*Indexed as:*

# Hollick v. Toronto (City)

**John Hollick, appellant;**
**v.**
**City of Toronto, respondent, and**
**Friends of the Earth, West Coast Environmental Law Association, Canadian Association of Physicians for the Environment, the Environmental Commissioner of Ontario and Law Foundation of Ontario, interveners.**

[2001] 3 S.C.R. 158

[2001] S.C.J. No. 67

**2001 SCC 68**

File No.: 27699.

Supreme Court of Canada

2001: June 13 / 2001: October 18.

**Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO (38 paras.)

*Practice -- Class actions -- Certification -- Plaintiff complaining of noise and physical pollution from landfill owned and operated by city -- Plaintiff bringing action against city as representative of some 30,000 other residents who live in vicinity of landfill -- Whether plaintiff meets certification requirements set out in provincial class action legislation -- Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5(1).*

The appellant complains of noise and physical pollution from a landfill owned and operated by the respondent city. He sought certification, under Ontario's Class Proceedings Act, 1992, to represent some 30,000 people who live in the vicinity of the landfill. The motions judge found that the appellant had satisfied each of the five certification requirements set out in s. 5 of the Act and ordered that the appellant be allowed to pursue his action as representative of the stated class. The Division-

al Court overturned the certification order on the grounds that the appellant had not stated an identifiable class [page159] and had not satisfied the commonality requirement. The Court of Appeal dismissed the appellant's appeal, agreeing with the Divisional Court that commonality had not been established.

Held: The appeal should be dismissed.

The Class Proceedings Act, 1992 should be construed generously to give full effect to its benefits. The Act was adopted to ensure that the courts had a procedural tool sufficiently refined to allow them to deal efficiently, and on a principled rather than ad hoc basis, with the increasingly complicated cases of the modern era.

In this case there is an identifiable class within the meaning of s. 5(1)(b). The appellant has defined the class by reference to objective criteria, and whether a given person is a member of the class can be determined without reference to the merits of the action. With respect to whether "the claims ... of the class members raise common issues", as required by s. 5(1)(c), the underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be common only where its resolution is necessary to the resolution of each class member's claim. Further, an issue will not be "common" in the requisite sense unless the issue is a substantial ingredient of each of the class members' claims. Here, if each of the class members has a claim against the respondent, some aspect of the issue of liability is common within the meaning of s. 5(1)(c). The issue is whether there is a rational connection between the class as defined and the asserted common issues. While the putative representative must show that the class is defined sufficiently narrowly, he or she need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. The appellant has met his evidentiary burden. It is sufficiently clear that many individuals besides the appellant were concerned about noise and physical emissions from the landfill. Moreover, while some areas within the geographical area specified by the class definition appear to have been the source of a disproportionate number of complaints, complaints were registered from many different areas within the specified boundaries.

A class proceeding would not be the preferable procedure for the resolution of the common issues, however, as required by s. 5(1)(d). In the absence of legislative guidance, the preferability inquiry should be conducted through the lens of the three principal advantages of class actions: judicial economy, access [page160] to justice, and behaviour modification. The question of preferability must take into account the importance of the common issues in relation to the claims as a whole. The preferability requirement was intended to capture the question of whether a class proceeding would be preferable in the sense of preferable to other procedures such as joinder, test cases and consolidation. The preferability analysis requires the court to look to all reasonably available means of resolving the class members' claims, and not just at the possibility of individual actions. The appellant has not shown that a class action is the preferable means of resolving the claims raised here. With respect to judicial economy, any common issue here is negligible in relation to the individual issues. While each of the class members must, in order to recover, establish that the landfill emitted physical or noise pollution, it is likely that some areas were affected more seriously than others, and that some areas were affected at one time while other areas were affected at other times. Once the common issue is seen in the context of the entire claim, it becomes difficult to say that the resolution of the common issue will significantly advance the action. Nor would allowing a class action here serve the interests of access to justice. The fact that no claims have been made against the

Small Claims Trust Fund may suggest that the class members claims are either so small as to be non-existent or so large as to provide sufficient incentive for individual action. In either case access to justice is not a serious concern. The argument that behaviour modification is a significant concern in this case should be rejected for similar reasons.

**Cases Cited**

Referred to: Rylands v. Fletcher (1868), L.R. 3 H.L. 330; Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172; Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, 2001 SCC 46; Caputo v. Imperial Tobacco Ltd. (1997), 34 O.R. (3d) 314; Webb v. K-Mart Canada Ltd. (1999), 45 O.R. (3d) 389; Mouhteros v. DeVry Canada Inc. (1998), 41 O.R. (3d) 63; Taub v. Manufacturers Life Insurance Co. (1998), 40 O.R. (3d) 379; Abdool v. Anaheim Management Ltd. (1995), 21 O.R. (2d) 453; Rumley v. British Columbia, [2001] 3 S.C.R. 184, 2001 SCC 69.

**Statutes and Regulations Cited**

Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 4(2).
Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 2(1), (2), 5(1), (4), (5), 6.

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Code of Civil Procedure, R.S.Q., c. C-25, Book IX.
Environmental Bill of Rights,1993, S.O. 1993, c. 28, ss. 61(1), 74(1).
Environmental Protection Act, R.S.O. 1990, c. E.19, ss. 14(1), 99, 172(1), 186(1).
Family Law Act, R.S.O. 1990, c. F.3.
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APPEAL from a judgment of the Ontario Court of Appeal (1999), 46 O.R. (3d) 257, 181 D.L.R. (4th) 426 (sub nom. Hollick v. Metropolitan Toronto (Municipality)), 127 O.A.C. 369, 32 C.E.L.R. (N.S.) 1, 41 C.P.C. (4th) 93, 7 M.P.L.R. (3d) 244, [1999] O.J. No. 4747 (QL), dismissing an appeal

from a decision of the Divisional Court (1998), 42 O.R. (3d) 473, 168 D.L.R. (4th) 760, 116 O.A.C. 108, 28 C.E.L.R. (N.S.) 198, 31 C.P.C. (4th) 64, [1998] O.J. No. 5267 (QL), allowing an appeal from a decision of the Ontario Court (General Division) (1998), 27 C.E.L.R. (N.S.) 48, 18 C.P.C. (4th) 394, [1998] O.J. No. 1288 (QL), granting a motion to have an action certified as a class proceeding. Appeal dismissed.

Michael McGowan, Kirk M. Baert, Pierre Sylvestre and Gabrielle Pop-Lazic, for the appellant.

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Graham Rempe and Kalli Y. Chapman, for the respondent.
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Doug Thomson and David McRobert, for the intervener the Environmental Commissioner of Ontario.
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Solicitor for the intervener the Law Foundation of Ontario: Mark M. Orkin, Toronto.

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The judgment of the Court was delivered by

1 **McLACHLIN C.J.**:-- The question raised by this appeal is whether the appellant has satisfied the certification requirements of Ontario's Class Proceedings Act, 1992, S.O. 1992, c. 6, and whether the appellant should accordingly be allowed to pursue his action against the City of Toronto as the representative of some 30,000 other residents who live in the vicinity of a landfill owned and operated by the City. For the following reasons, I conclude that the appellant has not satisfied the certification requirements, and consequently that he may pursue this action only on his own behalf, and not on behalf of the stated class.

I. Facts

2 The appellant Hollick complains of noise and physical pollution from the Keele Valley landfill, which is owned and operated by the respondent City of Toronto. The appellant sought certification, under Ontario's Class Proceedings Act, 1992, to represent some 30,000 people who live in the vicinity of the landfill, in particular:

A. All persons who have owned or occupied property in the Regional Municipality of York, in the geographic [page163] area bounded by Rutherford Road on the south, Jane Street on the west, King-Vaughan Road on the north and Yonge Street on the east, at any time on or after February 3, 1991, or where such a person is deceased, the personal representative of the estate of the deceased person; and

B. All living parents, grandparents, children, grandchildren, siblings, and spouses (within the meaning of s. 61 of the Family Law Act) of persons who were owners and/or occupiers ... .

The merits of the dispute between the appellant and the respondent are not at issue on this appeal. The only question is whether the appellant should be allowed to pursue his action as representative of the stated class.

**3** Until 1983, the Keele Valley site was a gravel pit owned privately. It operated under a Certificate of Approval issued by the Ministry of the Environment in 1980. After the respondent purchased the site in 1983, the Ministry of the Environment issued a new Certificate of Approval. The 1983 Certificate covers an area of 375.9 hectares, of which 99.2 hectares are actual disposal area. The remainder of the land constitutes a buffer zone. The Certificate restricts Keele Valley to the receipt of non-hazardous municipal or commercial waste, and it sets out various other requirements relating to the processing and storage of waste at the site. It also provides for a Small Claims Trust Fund of $100,000, administered by the Ministry of the Environment, to cover individual claims of up to $5,000 arising out of "off-site impact".

**4** The Ministry of the Environment monitors the Keele Valley site by employing two full-time inspectors at the site and by reviewing detailed reports that the respondent is required to file with the Ministry. In addition, the City of Vaughan has established the Keele Valley Liaison Committee, which is meant to provide a forum for community concerns related to the site. Until 1998, the appellant participated regularly at meetings of the Liaison Committee. Finally, the respondent maintains a telephone complaint system for members of the community.

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**5** The appellant's claim is that the Keele Valley landfill has unlawfully been emitting, onto his own lands and onto the lands of other class members:

(a) large quantities of methane, hydrogen sulphide, vinyl chloride and other toxic gases, obnoxious odours, fumes, smoke and airborne, bird-borne or air-blown sediment, particulates, dirt and litter (collectively referred to as "Physical Pollution"); and

(b) loud noises and strong vibrations (collectively referred to as "Noise Pollution");

The appellant filed a motion for certification on November 28, 1997. In support of his motion, the appellant pointed out that, in 1996, some 139 complaints were registered with the respondent's telephone complaint system. (Before this Court, the appellant submitted that "at least 500" complaints were made "to various governmental authorities between 1991 and 1996" (factum, at para. 7).) The

appellant also noted that, in 1996, the respondent was fined by the Ministry of Environment in relation to the composting of grass clippings at a facility located just north of the Keele Valley landfill. In the appellant's view, the class members form a well-defined group with a common interest vis-à-vis the respondent, and the suit would be best prosecuted as a class action. The appellant seeks, on behalf of the class, injunctive relief, $500 million in compensatory damages and $100 million in punitive damages.

**6** The respondent disputes the legitimacy of the appellant's complaints and disagrees that the suit should be permitted to proceed as a class action. The respondent claims that it has monitored air emissions from the Keele Valley site and the data confirm that "none of the air levels exceed Ministry of the Environment trigger levels". It notes that there are other possible sources for the pollution of which the appellant complains, including an active quarry, a private transfer station for waste, a plastics factory, and an asphalt plant. In addition, some farms in the area have private compost operations. The respondent also argues that the number of registered complaints -- it says that 150 people complained over the six-year period covered in the [page165] motion record -- is not high given the size of the class. Finally, it notes that, to date, no claims have been made against the Small Claims Trust Fund.

## II. Judgments

**7** The motions judge, Jenkins J., found that the appellant had satisfied each of the five certification requirements set out in s. 5(1) of the Class Proceedings Act, 1992: (1998), 27 C.E.L.R. (N.S.) 48. He found that the appellant's statement of claim disclosed causes of action under s. 99 of the Environmental Protection Act, R.S.O. 1990, c. E.19, and under the rule in Rylands v. Fletcher (1868), L.R. 3 H.L. 330; that the appellant had defined an identifiable class of two or more persons; that the issues of liability and punitive damages were common to the class; and that a class action would be the preferable procedure for resolving the complaints of the class. Finally, he found that the appellant would be an adequate representative for the class and that the appellant had set out a workable litigation plan. Though Jenkins J. struck out the appellant's claim for injunctive relief on the ground that damages would be a sufficient remedy and rejected his claims under the Family Law Act, R.S.O. 1990, c. F.3, on the grounds that the facts pleaded "cannot ... establish a basis for a claim for loss of care, guidance, and companionship" (p. 62). Jenkins J. concluded that the appellant had satisfied the certification requirements of s. 5(1). Accordingly he ordered that the appellant be allowed to pursue his action as representative of the stated class.

**8** The Ontario Divisional Court, per O'Leary J., overturned the certification order on the grounds that the appellant had not stated an identifiable class and had not satisfied the commonality requirement: (1998), 42 O.R. (3d) 473. O'Leary J. interpreted the identifiable class requirement to require that "there be a class that can all pursue the same cause of action" against the defendant. He noted that "[t]o pursue such cause of action the members of the class must have suffered the interference with use and enjoyment of property complained of in the [page166] statement of claim" (p. 479). O'Leary J. concluded that the appellant had not stated an identifiable class (at pp. 479-80):

> [T]he evidence does not make it likely that th[e] 30,000 [class members] suffered such interference. It cannot be assumed that the complaints made to Toronto make it likely that the landfill was the cause of the odour or thing complained about... . [E]ven if one were to assume that the Keele Valley landfill site was the source of all the complaints, 150 people making complaints over a seven-year

> period does not make it likely that some 30,000 persons had their enjoyment of their property interfered with.

For the same reasons, he concluded that the appellant had not satisfied the commonality requirement, writing that "[b]ecause the class that was certified ... bears no resemblance to any group that was on the evidence likely injured by the landfill operation, there are no apparent common issues relating to the members of the class" (p. 480). O'Leary J. set aside the certification order without prejudice to the plaintiff's right to bring a fresh application on further evidence.

