the main contest.

302 I do not see the extension of the class period beyond June 2, 2011, when the Muddy Waters Report became public, as a problem. Put shortly, at this juncture, and subject to what the defendants may later have to say, I agree with Rochon Genova's arguments about the appropriate class period end date for the shareholders.

303 If I am correct in this analysis so far, where it takes me is only to the conclusion that the best class period definition for shareholders is found in *Smith v. Sino-Forest.* It, however, does not take me to the conclusion that carriage should be granted to *Smith v. Sino-Forest.* Subject to what the defendants may have to say, the class definitions and class period in *Labourers v. Sino-Forest* and in *Northwest v. Sino-Forest* appear to be adequate, reasonable, certifiable, and likely consistent with the common issues that will be forthcoming.

304 Since for other reasons, I would grant carriage to *Labourers v. Sino-Forest*, the question I ask myself is whether the class definition in *Labourers*, which favourably includes bondholders, but which is not as good a definition as found in *Smith v. Sino-Forest* or in *Northwest v. Sino-Forest* should be a reason not to grant carriage to *Labourers*. My answer to my own question is no, especially since it is still possible to amend the class definition so that it is not under-inclusive.

(c) Theory of the Case, Causes of Action, Joinder of Defendants, and Prospects of Certification

305 The second group of interrelated determinative factors is: theory of the case, causes of action, joinder of defendants, and prospects of certification. Taken together, it is my opinion, that these factors, which are about what is in the best interests of the putative class members, favour staying *Smith v. Sino-Forest* and *Northwest v. Sino-Forest* and granting carriage to *Labourers v. Sino-Forest.*

306 In applying the above factors, I begin here with the obvious point that it would not be in the interests of the putative class members, let alone not in their best interests to grant carriage to an action that is unlikely to be certified or that, if certified, is unlikely to succeed. It also seems obvious that it would be in the best interests of class members to grant carriage to the action that is most likely to be certified and ultimately successful at obtaining access to justice for the injured or, in this case, financially harmed class members. And it also seems obvious that all other things being equal, it would be in the best interests of class members and fair to the defendants and most consistent with the policies of the *Class Proceedings Act, 1992* to grant carriage to the action that, to borrow from rule 1.04 or the *Rules of Civil Procedure* secures the just, most expeditious and least expensive determination of the dispute on its merits.

307 While these points seem obvious, there is, however, a major problem in applying them, because the court should not and cannot go very far in determining the matters that would be most determinative of carriage. A carriage motion is not the time to determine whether an action will satisfy the criteria for certification or whether it will ultimately provide redress to the class members or whether it would be the preferable procedure or the most expeditious and least expensive procedure to resolve the dispute.

308 Keeping this caution in mind, in my opinion, certain aspects of *Northwest v. Sino-Forest* make the other actions preferable. In this regard, I find the joinder of some defendants to *Northwest v. Sino-Forest* mildly troublesome.

309 More serious, in *Northwest v. Sino-Forest,* I find the employment and reliance on the tort action of fraudulent misrepresentation less desirable than the causes of action utilized to provide procedural and substantive justice to the class members in *Smith v. Sino-Forest* and *Labourers v. Sino-Forest*. In my opinion, the fraudulent misrepresentation action adds needless complexity and costs.

310 While the finger-pointing of the OSC at Ho, Hung, Ip, and Yeung supports their joinder, the joinder of Chen, Lawrence Estate, Maradin, Wong, and Zhao is mildly troublesome. The joinder of defendants should be based on something more substantive than their opportunity to be a wrongdoer, and at this juncture it is not clear why Chen, Lawrence Estate, Maradin, Wong, and Zhao have been joined to *Northwest v. Sino-Forest* and not to the other proposed class actions. Their joinder, however, is only mildly troublesome, because the plaintiffs in *Northwest v. Sino-Forest* may have particulars of wrongdoing and have simply failed to plead them.

311 Turning to the pleading of fraudulent misrepresentation, when it is far easier to prove a claim in negligent misrepresentation or negligence, the claim for fraudulent misrepresentation seems a needless provocation that will just fuel the defendants' fervour to defend and to not settle the class action. Fraud is a very serious allegation because of the moral and not just legal turpitude of it, and the allegation of fraud also imperils insurance coverage that might be the source of a recovery for class members.

312 Kim Orr has understated the difficulties the plaintiffs in *Northwest v. Sino-Forest* will confront in impugning the integrity of Sino-Forest, Ardell, Bowland, Chan, Horsley, Hyde, Mak, Martin, Murray, Poon, Wang, West, Chen, Ho, Hung, Ip, Lawrence Estate, Maradin, Wong, Yeung, Zhao, Canaccord, CIBC, Credit Suisse, Credit Suisse (USA), Dundee, Haywood, Maison, Merrill, Merrill-Fenner, Morgan, RBC, Scotia, TD, UBS, E&Y, BDO, Pöyry, Pöyry Forest, JP Management.

313 Fraud must be proved individually. In order to establish that a corporate defendant committed fraud, it must be proven that a natural person for whose conduct the corporation is responsible acted with a fraudulent intent. See: *Hughes v. Sunbeam Corp. (Canada)*, [2000] O.J. No. 4595 (S.C.J.) at para. 26; *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of)*, [1998] O.J. No. 2637 (Gen. Div.) at paras. 477-479.

314 A claim for deceit or fraudulent misrepresentation typically breaks down into five elements: (1) a false statement; (2) the defendant knowing that the statement is false or being indifferent to its truth or falsity; (3) the defendant having an intent to deceive the plaintiff; (4) the false statement being material and the plaintiff being induced to act; and (5) the defendant suffering damages: *Derry* v. *Peek* (1889), 14 App. Cas. 337 (H.L.); *Graham* v. *Saville*, [1945] O.R. 301 (C.A.); *Francis* v. *Dingman* (1983), 2 D.L.R. (4th) 244 (Ont. C.A.). The fraud elements are the second and third in this list.

315 In the famous case of *Derry* v. *Peek*, the general issue was what counts as a fraudulent misrepresentation. More particularly, the issue was whether a careless or negligent misrepresentation without more could count as a fraudulent misrepresentation. In the case, the defendants were responsible for a false statement in a prospectus. The prospectus, which was for the sale of shares in a tramway company, stated that the company was permitted to use steam power to work a tram line. The statement was false because the directors had omitted the qualification that the use of steam power required the consent of the Board of Trade. As it happened, the consent was not given, the

tram line would have to be driven by horses, and the company was wound-up. The Law Lords reviewed the evidence of the defendants individually and concluded that although the defendants had all been careless in their use of language, they had honestly believed what they had said in the prospectus.

316 In the lead judgment, Lord Herschell reviewed the case law, and at p. 374, he stated in the most famous passage from the case:

> I think the authorities establish the following propositions. First, in order to sustain an action for deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless, whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief. Thirdly, if fraud is proved, the motive of the person guilty is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

317 Lord Herschell's third situation is the one that was at the heart of *Derry* v. *Peek*, and the Law Lords struggled to articulate that relationship between belief and carelessness in speaking. Before the above passage, Lord Herschell stated at p. 361:

> To make a statement careless whether it be true or false, and therefore without any real belief in its truth, appears to me to be an essentially different thing from making, through want of care, a false statement, which is nevertheless honestly believed to be true. And it is surely conceivable that a man may believe that what he states is the fact, though he has been so wanting in care that the Court may think that there were no sufficient grounds to warrant his belief.

318 Lord Herschell is saying that carelessness in making a statement does not necessarily entail that a person does not believe what he or she is saying. However, later in his judgment, he emphasizes that carelessness is relevant and could be sufficient to show that a person did not believe what he or she was saying. Thus, carelessness may prove fraud, but it is not itself fraud. Lord Herschell's famous quotation, where he states that fraud is proven when it is shown that a false statement was made recklessly, careless whether it be true or false, states only awkwardly the role of carelessness and must be read in the context of the whole judgment.

319 In *Angus* v. *Clifford*, [1891] 2 Ch. 449 (C.A.) at p. 471, Bowen, L.J. discussed the role of carelessness or recklessness in establishing fraud; he stated:

> Not caring, in that context [i.e., in the context of an allegation of fraud], did not mean taking care, it meant indifference to the truth, the moral obliquity which consists of wilful disregard of the importance of truth, and unless you keep it clear that that is the true meaning of the term, you are constantly in danger of

> confusing the evidence from which the inference of dishonesty in the mind may be drawn - evidence which consists in a great many cases of gross want of caution - with the inference of fraud, or of dishonesty itself, which has to be drawn after you have weighed all the evidence.

320 Bowen, L.J.'s statement alludes to the second element of what makes a statement fraudulent. Deceit or fraudulent misrepresentation requires that the defendant have "a wicked mind:" *Le Lievre* v. *Gould*, [1893] 1 Q.B. 491 at p. 498. Fraud involves intentional dishonesty, the intent being to deceive. If the plaintiff fails to prove this mental element, then, as was the case in *Derry* v. *Peek*, the claim is dismissed. To succeed in an action for deceit or for fraudulent misrepresentation, the plaintiff must show not only that the defendant spoke falsely and contrary to belief but that the defendant had the intent to deceive, which is to say he or she had the aim of inducing the plaintiff to act mistakenly: *BG Checo International Ltd. v. British Columbia Hydro and Power Authority* (1993), 99 D.L.R. (4th) 577 (S.C.C.).

321 The defendant's reason for deceiving the plaintiff, however, need not be evil. In the passage above from *Derry* v. *Peek*, Lord Herschell notes that the person's motive for saying something that he or she does not believe is irrelevant. A person may have a benign reason for defrauding another person, but the fraud remains because of the discordance between words and belief combined with the intent to mislead the plaintiff: *Smith* v. *Chadwick* (1854), 9 App. Cas. 187 at p. 201; *Bradford Building Society* v. *Borders*, [1941] 2 All E.R. 205 at p. 211; *Beckman* v. *Wallace* (1913), 29 O.L.R. 96 (C.A.) at p. 101.

322 In promoting its fraudulent misrepresentation claim, Kim Orr relied on *Gregory v. Jolley* (2001), 54 O.R. (3d) 481 (C.A.), which was a case where a trial judge erred by not applying the third branch of the test articulated in *Derry v. Peek*. Justice Sharpe discussed the trial judge's failure to consider whether the appellant had made out a case of fraud based on recklessness and stated at para. 20:

> With respect to the law, the trial judge's reasons show that he failed to consider whether the appellant had made out a case of fraud on the basis of recklessness. While he referred to a case that in turn referred to the test from *Derry v. Peek*, the reasons for judgment demonstrate to my satisfaction that the trial judge simply did not take into account the possibility that fraud could be made out if the respondent made misrepresentations of material fact without regard to their truth. The trial judge's reasons speak only of an intention to defraud or of statements calculated to mislead or misrepresent. He makes no reference to recklessness or to statements made without an honest belief in their truth. As *Derry v. Peek* holds, that state of mind is sufficient proof of the mental element required for civil fraud, whatever the motive of the party making the representation. In another leading case on civil fraud, *Edgington v. Fitzmaurice*, (1885), 29 Ch. D.459 at 481-82 (C.A.), Bowen L.J. stated: "[I]t is immaterial whether they made the statement knowing it to be untrue, or recklessly, without caring whether it was true or not, because to make a statement recklessly for the purpose of influencing another person is dishonest." The failure to give adequate consideration to the contention that the respondent had been reckless with the truth in regard to the income figures he gave in order to obtain disability insurance constitutes an error of law justifying the intervention of this court.

323 From this passage, Kim Orr extracts the notion that there is a viable fraudulent misrepresentation against forty defendants all of whom individually can be shown to be reckless as opposed to careless. That seems unlikely, but more to the point, recklessness is only half the battle. The overall motive may not matter, but the defendant still must have had the intent to deceive, which in *Gregory v. Jolley* was the intent to obtain disability insurance to which he was not qualified to receive.

324 Recklessness alone is not enough to constitute fraudulent misrepresentation, as Justice Cumming notes at para. 25 of his judgment in *Hughes v. Sunbeam Corp. (Canada)*, [2000] O.J. No. 4595 (S.C.J.), where he states:

> The representation must have been made with knowledge of its falsehood or recklessness without belief in its truth. The representation must have been made by the representor with the intention that it should be acted upon by the representee and the representee must in fact have acted upon it.

325 I conclude that the fraudulent misrepresentation action is a substantial weakness in *Northwest v. Sino-Forest.* In fairness, I should add that I think that the unjust enrichment causes of action and oppression remedy claims in *Labourers v. Sino-Forest* add little.

326 The unjust enrichment claims in *Labourers* seem superfluous. If Sino-Forest, Chan, Horsley, Mak, Martin, Murray, Poon, Banc of America, Canaccord, CIBC, Credit Suisse, Credit Suisse USA, Dundee, Maison, Merrill, RBC, Scotia and TD, are found to be liable for misrepresentation or negligence, then the damages they will have to pay will far exceed the disgorgement of any unjust enrichment. If they are found not to have committed any wrong, then there will be no basis for an unjust enrichment claim for recapture of the gains they made on share transactions or from their remuneration for services rendered. In other words, the claims for unjust enrichment are unnecessary for victory and they will not snatch victory if the other claims are defeated. Much the same can be said about the oppression remedy claim. That said, these claims in *Labourers v. Sino-Forest* will not strain the forensic resources of the plaintiffs in the same way as taking on a massive fraudulent misrepresentation cause of action would do in *Northwest v. Sino-Forest.*

327 For the purposes of this carriage motion, I have little to say about the "Integrity Representation" approach to the misrepresentation claims that are at the heart of the claims against the defendants in *Northwest v. Sino-Forest* or of the "GAAP" misrepresentation employed in *Labourers v. Sino-Forest,* or the focus on the authorized intermediaries in *Smith v. Sino-Forest.* Short of deciding the motion for certification, there is no way of deciding which approach is more likely to lead to certification or which approach the defendants will attack as deficient. For present purposes, I am simply satisfied that the class members are best served by the approach in *Labourers v. Sino-Forest.*

328 The cohesive, yet adequately comprehensive, approach used in *Smith v. Sino-Forest* appears to me close to *Labourers v. Sino-Forest,* but in my opinion, *Smith v. Sino-Forest* wants for the inclusion of the bondholders, and, as noted above, there are other factors which favour *Labourers v. Sino-Forest* over *Smith v. Sino-Forest*. That said, it was a close call for me to choose *Labourers v. Sino-Forest* and not *Smith v. Sino-Forest*.

H. CONCLUSION

329 For the above Reasons, I grant carriage to Koskie Minsky and Siskinds with leave to the plaintiffs in *Labourers v. Sino-Forest* to deliver a Fresh as Amended Statement of Claim.

330 In granting leave, I grant leave generally and the plaintiffs are not limited to the amendments sought as a part of this carriage motion. It will be for the plaintiffs to decide whether some amendments are in order to respond to the lessons learned from this carriage motion, and it is not too late to have more representative plaintiffs.

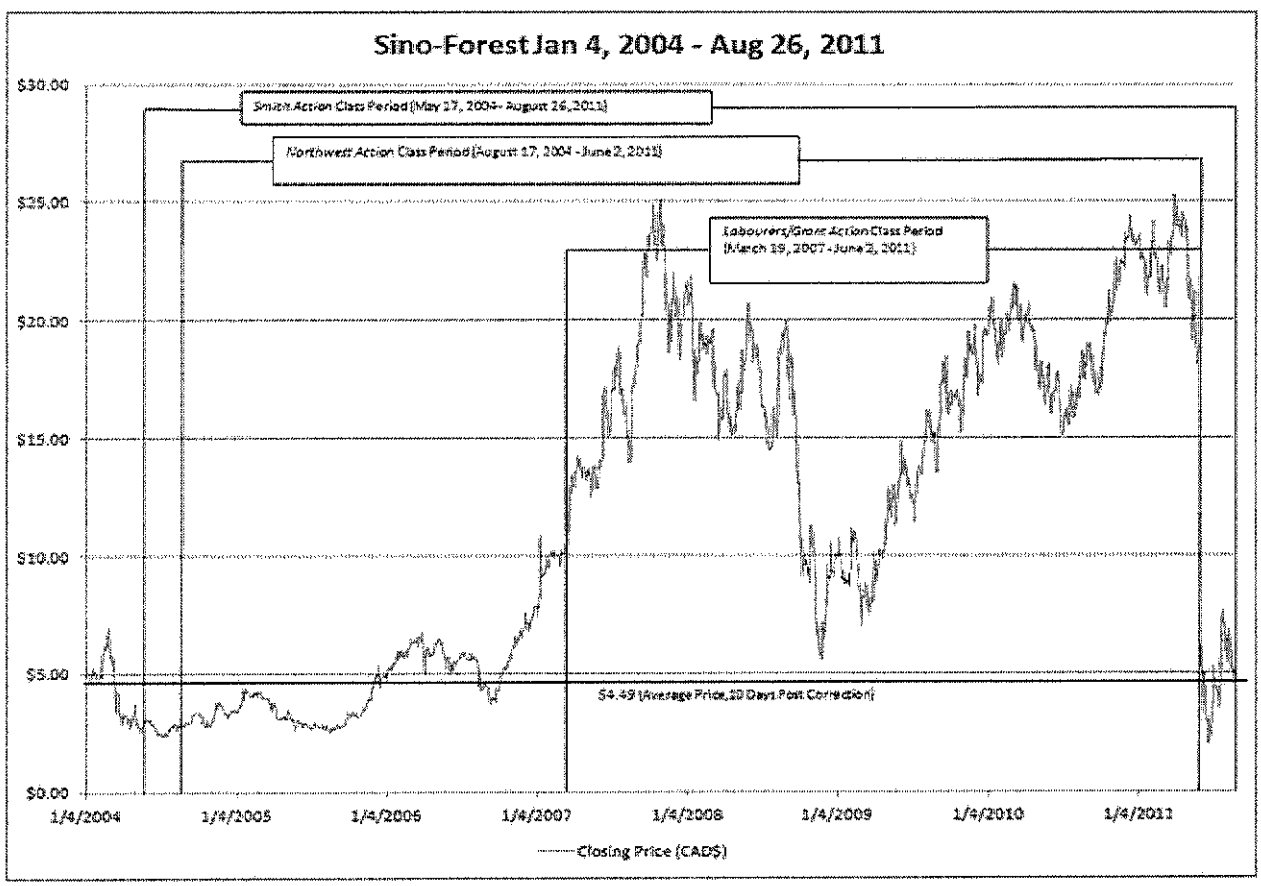
331 I repeat that a carriage motion is without prejudice to the defendants' rights to challenge the pleadings and whether any particular cause of action is legally tenable.

332 I make no order as to costs, which is in the usual course in carriage motions.

P.M. PERELL J.

* * * * *

SCHEDULE "A"



* * * * *

Corrigendum
Released: January 27, 2012

Paragraph 28 (page 8) - the second to last line should read "**a responsible issuer**" and not "a responsible issue"

Paragraph 73 (page 13) - the third line should read "**CIBC**" and not "CIDC"

Paragraph 228 (page 38) - on the third line, the word "losses" should be "**loses**"

Paragraph 252 (page 42) - on the third line, the word should be "**submitted**" and not "summited"

Paragraph 252 (page 42) - the last line should have a period at the end of the paragraph

Paragraph 282 (page 46) - on the last line, the word "paper" should be "**para.**"

cp/ci/e/qlafr/qlvxw/qlced/qljxh

Tab 3

Case Name:

Coulls v. Pinto

RE: Jason Coulls, and
Dr. Christopher Pinto, Court File No. 06-CV-303419SR,
AND RE: Meditel Inc., and
Baldhead Systems Inc., Court File No. 05-CV-300518SR

[2007] O.J. No. 4241

48 C.P.C. (6th) 183

2007 CarswellOnt 7050

Court File Nos. 06-CV-303419SR and 05-CV-300518SR

Ontario Superior Court of Justice

Master B.T. Glustein

Heard: August 31, 2007.
Judgment: September 4, 2007.

(43 paras.)

Civil procedure -- Actions -- Joinder of causes and consolidation -- Motion for an order that actions be heard together was dismissed -- The Meditel action was a commercial action -- The Coulls action was a tort claim -- There was no common question of fact in both actions -- The business meeting was not a common occurrence requiring the actions to be consolidated -- No issues of credibility that could result in inconsistent findings in either action.

The plaintiff Coulls and the defendant Baldhead brought motions for an order that the Coulls/Pinto and Meditel/Baldhead actions be heard together -- Baldhead was company providing computer services to Meditel -- Coulls developed the software system -- Pinto was the president of Meditel -- The parties agreed to develop prototype computer system to develop care treatment programs for various disease entities -- Coulls alleged that he met with Pinto on a doctor-patient basis and information from this private meeting was divulged during a Meditel/Baldhead meeting allegedly for the purposes of destroying his reputation -- HELD: Motion dismissed -- The Meditel action was a commercial action based on breach or repudiation of an agreement -- The Coulls action was a tort claim based on negligent or willful breach of fiduciary duties and invasion of privacy -- There was

no common question of fact in both actions -- The business meeting between the parties was not a common occurrence that would require actions to be consolidated -- No issue of credibility arising from the business meeting that could result in inconsistent findings in either action -- Costs awarded to Meditel in the amount of $2,070 and to Pinto in the amount of $1,750.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure R.R.O. 1990, Reg 194, Rule 6.01(1), Rule 6.01(1)(a), Rule 6.01(1)(b), Rule 6.01(1)(c)

Counsel:

Martin Dolan for the plaintiff Jason Coulls in Court File No. 06-CV-303419SR, and for the defendant/plaintiff by counterclaim Baldhead Systems Inc. in Court File No. 05-CV-300518SR.

Farah Malik for the defendant Dr. Christopher Pinto in Court File No. 06-CV-303419SR.

Tamara Center for the plaintiff/defendant by counterclaim, Meditel Inc. in Court File No. 05-CV-300518SR.

REASONS FOR DECISION

1 **MASTER B.T. GLUSTEIN**:-- The plaintiff Jason Coulls ("Coulls") in Court File No. 06-CV-303419SR (the "Coulls Action") and the defendant Baldhead Systems Inc. ("Baldhead") in Court File No. 05-CV-300518SR (the "Meditel Action") bring motions under Rule 6.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for an order that the Coulls Action and the Meditel Action be heard together. For the reasons discussed below, I dismiss the motions.[1]

Background to the motion

(a) The Meditel Action

2 Meditel Inc. ("Meditel") issued its action in November 2005. Meditel is a corporation which carries on the business of developing optimal care treatment programs for various disease entities. The president of Meditel is Dr. Christopher Pinto ("Dr. Pinto").

3 Baldhead is a corporation engaged in computer software design and development. Coulls was at all material times the president and chief executive officer of Baldhead.

4 Meditel alleges that it entered into an agreement with Baldhead on April 7, 2005 by which Meditel would pay Baldhead $50,000 and Baldhead would develop a generic "disease optimization program" within two weeks, based on a demonstrative system developed by Meditel. Meditel further alleges that it relied on Baldhead's representations that it had the expertise to do the work in the time period.

5 Meditel alleges that it paid $25,000 to Baldhead and that the work was not completed on time. Meditel claims that Baldhead repudiated the contract. Meditel seeks damages of $50,000 for breach of contract or in the alternative, for negligent misrepresentation. In the further alternative, Meditel seeks rescission of the agreement and restitution of all sums paid by Meditel pursuant to the agreement. The claim is brought under the simplified rules procedure.

6 Baldhead defends the action by pleading that it only agreed to develop a prototype system for $50,000, and that it advised Meditel that it would cost approximately $500,000 to develop software duplicating the functionality of Meditel's demonstrative system with the expanded criteria and parameters sought by Meditel. Baldhead alleges that it could not complete the prototype project in the originally anticipated time frame due to Meditel's failure to provide information and Meditel's insistence on including criteria and parameters approaching the scope of the completed system, for which Baldhead had quoted a price of $500,000.

7 Baldhead pleads that at a meeting on May 25, 2007 (the "Meeting"), (i) Meditel refused to pay more than the $25,000 for the prototype system and (ii) Meditel demanded the source code for the prototype system.

8 It is not in dispute that, at the Meeting, Meditel refused to pay more than $25,000 and demanded the source code. This was acknowledged by Meditel's counsel at the hearing.

9 Meditel's counsel's acknowledgement is also supported by the pleadings in that Meditel claims repudiation of the contract and demands that Baldhead repay the $25,000, and Meditel alleges that "regarding the meeting on May 25, 2005, it was clear to [Meditel] by that time, that Baldhead would not be able to deliver the functionality specified" and that "by the time of this meeting, Baldhead had worked on the project for over eight weeks, notwithstanding their agreement to complete the program within two weeks" (at paragraph 12 of the Reply and Defence to Counterclaim).

10 Meditel also acknowledges that it asked for the source code at the Meeting, and Baldhead refused (at paragraph 13 of the Reply and Defence to Counterclaim).

11 Baldhead pleads that Meditel's conduct constituted a repudiation of the contract, and brings a counterclaim for damages of $38,100 for the balance of the alleged contract and the additional cost of providing the improvements to the prototype system requested by Meditel during the course of the project.

12 Consequently, the issues in the Meditel Action are (i) the nature of the agreement or representations between the parties and (ii) which party breached or repudiated the agreement. The Meditel Action is a commercial claim, essentially one for breach of contract and misrepresentation.

(b) The Coulls Action

13 Coulls issued his claim in January 2006. The basis of the claim is that while Baldhead was attempting to develop the prototype system, Coulls alleges that he met with Dr. Pinto on a doctor-patient basis to discuss a medical problem. Coulls alleges that in the course of that doctor-patient relationship, he imparted personal information to Dr. Pinto which he understood would be subject to doctor-patient privilege.

14 Coulls alleges that at the Meeting, Dr. Pinto "stated words to the effect that he was not surprised that the project had gone off the rails as he had learned in the course of his doctor-patient relationship with [Coulls] that [Coulls] was mentally ill'". Coulls alleges that the words were defamatory and uttered maliciously by Dr. Pinto, "for the calculated purposes of destroying his reputation within [Baldhead] and destabilizing his position within [Baldhead], in order to obtain a commercial advantage on behalf of [Meditel]".

15 Coulls further alleges that Dr. Pinto, by making the alleged statement at the Meeting, "negligently or willfully breached his statutory and common law fiduciary duties to maintain doctor-patient confidentiality and has also committed the tort of invasion of privacy". Coulls seeks $50,000 in damages. This claim, like the Meditel Action, is brought under the simplified rules procedure.

16 Dr. Pinto denies making the alleged statements at the Meeting, or any defamatory statements at all. He further denies that he was ever in a doctor-patient relationship with Coulls. Dr. Pinto seeks dismissal of the action.

17 Consequently, the issues in the Coulls Action are (i) did Dr. Pinto make the statement at the Meeting, (ii) if so, were the words defamatory or uttered with malicious intent, and (iii) were Coulls and Dr. Pinto in a doctor-patient relationship. This is a tort claim requiring consideration of issues such as defamation, invasion of privacy, and breach of fiduciary duty.

Analysis

18 The parties agree that the underlying policy of Rule 6 is to avoid a multiplicity of proceedings, to promote expeditious and inexpensive determination of disputes and to avoid inconsistent judicial findings (*Pilon v. Janveaux*, [2000] O.J. No. 4743 (S.C.J.) at para. 6).

19 The parties also agree that if I find that there is either (i) a question of law or fact in common (under Rule 6.01(1)(a)), or (ii) the relief arises out of the same transaction or occurrence or series of transactions or occurrences (under Rule 6.01(1)(b)), or (iii) another reason why an order under Rule 6 ought to be made (under Rule 6.01(1)(c)), the court must still consider whether the balance of convenience favours such an order (*Drabinsky v. KPMG*, [1999] O.J. No. 3630 (S.C.J.)).

20 Consequently, I first must determine whether any of the criteria under Rule 6.01(1) have been met. If so, I would then consider whether the balance of convenience favours such an order, pursuant to the discretionary factors which include: (i) will the order sought create a saving in pre-trial procedures, and in particular, pre-trial conferences; (ii) will there be a real reduction in the number of trial days taken up by the trials being heard at the same time; (iii) what is the potential for a party to be seriously inconvenienced by being required to attend a trial in which that party may have only a marginal interest; (iv) will there be a real saving in experts' time and witness fees; (v) is one of the actions at a more advanced stage than the other, and (vi) will the order result in a delay of the trial of one of the actions, and if so, does any prejudice which a party may suffer as a result of that delay outweigh the potential benefits a combined trial might otherwise have (*Shah v. Bakken*, [1996] B.C.J. No. 2836 (S.C.) at paras. 14-15 ("*Shah*"); adopted by O'Neill J. in *McKee v. Thistlethwaite*, [2003] O.J. No. 2850 (S.C.J.) ("*McKee*") at para. 11).

(a) Step 1: The criteria under Rule 6.01(1) have not been met

21 For the reasons set out below, I find that Baldhead and Coulls have failed to establish that any of the criteria under Rule 6.01(1) have been met.

(1) Rule 6.01(1)(a)

22 With respect to Rule 6.01(1)(a), Coulls and Baldhead submit in their factum that there is a common question of fact in that both actions "involve identical questions of fact stemming from [the Meeting]. What was said by whom and to whom at this meeting is central to both actions". I do not agree.

23 What was said at the Meeting is central to the Coulls Action, since it is a defamation-based claim and the parties dispute whether the alleged statement was made. However, what was said at the Meeting in the Meditel Action is not a "question of fact" at issue in that case. The statements at the Meeting have no relevance to the contractual dispute, *i.e.* what were the terms of the agreement and whether the agreement was breached or repudiated.

24 Further, even though Coulls alleges in the Coulls Action that the statement was made by Dr. Pinto to obtain a commercial advantage for Meditel (he makes no such claim in the Meditel Action), such an allegation could not have any relevance to either the terms of the agreement or whether it was breached.

25 The issues of whether Baldhead breached or repudiated the agreement by not completing the work within two (or possibly eight) weeks, or whether Meditel breached the agreement by not paying $50,000 for the prototype system and by demanding the source code, are not affected by what took place at the Meeting. There is no dispute that, at the Meeting, Meditel refused to pay more than $25,000, and demanded the source code. The contractual issue depends on the terms of the alleged agreement in April 2005, what happened in the eight weeks leading up to the Meeting, and which party breached or repudiated which agreement as a result of that conduct.

26 Consequently, while there may be evidence led in the Meditel Action that at the Meeting, Meditel refused to pay more than $25,000 and demanded the source code, this is not a "question of fact", let alone an identical question of fact with whether defamatory words were uttered at the Meeting. There is no question of fact arising from the Meeting that could be relevant to the Meditel Action. I find that the test under Rule 6.01(1)(a) has not been met.

(2) Rule 6.01(1)(b)

27 With respect to Rule 6.01(1)(b), I reject the Coulls/Baldhead submissions that there is a common occurrence. While there is a meeting which is common to both actions, the rule requires that "the relief claimed" in the actions arise out of "the same transaction or occurrence". In this case, the Coulls Action arises out of statements made at the Meeting. However, the Meditel Action arises out of (i) an alleged agreement reached by the parties in April 2005, with both parties claiming a different agreement and (ii) conduct subsequent to that agreement (and prior to the Meeting), which

both parties allege constitutes a breach or repudiation of that agreement. The Meditel Action does not arise from the Meeting.

(3) Rule 6.01(1)(c)

28 With respect to Rule 6.01(1)(c), I accept the submissions of Meditel's counsel that there is not an issue of credibility relating to the Meeting which would have to be determined in the Meditel Action. Consequently, there is no risk of inconsistent judgments between the Meditel Action and the Coulls Action with respect to credibility issues arising from the Meeting.

29 While it may be the case, as submitted by Coulls/Baldhead in their factum, that "the exact same witnesses will be called in each of the actions to testify as to their recollection of the meeting", I do not agree with their submission that this "creates a significant risk that inconsistent findings of fact could be made if the actions are tried separately". No such risk exists in this case.

30 There is no issue of credibility in the Meditel Action arising from the Meeting. As I discussed above, the issue of the nature of the agreement and whether it was breached or repudiated depends on the evidence leading up to the Meeting. It is not in dispute that, at the Meeting, Meditel demanded the source code and refused to pay more than the $25,000 it had already paid. Any evidence relating to the allegedly defamatory statements would be irrelevant, even if the statements were made for a competitive advantage, as alleged in the Coulls Action.

31 It cannot be that simply because there is a meeting in a contractual relationship at which defamatory words are allegedly spoken, that consolidation or trials heard together ought to be ordered. Otherwise, counsel in a defamation action would have to sit through an entire action relating to a commercial dispute, and *vice versa*. There must be some risk of inconsistent findings of credibility in the two actions to meet the requirements under Rule 6.01(1)(c), and this test has not been met. **(b) Step 2: The balance of convenience militates against an order under Rule 6.01(1)**

32 Even had I held that there was a basis under Rule 6.01(1) to make an order that the actions be heard together, I would not do so, as the balance of convenience does not favour such an order.

33 I adopt the conclusion of McQuaid J.A. in *Abegweit Potatoes Ltd. v. J.B. Read Marketing Inc.*, [2003] P.E.I.J. No. 80 (C.A.) (at para. 23) that:

> In assessing whether there is a common question of fact or law common to both proceedings so as to meet the threshold test for granting one of the remedies in Rule 6.01(1)(d), the focus should be on whether there is a common issue of fact or law that bears sufficient importance in relation to the other facts or issues in the proceedings which would render it desirable that the matters be consolidated, heard at the same time or after each other. This assessment is to be made by reference to the pleadings.

(See also *Shah*, at para.12)

34 Even if the Meeting could be said to raise a common issue of fact (or otherwise meet any of the criteria under Rule 6.01(1)), that issue would be of such minimal importance in the Meditel Action that an order that the actions be heard together would not be appropriate.

35 Also, the factors in *Shah* and *McKee* would not be met in this case, for the following reasons:

(i) There are limited pre-trial procedures available in simplified rules matters, and there is no basis to conclude that any of the production or other issues which could arise in one action would be common to the other. Further, a common pre-trial would not necessarily be easier for the parties, as each case has its own merits and the pre-trial judge could not apply his or her views in one action to the other action.

While it may be the case (as submitted by Coulls and Baldhead) that having all of the parties at one pre-trial might facilitate settlement, this cannot suffice for an order that actions be heard together. Otherwise, whenever there were two actions between the same or related parties, such an order would be made. There must be some basis on the pleadings to conclude that a pre-trial judge could make common comments to assist the parties in both actions, and there is no basis in this case for such a finding.

(ii) There would be no reduction in trial days. The Meditel Action would require evidence as to the nature of the agreement and representations, the alleged conduct of the parties, and possibly expert evidence as to the nature and components of software development agreements. The evidence as to what took place at the Meeting with respect to the contractual dispute would require no time at trial, as the parties agree as to what happened at the Meeting, and any discussion of allegedly defamatory comments would be irrelevant, even if the argument was that the statements were made for a commercial advantage.

Conversely, the Coulls Action would require extensive evidence of the Meeting, as well as evidence of the alleged doctor-patient relationship, circumstances of privacy, and damages allegedly suffered as a result of the alleged statement.

Consequently, there would be no overlap of evidence (or only a minimal overlap of evidence) and as such, no reduction in trial days.

(iii) There is potential for Meditel and Dr. Pinto to be seriously inconvenienced by being required to attend both trials. While Dr. Pinto would likely attend both trials in any event, he would be required to have two counsel defend him for the entire time period, given that he has retained different counsel for each action who have been involved with the action for several years.

(iv) There likely will be a savings in experts' time and witness fees if no order is made. If experts are required for a joint hearing, they may be required to attend for the whole trial, even though their only involvement is in the commercial action. Similarly, witnesses would have to make themselves available for the entire trial, causing both inconvenience to the witnesses and potentially higher fees.