**9** The Court of Appeal for Ontario, per Carthy J.A., dismissed Hollick's appeal ((1999), 46 O.R. (3d) 257), agreeing with the Divisional Court that commonality had not been established. Citing Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172 (Ont. Ct. (Gen. Div.)), Carthy J.A. noted that the definition of a class should not depend on the merits of the litigation. However, he saw no bar to a court's looking beyond the pleadings to determine whether the certification criteria had been satisfied. "If it were otherwise", he noted, "any statement of claim alleging the existence of an identifiable group of people would foreclose further consideration by the court" (p. 264). Carthy J.A. acknowledged that a court should not test the existence of a class by demanding evidence that each member of the purported class have, individually, a claim on the merits. The court should, however, demand "evidence to give some credence to the allegation that ... 'there is an identifiable class ...'" (p. 264) (emphasis deleted).

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**10** Carthy J.A. did not find it necessary to resolve the issue of whether the appellant had stated an identifiable class, because in his view the appellant had not satisfied the commonality requirement. In Carthy J.A.'s view, proof of nuisance was essential to each of the appellant's claims. Because a nuisance claim requires the plaintiff to make an individualized showing of harm, there was no commonality between the class members. Carthy J.A. wrote (at pp. 266-67):

> This group of 30,000 people is not comparable to patients with implants, the occupants of a wrecked train or those who have been drinking polluted water. They are individuals whose lives have each been affected, or not affected, in a different manner and degree and each may or may not be able to hold the respondent liable for a nuisance... .
>
> No common issue other than liability was suggested and I cannot devise one that would advance the litigation.

Carthy J.A. dismissed the appeal, affirming the Divisional Court's order except insofar as it would have allowed the appellant to bring a fresh application on further evidence.

## III. Legislation

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

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

(a) the pleadings or the notice of application discloses a cause of action;
(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
(c) the claims or defences of the class members raise common issues;
(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
(e) there is a representative plaintiff or defendant who,

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

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(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

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

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

IV. Issues

**12** Should the appellant be permitted to prosecute this action on behalf of the class described in his statement of claim?

V. Analysis

**13** Ontario's Class Proceedings Act, 1992, like similar legislation adopted in British Columbia and Quebec, allows a member of a class to prosecute a suit on behalf of the class: see Ontario Class Proceedings Act, 1992, s. 2(1); see also Quebec Code of Civil Procedure, R.S.Q., c. C-25, Book IX;

British Columbia Class Proceedings Act, R.S.B.C. 1996, c. 50. In order to commence such a proceeding, the person who seeks to represent the class must make a motion for an order certifying the action as a class proceeding and recognizing him or her as the representative of the class: see Class Proceedings Act, 1992, s. 2(2). Section 5 of the Act sets out five criteria by which a motions judge is to assess whether [page169] the class should be certified. If these criteria are satisfied, the motions judge is required to certify the class.

**14** The legislative history of the Class Proceedings Act, 1992, makes clear that the Act should be construed generously. Before Ontario enacted the Class Proceedings Act, 1992, class actions were prosecuted in Ontario under the authority of Rule 12.01 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. That rule provided that

> [w]here there are numerous persons having the same interest, one or more of them may bring or defend a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so.

While that rule allowed courts to deal with relatively simple class actions, it became clear in the latter part of the 20th century that Rule 12.01 was not well-suited to the kinds of complicated cases that were beginning to come before the courts. These cases reflected "[t]he rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs": Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, 2001 SCC 46, at para. 26. They often involved vast numbers of interested parties and complex, intertwined legal issues -- some common to the class, some not. While it would have been possible for courts to accommodate moderately complicated class actions by reliance on their own inherent power over procedure, this would have required courts to devise ad hoc solutions to procedural complexities on a case-by-case basis: see Western Canadian Shopping Centres, at para. 51. The Class Proceedings Act, 1992, was adopted to ensure that the courts had a procedural tool sufficiently refined to allow them to deal efficiently, and on a principled rather than ad hoc basis, with the increasingly complicated cases of the modern era.

**15** The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. As I discussed at some length in Western Canadian Shopping Centres (at paras. [page170] 27-29), class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public. In proposing that Ontario adopt class action legislation, the Ontario Law Reform Commission identified each of these advantages: see Ontario Law Reform Commission, Report on Class Actions (1982), vol. I, at pp. 117-45; see also Ministry of the Attorney General, Report of the Attorney General's Advisory Committee on Class Action Reform (February 1990), at pp. 16-18. In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.

**16** It is particularly important to keep this principle in mind at the certification stage. In its 1982 report, the Ontario Law Reform Commission proposed that new class action legislation include a "preliminary merits test" as part of the certification requirements. The proposed test would have required the putative class representative to show that "there is a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class": Report on Class Actions, supra, vol. III, at p. 862. Notwithstanding the recommendation of the Ontario Law Reform Commission, Ontario decided not to adopt a preliminary merits test. Instead it adopted a test that merely requires that the statement of claim "disclos[e] a cause of action": see Class Proceedings Act, 1992, s. 5(1)(a). Thus the certification stage is decidedly [page171] not meant to be a test of the merits of the action: see Class Proceedings Act, 1992, s. 5(5) ("An order certifying a class proceeding is not a determination of the merits of the proceeding"); see also Caputo v. Imperial Tobacco Ltd. (1997), 34 O.R. (3d) 314 (Gen. Div.), at p. 320 ("any inquiry into the merits of the action will not be relevant on a motion for certification"). Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action: see generally Report of the Attorney General's Advisory Committee on Class Action Reform, at pp. 30-33.

**17** With these principles in mind, I turn now to the case at bar. The issue is whether the appellant has satisfied the certification requirements set out in s. 5 of the Act. The respondent does not dispute that the appellant's statement of claim discloses a cause of action. The first question, therefore, is whether there is an identifiable class. In my view, there is. The appellant has defined the class by reference to objective criteria; a person is a member of the class if he or she owned or occupied property inside a specified area within a specified period of time. Whether a given person is a member of the class can be determined without reference to the merits of the action. While the appellant has not named every member of the class, it is clear that the class is bounded (that is, not unlimited). There is, therefore, an identifiable class within the meaning of s. 5(1)(b): see J. H. Friedenthal, M. K. Kane and A. R. Miller, Civil Procedure (2nd ed. 1993), at pp. 726-27; Bywater, supra, at pp. 175-76; Western Canadian Shopping Centres, supra, at para. 38.

**18** A more difficult question is whether "the claims ... of the class members raise common issues", as required by s. 5(1)(c) of the Class Proceedings Act, 1992. As I wrote in Western Canadian Shopping Centres, the underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". Thus an issue will be common "only where its resolution is necessary to the resolution of each class member's claim" (para. 39). Further, [page172] an issue will not be "common" in the requisite sense unless the issue is a "substantial ... ingredient" of each of the class members' claims.

**19** In this case there is no doubt that, if each of the class members has a claim against the respondent, some aspect of the issue of liability is common within the meaning of s. 5(1)(c). For any putative class member to prevail individually, he or she would have to show, among other things, that the respondent emitted pollutants into the air. At least this aspect of the liability issue (and perhaps other aspects as well) would be common to all those who have claims against the respondent. The difficult question, however, is whether each of the putative class members does indeed have a claim -- or at least what might be termed a "colourable claim" -- against the respondent. To put it another way, the issue is whether there is a rational connection between the class as defined and the asserted common issues: see Western Canadian Shopping Centres, at para. 38 ("the criteria [defining the class] should bear a rational relationship to the common issues asserted by all class members"). In asserting that there is such a relationship, the appellant points to the numerous complaints

against the Keele Valley landfill filed with the Ministry of Environment. In the appellant's view, the large number of complaints shows that many others in the putative class, if not all of them, are similarly situated vis-à-vis the respondent. For its part the respondent asserts that "150 people making complaints over a seven-year period does not make it likely that some 30,000 persons had their enjoyment of their property interfered with" (Divisional Court's judgment, at pp. 479-80). The respondent also quotes the Ontario Court of Appeal's judgment (at p. 264), which declined to find commonality on the grounds that

> [i]n circumstances such as are described in the statement of claim one would expect to see evidence of the existence of a body of persons seeking recourse for their [page173] complaints, such as, a history of "town meetings", demands, claims against the no fault fund, [and] applications to amend the certificate of approval ... .

**20** The respondent is of course correct to state that implicit in the "identifiable class" requirement is the requirement that there be some rational relationship between the class and common issues. Little has been said about this requirement because, in the usual case, the relationship is clear from the facts. In a single-incident mass tort case (for example, an airplane crash), the scope of the appropriate class is not usually in dispute. The same is true in product liability actions (where the class is usually composed of those who purchased the product), or securities fraud actions (where the class is usually composed of those who owned the stock). In a case such as this, however, the appropriate scope of the class is not so obvious. It falls to the putative representative to show that the class is defined sufficiently narrowly.

**21** The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad -- that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended: see W. K. Branch, Class Actions in Canada (1996), at para. 4.205; Webb v. K-Mart Canada Ltd. (1999), 45 O.R. (3d) 389 (S.C.J.) (claim for compensation for wrongful dismissal; class definition overbroad because included those who could be proven to have been terminated for just cause); Mouhteros v. DeVry Canada Inc. (1998), 41 O.R. (3d) 63 (Gen. Div.) (claim against school for misrepresentations about marketability of students after graduation; class [page174] definition overinclusive because included students who had found work after graduation).

**22** The question arises, then, to what extent the class representative should be allowed or required to introduce evidence in support of a certification motion. The recommendations of the Ontario Law Reform Commission's 1982 report on this point should perhaps be given limited weight because, as discussed above, those recommendations were made in the context of a proposal that the certification stage include a preliminary merits test: see Report on Class Actions, supra, vol. II, at pp. 422-26 (recommending that both the representative plaintiff and the defendant be required, at the certification stage, to file one or more affidavits setting out all the facts upon which they intend to rely, and that the parties be permitted to examine the deponents of any such affidavits). The 1990 report of the Attorney General's Advisory Committee is perhaps a better guide. That report suggests that "[u]pon a motion for certification ... , the representative plaintiff shall and the defendant may serve and file one or more affidavits setting forth the material facts upon which each intends to rely"

(emphasis added): see Report of the Attorney General's Advisory Committee on Class Action Reform, supra, at p. 33. In my view the Advisory Committee's report appropriately requires the class representative to come forward with sufficient evidence to support certification, and appropriately allows the opposing party an opportunity to respond with evidence of its own.

**23** This appears to be the existing practice of Ontario courts. In Caputo, supra, the representative brought a class action against cigarette manufacturers claiming that they had knowingly misled the public about the risks associated with smoking. In support of the certification motion, the class representative filed only a solicitor's affidavit based on information and belief. The court held that the evidence adduced by the class representative was insufficient to support certification, and that the defendant manufacturers should be allowed to examine the individual class members in order to obtain the information required to allow the court [page175] to decide the certification motion. The "primary concern", the court wrote, is "[t]he adequacy of the record", which "will vary in the circumstances of each case" (p. 319).

**24** In Taub v. Manufacturers Life Insurance Co. (1998), 40 O.R. (3d) 379 (Gen. Div.), the representative sought to bring a class action on behalf of the residents in her apartment building, alleging that mould in the building was exposing the residents to health risks. The representative provided no evidence, however, suggesting that the mould had been found anywhere but in her own apartment. The court wrote (at pp. 380-81) that "the CPA requires the representative plaintiff to provide a certain minimum evidentia[ry] basis for a certification order" (emphasis added). While the Class Proceedings Act, 1992 does not require a preliminary merits showing, "the judge must be satisfied of certain basi[c] facts required by s. 5 of the CPA as the basis for a certification order" (p. 381).

**25** I agree that the representative of the asserted class must show some basis in fact to support the certification order. As the court in Taub held, that is not to say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. However, the Report of the Attorney General's Advisory Committee on Class Action Reform clearly contemplates that the class representative will have to establish an evidentiary basis for certification: see Report, at p. 31 ("evidence on the motion for certification should be confined to the [certification] criteria"). The Act, too, obviously contemplates the same thing: see s. 5(4) ("[t]he court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence"). In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action. That latter requirement is of course governed by the rule that a pleading should not be struck for failure to disclose [page176] a cause of action unless it is "plain and obvious" that no claim exists: see Branch, supra, at para. 4.60.

**26** In my view the appellant has met his evidentiary burden here. Together with his motion for certification, the appellant submitted some 115 pages of complaint records, which he obtained from the Ontario Ministry of Environment and Energy and the Toronto Metropolitan Works Department. The records of the Ministry of Environment and Energy document almost 300 complaints between July 1985 and March 1994, approximately 200 complaints in 1995, and approximately 150 complaints in 1996. The Metropolitan Works Department records document almost 300 complaints between July 1983 and the end of 1993. As some people may have registered their complaints with both the Ministry of Environment and Energy and the Metropolitan Works Department, it is difficult to determine exactly how many separate complaints were brought in any year. It is sufficiently

clear, however, that many individuals besides the appellant were concerned about noise and physical emissions from the landfill. I note, further, that while some areas within the geographical area specified by the class definition appear to have been the source of a disproportionate number of complaints, complaints were registered from many different areas within the specified boundaries. I conclude, therefore, that the appellant has shown a sufficient basis in fact to satisfy the commonality requirement.

**27** I cannot conclude, however, that "a class proceeding would be the preferable procedure for the resolution of the common issues", as required by s. 5(1)(d). The parties agree that, in the absence of legislative guidance, the preferability inquiry should be conducted through the lens of the three principal advantages of class actions -- judicial economy, access to justice, and behaviour modification: see also Abdool v. Anaheim Management Ltd. (1995), 21 O.R. (2d) 453 (Div. Ct.); compare British Columbia Class Proceedings Act, s. 4(2) (listing factors that court must consider in [page177] assessing preferability). Beyond that, however, the appellant and respondent part ways. In oral argument before this Court, the appellant contended that the court must look to the common issues alone, and ask whether the common issues, taken in isolation, would be better resolved in a class action rather than in individual proceedings. In response, the respondent argued that the common issues must be viewed contextually, in light of all the issues -- common and individual -- raised by the case. The respondent also argued that the inquiry should take into account the availability of alternative avenues of redress.