While there may be a few witnesses in both actions who might testify as to the discussions at the Meeting and as such would not need to appear twice if an order under Rule 6.01 were made, their evidence as to the Meeting in the Meditel Action would be minimal, given its lack of relevance. Consequently, on balance, this factor favours Meditel and Dr. Pinto.

(v) The stage of the actions is not relevant to this motion, given that both actions are under the simplified rules, and both are effectively ready for mediation, pre-trial, and the scheduling of trial dates. Consequently, this factor is neutral (as finding that two actions are at the same stage is neutral to an order under Rule 6.01(1) rather than supporting such an order).

(vi) I also find that there would be no delay of the trial of one of the actions if an order was made, and as such, this factor is neutral (as finding that there is no delay is neutral to an order under Rule 6.01(1) rather than supporting such an order).

36 Consequently, even if the first part of the test for an order under Rule 6.01(1) were met (*i.e.* one of the conditions under subrule (a), (b) or (c) could be established), I would exercise my discretion to deny such an order based on the factors discussed above.

Orders and costs

37 I dismiss the motions by Coulls and Baldhead for an order that the actions be heard together.

38 Further, counsel agreed at the hearing to an order that mediation in both actions be completed by October 31, 2007, and that a pre-trial in both actions be conducted no later than January 31, 2008. I make this order on the consent of the parties.

39 Counsel for Coulls and Baldhead and counsel for Dr. Pinto submitted Costs Outlines. Counsel for Meditel submitted a Bill of Costs.[2] In all cases, the costs incurred by each of the parties for the consolidation motion were practically identical, in the range of $2,100 on a partial indemnity scale. This amount is reasonable given the expectations of an unsuccessful party to this type of motion, particularly given the motions records, factums, and briefs of authorities prepared for the motion.

40 Consequently, in the Meditel Action, I order Baldhead to pay costs to Meditel in the amount of $2,070 (the amount sought by Meditel on a partial indemnity scale), plus disbursements and GST, payable within 30 days of this Order.

41 With respect to the Coulls Action, counsel for Coulls and Baldhead seeks an order of no costs, as he incurred costs to respond to the motion by Dr. Pinto to dismiss the action for delay equal to those of the consolidation motions. Dr. Pinto did not pursue the motion to dismiss at the hearing except for the alternative relief of a timetable, which was agreed to by the parties. I agree with counsel for Coulls and Baldhead that some reduction of costs is appropriate, since he expressly raised the issue of the entitlement of Dr. Pinto to bring the motion in correspondence prior to the motion. Dr. Pinto did not advise that he would not pursue the dismissal motion. Consequently, counsel for Coulls and Baldhead prepared submissions in his factum that addressed the issue. Dr. Pinto's counsel waited until the confirmation form filed immediately prior to the hearing to advise that she would not pursue the dismissal motion, but would only seek a timetable.[3]

42 However, I do not order a full reduction of Dr. Pinto's costs. If Dr. Pinto had not brought his motion to dismiss, the action against him would likely still be inactive. Counsel for Dr. Pinto wrote numerous letters since September 2006 to move the matter ahead and received no response. Coulls did not serve his affidavit of documents until one week prior to the motion, even after being served with the motion material in early July 2007. Dr. Pinto's counsel did obtain a timetable to address these timing concerns. Consequently, while it would have been preferable that Dr. Pinto make clear he was not proceeding with the substance of the motion to dismiss, Coulls should not receive significant, let alone full, credit for not responding to counsel and requiring Dr. Pinto's counsel to bring a motion. I thus order that Coulls pay $1,750 in costs, plus GST and disbursements, to Dr. Pinto within 30 days of this order.

43 I thank counsel for their thorough and well-prepared submissions on this motion.

MASTER B.T. GLUSTEIN

cp/e/qlttm/qljjn/qljxl

1 Coulls and Baldhead sought an order of consolidation in their notices of motion, and the responding parties prepared motion records, factums and briefs of authorities on that basis. However, at the hearing, counsel for Coulls and Baldhead advised the court that he was seeking a "heard together" order. This change of relief would have been relevant to a costs order if Coulls and Baldhead were successful, but it is irrelevant to the costs consequences since I dismiss the motions for the "heard together" relief.

2 While Meditel's counsel was required to submit a Costs Outline under Rule 57.01(6), given that her costs were almost identical to those sought by all other counsel, I am prepared to consider the quantum in her Bill of Costs as reasonable.

3 Counsel for Coulls and Baldhead did not receive the confirmation form since his firm's fax system was not operational. Consequently, I do not consider his costs for preparation of oral submissions in the days prior to the motion, but I do include his costs of preparing the factum which took place prior to delivery of the confirmation form.

Tab 4

Indexed as:

Drabinsky v. KPMG

Between
Garth H. Drabinsky, plaintiff, and
KPMG and KPMG Investigation & Security Inc., James Hunter, Gary R. Gill, John Beer, Rochelle Levine, Peter McQuillan, Scott Wetmore, David Knight and Axel Thesberg, defendants

[1999] O.J. No. 3630

96 O.T.C. 361

91 A.C.W.S. (3d) 561

Court File Nos. 98-CL-3116 and 98-CV-155092

Ontario Superior Court of Justice

Swinton J.

Heard: September 16-17, 1999.
Judgment: September 22, 1999.

(28 paras.)

Practice -- Joinder of causes and consolidations -- Discovery -- Collateral use of discovery information (implied undertaking rule) -- Affidavit or list of documents -- Order for further and better affidavit -- Pleadings -- Striking out pleadings.

Application by the defendants KPMG, KPMG Investigation & Security, and partners or employees those defendants, for an order that this action be tried following two other actions involving the plaintiff, Drabinsky. They also sought relief from the deemed undertaking rule to allow them to share discovery evidence from the three actions, and an order for joint discovery of Drabinsky in the three actions, and an order for a further and better affidavit of documents. Drabinsky brought a cross-motion to strike a paragraph of the Statement of Defence. Drabinsky was a former senior officer, director and significant shareholder of Livent, a public company of which he was co-founder. KPMG Investigation and Security was retained to investigate alleged irregularities in Livent's financial statements. Livent suspended Drabinsky on the same day. Drabinsky brought an action against the defendants for damages, alleging breach of fiduciary duty and duty of confidence, as

well as trespass to property. Drabinsky brought a second action against Ovitz and other defendants, alleging conspiracy to injure. In a third action, Livent sued Drabinsky and others for damages for breach of contract, breach of fiduciary duty, conversion, unjust enrichment and conspiracy.

HELD: Motions and cross-motion dismissed. The overlap alleged by the defendants was not significant, as the actions did not arise from the same series of transactions. The balance of convenience was not in favour of trial in succession. Joint discoveries were not appropriate, as the issues were different in the three actions. Moreover, discovery had not yet taken place in the other two actions, and joint discovery would delay timely resolution of this action. Drabinsky was obliged to produce an affidavit of documents relevant to the issue of breach of duty by KPMG and related damages, but that did not include all documents related to his activities at Livent. As it was not clear that the affidavit of documents was incomplete at this time, no order was made. There was no legal basis to strike the impugned paragraph of the Statement of Defence, as it set out a standard defence to a claim for damages.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 6.01(1)(a), 6.01(1)(b), 6.01(1)(c), 21.01(1)(b), 30.1.01(3).

Counsel:

L. David Roebuck, for the plaintiff.
E. Cherniak and E. Grace, for the defendants.

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1 **SWINTON J.**:-- The defendants, KPMG and KPMG Investigation and Security Inc. ("KPMG ISI") and a number of individuals who are partners or employees of KPMG and KPMG ISI, have brought a motion seeking orders that this action be tried in succession following two other actions involving the plaintiff, Garth Drabinsky; to give relief to counsel in the three actions from the deemed undertaking rule so as to allow them to share discovery evidence of Mr. Drabinsky and information from the three actions; to order a joint discovery of Mr. Drabinsky in the three actions; and to order a further and better Affidavit of Documents from Mr. Drabinsky in this action. The defendants did not pursue the claim in the Notice of Motion for an order to sever the trial of the issues of liability and damages. A cross-motion by the plaintiff sought to strike paragraph 41 of the Statement of Defence, while relief pertaining to Mr. Hunter's Affidavit of Documents, filed on behalf of the defendants, was adjourned to be heard by Ground J., as the relief may be affected by his earlier order granting an interlocutory injunction against the defendants.

2 The plaintiff, Garth Drabinsky, was, until August 10, 1998, a senior officer, director and significant shareholder of Livent, a public company of which he was co-founder. He brought the present action against the defendants, claiming damages arising out of an alleged breach of fiduciary duty and duty of confidence, as well as trespass to property. The breach is alleged to have occurred when KPMG ISI was retained by Stikeman, Elliott, solicitors to Livent, on August 10, 1998, to investigate alleged irregularities in Livent's financial statements. It was to produce a report on whether the alleged irregularities were the result of theft, financial statement manipulation or other fraudu-

lent activity, and to identify where the responsibility lies for any irregularities. Mr. Drabinsky was suspended by Livent on the same day.

3 KPMG's North York office had provided Mr. Drabinsky with personal accounting services and tax planning advice for some 20 years, and he was a continuing client. He complained of KPMG's participation in the investigation, and subsequently launched this action, in which he sought an injunction and claimed $21 million in general damages for breach of fiduciary duty, breach of confidence and trespass to property, and $5 million as punitive damages. The plaintiff also sought an interlocutory injunction, resulting in the order of Ground J. prohibiting the defendants from disclosing Mr. Drabinsky's confidential information and permitting KPMG ISI to deliver a report to Livent containing only the results of objective fact finding and no expression of opinion or conclusions.

4 Mr. Drabinsky is a plaintiff in another action, along with a numbered company which holds his shares in Livent, against Michael Ovitz and a number of other defendants, alleging conspiracy to injure. Essentially, the claim is based on an allegation that Mr. Ovitz conspired with others to take over control of Livent and to push Mr. Drabinsky out of any artistic or creative role. The damages claimed, in the amount of $100 million, are pleaded to have resulted from a decrease in the valuation of the shares in Livent, and mental anguish, distress and loss of enjoyment of life, and damage to the personal and business reputation of Mr. Drabinsky.

5 In a third action, Livent has sued Mr. Drabinsky, Myron Gottlieb, King Commodity Services and Robert Topol for damages for breach of contract, breach of fiduciary duty, conversion, unjust enrichment and conspiracy in the period from 1989 to August 10, 1998. Mr. Drabinsky has filed a third party claim against individuals involved in accounting activities at Livent for contribution and indemnity.

Trial Together

6 The defendants seek an order that the KPMG action be set down for trial immediately following the Ovitz and Livent actions for trial by the same judge, arguing that there is significant overlap in the relevant facts in the three actions and similar and overlapping damages in the Ovitz and KPMG actions.

7 Rule 6.01(1) confers a discretion on the court to order that one proceeding be heard after another where

> (a) they have a question of law or fact in common;
> (b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or
> (c) for any other reason an order ought to be made under this rule ...

8 In determining whether to order consolidation of actions or to order trial together, courts have looked not only at whether the actions arise out of the same transaction or series of transactions and whether they involve a common question of fact or law of sufficient importance that they should be joined together, but whether the balance of convenience favours such an order (Thames Steel Construction Ltd. v. Portman (1980), 28 O.R. (2d) 445 (Div. Ct.) at 453-54; Reichmann v. Toronto Life Publishing Co. (No. 1) (1988), 31 C.P.C. (2d) 54 (Ont. H.C.) at 60-62).

9 The defendants argue that there will be considerable overlap in terms of the evidence relevant to the three actions, as well as the damages claimed. Damages for mental anguish are claimed in both the KPMG and Ovitz actions, and are alleged in both actions to have been caused by events in August of 1998 and after. On August 10, Mr. Drabinsky was suspended from his responsibilities at Livent. As a result of the alleged conspiracy to injure him, he has claimed damages for the mental anguish caused by the acts of the Ovitz defendants. In the KPMG action, he has claimed damages for mental anguish caused by his accountants' breach of loyalty as a result of acts done pursuant to the retainer from Stikeman, Elliott. Counsel for the defendants argued that there is a real risk of inconsistent findings and an inappropriate assessment of any mental anguish damages found to be caused by KPMG, if the issue of damages for mental anguish in this action is decided without the benefit of the evidence relating to mental anguish in Ovitz. In addition, the KPMG defendants plead that the mental anguish was caused, in whole or in part, by Mr. Drabinsky's own conduct - that is, the anguish was caused by the stress of carrying on the alleged improprieties at Livent and/or in being found out in August, 1998. Thus, they argue that all three actions relate to Mr. Drabinsky's position as director and officer of Livent up to the time of his suspension.

10 However, a close look at the subject matter of the three actions indicates that the overlap alleged by the defendants is not, in fact, significant. The major issue in the KPMG action will be the scope of KPMG's fiduciary duty to Mr. Drabinsky, and whether there was a breach of that duty, whether by release of confidential information or by actions taken during the investigation. If a breach of duty is established, there will be issues of damages that may include damages for trespass to property, damages related to the need for Mr. Drabinsky to find and instruct new accountants, and damages for mental anguish. Counsel for Mr. Drabinsky has made it clear that there is no claim for loss of reputation in this case. The claim for mental anguish is for the added mental anguish allegedly caused by KPMG's acts, beyond the stress and anguish Mr. Drabinsky was experiencing due to other causes at the time.

11 The major issue of liability here turns on the conduct of KPMG and whether it breached a fiduciary duty. The fact that Mr. Drabinsky might at some point be found to have engaged in some wrongdoing with respect to Livent does not disentitle him to damages caused by the breach of fiduciary duty by his accountants. In Stewart v. Canadian Broadcasting Association (1997), 150 D.L.R. (4th) 24 (Ont. Ct. (Gen. Div.)), J. Macdonald J. drew a distinction between emotional distress experienced by the plaintiff arising from his own wrongdoings, and the emotional distress caused by the defendant's breach of fiduciary duty (at 164, 166-67). Only the incremental distress caused by the breach of fiduciary duty was held to be compensable. Similarly, in this case, Mr. Drabinsky's alleged misconduct, even if proved, does not disentitle him to claim damages for breach of fiduciary duty.

12 Mr. Drabinsky's conduct at Livent is not directly at issue in this action, as it is in the other two actions. Here, he has the burden of proving the incremental mental distress caused by KPMG's actions. If the defendants take the position that his emotional distress arose from the need to conceal wrongdoing, that does not require the judge in this action to make findings about impropriety with respect to Livent. To the extent that he was experiencing stress prior to August, 1998 because of this alleged wrongdoing, it is the existence of the stress and its effect on him that is relevant here, not whether there was misconduct. With respect to sources of stress after August 10, the role of the trial judge will be to determine the amount of mental anguish caused by KPMG rather than the other sources.

13 The defendants also argued that Mr. Drabinsky's misconduct, if proved, would be relevant to his claim for punitive damages. However, the cases relied on in support of this proposition were cases where there had been an assault by the defendant and provocation by the plaintiff, which affected the determination of punitive damages (Shaw v. Gorter (1977), 16 O.R. (2d) 19 (C.A.); Erikson v. Hall [1995] B.C.J. No. 2475 (B.C.S.C.)). The case for punitive damages rests on proof of harsh, vindictive or reprehensible conduct by the defendant. The plaintiff's character is not in issue, nor is his or her conduct, as the purpose of punitive damages is to punish the defendant for malicious or oppressive conduct (Whiten v. Pilot Insurance Co. (1999), 42 O.R. (3d) 641 at 649). Thus, whether Mr. Drabinsky may at some time be proved to have engaged in wrongdoing in respect of Livent is irrelevant to the determination of the punitive damages claimed in this action.

14 In sum, this is not a case where it can be said that the actions arise from the same series of transactions, as in other cases where a trial together has been ordered - for example, where there are two actions arising out of the same motor vehicle accident or the same series of events. The only possible overlap here is in determining the relative causation of any mental distress damages in the Ovitz and KPMG actions, and in quantifying the amount of compensation for which each set of defendants is liable.

15 I have concluded that the balance of convenience does not favour an order of trial in succession. The overlap with respect to the mental damages claim does not raise questions of such complexity as to warrant trial in succession. Moreover, an order to try these actions in succession would delay the resolution of this action, which is the subject of a timetable set by Ground J. in May, 1999, culminating in a three week trial scheduled to begin January 31, 2000. The Ovitz action has not yet been the subject of a timetabling order, and it is clear from a reading of the pleadings that it is a much more complex action, covering a much wider time period and a broader range of actors than this action. I do not find that there is a significant risk that the defendants will be prejudiced if this action proceeds on the timetable set. Therefore, there will be no order for the trial of this action after the other two actions.

Joint Discovery and Relief from the Deemed Undertaking Rule

16 In any event of my ruling with respect to the trial of this action, the defendants seek relief from the deemed undertaking rule in Rule 30.1.01 with respect to the discovery evidence of Mr. Drabinsky and information disclosed in the other two actions, and for an order of joint discovery of Mr. Drabinsky in the three actions. The defendants have suggested that the discovery be conducted so that they will examine Mr. Drabinsky last, and do so in a manner that will conceal from the parties in the other actions any information subject to the interlocutory injunction - for example, Mr. Drabinsky's confidential information held by KPMG prior to the retainer.

17 Rule 30.1.01(3) provides that parties and their counsel are deemed to undertake not to use evidence and information to which the Rule applies for any purposes other than the proceedings in which the evidence has been obtained. The Rule has as its goal the protection of the privacy rights of a litigant. Relief can be given from the deemed undertaking rule, where special circumstances exist, under Rule 30.1.01(8), if the court is satisfied that the interests of justice outweigh any prejudice to the party who disclosed the evidence. In Gleadow v. Nomura Canada Inc. (1996), 44 C.P.C. (3d) 133 (Ont. Ct. (Gen. Div.)), Kiteley J. permitted the use of certain documents disclosed in a civil action for wrongful dismissal to be produced before an employment standards officer dealing with similar issues involving the same parties. In contrast, in Goodman v. Rossi (1995), 24 O.R. (3d) 359 (C.A.), the Court of Appeal, having found that an implied undertaking rule existed in Ontario, re-

fused to grant the plaintiff leave to use a document disclosed by the defendant in a wrongful dismissal action in a separate action for defamation.

18 Here, in contrast to the facts in Gleadow, the defendants seek a broad order that would likely allow them access to a wide range of documents produced by Mr. Drabinsky in the other actions and to his full discovery transcript. As noted earlier, the other two actions cover a much broader range of activities and time span than this action, and KPMG is not a party in those actions. Mr. Drabinsky has a right to privacy with respect to the material filed in those actions, as he has with respect to his documents in this action. However, counsel for the parties in the other actions have asked that if relief is granted from the deemed undertaking rule with respect to KPMG, then the same relief should be accorded to them with respect to Mr. Drabinsky. I am not satisfied that there is prejudice to the defendants here if they are denied access to the documents and discovery from those proceedings, given my understanding of the issues in this action.

19 Moreover, this is not an appropriate case in which to order joint discoveries. In Tusa v. Walsh (1994), 23 C.P.C. (3d) 178 (Ont. Ct. (Gen. Div.)), important issues as to causation of the plaintiff's injuries as between the defendants in one action arising out of a motor vehicle accident and the defendant in the second action, a treating physician, led to an order for discovery of the physician by the defendants in the motor vehicle action. Here, the issues are different in the three actions. Moreover, discoveries have not yet been scheduled in the other actions, as they have been here, and an order of joint discovery would have the effect of delaying timely resolution of this action in accordance with the schedule.

A Further and Better Affidavit of Documents

20 The defendants argue that Mr. Drabinsky should be ordered to produce a further and better Affidavit of Documents, since he did not include in his Affidavit of Documents any documents relevant to his alleged improprieties in his capacity as officer and director of Livent that resulted in his suspension and are the subject of the Livent action.

21 Again, it is important not to lose sight of what is in issue here. It is not Mr. Drabinsky's record over the years at Livent, or even the events leading up to his suspension, but rather whether KPMG breached its duty and the damages caused, including the amount of mental anguish suffered after August 10, 1998. He is obliged to produce documents that bear a "semblance of relevancy" to these issues (Kay v. Posluns (1989), 71 O.R. (2d) 238 (H.C.J.) at 246). I am not satisfied that all "documents related to his alleged improprieties at Livent" meet that test, given that the issue here will be the cause of his mental distress in August, 1998 and following. As discussed earlier, the fact of any stress that he might have experienced from concealing wrongdoing prior to August 1998 may be relevant, but not the details of the alleged wrongdoing. After August 10, the issue is the role of other sources in causing him stress, such as the actions taken by Livent and the Ovitz defendants and perhaps the discovery of wrongdoing or the accusation thereof. The reasons behind those causes of stress are not the issue.

22 Nor am I satisfied that Mr. Drabinsky's alleged wrongdoing becomes relevant, as argued by the defendants, because any other accounting firm retained by Stikeman, Elliott or Livent would have brought the same misconduct to light. Again, the issue is the mental anguish caused by KPMG's alleged breach of fiduciary duty, not the fact that an accounting firm other than KPMG could have found and disclosed the information that was the subject matter of the report.

23 The plaintiff has argued that the doctrine of issue estoppel prevents the defendants from raising the issue of Mr. Drabinsky's conduct, since allegations with respect to his misconduct were struck, on consent, from an affidavit filed by Mr. Webster in support of Livent's position in the motion for an interlocutory injunction. I cannot accept that there has been a determination of the same legal issue arising on the claim of damages so as to estop the defendants here. The significant questions in the interlocutory injunction proceeding were irreparable harm and the balance of convenience, not the cause of the mental anguish suffered. There has been no determination of the degree to which Mr. Drabinsky's conduct may have had an impact on his mental state after August 10.

24 It is not clear to me at this time that the Affidavit of Documents is incomplete. Therefore, I make no order, although I note that the plaintiff does have an ongoing obligation to ensure that documents relevant to the claim for mental distress are produced, if that has not already occurred.

Plaintiff's Motion to Strike

25 The plaintiff seeks to strike paragraph 41 of the Statement of Defence pursuant to Rule 21.01(1)(b) on the basis that it discloses no reasonable cause of action or defence. That paragraph reads:

> In the alternative, the defendants plead that if the plaintiff has sustained or suffered any of the damages as alleged or at all, which is denied, these are solely the result of the plaintiff's own conduct with respect to the financial affairs of Livent and his response to the complaints of Livent against him (full particulars of which are known to the plaintiff) and are in no way attributable to these defendants.

26 The threshold on a motion to strike is high. It must be plain and obvious, assuming the facts as pleaded are true, that there is no reasonable cause of action or defence (Hunt v. Carey (1990), 74 D.L.R.(4th) 321 (S.C.C.) at 336).

27 A careful reading of paragraph 41 indicates that it sets out a standard defence to a claim for damages. Essentially, it denies that the defendants caused the damages, and alleges that the plaintiff or others caused his mental distress. There is no legal basis to strike this paragraph.

Conclusion

28 For these reasons, the defendants' motion is dismissed, as is the plaintiff's cross-motion to strike paragraph 41 of the Statement of Defence. If the parties are unable to agree on costs, they may make an appointment with my secretary.

SWINTON J.

cp/d/mcc

Tab 5

Case Name:

Chebib v. Medcomsoft Inc.

Between
Chebib, and
Medcomsoft Inc. and Aita
And between
Medcomsoft Inc., and
Nightengale et al.

[2003] O.J. No. 522

2003 CarswellOnt 563

Court File Nos. 01-CV-220025CM2 and 02-CV-234676CM2

Ontario Superior Court of Justice

Master Albert

Heard: January 21, 2003.
Judgment: February 4, 2003.

(11 paras.)

Practice -- Trials -- Consolidation of actions -- Evidence -- Trial of actions together -- When appropriate.

Motion by Medcomsoft for separate trials. Chebib sued Medcomsoft and its 12 directors for wrongful dismissal. Medcomsoft sought to file a counterclaim, missed the deadline, and sued Chebib and other former employees in a separate action, alleging that they breached non-competition clauses, misused confidential information, and interfered with Medcomsoft's economic relations. The former employees had differing non-competition clauses and employment contracts, and intended to sue Medcomsoft for wrongful dismissal. Chebib's action was ready for trial, and Medcomsoft's action was one year away. Medcomsoft argued that the common issues and the possibility of inconsistent findings required consecutive trials. Chebib argued that consecutive trials would be unduly complex and the issues did not overlap sufficiently.

HELD: Motion dismissed. The negative factors for consecutive trials outweighed the positive. The unfavourable factors included a lack of overlap of the issues, evidence, sources of damages and par-

ties, given Medcomsoft's broader and more complex claims of misuse of confidential information, competition, and interference with economic relations, as opposed to Chebib's comparatively simple wrongful dismissal claim. As the other former employees intended to sue Medcomsoft for wrongful dismissal under differing employment contracts with differing non-competition clauses, the lack of overlap would be multiplied. Additionally, the differing stages of the actions would cause delay and Medcomsoft contributed to the problem of delay by missing the deadline for the counterclaim. The only positive factor was the avoidance of inconsistent results, but due to the small overlap in issues, that was only a small possibility.

Counsel:

S. Gleave, for the Chebib, responding party.
M.H. Mayer, for Medcomsoft as defendant, moving party.
J. Harris, for Medcomsoft as plaintiff, moving party.

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1 **MASTER ALBERT** (endorsement):-- After seeking and obtaining a court order to delay action 01-CV-220025CM2 (the "First Action") to issue a counterclaim, Medcomsoft and Aita missed the deadline and instead commenced action 02-CV-234676CM2 (the "Second Action"), using different counsel. Now they seek discretionary relief to combine the two actions by way of consecutive trials. This would delay trial of the First Action by more than a year. The issue is whether justice is better served by ordering consecutive trials.

Background

2 Medcomsoft is in the business of distributing medical software. Aita is its chief executive officer and controlling shareholder. The company experienced financial difficulties and downsized significantly. Chebib's employment was terminated in September 2001. He was not paid the severance package provided for in his employment contract.

3 In the First Action, commenced November 6, 2001, Chebib claims damages for wrongful dismissal. He was president and chief operating officer of Medcomsoft from April 17, 2000 to September 26, 2001. Medcomsoft pleads that it had just cause to dismiss Chebib because he had breached his fiduciary and statutory obligations. The First Action is ready for a trial date.

4 Chebib incorporated Nightingale in April 2002 and became its president. He hired eight (8) former employees of Medcomsoft (the "Departing Employees"), who had also been terminated. In the Second Action, issued August 20, 2002, Medcomsoft and Aita, claim against Chebib and the Departing Employees for breach of contractual and fiduciary obligations and for intentional interference with economic relations, claiming they breached non-competition clauses when Chebib launched Nightingale and hired Medcomsoft's former employees.

5 The five (5) additional defendants by counterclaim sued by Chebib and the Departing Employees in the Second Action are directors of Medcomsoft (the "Medcomsoft Directors"). Twelve parties named in the Second Action are not parties to the First Action.

6 If the litigation timetable is followed the Second Action is eleven months away from being ready for a trial date. Discoveries are to be conducted in April and May 2003 and trial scheduling

court is fixed for December 16, 2003 (note that date is changed from December 17, 2003 since long trials are now scheduled at a separate trial scheduling court).

Relevant factors in exercising discretion to order consecutive trials

7 The court's decision to order consecutive trials is discretionary. Factors relevant to the court's determination and my findings upon applying these factors to this case, are:

(a) Whether the actions have a common question of fact or law:

The only common question is whether Medcomsoft had cause to terminate Chebib's employment. This is the issue in the First Action. Medcomsoft alleges that Chebib paid unauthorized bonuses in June 2001 to some employees, including the Departing Employees, and had unauthorized discussions with National Bank about financing for Medcomsoft in September 2001.

At discoveries Dr. Aita admitted that Chebib was authorized to pay the bonuses and Mr. Nicoletti for Medcomsoft admitted that Chebib was authorized to discuss a strategic equity partner with National Bank.

The evidence needed to determine the issues in the first action is narrow, largely confined to events between June and September 2001.

The Second Action raises numerous issues of whether the Departing Employees and Chebib misused confidential information, breached different non-competition clauses, and interfered with contractual and economic relations by creating and operating Nightingale. The Departing Employees had different employment agreements and different non-competition clauses.

Also in issue by counterclaim in the Second Action is whether the claim is an abuse of process designed to interfere with Nightingale's business. Nightingale and Chebib allege that Medcomsoft, Aita and the Medcomsoft Directors interfered with their bid for work from the government of Ontario. Nightingale was disqualified from the bid by reason of this pending litigation. Chebib and Nightingale claim Medcomsoft, Aita and the Medcomsoft Directors were aware that commencing the litigation against Nightingale would result in disqualification.

Counsel advised the court that in addition, each of the Departing Employees brought or is bringing a claim against Medcomsoft and Aita for wrongful dismissal of their employment. Consequently, if the two actions that are before the court today are ordered tried consecutively, it would follow that the eight additional wrongful dismissal claims should also be heard consecutively. This would add further complexity and additional trial time to the proceedings and cause more delay in the First Action.

The fact that there may be some overlap in a question of law or fact is insufficient to order consolidation or trial consecutively, where the evidence will not sufficiently overlap (Don Bodkin Leasing Ltd. v. Bank of Montreal [1990] O.J. No. 732 at page 3).

The issues in the Second Action are broader and more complex. Applying this factor consecutive trials are not appropriate.

(b) Whether damages arise from the same transaction(s) or occurrence(s):

In the First Action damages, if any, will flow from a finding of termination without just cause. In the Second Action damages, if any, would arise from a finding that the Departing Employees and Chebib breached a valid non-competition agreement. In the counterclaim in the Second Action damages, if any, would arise from a finding that Medcomsoft deliberately commenced the action knowing that it would disqualify Nightingale from bidding for the government contract. Potential damages in the different claims do not arise from the same transactions or occurrences.

(c) Whether there will be duplication of evidence:

Potential duplication of evidence is minimal.

(d) Whether the parties are the same in both actions:

Only three of the 16 parties are the same in both actions.

(e) Whether counsel are the same in both actions:

Counsel for Medcomsoft and Aita are not the same in both actions.

(f) Relative stages of the two actions:

In the First Action all pre-trial litigation steps are done and the parties are ready for a trial date. As a regular trial it can be accommodated for trial by the court within a few months, with a result likely by the fall of 2003. The Second Action will not be ready for a trial date to be fixed until December 2003 at the earliest and unless the issues are narrowed or the action proceeds on agreed facts, a long trial (more than 10 days) is inevitable. While regular trials can be fixed for hearing within a few months (subject to counsel's availability), long trials are generally scheduled eight to twelve months in advance. It is unlikely that the trial of the Second Action will be reached before late 2004 or 2005.

The two actions are at very different stages. While the agreed discovery schedule in the Second Action will have the first round of discoveries

completed by May 31, 2003, frequently in actions involving so many parties it is difficult to estimate the number of days needed for discoveries. If even one or two of the many parties run over the time allotted or fail to attend their examinations, finding alternate dates for so many lawyers and parties to convene could cause delays of several more months. At the earliest discoveries will be completed May 31, 2003 and the action will be ready for a trial date to be fixed by mid-December 2003.

In G.W. Martin Veneer Ltd. v. Coronation Insurance Co. [1988] O.J. No. 86 Steele, J. found that where one action was ready for trial and the other had not yet had discoveries it would severely prejudice the plaintiff to delay the trial of the action that was ready to proceed. Applying this factor consecutive trials are not appropriate.

(g) The possibility of inconsistent findings:

An important consideration is whether there is a risk of inconsistent findings if the actions are tried separately. Here, it is unlikely that there could be inconsistent findings. Since the actions involve different issues. The one area of overlap is whether Chebib was terminated for cause. The finding on this issue in the First Action can be applied in the Second Action, where the court must determine whether the non-competition clause is enforceable.

If there is a need to address the potential for set-off if there is a finding in the First Action that Chebib is entitled to damages for wrongful dismissal, and in the Second Action that he is liable to pay damages for breach of a non-competition clause, the concern can be addressed by asking the court at trial of the First Action to require damages to be paid into court pending disposition of the Second Action, and a direction for set-off if applicable.

(h) The level of complexity if heard consecutively:

Counsel for Chebib tried to persuade the court that consecutive trials would greatly increase the complexity of the proceedings, as in Reichmann v. Toronto Life Publishing (1988), 31 C.P.C. (2d) 54 at page 64. I find that this is not the case. Consecutive trials are different from trials conducted together. In a consecutive trial the same judge would first try one case and upon its conclusion would try the other case.

Although consecutive trials would cause delay because of the status of the Second Action and scheduling difficulties on the long trials list, hearing the trials one after the other would not likely add to the complexity to the trials themselves.

(i) Whether the party seeking discretionary relief has deliberately delayed the action:

Medcomsoft and Chebib delayed the First Action by adjourning the June 26, 2002 trial scheduling court so they could issue a counterclaim based on recently acquired information about Chebib commencing a competitive business.

The presiding judge ordered the parties to attend an immediate case conference before me, which they did. Counsel agreed on a timetable that allowed for issuance of a counterclaim by August 16, 2002. The June 26, 2002 order provided:

> "Defendant shall file amended defence and counterclaim, if any, by August 16, 2002, parties consenting to same, failing which such amendment and counterclaim deemed waived."

The June 26, 2002 order fixed the next trial scheduling court date for December 18, 2002 and invited counsel to request an earlier date if the defendants did not serve a counterclaim. A counterclaim was never brought and the trial scheduling court date was moved up to October 30, 2002.

Medcomsoft and Chebib further delayed the First Action by adjourning trial scheduling court from October 30, 2002 to February 5, 2003 to bring this motion for consecutive hearings. They scheduled the motion for January 21, 2003 only two weeks before the return trial scheduling court date of February 5, 2003, placing that date in jeopardy by failing to take into account the possibility of a reserve decision[1].

The moving party's materials offer no reason why the claim was brought as a separate action with different counsel, and why the motion for consecutive hearings was not brought in August or September 2002 immediately upon issuing the Second Action.

The inference the court draws in the absence of evidence to the contrary is that these are attempts to delay the First Action.

(j) Whether further delay will result from an order for consecutive hearings:

I have already made a finding that an order for consecutive trials will delay the First Action by over a year.

I agree with the statement of Justice E.M. Macdonald in Minerbray v. Uhlig [1998] O.J. No. 836, when she expressed her concern about the delay that would result if two matters were consolidated. She observed that there was a desire to delay the proceedings because it might result in con-

siderable success by one party with significant monetary consequences to the party seeking to delay matters. She said

> "The court must control its own process. I would impugn the reputation of the administration of justice if I were to ignore certain overwhelming realities which strongly suggest that this application is ready to proceed and must do so."

I agree with this statement and find that it this applies to the case before me. The First Action is ready to proceed and it must do so.

(k) Whether consecutive trials would do more harm than good:

Medcomsoft made a conscious decision to keep the two actions separate when they chose to pursue their claim against Chebib, Nightingale and the Departing Employees as a separate action rather than as a counterclaim with parties added as defendants by counterclaim. Had they taken proceedings by way of counterclaim, the trials of the main action and the counterclaim would have been conducted together or consecutively unless separated by court order. Instead, by issuing a separate action the onus is on them to persuade the court that justice requires the relief sought. The court is not persuaded.