**28** The report of the Attorney General's Advisory Committee makes clear that "preferable" was meant to be construed broadly. The term was meant to capture two ideas: first the question of "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim", and second, the question of whether a class proceeding would be preferable "in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on": Report of the Attorney General's Advisory Committee on Class Action Reform, supra, at p. 32. In my view, it would be impossible to determine whether the class action is preferable in the sense of being a "fair, efficient and manageable method of advancing the claim" without looking at the common issues in their context.

**29** The Act itself, of course, requires only that a class action be the preferable procedure for "the resolution of the common issues" (emphasis added), and not that a class action be the preferable procedure for the resolution of the class members' claims. I would not place undue weight, however, on the fact that the Act uses the phrase "resolution of the common issues" rather than "resolution of class members' claims". As one commentator writes:

> The [American] class action [rule] requires that the class action be the superior method to resolve the "controversy." The B.C. and Ontario Acts require that the class proceeding be the preferable procedure for the resolution of the "common issues" (as opposed to the entire controversy). [This] distinctio[n] can be seen as creating a lower [page178] threshold for certification in Ontario and B.C. than in the U.S. However, it is still important in B.C. and Ontario to assess the litigation as a whole, including the individual hearing stage, in order to determine whether the class action is the preferable means of resolving the common issues. In the abstract, common issues are always best resolved in a common proceeding. However, it is important to adopt a practical cost-benefit approach to this proce-

> dural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court.

See Branch, supra, at para. 4.690. I would endorse that approach.

**30** The question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole. It is true, of course, that the Act contemplates that class actions will be allowable even where there are substantial individual issues: see s. 5. It is also true that the drafters rejected a requirement, such as is contained in the American federal class action rule, that the common issues "predominate" over the individual issues: see Federal Rules of Civil Procedure, Rule 23(b)(3) (stating that class action maintainable only if "questions of law or fact common to the members of the class predominate over any questions affecting only individual members"); see also British Columbia Class Proceedings Act, s. 4(2)(a) (stating that, in determining whether a class action is the preferable procedures, the court must consider "whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members"). I cannot conclude, however, that the drafters intended the preferability analysis to take place in a vacuum. There must be a consideration of the common issues in context. As the Chair of the Attorney General's Advisory Committee put it, the preferability requirement asks that the class representative "demonstrate that, given all of the circumstances of the particular claim, [a class action] would be preferable to other methods of resolving these claims and, in particular, that it would be preferable to the use of individual proceedings" (emphasis added): M. G. Cochrane, Class Actions: A Guide to [page179] the Class Proceedings Act, 1992 (1993), at p. 27.

**31** I think it clear, too, that the court cannot ignore the availability of avenues of redress apart from individual actions. As noted above, the preferability requirement was intended to capture the question of whether a class proceeding would be preferable "in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on": see Report of the Attorney General's Advisory Committee on Class Action Reform, supra, at p. 32; see also Cochrane, supra, at p. 27; M. A. Eizenga, M. J. Peerless and C. M. Wright, Class Actions Law and Practice (loose-leaf), at para. 3.62 ("[a]s part of the determination with respect to preferability, it is appropriate for the court to review alternative means of adjudicating the dispute which is before it"). In my view, the preferability analysis requires the court to look to all reasonably available means of resolving the class members' claims, and not just at the possibility of individual actions.

**32** I am not persuaded that the class action would be the preferable means of resolving the class members' claims. Turning first to the issue of judicial economy, I note that any common issue here is negligible in relation to the individual issues. While each of the class members must, in order to recover, establish that the Keele Valley landfill emitted physical or noise pollution, there is no reason to think that any pollution was distributed evenly across the geographical area or time period specified in the class definition. On the contrary, it is likely that some areas were affected more seriously than others, and that some areas were affected at one time while other areas were affected at other times. As the Divisional Court noted, "[e]ven if one considers only the 150 persons who made complaints -- those complaints relate to different dates and different locations spread out over seven years and 16 square miles" (p. 480). Some class members are close to the site, some are further away. Some class members are close to other possible sources of pollution. Once the common issue is seen in the [page180] context of the entire claim, it becomes difficult to say that the resolution of the common issue will significantly advance the action.

**33** Nor would allowing a class action here serve the interests of access to justice. The appellant posits that class members' claims may be so small that it would not be worthwhile for them to pursue relief individually. In many cases this is indeed a real danger. As noted above, one important benefit of class actions is that they divide fixed litigation costs over the entire class, making it economically feasible to prosecute claims that might otherwise not be brought at all. I am not fully convinced, however, that this is the situation here. The central problem with the appellant's argument is that, if it is in fact true that the claims are so small as to engage access to justice concerns, it would seem that the Small Claims Trust Fund would provide an ideal avenue of redress. Indeed, since the Small Claims Trust Fund establishes a no-fault scheme, it is likely to provide redress far more quickly than would the judicial system. If, on the other hand, the Small Claims Trust Fund is not sufficiently large to handle the class members' claims, one must question whether the access to justice concern is engaged at all. If class members have substantial claims, it is likely that they will find it worthwhile to bring individual actions. The fact that no claims have been made against the Small Claims Trust Fund may suggest that the class members claims are either so small as to be non-existent or so large as to provide sufficient incentive for individual action. In either case access to justice is not a serious concern. Of course, the existence of a compensatory scheme under which class members can pursue relief is not in itself grounds for denying a class action -- even if the compensatory scheme promises to provide redress more quickly: see Rumley v. British Columbia, [2001] 3 S.C.R. 184, 2001 SCC 69, at para. 38. The existence of such a scheme, however, provides one consideration that must be taken into account when [page181] assessing the seriousness of access-to-justice concerns.

**34** For similar reasons I would reject the argument that behaviour modification is a significant concern in this case. Behavioural modification may be relevant to determining whether a class action should proceed. As noted in Western Canadian Shopping Centres, supra, at para. 29, "[w]ithout class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery". This concern is certainly no less pressing in the context of environmental litigation. Indeed, Ontario has enacted legislation that reflects a recognition that environmental harm is a cost that must be given due weight in both public and private decision-making: see Environmental Bill of Rights, 1993, S.O. 1993, c. 28, and Environmental Protection Act. I am not persuaded, however, that allowing a class action here would serve that end. If individual class members have substantial claims against the respondent, we should expect that they will be willing to prosecute those claims individually; on the other hand if their claims are small, they will be able to obtain compensation through the Small Claims Trust Fund. In either case, the respondent will be forced to internalize the costs of its conduct.

**35** I would note, further, that Ontario's environmental legislation provides other avenues by which the complainant here could ensure that the respondent takes full account of the costs of its actions. While the existence of such legislation certainly does not foreclose the possibility of environmental class actions, it does go some way toward addressing legitimate concerns about behaviour modification: see Environmental Bill of Rights, 1993, ss. 61(1) (stating that "[a]ny two persons resident in Ontario who believe that an existing policy, Act, regulation or instrument of Ontario should be [page182] amended, repealed or revoked in order to protect the environment may apply to the Environmental Commissioner for a review of the policy, Act, regulation or instrument by the appropriate minister") and 74(1) (stating that "[a]ny two persons resident in Ontario who believe that a prescribed Act, regulation or instrument has been contravened may apply to the Environmen-

tal Commissioner for an investigation of the alleged contravention by the appropriate minister"); Environmental Protection Act, s. 14(1) (stating that "[d]espite any other provision of this Act or the regulations, no person shall discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect"); s. 172(1) (stating that "[w]here a person complains that a contaminant is causing or has caused injury or damage to livestock or to crops, trees or other vegetation which may result in economic loss to such person, the person may, within fourteen days after the injury or damage becomes apparent, request the Minister to conduct an investigation"); and s. 186(1) (stating that "[e]very person who contravenes this Act or the regulations is guilty of an offence").

**36** I conclude that the action does not meet the requirements set out in s. 5(1) of Ontario's Class Proceedings Act, 1992. Even on the generous approach advocated above, the appellant has not shown that a class action is the preferable means of resolving the claims raised here.

**37** I should make one note on the scope of the holding in this case. The appellant took pains to characterize this case as raising the issue of whether Ontario's Class Proceedings Act, 1992 permits environmental class actions. I would not frame the issue so broadly. While the appellant has not met the certification requirements here, it does not follow that those requirements could never be met in an environmental tort case. The question of whether an action should be permitted to be prosecuted as a class action is necessarily one that turns on the [page183] facts of the case. In this case there were serious questions about preferability. Other environmental tort cases may not raise the same questions. Those cases should be decided on their facts.

**38** The appeal is dismissed. There will be no costs to either party.

cp/e/qllls

*Case Name:*

# Price v. Panasonic Canada Inc.

**Between**
**Kerry Price and Patricia Dean, plaintiffs, and**
**Panasonic Canada Inc., defendant**

**[2001] O.J. No. 5244**

110 A.C.W.S. (3d) 814

Court File No. 55471/00

Ontario Superior Court of Justice
Newmarket, Ontario

**Shaughnessy J.**

Heard: December 3, 2001.
Judgment: December 21, 2001.

(17 paras.)

*Practice -- Persons who can sue and be sued -- Individuals and corporations, status or standing -- Class actions, certification, considerations (incl. when class action appropriate) -- Class actions, certification, evidence and proof.*

Application by the defendant, Panasonic Canada, to compel the plaintiff, Dean, to answer questions and make productions in the context of an application for certification of a class action by Dean and Price against Panasonic. The plaintiffs alleged that for 20 years Panasonic had maintained the resale price of various audio-visual products in breach of Canadian competition laws. Dean's affidavit in support of the certification application referred to videotaped interviews with Panasonic's product manager and retail store staff. She quoted selective statements from those interviews. Panasonic was given copies of the videotaped interviews. However, it wanted the plaintiffs to provide all transcripts from the interviews. The transcripts were sought to show that Dean's statements were taken out of context. The plaintiffs refused this demand for production. Panasonic also wanted Dean to provide full details of when she first watched or listened to the interviews and read any partial or complete transcripts. The plaintiffs refused to answer on the basis of relevance and privilege. Dean stated that she retained a lawyer and had received advice from him for some time. Panasonic wanted

to know when the lawyer was retained and the period of time that he provided advice. Dean refused to answer on the basis of solicitor and client privilege.

HELD: Application dismissed. The concern of the court on a certification application was with the adequacy of the evidentiary record upon which certification issues would be determined. The plaintiffs provided sufficient evidence for the determination of this application. The answers and productions sought were irrelevant to the certification application. They pertained to the plaintiffs' credibility, which related to the merits of the action. At this stage Panasonic's requests were not reasonable or necessary.

**Statutes, Regulations and Rules Cited:**

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5, 5(1), 5(1)(a).

Ontario Rules of Civil Procedure, Rule 30.04(2).

**Counsel:**

John L. Hill, for the plaintiffs.
Linda M. Plumpton, for the defendants.

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1 **SHAUGHNESSY J.**:-- This is a motion in an intended class proceeding in which the Defendant seeks an order compelling the Plaintiff, Patricia Dean to answer questions and make productions refused in her written responses to questions on her affidavit sworn September 7, 2000. The certification motion in this matter is scheduled to be heard on January 22, 2002.

2 In this proposed class action proceeding, the Plaintiffs allege that over a period of approximately 20 years, the Defendant Panasonic Canada Inc. sought to maintain the re-sale price of various audio-visual products in breach of Canadian competition laws. The Plaintiffs purport to bring this action on their own behalf and on behalf of end purchasers who bought these products from authorized retail dealers in Ontario in this time period. The Plaintiffs seek damages equal to 15% of the retail prices paid by the members of the class, as well a punitive, exemplary and aggravated damages.

3 The Plaintiffs filed the affidavit of Patricia Dean in support of their motion for certification of this action as a class proceeding. In lieu of cross-examination on the affidavit, the parties agreed to exchange questions and answers in writing.

The Questions that the Plaintiff Refused to Answer

(a) The Plaintiff, Patricia Dean at paragraphs 12, 13, 14, 15, 19 & 26 of her Affidavit, refers to videotaped interviews with the product manager and retail store staff of the Defendant company. Ms. Dean in her affidavit purports to quote selective statements from those interviews.

The Defendant acknowledges that the Plaintiff has produced copies of the videotaped interviews. However, the Defendant requests that the Plaintiff produce all

transcripts, complete or partial that have been prepared of these interviews. The Defendant's counsel maintains that they are entitled to the transcripts as they may be able to demonstrate that the statements detailed by its employees are taken out of context and thereby prove to the Court that it is dangerous to rely on the alleged statements of the employees as contained in the affidavit of Patricia Dean. The Defendant states that the bald assertions in the affidavit attritubed to its employees have to be examined in relation to the question being asked and the context of the statement.

The Plaintiffs response to this request for production is that the communications are privileged and that any materials which the defense seeks production is "irrelevant to the proceedings in question".

(b) In paragraph 19 of the Affidavit, Ms. Dean states that she verily believes from inter alia, "videotaped and recorded statements by retailers", that Panasonic engaged in various conduct through which it monitored and controlled retail prices. The Defendant Panasonic asked the Plaintiff Dean to provide full details when she personally first watched or listened to the complete interview and read any partial or complete transcripts of these interviews. The Plaintiff refused to answer this question on the basis of privilege and relevance.

(c) In paragraph 3 of her affidavit, the Plaintiff Dean states that she retained her counsel John L. Hill "some time ago" and has been receiving advice from him in regard to the action for "a period of time". Panasonic asked Ms. Dean to provide specific details as to when Mr. Hill was retained and the period of time during which she has been receiving advice from Mr. Hill to which she refers in her affidavit. The Plaintiff Dean again advises that she objects to answering this question on the basis that the communication is protected by solicitor and client privilege and further, that the answer to such an inquiry is irrelevant to the proceeding.