(l) Whether case management changes the factors:

Case management does not change the factors that must be considered on a motion for trial together or consecutively. As noted by Master MacLeod in Tor Ham Capital Ltd. v. Yorkton Securities Inc. [2001] O.J. No. 5691 at paragraph 7:

> "The policy behind rule 6.01 is a policy of efficiency. It will generally be more efficient to have a single determination of overlapping facts or legal issues rather than multiple proceedings dealing with the same issues. That is not the case here. The overlap between the cases is minor as they arise from two completely separate contractual and factual situations ... While the combined trial of both actions might be marginally shorter than the trial of both actions individually, this does not outweigh the disadvantage of all parties to both actions having to participate in the longer trial."

Conclusion

8 The court must compare the ills which might occur if the actions are tried separately and the ills which might occur if they are tried consecutively. In Don Bodkin Leasing v. Bank of Montreal [1990] O.J. No. 732 Master Donkin found that while delay in bringing a motion for trial consecutively or together is not fatal, it cannot be ignored. Where one action was at a very late stage and the

other action was at an early stage Master Donkin found that more harm would be done by ordering trial together or consecutively than by leaving the two actions to be tried separately.

9 Applying and weighing the factors described in these reasons, I find that the balance favours trying the two actions separately. As in Don Bodkin Leasing v. Bank of Montreal [1990] O.J. No. 732 more harm would be done by ordering these two actions tried consecutively than by leaving the two actions to be tried separately.

10 I conclude that the balance of convenience does not favour consecutive trials of these two actions. An order for consecutive trials would unreasonably delay resolution the First Action. The Second Action is a much more complex action involving multiple parties and many issues. There is no evidence of any prejudice to Medcomsoft and Aita if the trials proceed separately.

11 Accordingly, THIS COURT ORDERS that:

1. The motion by Medcomsoft and Aita for trial of actions 01-CV-220025CM2 and 02-CV-234676CM2 consecutively is dismissed;
2. The parties to action 01-CV-220025CM2 shall attend trial scheduling court on February 5, 2003 as previously ordered to fix dates for the settlement conference and trial;
3. The trial scheduling court in action 02-CV-234676CM2 is changed from December 17, 2003 to December 16, 2003 so that it is on the list for team 4, to schedule a date for a long trial;
4. Generally costs follow the event. If counsel are unable to agree on costs then I will receive brief submissions from counsel for Chebib no later than February 14, 2003, and counsel for Medcomsoft shall have until February 24, 2003 to file brief written submissions in response. Submissions received after these deadlines will not be considered.

MASTER ALBERT

cp/s/qw/qlrme/qllxr

1 Counsel submitted that it was the first date available to the court and all counsel after the booking date of November 5, 2002. In any event, counsel should not have waited until after the October 30, 2002 trial scheduling court appearance to book the motion. It should have been booked in August or September, 2002.

Tab 6

Case Name:

1014864 Ontario Ltd. v. 1721789 Ontario Inc.

RE: 1014864 Ontario Limited, Plaintiff, and 1721789 Ontario Inc., David Mehrasa, Phillips-Van Heusen Corporation and Supersign Gamma Inc., Defendants

[2010] O.J. No. 2624

2010 ONSC 3306

Court File No. 07-CV-337088

Ontario Superior Court of Justice

Master R. Dash

Heard: June 3, 2010.
Judgment: June 18, 2010.

(36 paras.)

Civil litigation -- Civil procedure -- Actions -- Causes of action -- Joinder and consolidation -- Motion by the plaintiff purchaser to have three actions consolidated dismissed -- The purchaser was represented by Bernstein for a property purchase -- The neighbour commenced a nuisance action against the purchaser -- The purchaser commenced an action against Bernstein for negligence and another against the vendor for misrepresentations -- The nuisance action arose from the erection of a display sign without a permit whereas the other two actions arose from the property purchase -- The nuisance action was also further advanced -- There was thus no good reason to try the nuisance action together with the other actions -- Rules of Court, Rule 6.01(1).

Tort law -- Nuisance -- Practice and procedure -- Joinder -- Motion by the plaintiff purchaser to have three actions consolidated dismissed -- The purchaser was represented by Bernstein for a property purchase -- The neighbour commenced a nuisance action against the purchaser -- The purchaser commenced an action against Bernstein for negligence and another against the vendor for misrepresentations -- The nuisance action arose from the erection of a display sign without a permit whereas the other two actions arose from the property purchase -- The nuisance action was also further advanced -- There was thus no good reason to try the nuisance action together with the other actions -- Rules of Court, Rule 6.01(1).

Tort law -- Practice and procedure -- Motion by the plaintiff purchaser to have three actions consolidated dismissed -- The purchaser was represented by Bernstein for a property purchase -- The neighbour commenced a nuisance action against the purchaser -- The purchaser commenced an action against Bernstein for negligence and another against the vendor for misrepresentations -- The nuisance action arose from the erection of a display sign without a permit whereas the other two actions arose from the property purchase -- The nuisance action was also further advanced -- There was thus no good reason to try the nuisance action together with the other actions -- Rules of Court, Rule 6.01(1).

Motion by the plaintiff purchaser to have three actions consolidated or tried together. The purchaser bought a property in Toronto from the defendant vendor in January 2007. The purchase price included the assignment of a lease for a large display sign which was apparently erected without a permit. The purchaser was represented by lawyer Bernstein on the purchase. The neighbouring property erected a display sign with a permit and the neighbour commenced a nuisance action against the purchaser, alleging that the purchaser's display sign blocked the neighbour's display sign. In April 2009, the purchaser received notice of expropriations for part of the property for a highway expansion project. The purchaser commenced an action against Bernstein for negligence in failing to confirm that all necessary sign permits had been obtained and in failing to inquire as to pending expropriations. The purchaser also commenced an action against the vendor claiming damages for misrepresentations regarding the obtaining of a permit for the display sign. The purchaser submitted that the three actions were tied together by a common transaction, being the purchase of the property.

HELD: Motion dismissed. The nuisance action had its origin in the erection of the offending sign and was not related to the purchase of the property. Also, the relief claimed in the nuisance action did not arise from the same transaction or occurrence as the relief claimed in the other actions. On the other hand, however, the actions commenced against the vendor and the lawyer, and the relief claimed therein, did arise out of the purchase of the property. The only party that was the same in all three actions was the purchaser and there was no risk of inconsistent findings if the neighbour's nuisance action was not tried together with the other two actions. Finally, the nuisance action was much further advanced and was the only action that had had examinations for discovery. Therefore, there was no good reason to try the nuisance action together with the other actions. However, there was good reason to order the actions commenced against the vendor and the lawyer to be tried together.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 138

Limitations Act, 2002, S.O. 2002, c. 24, Schedule B, s. 18

Rules of Court, Rule 6.01, Rule 6.01(1)(a), Rule 6.01(1)(b), Rule 6.01(1)(c), Rule 57.01(6)

Counsel:

Edward Tonello, for the plaintiff 1014864 Ontario Ltd. in action 07-CV-337088.

Alvin Meisels, for 1721789 Ont. Inc. and Mehrasa as defendants in action 07-CV-337088 and plaintiffs in action CV-10-400470.

Michael Tweedie, for 1721789 Ont. Inc. and Mehrasa as plaintiffs in action CV-09-383666.

R. Leigh Youd, for the defendant Bernstein in action CV-09-383666.

Howard Reininger, for the defendants 985091 Ont. Ltd. and Gidda in action CV- 10-400470.

REASONS FOR DECISION

1 MASTER R. DASH:-- In this action a property owner was sued by his neighbour in nuisance for allowing a large display sign, erected without a permit, to block the view of the neighbour's sign. The property owner commenced a separate action in negligence against the lawyer who represented him on the purchase of the property for failing to ensure the sign was lawful and for failing to ascertain that a portion of the property would be subject to expropriation. The property owner commenced a further separate action against the vendor of the property for misrepresentations about the pending expropriation.[1] The property owner moves to have all three actions consolidated or tried together. The motion is supported by the neighbour, but opposed by both the vendor and the lawyer.

BACKGROUND

2 In January 2007, 1721789 Ont. Inc. ("172") purchased from 985091 Ontario Ltd. ("985") a property known as 175 Welland Ave. (the "Property") in Toronto containing a coin car wash. 985 took back a vendor's mortgage for part of the purchase price. 172 and its principal Navid Mehrasa are referred to collectively in these reasons as the "Purchaser".[2] 985 and its principal Gurcharan Gidda are referred to collectively in these reasons as the "Vendor".[3] Part of the purchase price included assignment of a long term lease for a large display advertising sign, or billboard, in which Supersign Gamma Inc. ("Supersign") was lessee. The lease for the billboard had been executed between the Vendor and Supersign and the foundation for the sign created prior to the purchase, but the sign was erected shortly after the closing. Rent was paid for the sign commencing March 2007. The sign advertised businesses not located on the premises including Van Heusen Shirts ("Van Huesen"). It appears that the sign was erected without a permit from the Ministry of Transportation and contravened Ministry setback requirements. Lawyer Daniel Bernstein (the "Lawyer") represented the Purchaser on the purchase.

3 The neighbouring property, 1885 Wilson Avenue ("Neighbouring Property") was owned by 1014864 ("101"), referred to herein as the "Neighbour". A Remax real estate office is located on the Neighbouring Property and a sign was erected thereon, with a proper permit, advertising the Remax location. It is alleged that the display sign on the Property impeded the view of the Remax sign on the Neighbouring Property.

4 Certain events took place in relation to the Property as the litigation progressed. Supersign defaulted on rent payments for the billboard in June 2007 and the display portion of the sign was taken down in May 2008. In April 2009 the Purchaser received a notice of expropriation respecting part of the Property for purposes of highway expansion. The Purchaser defaulted on the mortgage back and following summary judgment in favour of the Vendor on the mortgage in July 2009, the Purchaser surrendered possession of the Property back to the Vendor. The Vendor ultimately sold the Property in April 2010. These events will be discussed further in the context of the various court proceedings.

THE COURT ACTIONS

(a) The Nuisance Action

5 On July 23, 2007 the Neighbour commenced action 07-CV-337088 (the "Nuisance Action") against the Purchaser based on both nuisance and negligence because the billboard on the Property blocked the Remax sign on the Neighbouring Property. It is alleged that the billboard was erected without a permit and was contrary to Ministry guidelines prohibiting signs that block the view of a commercial establishment or an approved sign. The Neighbour sought damages and an injunction against the Purchaser. The Neighbour also named Van Huesen as a defendant, but that claim was disposed of in May 2008 and in February 2009 Supersign was added as a defendant by Master Glustein.[4] Supersign has never defended and although not noted in default is said to be insolvent. The Purchaser filed a statement of defence and crossclaim (against Supersign) in January 2009, which it amended in July 2009. As part of its defence the Purchaser denied the sign impeded the view of the Neighbour's sign, pleaded that the sign was lawful and that the Vendor and Supersign represented that a permit application had been submitted. The Purchaser at no time issued a third party claim against either the Vendor or against the Lawyer.

(b) The First Vendor Action

6 On January 2, 2008 the Purchaser commenced action 08-CV-346437 against the Vendor ("First Vendor Action") claiming damages for breach of warranties and misrepresentations respecting the obtaining of a permit for the sign (and with respect to revenue from the car wash) as well as contribution and indemnity with respect to losses in the Nuisance Action. The Vendor denied the misrepresentations, stated that the sign was erected after closing and that the Purchaser had independent legal advice. The Vendor alleged that the vendor take-back mortgage was in default and counterclaimed for the amount due on the mortgage and possession. The Purchaser in reply pled that the Vendor was not entitled to payments on the mortgage as a result of its fraud and misrepresentations. The Vendor brought a motion for summary judgment and by reasons dated July 16, 2009 and supplementary reasons dated September 21, 2009 Strathy J. dismissed the Purchaser's action and granted judgment on the Vendor's counterclaim. In so doing he held there was no basis to assert any misrepresentations as to revenue from the car wash, which in any event merged on closing. He also determined that there was no evidence of a representation as to the validity of the sign or that the Vendor knew it was unlawful and that the Purchaser knew or should have known when the sign was erected after closing that Supersign had not obtained a permit.[5] He held that the Purchaser permitted the erection of the sign after closing without ensuring Supersign obtained the necessary approvals and that if either the Purchaser or its lawyer failed to do due diligence it has itself to blame.[6] Strathy J. acknowledged that "at best" the Purchaser "may have a claim against the [Vendor] for indemnity for any damages awarded in the [Nuisance] Action"[7] and that the Purchaser was free to assert a third party claim in the Nuisance Action,[8] "something that the [Purchaser] indicated that it intended to do."[9] It is noteworthy that despite such invitation the Purchaser has never issued a third party claim against the Vendor in the Nuisance Action.

7 During the course of the First Vendor Action, in or about April 2009 the Purchaser was served with a notice of expropriation of a part of the Property to facilitate highway widening. Strathy J. held there was no pleading of misrepresentation respecting the expropriation but even if it had been pled there was no evidence to establish either that expropriation had been planned at the time of closing or that the Vendor was aware of any planned expropriation.[10] He held it could not be

a defence to the counterclaim on the mortgage. On the other hand, Strathy J. noted that the expropriation issue was "not an issue properly before [him] on the motion, as it had not been pleaded" and while he "found it could not be a defence to the counterclaim in any event, [he] did not deal with it in any other respect".[11] For example Strathy J. did not determine whether it could form a basis for a claim for damages against the Vendor.

8 The Court of Appeal dismissed the Purchaser's appeal on January 12, 2010 and on the sign issue stated "there was no evidence to support the appellant's claim that the respondent had breached any representation or warranty contained in the closing documents ... regarding the sign and the lease for the sign."[12] Possession of the Property was subsequently surrendered to the Vendor.

(c) The Solicitor's Negligence Action

9 The Purchaser also commenced action CV-09-383666 against the Lawyer on July 23, 2009 (the "Solicitor's Negligence Action"). The Purchaser pleads that the Lawyer was negligent by failing to confirm that all necessary permits for the sign had been obtained and failing to inquire as to planned or pending expropriations. The Purchaser claims by way of damages "loss of rental income from the advertising sign" and "loss of revenue from the car wash business caused by the denial of access to a section of the Property due to ... expropriation." The Purchaser did NOT claim against the Lawyer for contribution and indemnity for the damages and costs claimed against the Purchaser in the Nuisance Action. The Lawyer pleads by way of defence that he took all reasonable steps within the standards of a reasonably competent lawyer, that if the sign was illegal the Purchaser's rights are against the Vendor and that the Purchaser will be compensated by the expropriating authorities. The Lawyer does NOT plead that the sign is lawful.

(d) The Second Vendor Action

10 Finally, on April 6, 2010 the Purchaser commenced a second action against the Vendor (action CV-10-400470) for a declaration that the agreement of purchase and sale is rescinded or damages in the alternative plus punitive damages as a result of false representations about the planned expropriation ("the "Second Vendor Action.") The Purchaser pleads that information indicating that the Vendor likely had prior knowledge of the pending expropriation did not come to its attention until February 2010. The Vendor has yet to deliver a statement of defence. It may bring a summary judgment motion.

THE STATUS OF THE ACTIONS

11 In the Nuisance Action, discovery has been completed and a status hearing was adjourned to August 11, 2010 pending the results of this motion. If the actions are not joined, the Nuisance Action is ready to be set down for trial subject to an agreement on a mediator and mediation date to satisfy the requirements of the new Toronto Practice Direction. Supersign will also have to be noted in default before a trial record can be filed. The Solicitor's Negligence Action is almost 10 months old and has not progressed beyond pleadings. There has been no exchange of affidavits of documents and no examinations for discovery. The Second Vendor Action is four months old and no defence has yet been delivered. There may be a summary judgment motion.

12 I note that the Purchaser is represented by the Blaney McMurtry firm in the Nuisance Action and in both the First and Second Vendor Actions; however it is represented by the Drudi Alexiou Kuchar firm in the Solicitor's Negligence Action.

THE MOTION

13 The Purchaser (by its lawyers Blaney McMurtry) moves before me for consolidation or trial together of the Nuisance Action, the Solicitor's Negligence Action and the Second Vendor Action. The Purchaser really seeks trial together rather than a formal consolidation. The motion is supported by the Purchaser's other lawyers and by the Neighbour. It is opposed by the Vendor and by the Lawyer. If the Nuisance Action is not joined the Purchaser (both law firms) and the Lawyer support trial together of the Second Vendor Action and the Solicitor's Negligence Action, but this is opposed by the Vendor. (This alternate order would not involve the Neighbour.)

THE LAW

14 The motion is brought under rule 6.01 which provides:

> **6.01** (1) Where two or more proceedings are pending in the court and it appears to the court that,
>
> (a) they have a question of law or fact in common;
> (b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or
> (c) for any other reason an order ought to be made under this rule,
>
> the court may order that,
>
> (d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or
> (e) any of the proceedings be,
>
> (i) stayed until after the determination of any other of them, or
> (ii) asserted by way of counterclaim in any other of them.
>
> (2) In the order, the court may give such directions as are just to avoid unnecessary costs or delay ...

15 The motion is also to be informed by section 138 of the Courts of Justice Act which states:

> 138. As far as possible, multiplicity of legal proceedings shall be avoided.
>
> However "this does not mean that there may be an indiscriminate joinder of parties, and of causes of action, but it indicates the spirit in which such a matter...is to be approached."[13]

16 Counsel have provided me with several cases dealing with bifurcation of issues within a single action (for example severing issues of liability and damages). The oft-quoted statement by the Court of Appeal in *Elcano* on a bifurcation motion that "it is a basic right of a litigant to have all issues in dispute resolved in one trial"[14] may also apply to a motion to consolidate or order trial together of several separate actions provided of course that the issues in the various actions to be re-

solved in one trial are sufficiently related. Several court decisions dealing with bifurcation set out a list of factors that the court should consider in determining whether severance of issues and ordering separate trials for each issue is just and expeditious.[15] Counsel has submitted that the court adapt the same list of factors in determining whether to order trial together of separate actions. In my view, considerations for bifurcating issues in an action are not necessarily applicable to a motion for consolidation or trial together of two or more actions, although they may provide some guidance. Other court decisions have referenced some relevant considerations in exercising the court's discretion to order trial together, although I have not been provided with any decision summarizing the factors courts have considered on such motions.

17 In my view the proper approach on a motion for consolidation or trial together is to first ascertain whether the moving party has satisfied one or more of the three "gateway" criteria set out in rule 6.01(1)(a), (b) or (c) and then consider all relevant factors as well as section 138 of the *Courts of Justice Act* which directs the court to avoid a multiplicity of proceedings whenever possible, in order to exercise the court's discretion and make such order as is just. I will attempt to set out a list of factors courts have considered on motions for trial together as well as some of the "bifurcation factors" modified appropriately to reflect that this is a motion to try actions together, not sever issues within an action. I point out that the list that follows are considerations for ordering trial together of various actions, which is the relief sought on this motion, and not full consolidation of various actions,[16] for which some different factors may apply.

18 A non-exhaustive list of some of the considerations on ordering trial together may, depending on the circumstances, include:

(a) the extent to which the issues in each action are interwoven;
(b) whether the same damages are sought in both actions, in whole or in part;
(c) whether damages overlap and whether a global assessment of damages is required;
(d) whether there is expected to be a significant overlap of evidence or of witnesses among the various actions;
(e) whether the parties the same;
(f) whether the lawyers are the same;
(g) whether there is a risk of inconsistent findings or judgment if the actions are not joined;
(h) whether the issues in one action are relatively straight forward compared to the complexity of the other actions;
(i) whether a decision in one action, if kept separate and tried first would likely put an end to the other actions or significantly narrow the issues for the other actions or significantly increase the likelihood of settlement;
(j) the litigation status of each action;
(k) whether there is a jury notice in one or more but not all of the actions;
(l) whether, if the actions are combined, certain interlocutory steps not yet taken in some of the actions, such as examinations for discovery, may be avoided by relying on transcripts from the more advanced action;
(m) the timing of the motion and the possibility of delay;
(n) whether any of the parties will save costs or alternatively have their costs increased if the actions are tried together;

(o) any advantage or prejudice the parties are likely to experience if the actions are kept separate or if they are to be tried together;
(p) whether trial together of all of the actions would result in undue procedural complexities that cannot easily be dealt with by the trial judge;
(q) whether the motion is brought on consent or over the objection of one or more parties.

ANALYSIS

19 I first consider whether the actions have a question of law or fact in common (rule 6.01(1)(a)) or if the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences (rule 6.01(1)(b)).

(a) Relief Arising out of the Same Transactions or Occurrences: Rule 6.01(1)(b)

20 With respect to rule 6.01(1)(b) the Purchaser argues that what ties the three actions together is a common transaction, namely the purchase of the Property. I agree that the purchase of the Property is the transaction that gives rise both to the Second Vendor Action, where the Purchaser alleges misrepresentations and breach of warranty on the purchase respecting the pending expropriation, and the Solicitor's Negligence Action, where the Purchaser alleges that its lawyer was negligent when representing it on the purchase by failing to ascertain that an expropriation was pending and by failing to ascertain that a permit had not been obtained for the sign. The purchase of the Property on the other hand, has no bearing on the Nuisance Action, which has its origin in the erection of the offending sign after the sale to the Purchaser closed and its continued impingement on the Neighbour's sign. The Nuisance Action involves dealings between the Purchaser and the Neighbour. The dealings between the Purchaser and Vendor or between the Purchaser and Lawyer have no bearing on the issues between the Purchaser and the Neighbour. In fact, the Second Vendor action is not concerned with the sign issue at all, only the expropriation issue.

21 Furthermore the rule requires that "the relief claimed" in each action arise out of the same transaction. The relief claimed in the Second Vendor Action, setting aside the agreement of purchase and sale and damages arising from the expropriation, and the relief claimed in the Solicitor's Negligence Action, loss of income arising from the expropriation and from being unable to draw income from the offending sign both arise from the purchase of the Property and the misrepresentations of the Vendor about a pending expropriation and the negligence of the Lawyer in failing to ascertain the pending expropriation and the fact that there was no permit for the sign. The relief claimed in the Nuisance Action is damages to the Neighbour and arises from the Purchaser's billboard blocking his own sign. It is particularly noteworthy that in neither the Second Vendor Action nor the Solicitor's Negligence Action does the Purchaser claim contribution and indemnity for any costs or judgment that may be awarded against it in the Nuisance Action. It is also worth noting that the Purchaser had an opportunity to issue a third party claim against either or both of the Vendor or Lawyer in the Nuisance Action for contribution and indemnity for any damages that the Neighbour may recover against the Purchaser for the offending sign, but failed to do so.

22 Interestingly, the "relief claimed" in the First Vendor Action did include a claim for contribution and indemnity for any costs or judgment awarded against it in the Nuisance Action as a result of the offending sign. The First Vendor Action did not raise the expropriation issue. There would have been a strong argument to tie the Nuisance Action and the First Vendor Action together

in a common trial, but no motion for trial together had been brought and the First Vendor Action has now been dismissed on a summary judgment motion.

23 I therefore conclude that the relief claimed in the Nuisance Action does not arise from the same transaction, occurrence or series of transactions or occurrences as the Second Vendor Action or the Solicitor's Negligence Action. On the other hand the relief claimed in the Second Vendor Action and the Solicitor's Negligence Action both arise out of the same transaction - the purchase of the Property.

(b) Common Question of Fact or Law: Rule 6.01(1)(a)

24 I next consider whether the three actions have a question of law or fact in common within the meaning of rule 6.01(1)(a). There are no issues of fact or law in common between the Nuisance Action and the Second Vendor Action. The first involves the Neighbour's damages arising from an offending sign and the second involves damages, primarily loss of income, suffered by the Purchaser from a failure to disclose a pending expropriation. There potentially could have been an issue of mixed fact and law between the Nuisance Action and the Solicitor's Negligence Action, namely, was the sign unlawful? The Lawyer however, does not defend his action on the basis that the sign was not unlawful. Rather, he claims whether or not there was a permit and whether or not the sign complied with Ministry requirements, he complied with the appropriate standard of care and that if the sign was illegal the Purchaser's rights are against the Vendor. Based on the current pleadings, Mr. Youd, the lawyer for the Lawyer, has undertaken to the court that he will not challenge the legality of the sign at trial in his action and is content that the Lawyer be bound by any findings in that regard made by the court in the Nuisance Action. Further, any breach of duty by the Lawyer in failing to determine the absence of a permit for the sign is not a fact in issue in the Nuisance Action, and whether the sign has caused problems to the Neighbour is not a fact in issue in the Solicitor's Negligence Action.

25 I therefore conclude that the Nuisance Action does not have an issue of fact or law in common with either the Second Vendor Action or the Solicitor's Negligence Action. On the other hand the Second Vendor Action and the Solicitor's Negligence Action have a common fact - that the Property may have been sold at a time when there was a pending expropriation, a fact allegedly withheld by the Vendor and a fact that the Lawyer allegedly should have discovered.

(c) Any Other Reason: Rule 6.01(1)(c)

26 No "other reasons" have been advanced by the Purchaser to order trial together so as to invoke rule 6.01(1)(c) other than a submission that some of the witnesses will be the same. Clearly the Purchaser would be a witness, both at discovery and at trial in all three actions. It is difficult to imagine what evidence the Lawyer might have that could have any relevance to the issues in the Nuisance Action. The issues in the Nuisance action are whether the billboard sign in fact was erected without a permit, whether the billboard was erected contrary to Ministry guidelines, whether the Purchaser's sign in fact impedes the view of the Neighbour's sign and whether the Neighbour has suffered damages as a result. The extent to which the Lawyer made all necessary searches is not relevant. The Vendor may have some evidence as to the obtaining of the permit, since the lease with Supersign was signed and the foundation for the billboard was installed before the closing; however it is the fact of the nuisance after the sign was erected, which was after the closing, that is the issue in the Nuisance Action. Whether the Vendor misrepresented the permit to the Purchaser is not rele-

vant to the Nuisance Action. The Vendor's testimony, if any, would thus be minimal at the trial of the Nuisance Action. The Vendor's testimony in the Second Vendor Action would not be about the sign, but about the expropriation. The Neighbour may have evidence to give at the trial of the Second Vendor Action as to the date he became aware of the Ministry's intention to expropriate for purposes of road widening, but his testimony would be just one of a number of nearby property owners or tenants abutting the highway with evidence to give as to notification of expropriation. The Neighbour would have no evidence to give in the Solicitor's Negligence Action or the Second Vendor Action about the issues in the Nuisance Action or the damages suffered by the impugned sign (since contribution and indemnity for the Neighbour's losses have not been claimed in either of these two actions) and in fact the sign is not an issue at all in the Second Vendor Action. I have not been advised of any other witnesses that may be required to testify at any of the trials.

27 There were no submissions as to whether the Lawyer may have relevant evidence to give at the trial of the Second Vendor Action or whether the Vendor may have relevant evidence to give at the trial of the Solicitor's Negligence Action if those actions were kept separate. Conceivably the Lawyer may have some evidence in the Second Vendor's Action about the Vendor's representations in the purchase documents.

28 In my view the court should consider the factors outlined earlier in these reasons, particularly to the extent that the Purchaser may be relying on "other reasons" for joinder as set out in rule 6.01(1)(c).

(a) The issues in the Nuisance Action are not at all interwoven with the other two actions. They are distinct and different. The issues in the Nuisance action are whether the billboard impeded the Neighbour's sign and caused the Neighbour damage. The issues in the other two actions involve losses to the Purchaser on the purchase of the Property arising out of the Vendor's misrepresentations in one action and lawyer's negligence in the other. The issues in the Lawyer Action and Second Vendor Action are also quite different from each other, but they both involve damages to the Purchaser arising out of the purchase of the Property and the Lawyer pleads that the Purchaser should look to the Vendor for his damages.

(b) The damages in the Nuisance action are unrelated to the damages claimed in the other two actions, as there is no claim for contribution and indemnity for the damages that may be awarded in the Nuisance Action. On the other hand, the damages claimed by the Purchaser for loss of income arising out of the expropriation is the same or similar in both the Solicitor's Negligence Action and the second Vendor Action, whether caused by the Vendor's misrepresentations or the Lawyer's negligence or both. Of course in the Solicitor's Negligence Action there are additional damages claimed for loss of income arising out of the illegal sign and in the Second Vendor Action rescission of the agreement of purchase is also claimed.

(c) As noted, the damages in the Solicitor's Negligence Action and the Second Vendor Action overlap, but are unrelated to the damages in the Nuisance action.

(d) I have already dealt with overlapping witnesses. Only the Purchaser is known to be a witness in all three actions. The Neighbour will be a witness only in the Nuisance Action, although he may have some evidence in Second Vendor Action, not about issues relating to the nuisance or to the sign, but as one of a num-

ber of nearby property owners as to the time they were notified of a pending expropriation. The Lawyer would be a witness primarily only in the Solicitor's Negligence Action and the Vendor would be a witness primarily only in the Second Vendor Action. I have been advised of no other witnesses.

(e) The only party that is the same in all three actions is the Purchaser. Each of the Neighbour, the Vendor and the Lawyer are each a party in only one action.

(f) The only lawyer that is the same in more than one action is Mr. Meisels, who represents the Purchaser in the Nuisance Action and in the Second Vendor Action. He does not represent the Purchaser in the Solicitor's Negligence Action. No other lawyer appears in more than one action.

(g) There would be no risk of inconsistent findings or judgment if the Solicitor's Negligence Action and the Second Vendor Action are not tried together with the Nuisance Action. In the Nuisance Action the court will determine if the Purchaser's sign unlawfully impeded the Neighbour's sign and the damages, if any, arising therefrom. These are not issues in the other two actions, there is no claim for contribution to those damages, and a result no finding thereon will be made. On the existing pleading the Lawyer in the Solicitor's Negligence Action does not assert and will not seek a finding that the impugned sign was lawful and the Second Vendor Action does not concern the sign. A determination of whether there was a known plan for expropriation at the time of the closing of the purchase however may possibly need to be made in both the Solicitor's Negligence Action and the Second Vendor Action and thus a risk of inconsistent findings within those two actions if tried separately.

(h) The issues in the Nuisance Action are quite straightforward and nuisance is a strict liability cause of action. There is no need to find negligence or misrepresentations. The other two actions are more complex. The Solicitor's Negligence Action requires the determination of a standard of care and whether there has been a breach of the duty of care and the Second Vendor Action requires a determination whether misrepresentations were knowingly made.

(i) A decision in the Nuisance Action will not put an end to the other two actions as the damages claimed, and the claimants, are quite different. On the other hand if the Purchaser is successful in the Second Vendor Action and is able to collect, this would make the claim against the Lawyer, at least on the expropriation issue, moot.

(j) The litigation status in the Nuisance action is much further advanced and once a mediation is booked, the action can be set down for trial. The Solicitor's Negligence Action has not gone beyond pleadings and pleadings are not yet complete in the Second Vendor Action.

(k) There is no jury notice at this time in any of the actions and this is not a factor.

(l) Only the Nuisance Action has had examinations for discovery. Neither the Lawyer nor the Vendor is a party to that action and neither participated in the discoveries of the Neighbour and the Purchaser. The issues being very different in the other two actions, examinations for discovery will not be either eliminated or shortened by use of the transcripts in the Nuisance Action even if the actions were joined.

(m) The Purchaser waited until the Nuisance Action was ready to be set down for trial and a status hearing approaching to bring this motion. In fact he waited until July 2009 to bring the Solicitor's Negligence Action and April 2010 to bring the Second Vendor Action. There was no effort to join the First Vendor Action before it was dismissed. There was no attempt to bring third party proceedings against the Vendor or the Lawyer. On the other hand the only proceeding that will be delayed by joinder is the Nuisance Action. The parties to that action do not complain about delay. In fact the Neighbour supports the Purchaser's motion.[17]

(n) The Purchaser will save costs if he has only to try one set of actions. The costs of the Neighbour will increase if he must sit through unrelated proceedings in the Solicitor's Negligence Action and Second Vendor Action. The costs of each of the Vendor and the Lawyer will increase if they must sit through unrelated proceedings in the Nuisance Action.

(o) The Lawyer and the Vendor will suffer prejudice in the form of increased costs if their actions are joined with an unrelated proceeding. The Neighbour may suffer prejudice by delay if the actions are joined, but he supports the joinder and waives any such prejudice. There may have been some prejudice to the Purchaser if the actions are joined since he has waived privilege in the Solicitor's Negligence Action by suing his lawyer, and in the absence of joinder, production of privileged communications could have been avoided in the Nuisance Action and the Second Vendor Action. The Purchaser however, through both of his lawyers, agrees to waive privilege in all actions if the motion to join the actions is successful. There may be some prejudice to the Purchaser since if the actions are kept separate he will have the costs of three separate trials (or two if the Solicitor's Negligence Action and Second Vendor Action are joined), yet it was clearly the Purchaser's decision to commence two separate actions (actually three including the First Vendor Action which was dismissed) after he was named as defendant in the Nuisance Action, rather than issuing a third party claim or alternatively commencing a single proceeding as against the Vendor and the Lawyer. Whether or not the actions are joined the Purchaser will be paying two separate lawyers as he retained different counsel in the Solicitor's Negligence Action.

(p) While trying the Solicitor's Negligence Action and the Second Vendor Action with the Nuisance Action would add a layer of procedural complexity, I cannot say that such complexity is undue or that it cannot dealt with appropriately by the trial judge.

(q) The Purchaser moves to join all three actions but if that is refused consents to joinder of the Solicitor's Negligence Action and the Second Vendor Action. The Neighbour consents to join all three actions, but if that is refused has no interest in whether the Solicitor's Negligence Action and the Second Vendor Action are tried together. The Lawyer objects to joining all three actions but consents to joining the Solicitor's Negligence Action and the Second Vendor Action, and in fact reminds the court that the Lawyer encouraged the Purchaser to seek his damages from the Vendor. The Vendor objects to joining all three actions and

also objects to joining the Solicitor's Negligence Action and the Second Vendor Action. He intends to move for summary judgment or other pre-trial dismissal.

CONCLUSION

29 The moving party has failed to meet the test under any of rules 6.01(1)(a), (b) or (c) for joining the Nuisance Action with the other two actions. There are no common issues of fact or law as between the Nuisance Action on one hand and either the Solicitor's Negligence Action or the Second Vendor Action on the other hand. The relief claimed in the Nuisance Action arises out of a different transaction than the other two actions. In terms of avoiding multiplicity of proceedings as mandated by section 138 of the Courts of Justice Act, it was a decision of the Purchaser to commence three separate actions in addition to the action in which he was named as defendant and not to commence third party proceedings, which was open to him to do at the appropriate time. He may now be out of time to issue a third party claim or to amend the Solicitor's Negligence Action or Second Vendor's Action to add a claim for contribution and indemnity for the damages in the Nuisance Action.[18] There is in my view no "other reason" that justifies joining these actions. The equitable factors almost all favour non-joinder. In my view the grounds for not joining the Nuisance Action with either or both of the Solicitor's Negligence Action and the Second Vendor Action, as set out in these reasons, is overwhelming.

30 In my view however there is good reason to order trial together of the Solicitor's Negligence Action and the Second Vendor Action given the overlap of damages, the fact that both actions arise out of the purchase of the Property and both deal with damages caused by the expropriation (although in the Solicitor's Negligence Action additional damages are claimed arising out of the illegality of the sign), and the fact that both are at an early stage with no examinations for discovery having been conducted. There can be a single discovery of the Purchaser on his damages. Two different claims for the same loss could promote settlement. If the Vendor brings a successful summary judgment motion that may end the joinder, but at this time it is speculative.

COSTS

31 The moving Purchaser sought costs of the motion, but only as against the Lawyer. The Lawyer sought costs of the motion, but only as against the Purchaser. The Vendor sought costs against the Purchaser, but having delivered no material, only for counsel fee at the hearing of the motion. The solicitors for the Purchaser in the Solicitor's Negligence Action did not seek costs. The Neighbour did not seek costs.