**4** The Defendant relies on Rule 30.04(2) of the Rules of Civil Procedure which provides that:

> A request to inspect documents may also be used to obtain the inspection of any document in another party's possession, control or power that is referred to in the originating process, pleading or an affidavit served by the other party.

**5** The Defendant maintains that the Plaintiff must produce the document referred to in an affidavit, irrespective of any privilege attaching to the document. The Defense further states that once portions of a document over which a party asserts privilege are disclosed, then the rest of the document and other related documents must be disclosed.

**6** The Defense further maintains that cross-examination on an affidavit (or written interrogatories) is designed to test the truth of the statements therein as well as the credibility of the deponent.

**7** Finally, the Defense submits that questions which relate to an issue raised by the deponent in her affidavit should be answered regardless of the relevance of the issue raised. The Defense argues that the date on which counsel was retained is a question of fact, and is not protected by the solici-

tor/client privilege that extends to the contents of communication between clients and lawyers, (General Accident Assurance Co. v. Chrusz (1999) 45 O.R. (3d) 321 at 347 (Ont.C.A.).

Analysis

**8** The Defense motion compelling the Plaintiff to answer further questions and make productions is dismissed. The first requirement that the Court must assess is whether the answers and productions sought are relevant to the proceeding. The permissible scope of questions is broad and includes any question that has a semblance of relevancy as defined by the issued raised in the matter and in the affidavits.

**9** There is authority that any inquiry into the merits of an action is not relevant on a motion for certification (Caputo, et al v. Imperial Tobacco Ltd. (1997) 34 O.R. (3d) 314 per Winkler J.) Further the decisions in Canada Metal Co. v. Heap (1975) 7 O.R. (2d) 185 (Ont. C.A.) and Transamerica Life Insurance Co. v. Canada Life Assurance Co. (1995) 27 O.R. (3d) 291 provide the principle of law that a party resorting to an examination is required to show that the proposed examination will be on an issue relevant to the pending motion.

**10** In a motion for certification under the Class Proceedings Act, 1992 S.O. 1992 c. 6, the principle concern of the Court is the adequacy of the evidentiary record upon which the certification issues will be determined. Accordingly, the Defendant has "a right to examine a representative party on matters relevant to the certification motion in circumstances where there would otherwise be an insufficient evidentiary record before the court for the determination of the motion." (see Caputo decision at pages 319, 320)

**11** The Class Proceedings Act is a procedural statute. Recently in the decision of Hollick v. Toronto, [2001] S.C.C. 68 at paragraph 14, the Supreme Court of Canada stated:

> The Class Proceeding Act, 1992, was adopted to ensure that the courts had a procedural tool sufficiently refined to allow them to deal efficiently, and on a principled rather than on a ad hoc basis, with the increasingly complicated cases of the modern era.

**12** In Hollick, the Supreme Court of Canada (paragraph 16), went on to state that in Ontario, "the certification stage is decidedly not meant to be a test of the merits of the action". The Supreme Court of Canada cited with approval Caputo v. Imperial Tobacco Ltd (supra), that "any inquiry into the merits of the action will not be relevant on a motion for certification."

**13** Therefore, as stated in the Hollick case, the certification stage focuses on the form of the action. "The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action."

**14** The class representative then, must show some basis in fact for each of the certification requirements set out in s. 5 of the Class Proceedings Act other than the requirement that the proceedings disclose a cause of action.

**15** After reviewing the affidavit of Patricia Dean filed in support of the motion for certification, as well as the written interrogatories and answers, I am satisfied that there is a sufficient evidentiary record before the Court for the determination of the motion. The Defendant may not examine on the merits of an action, nor can it examine the Plaintiff in respect of s. 5(1)(a) as to the existence of a cause of action, (see Caputo v. Imperial Tobacco Ltd. (supra) at pg. 322). In my opinion, the in-

tended purpose of the further examination is directed to the credibility of the Plaintiff and therefore relates to the merits of the action. This is simply not relevant at this stage of the proceedings. The Plaintiff has produced to the Defendant, copies of the videotapes and statements relied on. To suggest that the Plaintiff should then prepare and/or produce transcripts of these video statements is neither reasonable or necessary in the circumstances of this proceeding.

**16** I agree that the date the Plaintiff's counsel was retained is not protected by solicitor/client privilege. However, the Defendant has failed to demonstrate to my satisfaction, how this information is relevant to the criteria set forth in s. 5(1) of the Class Proceedings Act in relation to certification of the proceeding.

**17** In the result, the Defendant's motion is dismissed. Counsel may speak to me on January 22, 2002 with respect to costs of this motion.

SHAUGHNESSY J.

cp/d/qlala/qlkjg

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*Indexed as:*

# Matthews v. Servier Canada Inc.

**Between**
**Joan Matthews, plaintiff, and**
**Servier Canada Inc., Biofarma S.A., and X, defendant**

**[1999] B.C.J. No. 435**

65 B.C.L.R. (3d) 348

86 A.C.W.S. (3d) 486

Vancouver Registry No. C973178

British Columbia Supreme Court
Vancouver, British Columbia

**E.R.A. Edwards J.**

Heard: February 23, 1999.
Judgment: filed February 25, 1999.

(6 pp.)

*Practice -- Persons who can sue and be sued -- Individuals and corporations, status or standing -- Class actions, certification, considerations.*

Application by the plaintiff, Matthews, for an extension of time for the certification of the action as a class action. Matthews brought an action against the defendants Servier and Biofarma after contracting primary pulmonary hypertension from using a drug manufactured by them. The plaintiff proposed amending the claim to include not only the subclass also suffering from the same condition but also those with no present symptoms.

HELD: The application was adjourned. A fresh proceeding should be commenced and certification sought for the wider class. The amended action would include a much larger class and raised different causation and other issues than originally pleaded. If the extension of time was denied then the small number of possible members of the subclass might be out of time to commence individual proceedings.

**Statutes, Regulations and Rules Cited:**

Class Proceedings Act, s. 2.

**Counsel:**

David A. Klein and B. Nayer, for the plaintiff.
John D. Dives, for the defendant.

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**1** **E.R.A. EDWARDS J.**:-- The plaintiff applies for an extension of time for the certification of this action as a class action, for the substitution of the representative plaintiff, for leave to amend the statement of claim and for the setting of a pre-certification schedule.

**2** Counsel for the defendant advised the court that the key issue was the extension of time for certification, and that if the extension were granted he would not oppose substitution of the plaintiff or amendment of the statement of claim.

**3** The Class Proceedings Act provides in s. 2 that an application for certification be made within 90 days after the filing of a statement of defence or appearance or within 90 days of the time limit for filing a statement of defence or at any other time with leave of the court.

**4** Of the relatively few cases certified since the Act came into force, plaintiff's counsel told me he knew of none where the 90 day limit has been met. Nevertheless, there must have been some reason the legislature stipulated the 90 days. One possibility is that the legislature intended that a certification application should generally be based on what is alleged in the pleadings. In other words, that the pleadings should establish whether the case is appropriate for certification.

**5** The question of whether document discovery should be permitted before certification was addressed earlier in this case and in Endean v. Canadian Red Cross Society, [1997] B.C.J. No. 295, (6 February 1997) Vancouver C965349. Document discovery, if ordered before certification in a case such as this where it will be an enormous task for the defendants to produce all potentially relevant documents will not be ordered automatically. The plaintiff will be required to show discovery of documents is necessary in order to inform the certification process.

**6** This could lead to a "chicken and egg" debate over which comes first, but unless a plausible basis for requiring extensive pre-certification document discovery is demonstrated, there is a risk that a requirement to make full disclosure before certification will be so onerous it will amount to an unfair imposition on defendants and potential settlement tool in the hands of a plaintiff who may not have a certifiable class action.

**7** On January 27, 1998, the plaintiff applied for an order that the defendants be required to provide document discovery or at least a document list within three weeks since the documents might be relevant to the application to certify. I adjourned that application on the basis it was premature until plaintiff's counsel indicated what classes of documents might be relevant to the certification application.

**8** In February 1998 the plaintiff amended her statement of claim. In September 1998, the plaintiff filed a statement of claim in another action against her doctor and the defendants in this action.

She and about six others with similar claims represented by the same counsel now intend to pursue individual actions, rather than this proposed class action, I was told.

**9** As initially pleaded, this action was primarily a claim that the plaintiff contracted primary pulmonary hypertension ("PPH") as a result of using a drug manufactured by the defendants. I was advised in January 1998 that the potential class consisted of tens not hundreds of people.

**10** The claim as amended and as it is proposed to be further amended is on behalf not only of persons who used the drug and have PPH, but also those with heart valve disorders, those with neurotoxicity and those with no present symptoms. In other words, it is a case where everyone who ever used the drug is a potential claimant. Those prospective claimants with PPH, apart from the few mentioned above who intend to pursue individual actions, would constitute a tiny subclass of the entire proposed class in the amended action.

**11** The limitation period for the members of this subclass may have now expired. For the much larger proposed class, it was acknowledged by counsel for the defendants that period began to run August 28, 1997 and expires two years from that date.

**12** Defence counsel argued this action with amendments and proposed amendments to the statement of claim is entirely different in scope and focus from the original one involving a small class of claimants with PPH. In response to the original statement of claim the defendants did not contest this court's jurisdiction and filed a statement of defence.

**13** The defendants' position is that a new action should be commenced so that they will have the opportunity to persuade the court on a number of grounds that it should decline jurisdiction in the more widely cast action. The defendants cannot ask the court in this action to decline jurisdiction after filing a statement of defence.

**14** The amended action will include a much larger class and raises different causation and other issues than were originally pleaded. These circumstances and others might persuade the court to decline jurisdiction. The defendants should be given the opportunity to make their arguments in that regard.

**15** If an extension of time for certifying this action is denied, then the action is effectively over because the plaintiff intends to pursue her individual action. If this action ends, the small number of possible members of the proposed PPH subclass may be out of time to commence individual proceedings.

**16** Counsel for the defendants asked me to make a tentative decision declining the extension of time to certify this action so he could get instructions to waive any reliance on the limitation period in respect of the members of this small proposed PPH subclass.

**17** That is a practical solution. The application for an extension of time to certify this as a class action is adjourned. A fresh proceeding should be commenced and certification sought in it for the wider class.

**18** If the defendants do not waive the limitation period for the proposed PPH subclass in that new action, then this action might be "revived" if a substituted PPH plaintiff comes forward and appropriate amendments to refocus the claim for PPH claimants only are proposed. That way, the limitation defence might be avoided for any PPH claimants who, relying on this action, postponed a decision to sue individually beyond the expiry of the limitation period.

**19** This application raised a novel issue and neither side lost. The parties will bear their own costs7.

E.R.A. EDWARDS J.

cp/d/asl/DRS

# Ventas, Inc. et al. v. Sunrise Senior Living Real Estate Investment Trust et al. [Indexed as: Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust]

**85 O.R. (3d) 254**

Court of Appeal for Ontario,

**Blair, MacFarland and LaForme JJ.A.**

March 23, 2007

*Contracts -- Interpretation and construction -- Vendor's board of trustees offering to sell its assets through auction process and entering into Confidentiality Agreements with interested bidders which contained Standstill Agreements preventing each prospective acquiring party from attempting hostile unsolicited takeover bid -- Vendor signing purchase agreement with one bidder subject to unitholder approval -- Second bidder then submitting superior bid -- Application judge not erring in interpreting purchase agreement as imposing obligation on vendor to enforce its Standstill Agreement with second bidder and as precluding it from considering acquisition proposal submitted by that bidder.*

Sunrise was a Canadian public real estate investment fund which owned and invested in senior living communities. It undertook a strategic sale process of its assets. Both HCPI and Ventas were interested in bidding, and each was required to enter into a Confidentiality Agreement with Sunrise in order to prevent non-public information exchanged by the parties from being publicly disclosed. The Confidentiality Agreements contained restrictions preventing each prospective acquiring party from attempting a hostile (unsolicited) takeover bid (the "Standstill Agreements"). Ventas submitted a successful bid to acquire all of the assets for a price of $15 per unit, subject to shareholder approval. HCPI withdrew from the auction process and did not bid at that time. Instead, it put forward a post-auction bid, after it knew what Ventas had offered, of $18 per unit. Ventas brought an application for a declaration that Sunrise was required to enforce the Standstill Agreement it had entered into with HCPI, thereby preventing it from considering the HCPI Proposal. The application was granted. Sunrise and HCPI appealed.

Held, the appeal should be dismissed.

The application judge was correct in interpreting s. 4.4 of the Purchase Agreement as imposing an obligation on Sunrise to enforce the Standstill Agreement between it and HCPI, thus precluding it from considering the acquisition proposal submitted by HCPI following the close of the auction and

after the Ventas bid had been accepted. She found this to be objectively reasonable and a form of protection afforded to Ventas as part of the package negotiated between it and Sunrise. The application judge did not fail to consider the factual matrix underlying the negotiation of the Purchase Agreement and did not fail to give effect to the "commercial sense" component of contract interpretation. The application judge was sensitive to the fiduciary out provisions of the Agreement that permitted other bona fide written unsolicited Acquisition Proposals. In her view, this was balanced, objectively and reasonably, by the requirement that Sunrise ensure enforcement of Standstill Agreements that had been signed as part of the auction process in order to protect the successful bidder. This interpretation made commercial sense. It was unnecessary to adopt the principle gleaned from some American authorities that the target vendor can place no limits on the directors' right to consider superior offers and that any provision to the contrary is invalid and unenforceable. That was not what happened in this case. The trustees did not contract away their fiduciary obligations. Rather, they complied with [page255] them by setting up an auction process that was designed to maximize the unit price obtained for Sunrise's assets, in a fashion resembling a "shotgun" clause, by requiring bidders to come up with their best price in the second round, subject to a fiduciary out clause that allowed them to consider superior offers from anyone save only those who had bound themselves by a Standstill Agreement in the auction process not to make such a bid. The application judge viewed "bona fide" as meaning acting "in good faith; sincere; genuine", and found that the HCPI Acquisition Proposal was not bona fide because it was made in breach of the HCPI Standstill Agreement. The application judge did not err in her assessment and use of the term "bona fide".

Cases referred to

ACE Ltd. v. Capital Re Corp., 747 A. 2d. 95 (Del. Ch. 1999); BG Checo International Ltd. v. British Columbia Hydro & Power Authority, [1993] 1 S.C.R. 12, [1993] S.C.J. No. 1, 7 B.C.L.R. (2d) 145, 99 D.L.R. (4th) 577, 147 N.R. 81, [1993] 2 W.W.R. 321, 14 C.C.L.T. (2d) 233; Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co., [1980] 1 S.C.R. 888, [1979] S.C.J. No. 133, 112 D.L.R. (3d) 49, 32 N.R. 488, [1980] I.L.R. Â1-1176; CW Shareholdings Inc. v. WIC Western International Communications Ltd. (1998), 39 O.R. (3d) 755, [1998] O.J. No. 1886, 160 D.L.R. (4th) 131, 38 B.L.R. (2d) 196 (Gen. Div.); Eli Lilly and Co. v. Novopharm Ltd., [1998] 2 S.C.R. 129, [1998] S.C.J. No. 59, 161 D.L.R. (4th) 1, 227 N.R. 201, 80 C.P.R. (3d) 321; Kentucky Fried Chicken Canada, a Division of Pepsi-Cola Canada Ltd. v. Scott's Food Services Inc., [1998] O.J. No. 4368, 114 O.A.C. 357 (C.A.); Maple Leaf Foods Inc. v. Schneider Corp. (1998), 42 O.R. (3d) 177, [1998] O.J. No. 4142, 44 B.L.R. (2d) 115 (C.A.); Paramount Communications, Inc. v. QVC Network Inc., 637 A. 2d 34 (Del. 1994); Scanlon v. Castlepoint Development Corp. (1992), 11 O.R. (3d) 744, [1992] O.J. No. 2692, 9 D.L.R. (4th) 153, 29 R.P.R. (2d) 60 (C.A.); Toronto (City) v. W.H. Hotel Ltd., [1966] S.C.R. 434, [1966] S.C.J. No. 23, 56 D.L.R. (2d) 539; Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of) (1999), 45 O.R. (3d) 417, [1999] O.J. No. 3290, 178 D.L.R. (4th) 634, 50 B.L.R. (2d) 64 (C.A.), affg [1998] O.J. No. 2637, 40 B.L.R. (2d) 1 (Gen. Div.); Venture Capital USA Inc. v. Yorkton Securities Inc. (2005), 75 O.R. (3d) 325, [2005] O.J. No. 1885, 197 O.A.C. 264, 4 B.L.R. (4th) 324 (C.A.)

Authorities referred to

McCamus, J.D., The Law of Contracts (Toronto: Irwin Law, 2005)

APPEAL from the order of Pepall J., [2007] O.J. No. 908, 156 A.C.W.S. (3d) 343 (S.C.J.), allowing an application for a declaration that the vendor was prevented by its agreement with the applicant from considering a bid submitted by the respondent.

Peter F.C. Howard and Eliot Kolers, for appellants Sunrise Senior Living Real Estate Investment Trust, Sunrise REIT Trust, and Sunrise REIT GP Inc.

Jeffrey S. Leon and Derek J. Bell, for appellants Health Care Property Investors, Inc.

Mark A. Gelowitz and Laura K. Fric, for respondents Ventas, Inc. and numbered companies.

Luis G. Sarabia and Cynthia Spry, for respondent Sunrise Senior Living Inc. [page256]

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The judgment of the court was delivered by

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

Overview

[1] Sunrise REIT is a Canadian public real estate investment trust whose units are traded on the Toronto Stock Exchange. It owns and invests in senior living communities in Canada and the United States. In September 2006, Sunrise's board of trustees determined that a strategic sale process of its assets would be beneficial to its unitholders, thus effectively putting Sunrise "in play" on the public markets.

[2] To carry out this plan, the Trustees developed a two-stage auction process with a view to maximizing the value of Sunrise's units. Ventas, Inc. ("Ventas") and Health Care Property Investors, Inc. ("HCPI") were two of seven initially interested prospective purchasers in the auction process. They emerged from the preliminary round as the only two potential bidders asked to participate in the final round.

[3] Ventas submitted a successful bid to acquire all of Sunrise's assets for a total purchase price of $1,137,712,410 (representing a price of $15 per unit), subject to unitholder approval. HCPI withdrew from the auction process and did not bid at that time. Instead, it put forward a post-auction bid -- after it knew what Ventas had offered -- "topping up" the Ventas offer by 20 per cent to $18 per unit. This increased offer represents an additional $227.5 million for the unitholders, who are to meet on March 30, 2007, to consider the Ventas proposal.

[4] Hence the urgency of this appeal.

[5] The appeal turns on the interpretation of the terms of the purchase agreement executed by Sunrise and Ventas following acceptance of the Ventas bid. The issue is whether Sunrise is obliged to enforce the terms of a prior standstill agreement entered into between it and HCPI in the course of the auction process and which prohibits HCPI from making an offer for the Sunrise assets without Sunrise's consent. If the answer to that question is "Yes", Sunrise will be precluded from considering or accepting the richer HCPI offer pending the unitholders' meeting.

[6] Following an urgent application, determined on March 6, 2007, Justice Pepall answered the foregoing question in the affirmative. Sunrise and HCPI appeal from that decision. Ventas supports it.

[7] For the reasons that follow, I would dismiss the appeal and uphold the decision of the application judge. [page257]

Facts

[8] As mentioned above, Sunrise owns and invests in senior living communities in Canada and the United States. The properties are managed by Sunrise Senior Living, Inc. ("SSL"), a U.S. public company whose shares are traded on the New York Stock Exchange.

[9] HCPI is a self-administered real estate investment trust that also invests in healthcare facilities. Ventas is a U.S.-based health care real estate investment trust whose shares are listed on the New York Stock Exchange.

[10] In September 2006, after Sunrise's board of trustees determined that a strategic sale process of the Trust's assets would be beneficial to its unitholders, it began an auction process with a view to maximizing unitholder value.

[11] Parties who were interested in acquiring Sunrise (including HCPI and Ventas) were required to enter into a confidentiality agreement with it in order to prevent non-public information exchanged by the parties from being publicly disclosed (the "Confidentiality Agreements"). The Confidentiality Agreements contained restrictions preventing each prospective acquiring party from attempting a hostile (unsolicited) takeover bid (the "Standstill Agreements").

[12] Although the parties' Confidentiality Agreements were largely similar, Ventas's Standstill Agreement was worded differently from HCPI's in that the Ventas standstill ceased to apply if, among other things, Sunrise entered into an agreement to sell more than 20 per cent of its assets to a third party. Notably, HCPI's Standstill Agreement did not contain a similar termination clause.

[13] On November 21, 2006, Sunrise invited potential bidders to submit bids in the non-binding preliminary round of an auction. After the first round of bids, Sunrise invited HCPI and Ventas to engage in further negotiations and on December 29, 2006, it invited them to submit final binding bids in the second round of the auction by January 8, 2007. Sunrise waived the Standstill Agreements with those bidders for that purpose, and HCPI and Ventas were expressly told not to assume that the "winning" bid was assured of actually acquiring Sunrise at the price agreed upon or that they would be given an opportunity to rebid, renegotiate, or improve the terms of their proposal.

[14] Ventas submitted a second bid on January 8, but HCPI withdrew from the auction and did not.

[15] On January 14, 2007, Ventas and Sunrise signed an agreement contemplating the purchase by Ventas of all of Sunrise's assets for a total purchase price of $1,137,712,410 (representing a price of $15 per Unit), subject to Unitholder approval (the [page258] "Purchase Agreement"). This price represented a 35.8 per cent premium over the closing price of the units on January 12, 2007. The Purchase Agreement contemplated subsequent third-party unsolicited bids and allowed Sunrise to accept such a bid if it was financially superior to Ventas's bid.

[16] On January 17, 2007, Sunrise notified HCPI of the agreement with Ventas and asked for the return of Sunrise's confidential materials. In the letter, Sunrise's solicitor reminded HCPI of the terms of the Confidentiality Agreement it signed in November 2006.

[17] On February 14, 2007, HCPI submitted a proposal to acquire all of Sunrise's assets for $18 per unit (the "HCPI Proposal"), conditional on HCPI's ability to reach a management agreement with SSL. Sunrise treated the HCPI Proposal as an unsolicited third-party bid, but it concluded that it was not in a position to determine whether the bid was a superior bid because of the SSL condition.

[18] The Confidentiality Agreements entered into in the course of the auction process contained a provision prohibiting prospective purchasers from communicating with SSL. This was because SSL was viewed as a possible bidder. Following the preliminary round of the auction, in late November 2006, and after realizing that SSL was not an interested purchaser, Sunrise had authorized its financial advisors to arrange to allow HCPI and Ventas to contact SSL for purposes of the second round of bidding. On February 15, 2007, however -- after learning of the HCPI Proposal -- Ventas advised Sunrise that, if it permitted communications between SSL and HCPI, Sunrise would be in breach of the Purchase Agreement. It did not assert that HCPI would be in breach of its Standstill Agreement because it apparently assumed that HCPI's Standstill Agreement was worded similarly to the Ventas Standstill Agreement, which meant that the restraint on an unsolicited bid was no longer enforceable since Sunrise had entered into an agreement with a third party.

[19] On February 18, 2007, Sunrise served application materials upon Ventas, HCPI and SSL indicating its intention to seek the court's interpretation of the Purchase Agreement, specifically on the issue of communications between HCPI and SSL. It is at this point that Ventas learned of the specific terms of HCPI's Confidentiality Agreement and realized that HCPI's Standstill Agreement did not contain the same termination clause as Ventas's Standstill Agreement. On February 21, 2007, Ventas brought the within application seeking a declaration that Sunrise was required to enforce its Standstill Agreement with HCPI, thereby preventing it from considering the HCPI Proposal. [page259]

[20] The application judge found that Sunrise had agreed with Ventas that it would enforce existing Standstill Agreements and that any bid made in breach of an existing Standstill Agreement would not be bona fide. She then concluded that Sunrise was required to enforce the Standstill Agreement with HCPI and that HCPI did not have prior written consent to submit its bid. She dismissed Sunrise's application on the grounds that the issue was moot in light of her earlier conclusion.

The Provisions of the Agreement

[21] Section 4 of the Purchase Agreement deals generally with the covenants of the parties. Section 4.4 deals with Sunrise's "Covenants Regarding Non-Solicitation". Because of their importance, I reproduce the provisions of s. 4.4 in their entirety (the underlining is mine):

> 4.4(1) Following the date hereof, Sunrise REIT shall not, directly or indirectly, through any trustee, officer, director, agent or Representative of Sunrise REIT or any of its Subsidiaries, and shall not permit any such Person to,

(i) solicit, initiate, encourage or otherwise facilitate (including by way of furnishing information or entering into any form of agreement, arrangement or understanding or providing any other form of assistance) the initiation of any inquiries or proposals regarding, or other action that constitutes, or may reasonably be expected to lead to, an actual or potential Acquisition Proposal,

(ii) participate in any discussions or negotiations in furtherance of such inquiries or proposals or regarding an actual or potential Acquisition Proposal or release any Person from, or fail to enforce, any confidentiality or standstill agreement or similar obligations to Sunrise REIT or any of its Subsidiaries,

(iii) approve, recommend or remain neutral with respect to, or propose publicly to approve, recommend or remain neutral with respect to, any Acquisition Proposal,

(iv) accept or enter into any agreement, arrangement or understanding, related to any Acquisition Proposal (other than a confidentiality agreement contemplated in Section 4.4(2)), or

(v) withdraw, modify or qualify, or publicly propose to withdraw, modify or qualify, in any manner adverse to the Purchasers, the approval or recommendation of the Board (including any committee thereof) of this Agreement or the transactions contemplated hereby.

(2) Notwithstanding anything contained in Section 4.4(1), until the Unitholder Approval, nothing shall prevent the Board from complying with Sunrise REIT's disclosure obligations under applicable Laws with regard to a bona fide written, unsolicited Acquisition Proposal or, following the receipt of any such Acquisition Proposal from a third party (that did not result from a breach of this Section 4.4), from furnishing or disclosing non-public information to such Person if and only to the extent that: [page260]

(i) the Board believes in good faith (after consultation with its financial advisor and legal counsel) that such Acquisition Proposal if consummated could reasonably be expected to result in a Superior Proposal; and

(ii) such third party has entered into a confidentiality agreement containing terms in the aggregate no more favourable to such third party than those in the Confidentiality Agreement as are then in effect in accordance with its terms.