32 The Purchaser brought this motion for an order that the Nuisance Action, the Solicitor's Negligence Action and the Second Vendor Action be consolidated or tried together or consecutively. It was supported by the Neighbour and the lawyer for the Purchaser in the Solicitor's Negligence Action. It was opposed by the Lawyer and the Vendor. That motion was unsuccessful. The Lawyer and the Vendor, who successfully opposed the motion, should have their costs as against the Purchaser on a partial indemnity scale.

33 It was the court that asked counsel near the conclusion of the motion whether an order for trial together of only the Solicitor's Negligence Action and the Second Vendor Action should be made if the motion to join all three actions failed. Although this was supported by the Purchaser (both counsel) and the Lawyer and opposed only by the Vendor (the Neighbour was not involved in those two actions), it was not the focus of the motion and in my view should play no bearing on the issue of costs. It certainly cannot be considered a "victory" for the Purchaser.

34 The Lawyer produced a Costs Outline for $2,275 fees, $750 counsel fees plus $549.89 disbursements and GST for a total of $3,726.14. Because the hearing took longer than had been estimated he asks to increase the counsel fee to $1200, which would increase the total to $4198.64. The issues on the motion were of average complexity. The motion was important to the Lawyer who did not want to be forced to participate in unrelated actions. The claim against the Lawyer is for $2,000,000. Costs were increased by the manner in which the Purchaser brought a multiplicity of proceedings. Counsel for the Lawyer prepared a short responding record and was the only party to prepare a factum. Mr. Youd (a 1987 call) claims a partial indemnity rate of $225 and Ms. Patrick (a 2005 call) who prepared the factum claims a partial indemnity rate of $100, both of which are reasonable. The time spent does not appear to be unreasonable. The fixing of costs however is more than an arithmetic exercise of multiplying hours spent by hourly rates. Costs of $4198 on a motion for trial together in my view exceed what may be reasonably anticipated by the losing party, but not excessively so. In my view costs of $3,500 inclusive of disbursements and GST would be fair and reasonable in the circumstances.

35 The Vendor did not prepare a Costs Outline as clearly mandated by rule 57.01(6). He prepared no material. Although he successfully opposed the motion, counsel for the Lawyer took the lead on the opposition. I would award costs to the Vendor of $750 inclusive of GST representing counsel fee on the motion.

ORDER

36 It is ordered as follows:

(1) The motion for an order that actions 07-CV-337088, CV-09-383666 and CV-10- 400470 be consolidated or tried together or one after the other is dismissed.

(2) Actions CV-09-383666 and CV-10-400470 shall be tried together or one after the other as the trial judge may determine. This order is without prejudice to any motion brought in either action for summary disposal of the action.

(3) The plaintiffs 1721789 Ontario Inc. and David Mehrasa in action CV-09-383666 shall pay to the defendant Daniel Bernstein his costs of this motion within 30 days fixed in the sum of $3,500.

(4) The plaintiffs 1721789 Ontario Inc. and David Mehrasa in action CV-10-400470 shall pay to the defendants 985091 Ontario Ltd. and Gidda their costs of this motion within 30 days fixed in the sum of $750.

(5) The Lawyers for all parties in action 07-CV-337088 shall attend the status hearing scheduled for August 11, 2010 unless before that date the plaintiff has (a) filed form 24.1A indicating the name of mediator and date of mediation and (b) set the action down for trial.

MASTER R. DASH

cp/e/qlafr/qlmxj/qljxr/qlced/qlsxs

1 The property owner had also previously commenced an action against the vendor for misrepresentations about the legality of the sign, but that action was dismissed on a summary judgment motion.

2 In some instances "Purchaser" refers only to 172 and at other times to 172 and Mehrasa, but it is of no consequence for purpose of the motion before me.

3 In some instances "Vendor" refers only to 985 and at other times to 985 and Gidda, but it is of no consequence for purpose of the motion before me.

4 Master Glustein refused to add 985 as a defendant to the Neighbour's action on the basis that there was no evidence that the sign had been erected prior to the closing of the sale to the Purchaser but without prejudice to move again on better material. That was never done.

5 Paragraph 50 of July 16, 2009 endorsement.

6 Paragraph 57 of July 16, 2009 endorsement

7 Paragraph 57 of July 16, 2009 endorsement

8 Paragraph 57 of July 16, 2009 endorsement and paragraph 3(b) of the September 21, 2009 endorsement.

9 Paragraph 3(b) of the September 21, 2009 endorsement.

10 Paragraph 62 of July 16, 2009 endorsement

11 Paragraph 5 of the September 21, 2009 endorsement

12 Court of Appeal decision January 12, 2010 paragraph 8.

13 *McKenzie v. Cramer*, [1947] O.R. 196 (H.C.J.) at paragraph 9.

14 *Elcano Acceptance Ltd. v. Richmond, Richmond, Stambler & Mills* (1986), 9 C.P.C. (2d) 260 (Ont. C.A.)

15 See for example *Bourne v. Saunby* (1993), 23 C.P.C. (3d) 333 (O.C.G.D.) at pg. 342 and *General Refractories Co. of Canada v. Venturedyne Ltd.*, [2001] O.J. No. 746, 6 C.P.C. (5th) 329 (S.C.J.) at paragraph 16.

16 Consolidation of one or more actions involves combing two or more actions into a single action, so that only one action continues throughout the litigation and there is only one action to be tried. Ordering trial together keeps the actions separate but requires that they be tried together or consecutively, typically as the trial judge directs.

17 The Neighbour admittedly supports the motion in order to have more deep pockets at the table. This is a strange position for the Neighbour to take as on the existing state of the pleadings there is no claim against the Vendor or the Lawyer for the Neighbour's damages either directly by the Neighbour or by way of indemnity claim by the Purchaser. Joinder can only serve to delay the Neighbour's action which is ready to be set down for trial.

18 See section 18 of the *Limitations Act, 2002*, S.O. 2002, C. 24, Schedule B which appears to require that claims for contribution and indemnity for the relief advanced against the Purchaser in the Nuisance Action be brought within 2 years of the date the Purchaser was served with the statement of claim in the Nuisance Action.

Tab 7

Indexed as:

Don Bodkin Leasing Ltd. v. Bank of Montreal

Between
Don Bodkin Leasing Limited, Plaintiff, and
Bank of Montreal and The Toronto-Dominion Bank, Defendants

[1990] O.J. No. 732

Action No. 10489/86

Ontario Supreme Court - High Court of Justice
Toronto, Ontario

Master Donkin

May 2, 1990

Practice -- Joinder of causes and consolidation -- Consolidation of actions -- Parties -- Third party procedure -- When available.

Motion by defendant for consolidation of actions and for an order allowing the defendant to bring a third party claim against officers and employees of the plaintiff. The plaintiff had sued defendant banks for recovery of funds which had been fraudulently diverted by one of the plaintiff's employees. The plaintiff also sued his accountants in a separate action for failure to detect the fraud sooner. The defendant wanted to bring a third party claim based on failure of plaintiff's employees to follow proper procedures and to deal properly with the monthly statements.

HELD: Motion dismissed. As action against banks was already listed for trial, whereas the action against the accountants was only in the beginning stages, the action against the banks would be greatly delayed if a consolidation order were made. The proposed third party claim was based on the same allegations that the defendant had made in the statement of defence. The court held the third party claim did not add anything to the action.

D. Quirt, for the Plaintiff.
D. McDuff, for the Defendant, Toronto-Dominion Bank.
B. Goddard, for the Defendants, Jarrett, Gould & Elliott and Price Waterhouse Defendants in action 8413/85.

MASTER DONKIN:-- This is a motion by the defendant Toronto-Dominion Bank for leave to issue a third party claim against certain employees and former employees of the plaintiff, and for an order that this action be consolidated with another action, or tried with or immediately after the other action.

The plaintiff had an employee named Williams. The plaintiff banked with Toronto-Dominion Bank. Williams forged certain cheques which were drawn on the plaintiff's account with its bank and he also managed to get into his hands the monthly bank statements and to deal with them in such a way that for many years his activities were not discovered. He also managed in one way or another to divert certain amounts into accounts of which he was the beneficiary. Some of these accounts were maintained by the Bank of Montreal.

Eventually, the activities of Williams became known and he was convicted of a criminal offence and sentenced to a term of imprisonment.

The present action is brought by the plaintiff against the Bank of Montreal and the Toronto-Dominion Bank for the recovery of the sums improperly handled by Williams. With respect to the actions of Williams that involved the delivery of monthly statements to the plaintiff's account, the Toronto-Dominion Bank takes the position that by virtue of its agreement with its customer, the customer is no longer in a position to bring an action based on errors which should have been picked up by an examination of that statement. Anticipating such a defence the plaintiff pleaded in its statement of claim that there had been no delivery of those statements and that the Bank was negligent and in breach of contract. What this comes down to is an argument that the statements should not have been delivered to Williams.

The other action is brought by the plaintiff against accountants. That action is based on the alleged failure of accountants to discover the activities of Williams long before they did in fact discover them. The defence in general terms alleges that the accountants followed proper accounting practice and were not negligent.

The actions were both started in 1986. With respect to consolidation, or trial together, the defendant Toronto-Dominion Bank states correctly that the damages in both actions will be the same. However, the two actions have very little else in common. There does not appear to be any real argument about what Williams really did and therefore there are few questions in dispute about the activities of Williams. It is true that the extent of his activities will have to be proved and that the defendant Toronto-Dominion Bank proposes to require the plaintiff to prove its damages and thereby to prove the actual extent of the activities of Williams. However, in the action against the banks the real issu+s will be the propriety of the Toronto-Dominion Bank delivering the monthly statements to Williams and the correctness of the actions of the Bank of Montreal. In the other action the real issues will be the conduct of the accountants in performing audits of the plaintiff's books and the standard of professional care required of those accountants.

The plaintiff has chosen to proceed with the action against the banks and some of the discoveries have been conducted and the plaintiff placed the action on the trial list in November 1987. It was struck from that list in December 1988, but went back on about a month later. The defendant Toronto-Dominion Bank has commenced its discovery of the plaintiff a year ago.

The plaintiff has not chosen to proceed with the action against the accountants because as counsel explained the plaintiff knows it can only recover its damages once. The parties to the action against the accountants are both content to wait to see the results of the action against the banks before deciding whether to incur the considerable cost by way of discovery and expert evidence, which would be required if that action goes to trial. It is apparent that if the plaintiff succeeds in the action against the banks it will not proceed with the action against the accountants. If it fails against the banks it may or may not proceed against the accountants.

The motion for consolidation or trial together is brought pursuant to rule 6.01. The approach to that rule is set out in Reichmann v. Toronto Life Publishing Co. (No. 1) (1988), 31 C.P.C. (2d) 54 at p. 60. Following the approach described by Anderson J. I find there is a common question of law or fact which is the extent of the plaintiff's damages. I further find that the relief claimed ir both actions arises out of the same series of transactions which is the series in which Williams participated.

I also find that there will be some duplication of evidence in establishing the damages.

The next matter to be approached is really a matter of drawing a comparison between the ills which might occur if the two trials are kept separate and the ills which might occur if the two cases are tried together, or one following another. In this case, counsel for the Toronto-Dominion Bank suggests that if the plaintiff fails against the Toronto-Dominion Bank, and then proceeds with its action against the accountants, the accountants might join the Toronto-Dominion Bank as a third party and might seek indemnity on the basis that the damage to the plaintiff was caused or contributed to at least in part by the Toronto-Dominion Bank. It is possible that the court hearing that action against the accountants and the third party claim might conclude that the Toronto-Dominion Bank did in fact contribute to the damages and if that happened there would be two contradictory findings. On the other hand, counsel for the plaintiff and for the accountants suggests that this risk is small and that to require trial together, or trial of one action following the other, would require the plaintiff and the defendant accountants to prepare fully for trial by examinations, the preparation of expert evidence, and any other steps necessary and would require the plaintiff to wait until that action was in a position to be tried. While delay in making a motion to consolidate is not fatal, I do not think it can be ignored. We are at a very late stage in the action against the banks and a relatively early stage in the action against the accountants.

In my view, more harm is done by ordering trial together or one following another than by leaving these two actions to be tried separately.

The motion for leave to issue a third party claim requests leave to make a claim against certain employees and former employees of the plaintiff. The plaintiff objects to leave being granted on the basis that the plaintiff will be prejudiced by being delayed at this late stage of the action. The plaintiff points out that if the third party claim is issued then the third parties have the right to defend the main action as well as the third party claim, they are subject to being examined, and they would probably have the right to examine the original parties again. This would probably entail a delay of a year. It is obvious that the third party claim would have to be tried at the same time as the main action. In my view, these are real matters of prejudice. There are other factors. One is that the defendant Toronto-Dominion bank has known for almost a year the facts out of which its proposed third party claim arises and while delay is not to be determinative on a motion such as this it is a factor.

The proposed third party claim against the officers and employees of the plaintiff is based or their failure to follow procedures Which had been outlined within the plaintiff organization itself and their failure to fulfill what is said to be a duty to the bank to properly deal with the monthly statements. It may be that the exact internal arrangements of the plaintiff which I referred to in this third party claim were not known to the defendant Toronto-Dominion Bank until the time of examinations for discovery but, in its defence delivered long before that the Toronto-Dominion Bank did state that the plaintiff was in breach of its duty owed to the bank to take reasonable and ordinary precautions to conduct its banking arrangements in a prudent manner. It also stated that the plaintiff owed a duty to the bank to examine the reconciliations and report discrepancies, and that the plaintiff breached that duty and further that the plaintiff was negligent in the supervision of its employees and failing to have internal control systems within the corporation to prevent and detect employee forgeries and that as a result of that negligence the plaintiff is estopped with respect to certain issues in the claim. If the bank succeeds in establishing this defence then it will not be liable. If it fails there will have been a judication to the effect that the plaintiff, who must act through its officers and employees, was not negligent. I cannot see how the third party claim can add anything to this action.

For the above reasons both branches of the motion are dismissed. With respect to costs, the defendant accountants in the other action are not parties to any action in which the Toronto-Dominion Bank is a party. Therefore costs must be dealt with now, and in my view they should be payable by the Toronto-Dominion Bank to the defendant accountants and should be assessed forthwith and paid forthwith. As between the plaintiff and the defendant Toronto-Dominion Bank the costs should be to the plaintiff in the cause.

MASTER DONKIN

Tab 8

Indexed as:

West York Construction (1984) Ltd. v. Walton Place (Scarborough) Inc.

Between
West York Construction (1984) Limited, Respondent, and Walton Place (Scarborough) Inc., Edward Beattie, Mildred Bleakley, Allan Boyd, William Perry, Kenneth Pettigrew, Baldeo Sairsingh, Dalton Smyth, Albert Thiessen, Charles Townsley, and John Clarke, Defendants

[1993] O.J. No. 3068

44 A.C.W.S. (3d) 1200

Action No. 91-CQ-8510

Ontario Court of Justice - General Division
Toronto, Ontario

Wilkins J.

December 17, 1993.

(12 pp.)

Practice -- Trials -- Joinder -- Factors to be considered -- Prejudice to opposing party -- Conduct and bona fides of party seeking joinder -- Similarity of issues.

Motion for an order that two actions be heard at the same time. The plaintiff's action arising out of a real estate development was set for trial in six months time when the applicant defendant moved for an order for leave to issue a third party claim against its own firm of architects. That motion having been dismissed, the applicant commenced a fresh action against the same architects. That action could not be ready for trial for at least one-and-a-half years. The issues raised in the action against the architects were materially the same as the issues attempted to be raised by the applicant by way of third party proceedings. The plaintiff contractor, who had not been paid, and, as such, had not been able to pay its subcontractors, resisted the motion on the ground that the delay resulting from an order directing a joint trial of the two actions would be excessive.

HELD: Motion dismissed. Although it might have been easier for all of the issues to be tried at one time, the excessive delay caused by the applicant in commencing the later proceedings and the inordinate length of the delay that would be necessitated and the obvious prejudices arising therefrom, convinced the court that justice was best served if the actions were tried separately. Parties to an action did not have the power to adjourn a fixed trial date simply by the issuance of fresh proceedings and by creating an overlap of fact and law in another proceeding. To automatically afford that right to the parties would be to abrogate the court's responsibilities.

STATUTES, REGULATIONS AND RULES CITED:

Ontario Rules of Civil Procedure, Rule 6.01.

John R. Carruthers, for the Plaintiff, West York Construction (1984) Limited.
Lisa Hamilton, for all Defendants, excepting John Clarke.
Sandro Laudadio, for the Defendant, John Clarke.
Michael MacKay, for the Defendant, Walton Place (Scarborough) Inc.
Andrew Lundy, for the Defendant, Brown Beck & Ross Architects in Action No. 93-CU-71461.

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1 **WILKINS J.**:-- The defendant, Walton Place (Scarborough) Inc., has brought two motions. The first motion is for an order that Court File No. 93-CU-71461 and Court File No. 93-CU-71461-A be heard at the same time or immediately following the trial of this action pursuant to the provisions of Rule 6. In companionship with this motion, the corporate defendant has moved for an order adjourning the trial of this action partly on the basis that this action should await action 93-CU-71461 and its companion third party claims and partly because it is asserted that the examinations on discovery of the plaintiff have, as yet, not been completed.

2 There is outstanding a motion and counter-motion brought to compel various parties to answer undertakings and to re-attend and answer refusals. At the present time, the status of that motion has been dealt with by an earlier order that requires no further comment in these motions.

3 On July 27th last, the corporate defendant moved for an order for leave to issue a late third party claim against its own firm of architects, Brown, Beck & Ross Architects. At that time and for the reasons given, I declined to delay the progress of the main action to allow what was a late attempt by the corporate defendant to expand the scope of the proceedings.

4 In the reasons given on July 30, 1993, I found there to be prejudice to the plaintiff and a very real apprehension of prejudice to the architects whom Walton Place sought to add as third parties at that time.

5 On this motion, it has been made clear that not only have the architects been added as defendants in a separate action, but the architects have, by third party proceedings, made West York Construction (1984) Limited a defendant in the third party proceedings and they have commenced third party proceedings against two firms of engineers, Robert Halsall and Associates Limited and M.V. Shore Associates Limited.