(3) Notwithstanding anything, contained in Section 4.4(1), until the Unitholder Approval, nothing shall prevent the Board from withdrawing or modifying, or proposing publicly to withdraw or modify its approval and recommendation of the transactions contemplated by this Agreement, or accepting, approving or recommending or entering into any agreement, understanding or arrangement providing for a bona fide written, unsolicited Acquisition Proposal (that did not result from a breach of this Section 4.4) ("Proposed Agreement") if and only to the extent that:

(i) it has provided the Purchasers with a copy of all of the documents relating to the Acquisition Proposal,

(ii) the Board, believes in good faith (after consultation with its financial advisor and legal counsel) that such Acquisition Proposal constitutes a Superior Proposal and has promptly notified the Purchasers of such determination,

(iii) a period of at least five Business Days (the "Matching Period") has elapsed following the later of (x) the date the Purchasers received written notice advising the Purchasers that the Board has resolved, subject to compliance with this Section 4.4(3), to withdraw, modify its approval and recommendation of the transactions contemplated by this Agreement or accept, approve or recommend or enter into a Proposed Agreement in respect of such Superior Proposal and (y) the date the Purchasers received a copy of the documentation related to such Superior Proposal pursuant to Section 4.4(3)(i),

(iv) if the Purchasers have proposed to amend the transactions contemplated under this Agreement in accordance with Section 4.4(6), the Board has again made the determination in Section 4.4(3)(ii) taking into account such proposed amendments, and

(v) if Sunrise REIT proposes to enter into a Proposed Agreement (other than a confidentiality agreement referred to in Section 4.4(2)) after complying with this Section 4.4(3), Sunrise REIT shall have complied with Section 5.2 and 5.3. For the purposes of this Section 4.4(3) the preparation and delivery of a directors' circular pursuant to Section 99 of the Securities Act relating to an Acquisition Proposal shall be deemed to be a qualification, withdrawal or modification, of the Board's recommendation of the transactions contemplated hereby unless the Board expressly, and without qualification, reaffirms its recommendation of the transactions contemplated hereby in such disclosure.

(4) If the expiry of the Matching Period referred to in Section 4.4(3)(iii) falls on a date which is less than five Business Days prior to the Unitholder Meeting, [page261] Sunrise REIT shall, at the request of the Purchasers, adjourn the Unitholder Meeting to a date that is not more than 10 Business Days following such expiry date.

(5) Sunrise REIT acknowledges and agrees that each successive amendment to any Acquisition Proposal shall constitute a new Acquisition Proposal for purposes of section 4.4.

(6) During the Matching Period, the Purchasers shall have the right, but not the obligation, to propose to amend the terms of this Agreement. The Trustees will review any proposal by the Purchasers to amend the terms of this Agreement in good faith in order to determine (after consultation with their financial advisor and legal counsel) whether the transactions contemplated by this Agreement, taking into account the Purchasers' proposed amendments would, if consummated in accordance with its terms, result in

the Superior Proposal ceasing to be a Superior Proposal. If the Trustees so determine, Sunrise REIT will enter into an amending agreement with the Purchasers reflecting such proposed amendment.

(7) Sunrise REIT shall, as promptly as practicable, notify the Purchasers of any relevant details relating to any Acquisition Proposal, or inquiry that could reasonably be expected to lead to any Acquisition Proposal, or any amendments to any Acquisition Proposal (including the identity of the parties and all material terms thereof), or any request for non-public information relating to Sunrise REIT or any of its Subsidiaries in connection with an Acquisition Proposal or inquiry that could reasonably be expected to lead to any Acquisition Proposal, or for access to the properties, books or records of Sunrise REIT or any of its Subsidiaries by any Person that informs Sunrise REIT or such Subsidiary that it is considering making, or has made, an Acquisition Proposal, or inquiry that could reasonably be expected to lead to any Acquisition Proposal, in each case which any of Sunrise REIT, any of its Subsidiaries or any officer, trustee, director, employee or Representative may receive after the date hereof relating to an Acquisition Proposal. Sunrise REIT shall promptly and fully keep the Purchasers informed of the status on a current basis, including any change to any of the terms, of any such Acquisition Proposal.

(8) Sunrise REIT shall

(i) ensure that its officers and Trustees and its Subsidiaries and their respective officers and directors and any Representatives retained by it or its Subsidiaries in connection herewith are aware of the provisions of this Section 4.4, and Sunrise REIT shall be responsible for any breach of this Section 4.4 by its [sic] and its Subsidiaries' officers, directors, trustees or representatives;

(ii) immediately cease and cause to be terminated any existing activities, discussions or negotiations with any parties conducted heretofore with respect to any Acquisition Proposal;

(iii) require all Persons other than the Purchasers who have been furnished with confidential information regarding Sunrise REIT or its Subsidiaries in connection with the solicitation of or discussion regarding any Acquisition Proposal within 12 months prior to the date hereof promptly to return or destroy such information, in accordance with and subject to the terms of the confidentiality agreement entered into with such Persons; [page262]

(iv) terminate access for all Persons (other than the Purchasers and its Representatives) of the electronic dataroom accessible through Merrill Datasite's website; and

(v) not amend, modify, waive or fail to enforce any of the standstill terms or other conditions included in any of the confidentiality agreements between Sunrise REIT and any third parties.

[22] The Purchase Agreement defines "Acquisition Proposal" and "Superior Proposal" as follows:

"Acquisition Proposal" means any proposal or offer made by any Person other than the Purchasers (or any affiliate of the Purchasers or any Person acting jointly and/or in concert with the Purchasers or any affiliate of the Purchasers) with respect to the acquisition, directly or indirectly, of assets, securities or ownership interests of or in Sunrise REIT or any of its Subsidiaries representing 20% or more of the consolidated assets of Sunrise REIT and its Subsidiaries taken as a whole, in a single transaction or a series of transactions, or, of equity interests representing a 20% or greater economic interest in Sunrise REIT or such Subsidiaries taken as a whole, in a single transaction or a series of transactions pursuant to any merger, amalgamation, tender offer, share exchange, business combination, liquidation, dissolution, recapitalization, take-over or non-exempt issuer bid, amendment to the Declaration of Trust, redemption of units, extraordinary distribution, sale, lease, exchange, mortgage, pledge, transfer, purchase, or issuance as consideration or similar transaction or series of transactions involving Sunrise REIT or any of such Subsidiaries or any other transaction the consummation of which would reasonably expected to impede, interfere with, prevent or materially delay the transactions contemplated hereby.

"Superior Proposal" means any unsolicited bona fide written Acquisition Proposal made by a third party that in the good faith determination of the Trustees, after consultation with its financial advisors and with outside counsel:

(a) is reasonably capable of being completed without undue delay having regard to financial, legal, regulatory and other matters;
(b) in respect of which adequate arrangements have been made to ensure that the required funds will be available to effect payment in full of the consideration; and
(c) would, if consummated in accordance with its terms, result in a transaction more favourable to Unitholders from a financial point of view (including financing terms, any termination fee or expenses reimbursement payable under this Agreement, any conditions to the consummation thereof) than the transactions contemplated by this Agreement; provided, however, that for purposes of this definition the references in the definition of Acquisition Proposal to "20%" shall be deemed to be references to "100%".

Analysis

[23] The central issue on this appeal, as it was before the application judge, is whether the provisions of s. 4.4 of the Purchase Agreement impose an obligation on Sunrise to enforce the Standstill [page263] Agreement between it and HCPI, thus precluding it from considering the Acquisition Proposal submitted by HCPI following the close of the auction and after the Ventas bid had been accepted. In my view, they do.

[24] Counsel accept that the application judge correctly outlined the principles of contractual interpretation applicable in the circumstances of this case. I agree. Broadly stated -- without reproducing in full the relevant passages from her reasons (paras. 29-34) in full -- she held that a commercial contract is to be interpreted,

(a) as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;[1]
(b) by determining the intention of the parties in accordance with the language they have used in the written document and based upon the "cardinal presumption" that they have intended what they have said;[2]
(c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties;[3] and (to the extent there is any ambiguity in the contract),
(d) in a fashion that accords with sound commercial principles and good business sense, and that avoid a commercial absurdity.[4] [page264]

[25] The appellants assert, however, that the application judge misapplied the principles of contractual interpretation that she had properly enunciated. They say she did so essentially,

(a) by misapprehending the interplay between ss. 4.4(1), 4.4(2), 4.4(3) and 4.4(8)(v) of the Purchase Agreement and, in particular by failing to appreciate, and to reconcile, the differences between the wording of ss. 4.4(1) and 4.4(8), and more generally,
(b) by failing to understand the "architecture" of s. 4.4 of the Purchase Agreement and to consider it against the background of the factual matrix in which the Agreement was negotiated.

[26] I do not agree.

The application judge's reasoning

[27] The thrust of the application judge's reasoning in this regard is found at paras. 35, 36, 38 and 39 of her reasons:

> Sunrise REIT expressly and unambiguously agreed that it would not amend, modify, waive or fail to enforce any of the standstill terms or other conditions included in any of the confidentiality agreements between Sunrise REIT and any third parties. The standstill enforcement obligations are found in sections 4.4(1) and 4.4(8) of the Purchase Agreement.
>
> Sections 4.4(2) and 4.4(3) address Sunrise REIT's obligations with regard to "a bona fide written, unsolicited Acquisition Proposal (that did not result from a breach of this section 4.4)." Sections 4.4(2) and 4.4(3) are prefaced with the words "notwithstanding anything contained in section 4.4(1)." Sections 4.4(2) and (3) do not say "notwithstanding anything contained in section 4.4(1) or 4.4(8)." If it had been the parties' contractual intention to exempt the circumstances described in sections 4.4(2) and (3) from the operation of section 4.4(8), they could have so provided but they did not. Similarly, unlike sections 4.7 and 4.8 which commence with the words "notwithstanding any other term of the Agreement", sections 4.4(2) and 4.4(3) do not use this language.
>
> . . . . .

> It seems to me that the clear scheme of this Purchase Agreement was [to] ensure enforcement of standstill agreements that had been signed as part of the auction process. This strikes me as being objectively reasonable and was a form of protection afforded to the purchaser, Ventas. This was part of the package negotiated between it and Sunrise REIT.
>
> Such an interpretation derives from the words used by the parties to the Purchase Agreement and gives effect to the parties' intention. It is also consistent with the context of the transaction including the auction process which was the genesis of the Purchase Agreement. The Purchase Agreement does not preclude bona fide written unsolicited Acquisition Proposals nor does it preclude such a proposal from a party whose standstill agreement [page265] operated to permit such a proposal. It simply precludes a proposal from anyone who is in breach of its standstill agreement. While creative, I view Sunrise REIT's and HCP's interpretation arguments to be strained. They disregard the parties' intention and the true meaning of the subject sections and the Purchase Agreement as a whole.

(Footnote omitted)

The scheme and interpretation of section 4.4

[28] I agree with the application judge that an important purpose of this part of the Purchase Agreement is to ensure the enforcement of standstill agreements entered into by previous players in the auction process. The negotiating context demonstrates that Ventas has been skilful in protecting its own position with respect to competition and standstills -- unlike the HCPI Standstill, the Ventas/Sunrise Standstill Agreement expired at the conclusion of the auction -- and it is objectively reasonable, given this background, that it would seek protection against competition from those who were unsuccessful in the auction, particularly its principle competitor.

[29] From Sunrise's perspective, the safety valve lies in the unitholders' meeting. If the unitholders believe that there is a more favourable offer available -- one worth the risk of rejecting the Ventas proposal -- they may well vote to reject the Ventas proposal at their meeting on March 30.

[30] The language used by the parties in the Purchase Agreement supports this interpretation.

[31] Viewed contextually, ss. 4.4(1), 4.4(2), 4.4(3) and 4.4(8) form part of a section of the Purchase Agreement that deals with the general covenant of Sunrise not to shop for other offers pending unitholder consideration of the Ventas bid. Viewed in light of the factual matrix in which the Agreement was negotiated, the provisions provide deal protection for Ventas, as the successful bidder in the auction, subject to Sunrise REIT's fiduciary out obligations.

[32] As I read s. 4.4 of the Agreement, it has four major components. First, it contains the overriding obligation of Sunrise not to solicit other bids, buttressed by the commitment of Sunrise to enforce existing standstill agreements that may be in place with bidders who have already engaged in the auction process (s. 4.4(1)). Secondly, it contains the "fiduciary out" protection for the Sunrise Trustees (and unitholders), permitting the Trustees to consider bona fide unsolicited Acquisition Proposals from third parties (that are not in breach of the provisions of section 4.4) (ss. 4.4(2) and 4.4(3)). Thirdly, it contains a series of provisions dealing with how the parties are to address a situa-

tion [page266] where a permitted Acquisition Proposal is received (ss. 4.4(3)- 4.4(7)).[5] Lastly, s. 4.4(8)(v) returns to the general non-solicitation obligation, reinforcing it by ensuring that Sunrise will (i) ensure all of its officers, Trustees and agents are aware of the non-solicitation provisions, (ii) immediately stop negotiating with anyone previously involved in the bidding process, (iii) require those bidders to return any confidential documentation and information they may have received during the process, (iv) terminate access to the data room by anyone other than Ventas and its representatives, and finally (a reiteration of the requirement set out in s. 4.4(1)):

> (v) not amend, modify, waive or fail to enforce any of the standstill terms or other conditions included in any of the confidentiality agreements between Sunrise REIT and any third parties.

[33] Contrary to the appellants' submissions, however, it is not any Acquisition Proposal that the Trustees are free to consider as part of the fiduciary out scenario; it is only an Acquisition Proposal from a third party that is not in breach of section 4.4 of the Agreement.

[34] Properly understood in this fashion, then, a reading of s. 4.4 demonstrates that there is no conflict between the provisions of ss. 4.4(1)(ii), 4.4(2), 4.4(3) and 4.4(8)(v). The repeated standstill enforcement terms complement one another. As the application judge pointed out, the opening phrases of ss. 4.4(2) and 4.4(3) -- "notwithstanding anything contained in Section 4.4(1)" -- do not have the words "or Section 4.4(8)(v)" added to them. This reinforces the interpretation that s. 4.4(8)(v) is there to clarify that Sunrise's obligation to enforce its Standstill Agreements with third parties is not negated by the fiduciary out clause. An unsolicited proposal by a prior bidder bound by a Standstill Agreement is a proposal that is otherwise in breach of s. 4.4, because it violates s. 4.4(8)(v), and therefore is not immunized by the fiduciary out provisions.

[35] In that sense, contrary to the appellants' submissions, the application judge's reading of the Purchase Agreement does not reduce s. 4.4(8)(v) to simply the functional equivalent of s. 4.4(1)(ii). Nor is it a case of s. 4.4(8)(v) continuing to require the enforcement of a Standstill Agreement even when the fiduciary out clause is otherwise applicable. The fiduciary out clause [page267] does not apply where the unsolicited proposal is tendered in breach of the non-solicitation provisions of the Purchase Agreement, i.e., in breach of a Standstill Agreement that Sunrise is obliged to enforce. The fiduciary out formula is an important feature of the non-solicitation format, but it does not allow Sunrise to resile from the terms of its Standstill Agreements with earlier bidders, in my opinion.

The difference in wording between sections 4.4(1)(ii) and 4.4(8)(v)

[36] Mr. Howard emphasized what he argued was a difference in wording between those two provisions. He points out that s. 4.4(1)(ii) expressly refers to situations involving "an actual or potential Acquisition Proposal" whereas s. 4.4(8)(v) contains no such reference, and further, that other subsections of s. 4.4(8) -- namely, ss. 4.4(8)(ii) and (iii) -- refer to Acquisition Proposals as well, although not in the context of standstill agreements (4.4(8)(ii) and 4.4(8)(iii)). Because s. 4.4(8)(v) does not refer to "Acquisition Proposals", Mr. Howard submits it does not apply in the context of such a proposal and therefore does not apply in the context of the HCPI Acquisition Proposal.

[37] There are several problems with this argument. First, it misapprehends the fact that any proposal to acquire more than 20 per cent of the assets of Sunrise -- whether made before or after the close of the auction -- constitutes an "Acquisition Proposal" as defined in the Agreement. Conse-

quently, s. 4.4(8) (v) can only apply in the context of an Acquisition Proposal of some sort, regardless of its wording.

[38] Secondly, the argument appears to be founded on the unarticulated premise that an Acquisition Proposal, as referenced in ss. 4.4(1)(ii), 4.4(2) and 4.4(3), is the equivalent of a Superior Proposal. The appellants' theory of the Agreement is that the Trustees are entitled to consider any Acquisition Proposal received after the close of the auction, and that the commitment in s. 4.4(8)(v) to enforce standstill agreements only applies in the event that a subsequent Acquisition Proposal received by the Trustees does not make the grade as a Superior Proposal. The function of s. 4.4(8)(v), they say, is to permit the Trustees in such circumstances to prevent a bidder in such a case -- whether a prior bidder or not -- from continuing to participate in the bidding process.

[39] It is not the case, however, that an Acquisition Proposal and a Superior Proposal are the same thing. The latter is a narrower concept than the former. While an Acquisition Proposal is essentially an offer by anyone to acquire more than 20 per cent of [page268] the assets of Sunrise, a Superior Proposal is an Acquisition Proposal[6] that is more favourable to the unitholders from a financial point of view than the Ventas bid. Sunrise submits, at para. 43 of its factum, that s. 4.4(8)(v) "is part of the filtering protection for both Ventas and Sunrise REIT that allows and obliges Sunrise REIT to deal summarily with offers that do not meet the Acquisition Proposal threshold". Sunrise does not mean the "Acquisition Proposal threshold" in this statement, however; it means the "Superior Proposal threshold". To support the appellants' argument, the reference to "Acquisition Proposal" in s. 4.4(1)(ii) would have to be read as "Superior Proposal". That is not what it says.

[40] Moreover, and in any event, a careful reading of s. 4.4(1)(ii) does not bear out the nexus between the reference to "Acquisition Proposal" and the commitment to enforce the standstill agreements. For ease of reference I repeat the wording of s. 4.4(1)(ii) here:

> 4.4(1) Following the date hereof, Sunrise REIT shall not . . .
>
> (ii) participate in any discussions or negotiations in furtherance of such inquiries or proposals or regarding an actual or potential Acquisition Proposal or release any Person from, or fail to enforce, any confidentiality or standstill agreement or similar obligations to Sunrise REIT or any of its Subsidiaries.

[41] Section 4.4(1)(ii) in reality contains two prohibitions, not one. The language does not work otherwise. Sunrise agrees not to participate in discussions or negotiations regarding actual or potential Acquisition Proposals. It also agrees not to release anyone from, or fail to enforce, existing Standstill Agreements. The drafters could well have divided s. 4.4(1) into six general prohibitions rather than five. The commitment to enforce the Standstill Agreements is not, therefore, tied to "Acquisition Proposals" in a way that s. 4.4(8)(v) is not.

[42] Accordingly, I agree with the application judge's observation that while the appellants' interpretation arguments are creative, they are strained. As she said [at para. 39], "They disregard the parties' intention and the true meaning of the subject sections and the Purchase Agreement as a whole."

An interpretation that reflects the "factual matrix", is "commercially sensible", and accords with the fiduciary obligations of the Sunrise trustees

[43] Nor do I accept the submission that the application judge failed to consider the factual matrix underlying the negotiation of [page269] the Purchase Agreement, or that she failed to give effect to the "commercial sense" component of contract interpretation.

[44] In a blended argument, the appellants submit that the application judge's interpretation of the Purchase Agreement ignores the factual matrix in which the Agreement was negotiated, defies commercial sense and reasonableness, and eviscerates the fiduciary out mechanism that was central to the parties' agreement. Respectfully, I do not read the application judge's reasons in this fashion.

The factual matrix

[45] Contracts are not made in a vacuum, and there is no dispute that the surrounding circumstances in which a contract is negotiated are relevant considerations in interpreting contracts. As this court noted in Kentucky Fried Chicken, supra, at para. 25, "[w]hile the task of interpretation must begin with the words of the document and their ordinary meaning, the general context that gave birth to the document or its 'factual matrix' will also provide the court with useful assistance."

[46] Sunrise points to a number of surrounding circumstances which it says the application judge ignored in arriving at her decision. These include that:

(a) the Purchase Agreement was entered into at the conclusion of the second stage of a private sale auction process where it was clear that the overall objective of Sunrise was to maximize value for [its] unitholders;
(b) the expectations of the bidders, objectively determined, could not have been that the "winner" of the auction was assured of acquiring the Sunrise assets, because everyone was aware that there would be a fiduciary out clause and that superior proposals could displace the winning bid;
(c) Ventas's own standstill terms ceased to apply in the event that Sunrise entered into a sales transaction with a third party, and Ventas could not know whether the other Standstill Agreements rested on the same footing (and did not know that HCPI's did not);
(d) Ventas never told Sunrise it believed the participants in the auction would be excluded from the operation of the fiduciary out provision; and
(e) Ventas had bargained for, and achieved, considerable deal protection, in the form of the "no shop" provision, the right [page270] to match any Superior Proposal, and the right to receive a $39.8 million break fee if it chose not to match such an offer.

[47] Matters involving the factual matrix underlying a contract are matters of fact, or at least matters of mixed fact and law. A judge is owed considerable deference in her assessment of such matters. Here, the experienced Commercial List judge was exercising a function common to that role -- the interpretation of a commercial contract -- and, while she may not have dealt with the foregoing themes expressly as the appellants would like, her reasons, read as a whole, indicate that she was alive to most, if not all, of them. She was certainly aware of the facts contained in points (a), (b), (c) and (e) above, as she dealt with them at one time or another in the reasons. The factor mentioned in (d) is not dispositive of anything.

[48] At the conclusion of her consideration of the interpretation issue, as noted earlier, the application judge said (at paras. 38 and 39):

> It seems to me that the clear scheme of this Purchase Agreement was [to] ensure enforcement of standstill agreements that had been signed as part of the auction process. This strikes me as being objectively reasonable and was a form of protection afforded to the purchaser, Ventas. This was part of the package negotiated between it and Sunrise REIT.
>
> Such an interpretation derives from the words used by the parties to the Purchase Agreement and gives effect to the parties' intention. It is also consistent with the context of the transaction including the auction process which was the genesis of the Purchase Agreement. The Purchase Agreement does not preclude bona fide written unsolicited Acquisition Proposals nor does it preclude such a proposal from a party whose standstill agreement operated to permit such a proposal. It simply precludes a proposal from anyone else who is in breach of its standstill agreement.

(Emphasis added, footnote omitted)

[49] I can find no basis for concluding the applications judge was not attuned to the need to keep the factual matrix in mind when conducting her interpretative exercise.

[50] Nor do I accept that she either ignored the need to interpret the contract in a way that reflected sound commercial sense, or that she failed to give it such an interpretation. It is apparent from her recitation of the principles of contract interpretation that she was aware of the relevance of the "sound commercial sense" theme. She cited the following passage from this court's decision in Kentucky Fried Chicken, supra, at para. 27:

> Where, as here, the document to be construed is a negotiated commercial document, the court should avoid an interpretation that would result in a commercial absurdity: [Toronto (City) v. W.H. Hotel Ltd., [1966] S.C.R. 434, [1966] S.C.J. No. 23, 56 D.L.R. (2d) 539, at p. 548 D.L.R.]. Rather, the document should be construed in accordance with sound commercial principles [page271] and good business sense: [Scanlon v. Castlepoint Development Corporation (1992), 11 O.R. (3d) 744, [1992] O.J. No. 2692 (C.A.), at p. 770 O.R.]. Care must be taken, however, to do this objectively rather than from the perspective of one contracting party or the other, since what might make good business sense to one party would not necessarily do so for the other.

[51] The appellants' argument that the application judge failed to interpret the Purchase Agreement in a fashion that accords with sound commercial sense is grounded in the belief that she overlooked the importance of the "maximizing value" principle and the centrality of the Trustees' fiduciary obligations in that regard, in cases of this nature. She did neither, in my view.

[52] As noted above, the application judge was sensitive to the fiduciary out provisions that permitted other bona fide written unsolicited Acquisition Proposals. In her view, however, this was balanced, objectively and reasonably, by the requirement that Sunrise ensure enforcement of Standstill Agreements that had been signed as part of the auction process in order to protect the successful bidder. This interpretation makes commercial sense, in my view.

[53] On behalf of HCPI, Mr. Leon placed great emphasis on the sanctity of the fiduciary out mechanism in acquisition agreements of this nature. There is no doubt that the directors of a corporation that is the target of a takeover bid -- or, in this case, the Trustees -- have a fiduciary obligation to take steps to maximize shareholder (or unitholder) value in the process: see CW Shareholdings Inc. v. WIC Western International Communications Ltd. (1998), 39 O.R. (3d) 755, [1998] O.J. No. 1886 (Gen. Div.), at pp. 768 and 774 O.R. That is the genesis of the "fiduciary out" clauses in situations such as the case at hand. They enable directors or trustees to comply with their fiduciary obligations by ensuring that they are not precluded from considering other bona fide offers that are more favourable financially to the shareholders or unitholders than the bid in hand.

[54] It is not necessary -- nor would it be wise, in my view -- to go as far as HCPI suggests this court might go, and adopt the principle gleaned from some American authorities, that the target vendor can place no limits on the directors' right to consider superior offers and that any provision to the contrary is invalid and unenforceable: see Paramount Communications, Inc. v. QVC Network Inc., 637 A. 2d 34 (Del. 1994), and ACE Ltd. v. Capital Re Corp., 747 A. 2d 95 (Del. Ch. 1999), at p. 105. That is not what happened in this case.

[55] The Trustees did not contract away their fiduciary obligations. Rather, they complied with them by setting up an auction process, in consultation with their professional advisers, that was designed to maximize the unit price obtained for Sunrise's [page272] assets, in a fashion resembling a "shotgun" clause, by requiring bidders to come up with their best price in the second round, subject to a fiduciary out clause that allowed them to consider superior offers from anyone save only those who had bound themselves by a Standstill Agreement in the auction process not to make such a bid. In this case, that turned out to be only HCPI.

[56] An auction process is well-accepted as being one -- although only one -- "appropriate mechanism to ensure that the board of a target company acts in a neutral manner to achieve the best value reasonably available to shareholders in the circumstances": Maple Leaf Foods Inc. v. Schneider Corp. (1999), 42 O.R. (3d) 177, [1999] O.J. No. 4142 (C.A.), at p. 200 O.R. Here, the trustees, acting reasonably and on professional advice, formed the view that an auction process was the best way to maximize value, and conducted such an auction to the point where they attracted a successful bidder. This is not a case where the Trustees were unable to judge the adequacy of the bid (Schneider, at p. 200 O.R.). They had dealt with seven prospective purchasers in the course of the two auction rounds, and had received preliminary proposals. Ventas's $15-per-unit price represented a 35.8 per cent increase over the market price of the Units on the date the auction closed. I do not think the Trustees can be said to have failed in the exercise of their fiduciary obligations to their unitholders in these circumstances simply by agreeing in the Purchase Agreement to preclude earlier bidders, who had bound themselves under Standstill Agreements not to do so, from coming in after the auction was concluded and the "successful" bidder had showed its cards and attempting to "top up" that bid.

[57] It is well accepted that "where an agreement admits of two possible constructions, one of which renders the agreement lawful and the other of which renders it unlawful, courts will give preference to the former interpretation": John D. McCamus, The Law of Contracts (Toronto: Irwin Law, 2005) at p. 729. Advancing this principle, the appellants argue that we should be loathe to adopt an interpretation of the Purchase Agreement that is inconsistent with overarching fiduciary obligations. While I accept the principle put forward, however, I do not think it applies in the context of this case for the reasons outlined above. The interpretation given to the Purchase Agreement

by the application judge is not inconsistent with the Trustee's fiduciary obligation to maximize unitholder value. Indeed, it is consistent with that obligation.