6 At the time of these motions, Brown, Beck & Ross Architects, the defendants in that action, were represented, but the two firms of engineers in the third party proceedings were not represented.

7 Counsel for the defendant architects in that proceeding has advised me that in order to do justice to his clients and in order to allow them to defend and to proceed with their third party claims and, further, to allow the firms of engineers to properly make true answer and defense that he believes that a pre-trial conference could not properly be held before late March or early April 1995. Counsel supports this by pointing out that the pleadings could likely be completed by mid-January 1994. In his file, there are 5,500 documents and he believes that each of the engineers added as third parties may have an equivalent number of documents. On this basis, he does not believe that the affidavit of documents could be ready to be prepared until about April of 1994. As far as delivery of the affidavit of documents is concerned, it could be shortly thereafter.

8 After the delivery of the documents, the discoveries would, in the opinion of counsel, be substantial and probably more lengthy than the discoveries held in this matter. To this extent, he did not believe that discoveries could be completed until the end of October 1994 and that date, he felt, was somewhat optimistic and would depend on counsel cooperating.

9 After the completion of discoveries and the resolution of any motions arising therefrom, the firm of architects would want to hire their own consultants to develop experts reports. This process is never short and, in the view of counsel, would take about four months.

10 After experts reports are on hand, it may be that other parties to the lawsuit wish to have those reports reviewed and develop their own experts reports.

11 On the basis of the above, it was the view of counsel for the architects that a proper and fair pre-trial conference in the matters in which he was involved could not be attained until some time in April 1995.

12 Although there may be some space in case management to advance the action in an expeditious and orderly fashion, it does seem to me unlikely, if not improbable, that a trial date could be attained before the spring of 1995 and more likely a trial date would be in the fall of 1995.

13 Rule 6.01 makes it clear that actions may be tried together or tried one after the other if they have common questions of fact or law, or if the relief arises out of the same transaction or occurrence. There is no question that the order being requested falls foursquare within the provisions of that rule. Counsel for the plaintiff concedes that under ordinary circumstances it would be more appropriate for the actions to all be tried together than it would be for there to be a separation of those actions. It is the position, however, of West York that the unfairness and prejudice arising from such an excessive delay is not capable of being compensated for by a straightforward order that the corporate defendant pay monies into court or by a cost order.

14 The corporate defendant takes the position that West York is not suffering any prejudice and that if there is any prejudice arising from delay, it will be visited upon the sub-trades who have not been paid and as a consequence thereof certain sub-trades may commence actions against West York and the costs of those actions can be added to the damages claimed by West York in this action.

15 On the information before me, it now appears that West York is not actually in financial difficulty, however, it has entered into contractual arrangements with most of its sub-trades whereby the sub-trades have agreed that they are not entitled to be paid until after West York has itself been

paid. I have had referred to me the specific wording of the agreement together with a list of the outstanding sub-trades who have, as yet, not been paid. The cross-examination of Mr. Kunst makes it abundantly clear that all of the monies in the hold-back in dispute would flow through West York directly to the sub-trades and that there is an amount outstanding to the sub-trades in the amount of $472,416.69.

16 Counsel for the corporate defendant argues that the prejudice of third parties, i.e. the sub-trades, is not a consideration that I should take into account and that since they have entered into a form of contract that was considered in the case of Timbro Developments Ltd. v. Grimsby Diesel Motors Inc. et al. 32 C.L.R. p. 32 that they should simply suffer the consequences of their own business arrangements. In that case, it was found by a majority of the Court of Appeal that the sub-contractors had clearly assumed the risk of non-payment by the owner to the contractor and since the contractor was not paid, it was not obliged to pay the sub-contractors.

17 In my view, there is more to this motion than the above issues. Having regard to the motion brought July 27, 1993 and my reasons at that time, it is my view that these motions are challenging the very nature of the court's capacity to control its own process and places in issue the question as to whether the tail or the dog will be wagged when it comes to deciding how an action in case management will progress to trial and obtain its ultimate resolution.

18 Although there may be sound arguments to be made that the prejudice of third parties should be ignored and that sub-contractors who enter into a form of contract that provides that they will not be paid unless the contractor is paid by the owner ought to be left to abide by the terms of those contracts, there is still much to be said for the application of common sense. The list of sub-trades to whom money is owed and the amount of that money is substantial. The delay to sometime in the spring or fall of 1995 is most substantial. Given the realities of the economy, a delay of that sort might well be perceived to be capable of giving rise to higher degree of harm in the long run. Although it may not be appropriate for the courts to consider the fall-out effects on parties removed from the action, it is certainly not something, however, which should be totally ignored when common sense dictates that it is a probable result. I say this particularly in respect of the court's responsibility to govern and control its own process and the sort and nature of considerations which a judge should bring to mind when exercising a discretion.

19 A review of the proceedings brought against the architect and the third party proceedings brought against the two firms of engineers satisfies me that the issues raised are in no way materially different from the issues that were attempted to be raised by way of third party proceedings by the corporate defendant in the motion heard July 27, 1993.

20 A review of the pleadings and the affidavits together with the transcripts filed suggests that these very same issues had been raised in this action. When the pleadings in this action were complete, there was, in my view, sufficient information in all of the pleadings to put Walton Place on notice that they ought to be considering their position vis-à-vis the architects. Having established a trial date of January 4, 1994 by agreement before the pre-trial judge on June 9, 1993, and having been found to be too late in the day to delay the action for third party proceedings at the end of July 1993, it strikes me as doubly late to be asking for joinder of actions and adjournment of the trial in December of 1993 as a consequence of proceedings which have only just recently been initiated or discoveries which have not been completed because of counsel's delay in moving.

21 There has to be some structure and some order in the method by which actions progress to trial. Within the bounds of reason, Rule 6 provides that a court ought properly to attempt to have all the matters before it at one time. There are, however, circumstances which, if allowed to persist, could mature into an abuse of the process. For example, the two firms of engineers added as third parties and as yet unrepresented might conceivably find it necessary to add somebody else as a forth party, hence necessitating a further delay in an action in which the architects' solicitors have persuasively pointed out, cannot have a fair trial until the spring or fall of 1995.

22 The parties to an action do not have the power to adjourn a fixed trial date simply by issuance of fresh process and creating an overlap of fact and law in a second piece of litigation. To automatically afford that right to the parties would be to abrogate the court's responsibilities.

23 Having regard to my reasons arising from the motion of July 27, 1993, I find that this is not a proper circumstance for consolidation or for an order that the trials be conducted one after the other. Although it might have been better and although it might have been easier for all of the issues to have been tried at one time, the excessive delay by Walton Place in commencing the proceedings against the architect together with the inordinate length of delay that would be necessitated and the obvious prejudices arising therefrom convince me that this is one of these situations where justice would be best served by the two actions being tried separately.

24 Counsel for all of the individual defendants with the exception of Clarke has advised that he is not in a position to be able to start the trial on the January 4, 1994 by reason of having been placed in a fixed commitment to appear in another court. That commitment was not of the making of counsel but was done without counsel's knowledge and he is now bound by that requirement.

25 Having regard to this, the action will remain on the trial list for trial of actions to be heard for the week commencing January 4, 1994, however, it will be held down pending counsel's completion of the other matters in which he is engaged and he shall be entitled to a few days' grace between the completion of those actions and the commencement of this action.

26 In the interval, I fix Tuesday, January 11, 1994 at 9:00 a.m. for the holding of an extra pre-trial conference in this matter.

27 Pre-trial conference memoranda shall be delivered to me no later than 2:00 p.m. on Friday, January 7, 1994.

28 All interlocutory motions and all examinations on discovery shall be completed prior to the date fixed for the extra pre-trial conference and all documents and transcripts shall be available by that date.

29 These motions were brought only by Walton Place (Scarborough) Inc. and the other defendants took no position other than the specific request for an indulgence. Having regard to the result of these motions and their dismissal, the respondent/ plaintiff West York shall have its costs for both motions fixed and payable forthwith in the amount of $4,000.00 by the applicant/ defendant Walton or, alternatively, the applicant/defendant Walton may have a right of assessment after paying to West York that sum, and after the assessment of those costs with either West York being liable to rebate any overage that me be paid or, alternatively, the applicant/defendant Walton to be liable for any costs assessed in excess.

WILKINS J.

Tab 9

Indexed as:

J.P. Capital Corp. (Re)

IN THE MATTER OF the Bankruptcy and Insolvency Act
AND IN THE MATTER OF the Bankruptcy of J.P. Capital Corporation (Bankruptcy Court File No. 074183)
AND IN THE MATTER OF the Bankruptcy of Jose Perez (Bankruptcy Court File No. 073885)
AND IN THE MATTER OF the Bankruptcy of J.P. Corporation (Bankruptcy Court File No. 073910)

[1995] O.J. No. 538

31 C.B.R. (3d) 102

54 A.C.W.S. (3d) 12

Court File Nos. 074183, 073885, 073910

Ontario Court of Justice (General Division)
Ottawa, Ontario

Chadwick J.

Oral judgment: February 28, 1995.

(8 pp.)

Bankruptcy -- Practice -- Joinder and consolidation -- Consolidation of estates -- Bars.

The trustee in bankruptcy sought an order consolidating three estates. The application was opposed by the individual bankrupt who at one time controlled the bankrupt companies. However, shortly before the bankruptcies, there was a restructuring and he distanced himself from the control of these companies.

HELD: The application was dismissed without prejudice to the trustee to renew the application once there was a clearer identification of the corporate structure, the assets and the effect of a pari passu distribution on the unsecured creditors. Although the law provided for consolidation of actions to avoid multiplicity, the bankruptcy was extremely complex and there was concern that consolidating

the actions would provide for pari passu distribution without knowing the effect that such an order would have on all creditors.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, s. 4. Courts of Justice Act, s. 138.
Ontario Rules of Civil Procedure, Rule 6.01(1).

Counsel:

Denis J. Power, Q.C., for the Trustee, Deloitte & Touche Inc.
Martin Z. Black, for Jose Perez.

---

1 **CHADWICK J.** (Orally):-- The trustee in bankruptcy of the above three bankrupt estates seeks and order consolidating the three estates under one title of proceedings. Further they seek an order that any realization of assets in any of the three bankruptcies shall be deemed to be for the credit of the consolidated proceedings with the intent that all creditors, regardless of which proceeding under which they filed proofs of claim, shall be entitled to share dividends on a pari passu in the division of such assets.

2 The application is opposed by counsel on behalf of the bankrupt, Jose Perez, and others.

3 At one time, the two bankrupt companies were controlled by the bankrupt Jose Perez. Shortly before the bankruptcies, there was a restructuring of the corporations and the individual bankrupt Jose Perez distanced himself from the control of these corporations.

4 Beside the two bankrupt corporation there are a number of other related corporations which are not part of the bankrupt estate, but in some cases, creditors of the bankrupt estates.

5 Counsel for the trustee acknowledges that there is no authority in the provisions of the Bankruptcy and Insolvency Act to provide for consolidation other than the general provisions of the act.

6 Section 4 B.I.A. states:

> The practice of the court in civil actions or matters, including the practice in chambers, shall, in cases not provided for by the act or these rules, insofar as it is applicable and not inconsistent with the act or these rules, apply to all proceedings under the act or these rules.

7 The Courts of Justice Act s.138 and the Rules of Practice R.6.01(1) attempt to avoid multiplicity of proceedings and provide for the consolidation of actions. The rule provides that there must be a common question of fact or law or the relief claim arises out of the same transactions or occurrences or a series of transactions or occurrences.

8 In Re A. and F. Baillargeon Express Inc. 37 C.B.R. (3d) 36, Greenberg J. of the Quebec Superior Court dealt with a similar application. In that case there were five bankrupt companies, and twenty-one related companies that were not bankrupt but an interim receiver had been appointed. The five bankrupt companies were operated as one company with an intermingling of customer

lists, bank accounts and assets without any separate corporate identity. In addition, the twenty-one companies that were not bankrupt also operated in a similar manner; there was a total intermingling of assets, operations, creditors and liabilities of all twenty-six companies.

9 The trustee brought a motion seeking the consolidation and the administration of five bankrupt estates. The registrar in bankruptcy dismissed the motion and on appeal Greenberg J. allowed the consolidation order to issue.

10 Greenberg J. acknowledged that there was no provision in the B.I.A. for consolidation of actions, but reviewed the American Authorities and in particular an article in California Law Review, Vol. LXV, p.720 entitled "Flow-of-Assets Approach". The article referred to an American case in Chemical Bank New York Trust Company v. Kheel 369 F. 2d 845 (2d CIR. 1966) where there was a similar situation where the companies paid no attention to the formalities of a corporation and operated by intermingling all the assets and accounts and were controlled by the same board of directors. In allowing the appeal, Greenberg J. stated at p.44:

> There is also the consideration that in Bankruptcy matters the Court exercises an equitable as well as a legal jurisdiction, and that practicality is always the order of the day. It is frequently said in the jurisprudence that the Act is a "businessman's law" and that practical business considerations should not be disregarded, as they sometimes are in other domains where a strict interpretation of the law must be followed and observed.

11 I am satisfied that the general provisions of s.4 of the B.I.A. and the Rules of Civil Procedure and the Courts of Justice Act in Ontario provide for consolidation of actions in order to avoid multiplicity of proceedings providing there are common questions of fact and law or the relief claimed arises out of the same transaction or occurrence or series of transactions or occurrences.

12 This consolidation application goes further than to consolidate for the purpose of avoiding multiplicity of proceedings and actually intermingles the assets of the corporate bankrupt into one common pool to be distributed on a pari passu basis. Rule 6.01(1) and s.138 Courts of Justice Act does not provide for an intermingling of assets and distribution from a common pool of funds.

13 The situation in this application differs somewhat from the facts in A. & F. Baillargeon Express Inc. in that the two bankrupt corporations maintained distinct and separate bank accounts and have acted as separate legal entities.

14 The other distinguishing factor is that Jose Perez, as an individual, may be in a different position relating to his discharge and that of the corporate bankrupts.

para15] A number of the major unsecured creditors are creditors in both estates and some claim guarantees over against the bankrupt Jose Perez. The majority of the creditors although served with this motion have not appeared and in fact have consented to the consolidation.

16 This consolidation application goes further than to consolidate for the purpose of avoiding multiplicity of proceedings and actually intermingles the assets of the corporate bankrupt into one common pool to be distributed on a pari passu basis. Rule 6.01(1) and s.138 Courts of Justice Act does not provide for an intermingling of assets and distribution from a common pool of funds.

17 I accept the evidence of Chris St. Germain, senior manager at Deloitte & Touche with reference to the fact that the consolidation of the actions will make the administration easier and no doubt in the long run, will probably save administrative fees.

18 My concern at this time is we are dealing with an extremely complex bankruptcy involving and touching on a number of companies and assets. Cross-examination of various people have been conducted over the past three or four months and have not yet been concluded. The actual corporate structure of the various companies and the tracing of assets in relationship to the parties is clearly in issue.

19 I am concerned with consolidating the actions which will provide for pari passu distribution without knowing the effect that such an order will have on all creditors. Although expediency is an appropriate consideration it should not be done at the possible prejudice or expense of any particular creditor.

20 Under the circumstances the application for consolidation is dismissed without prejudice to the trustee to renew the application once there has been a clearer identification of the corporate structure, the assets, and the effect a pari passu distribution would have on the unsecured creditors.

CHADWICK J.

qp/d/das/gta/DRS/DRS

Tab 10

COURT OF APPEAL FOR ONTARIO
COUR D'APPEL DE L'ONTARIO

PLEASE ADDRESS ALL COMMUNICATIONS TO:
ADRESSER TOUTE CORRESPONDANCE À :

SENIOR LEGAL OFFICER/AVOCAT PRINCIPAL
OSGOODE HALL
130 QUEEN STREET WEST/130, RUE QUEEN OUEST
TORONTO, ONTARIO
M5H 2N5

April 3, 2012
Sent by fax

David Byers
Stikeman Elliott LLP
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Dear Mr. Byers:

RE: In the Matter of the *Companies' Creditors Arrangement Act*
Re: Crystallex International Corporation

Associate Chief Justice O'Connor has reviewed your letter of April 2, 2012 regarding the above noted matter. He has requested that I respond on his behalf.

The Associate Chief Justice is prepared to case manage these matters. However, he is not prepared to meet before April 5th, 2012, the date that Justice Newbould may render a decision that might be the subject of a further motion for leave to appeal.

He has asked that I advise you that it is not his inclination, at this time, to collapse both motions for leave to appeal and both potential appeals into a single oral argument. The Court prefers to deal with the motions for leave to appeal in-writing first. If leave is granted, he will make special arrangements to schedule an early hearing for the appeal(s).

In fact, the Associate Chief Justice has requested that I advise you that if the parties prepare motion records and factums for both the earlier motion for leave to appeal (M41032) and the "new" motion for leave to appeal and file the material on Tuesday April 10, 2012 (Monday not being a juridical day) he will arrange to have the motions for leave to appeal in both cases heard in-writing on that day. If leave is granted in respect of either motion, he will arrange a case management meeting to ensure that the parties receive an appropriate early hearing for any such appeal.

I trust the foregoing is clear but if you have inquiries please do not hesitate to contact me.

Yours truly,

JOHN H. KROMKAMP
Senior Legal Officer
Court of Appeal for Ontario

JHK/va

c.c.: The Honourable Associate Chief Justice O'Connor

c.c.: Markus Koehnen, McMillan LLP
Richard Swan, Bennett Jones LLP
Brian Denega, Ernst & Young Inc.

Tab 11

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 -- Opera-

tion 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.

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 OR COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Court of Appeal File Number: M42404
Court File No. CV-12-9667-00CL

COURT OF APPEAL FOR ONTARIO

RESPONDING BOOK OF AUTHORITIES OF SINO-FOREST CORPORATION (Motion for Directions)

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