[58] Finally, Mr. Leon emphasizes the importance of the word "nothing" in the opening language of ss. 4.4(2) and 4.4(3) of the Purchase Agreement. Both provisions open with the words [page273] "Notwithstanding anything contained in Section 4.4(1), until the Unitholder Approval, nothing shall prevent the Board from . . ." (emphasis added). Mr. Leon submits that "nothing" means what it says, and must be given the full scope of that meaning, in order to ensure that "nothing" in the Purchase Agreement or otherwise is permitted to stand in the way of the Trustees performing their duty to maximize shareholder value. This point involves parsing the Purchase Agreement in a microscopic fashion that is a little too fine, in my view. The use of the word "nothing" in ss. 4.4(2) and 4.4(3) is nothing more than a different way of saying "Notwithstanding anything contained in Section 4.4(1) . . . the Board is not prevented from . . .". I would not ascribe to it the expanded role that HCPI proposes.

The meaning of "bona fide"

[59] The appellants also attack the conclusion of the application judge that the HCPI Acquisition Proposal was not a "bona fide" offer. She accepted the Ventas submission that "a proposal made in breach of a contractual obligation not to make such a proposal cannot be considered to be bona fide", noting that ss. 4.4(2) and 4.4(3) of the Purchase Agreement contemplate an Acquisition Proposal from a third party "that did not result from a breach of . . . Section 4.4".

[60] There was much debate about the meaning of "bona fide". The application judge viewed it as meaning acting "in good faith; sincere, genuine", relying upon The Oxford English Dictionary.[7] She found that the HCPI Acquisition Proposal was not bona fide because it was made in breach of the HCPI Standstill Agreement, which Sunrise was obliged by s. 4.4 to enforce. The appellants agree that bona fide means "genuine" or "made in good faith", but submit that a bona fide Acquisition Proposal, as contemplated by the Purchase Agreement, is one that is "genuine" or "authentic" in the sense that it is not a sham and is reasonably capable of becoming a Superior Proposal, and that this decision must be made in the context of the entire situation.

[61] In the end, there is not much difference between the parties as to the meaning of the term "bona fide". As with the principles of contract interpretation, they differ on the application of the term in the circumstances of this case. Given the language of the Purchase Agreement, and the context in which it was negotiated -- particularly the language "that did not result from a breach of this Section 4.4" in ss. 4.4(2) and 4.4(3) -- I do not think [page274] the application judge erred in her assessment and use of the term "bona fide" here.

Miscellaneous

[62] Two additional points were made by the appellants, but need not be dealt with at length.

[63] First, HCPI argued that Sunrise had given its prior consent to HCPI to make its subsequent Acquisition Proposal following completion of the auction process and the execution of the Purchase Agreement. This consent is said to derive from the waiver Sunrise gave to both HCPI and Ventas as part of the invitation to bid in the second round. The application judge made a specific finding against this position, however, concluding that the December 29, 2006 letter "cannot possibly be construed as constituting Sunrise REIT's prior written consent as that term is used in the Standstill Agreement". There is no basis for interfering with this finding.

[64] Secondly, HCPI submitted that the position of Ventas on these applications was tantamount to saying that the benefit of the HCPI Standstill Agreement had been assigned to it. The application judge correctly found that there was no merit in this argument. I agree with her that neither the Standstill Agreement nor its benefits had been assigned to anyone, and no one was taking the position that they had.

The HCPI Cross-Appeal

[65] HCPI applied for a declaration that communications between it and SSL regarding Sunrise were permitted. The application judge declined to deal with this request, given her ruling which effectively precluded the HCPI Acquisition Proposal from being pursued. She concluded the application was moot.

[66] I agree and for the same reason find it unnecessary to deal with the cross-appeal for the same relief.

Conclusion

[67] For the foregoing reasons, then, I would dismiss both the appeal and the cross-appeal.

[68] If the parties are unable to agree as to costs, they may make brief written submissions in that regard, not to exceed five pages in length.

[69] In closing, I would like to thank all counsel for their able presentations and assistance.

Appeal dismissed. [page275]

Notes

1 BG Checo International Ltd. v. British Columbia Hydro and Power Authority, [1993] 1 S.C.R. 12, [1993] S.C.J. No. 1, at pp. 23-24 S.C.R.; Scanlon v. Castlepoint Development Corp. (1992), 11 O.R. (3d) 744, [1992] O.J. No. 2692 (C.A.), at p. 770 O.R.

2 Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of), [1998] O.J. No. 2637, 40 B.L.R. (2d) 1 (Gen. Div.) at para. 403, affd (1999), 45 O.R. (3d) 417, [1999] O.J. No. 3290 (C.A.); Venture Capital USA Inc. v. Yorkton Securities Inc. (2005), 75 O.R. (3d) 325, [2005] O.J. No. 1885 (C.A.), at para. 26; Eli Lilly & Co. v. Novopharm Ltd., [1998] 2 S.C.R. 129, [1998] S.C.J. No. 59, at pp. 166-68 S.C.R. ("Eli Lilly").

3 Eli Lilly, ibid, at p. 166 S.C.R.; Kentucky Fried Chicken Canada, a Division of Pepsi-Cola Canada Ltd. v. Scott's Food Services Inc. [1998] O.J. No. 4368, 114 O.A.C. 357 (C.A.), at paras 25-27 ("Kentucky Fried Chicken").

4 Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co., [1980] 1 S.C.R. 888, [1979] S.C.J. No. 133, at p. 133, at p. 901 S.C.R.; Kentucky Fried Chicken, ibid.

5 The Proposal has to be a Superior Proposal; Sunrise has to notify Ventas of the Proposal and provide it with all relevant documentation; Ventas had the right to match the Proposal within five days (as defined) and, if it chooses not to, to terminate the Agreement and receive the break fee (see also, s. 5.3 and Schedule "B" (definition of "Termination Payment"))

6 That meets the s. 4.4.(2) requirements of being bona fide and unsolicited.

7 2d ed., s.v. "bona fide".

*Case Name:*

# IPEX Inc. v. AT Plastics Inc.

**RE: IPEX Inc., Plaintiff/Appellant, and AT Plastics Inc., Defendant/Respondent**

[2011] O.J. No. 3636

**2011 ONSC 4734**

337 D.L.R. (4th) 63

205 A.C.W.S. (3d) 654

4 C.L.R. (4th) 223

2011 CarswellOnt 8144

Court File No. 06-CV-316859PD1

Ontario Superior Court of Justice

**G.R. Strathy J.**

Heard: May 17, 2011.
Judgment: August 10, 2011.

(74 paras.)

*Civil litigation -- Civil procedure -- Discovery -- Production and inspection of documents -- Objections and compelling production -- Orders for production -- Privileged documents -- Documents prepared for the purpose of settlement -- Appeals -- From Masters' decisions -- Appeal by plaintiff from master's order requiring production of documents created in United States litigation to which plaintiff was party allowed in part -- Defendant supplied raw materials to plaintiff, who manufactured pipes -- Plaintiff claimed against defendant for contribution and indemnity after settlement of class actions relating to pipe failure -- Master ordered production of documents related to settlement of class actions -- Only way to understand plaintiff's liability in class actions was by examining documents -- Defendant entitled to know factual foundation of plaintiff's claim -- Only documents from claims for which plaintiff sought indemnity need be produced.*

Appeal by IPEX Inc. from a master's order requiring it to produce certain documents created in litigation to which IPEX was a party in the United States. IPEX claimed that the documents were protected by settlement privilege. IPEX manufactured pipe that was used in plumbing and heating installations. IPEX claimed against AT Plastics ("ATP"), which supplied raw materials to IPEX in negligence. IPEX was the defendant in 25 or more class actions in Canada and the United States related to premature failure of its pipes. The class actions had been conditionally settled. IPEX sought indemnity from ATP. The master's order required IPEX to produce all documents in the United States proceedings concerning offers to settle, mediation materials, and settlement agreements.

HELD: Appeal allowed in part. IPEX's claim against ATP was based on the settlements. Production of the documents was therefore essential to permit ATP to defend the claim. ATP would be unable to defend itself unless it was able to lift the veil on the settlements. The only way to understand the basis of IPEX's liability in the class actions was to examine the documents. The overriding interest of justice demanded that ATP be given a fair opportunity to know the underlying factual foundation for IPEX's claim and to properly meet that claim. However, the master erred in ordering production of all documents related to the class actions. The only documents that were to be provided were those that were subject to a claim of contribution and indemnity from ATP.

**Statutes, Regulations and Rules Cited:**

Rules of Civil Procedure, R.R.O. 1990, reg. 194, Rule 1.04(1.1), Rule 24.1.14, Rule 29.2.03, Rule 29.2.03(1)(a), Rule 29.2.03(1)(b), Rule 30.1

**Counsel:**

*Jessica Kimmel and Sara Gottlieb*, for the Plaintiff/Appellant.

*Larry Theall and Jeff Brown*, for the Defendant/Respondent.

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**REASONS FOR DECISION (APPEAL FROM MASTER)**

1 **G.R. STRATHY J.**:-- This is an appeal by the plaintiff IPEX Inc. ("IPEX") from an order of Master Graham requiring that it produce certain documents created in litigation to which it is a party in the United States. The appeal concerns, among other things, the nature and scope of the settlement privilege.

The Action and the Pleadings

2 IPEX manufactures "Kitec" pipe, which is used in residential, institutional and commercial plumbing and heating installations.

3 The defendant AT Plastics Inc. ("ATP") has supplied some of the raw materials used in the manufacture of Kitec pipe. Not all IPEX's Kitec pipe was manufactured using ATP's product. At various times, some was manufactured using raw materials purchased from other suppliers.

**4** IPEX alleges that it has received complaints of premature failure of the Kitec pipe. The complaints include allegations by end users that pipes have burst in plumbing and heating installations, with consequential property damages, replacement costs and related damages.

**5** IPEX is a defendant in some twenty-five or more class actions in Canada and the United States. There are also individual actions. The claims are massive.

**6** IPEX has commenced this action claiming damages against ATP for negligence, breach of contract and breach of warranty. It alleges that ATP's product degrades too quickly and was not fit for the purpose for which it was intended. It claims damages, including the cost of investigating and responding to complaints, payment for property damages, the cost of repairing and replacing the pipe, and associated costs.

**7** IPEX also claims contribution and indemnity for any amounts that it has paid, or pays in the future, or becomes obligated to pay, as a result of allegations related to Kitec pipe manufactured with ATP's product. There has been a conditional settlement of some of the U.S. and Canadian class actions for US$125,000,000, inclusive of attorneys' fees. IPEX claims indemnity for these amounts, as well as amounts paid as a result of settlements or judgments in other litigation. It is said that the potential claims for indemnity have a value in excess of $500 million and could potentially be as high as $1 billion.

**8** ATP's statement of defence asserts, among other things, that the damages claimed by IPEX are the result of its own negligent design and manufacturing process and, in particular, that IPEX used brass fittings in the construction of its pipe. These fittings were allegedly susceptible to a particular form of corrosion, known as "dezincification", whereby zinc leaches from the fitting and causes a powdery build-up on the inside of the fitting. It is alleged that this in turn restricts water flow, causing the pipe to become pressurized and ultimately to burst.

**9** Similar allegations have been made by the plaintiffs in the class actions.

The Documents at Issue

**10** ATP sought production of, among other things, all documents sent by IPEX or received from third party claimants, or their counsel, in the U.S. proceedings (described as the "Litigation Files"), including all documents concerning offers to settle, mediation materials, and settlement agreements (referred to as the "Mediation Briefs"), as well as pleadings and depositions. The precise relief requested was described in para. (n) of the notice of motion as follows:

> All documents of any kind received from or sent to any claimants or their counsel in relation to KITEX [sic] claims (including the Washington class action, the Woodlands matter, and the Nevada class action), including pleadings, correspondence, productions, offers to settle, agreements, mediation materials, settlement agreements, motion materials, discovery requests and responses, transcripts from examinations or depositions, and court orders including those used in an attempt to resolve the original [sic].

**11** IPEX took the position that these documents (other than the productions in the U.S. litigation, which it has agreed to produce) were privileged and confidential and were protected from production under the local laws of the jurisdictions in which the proceedings were being litigated.

The Decision of the Master

**12** The Master dealt with several other production issues in a brief endorsement and reserved his decision on the relief sought in para. (n), above. In a supplementary endorsement dated February 25, 2011, he granted an order requiring IPEX to produce:

> ... all documents produced or created in the US Actions, including pleadings, correspondence, productions, offers to settle, agreements, mediation materials, settlement agreements, motion materials, discovery requests and response, transcripts from examinations and court orders ...

**13** The "US Actions" were defined to mean all lawsuits, whether individual or class action, whether pending, dismissed, settled or otherwise resolved, in any jurisdiction in the United States, including the federal Multi-District Litigation ("MDL") regime, involving a claim or claims against IPEX in relation to Kitec pipe or fittings that (a) form a basis for IPEX's claim for contribution and indemnity against ATP and/or (b) relate to brass fittings and/dezincification.

**14** This order is extremely broad. It encompasses production of the Litigation Files, which includes the complete files of IPEX's lawyers in the various class proceedings, and the Mediation Briefs, which are a subset of the Litigation Files. The Mediation Briefs include all documents and briefs exchanged in connection with mediations in the U.S. litigation, some of which resulted in settlements that form a part of the claim by IPEX against ATP in this litigation and some of which did not. The order also covers production of documents in proceedings that are not the subject of IPEX's claims for contribution and indemnity from ATP.

**15** The Master's reasons on this issue were as follows:

> The issue on which I reserved is whether the plaintiff must produce further documents of the description in item (n) of the notice of motion.
>
> These documents include all documents forming part of the cases in the U.S. against IPEX with respect to which IPEX is claiming contribution and indemnity from AT Plastics ("ATP"). I accept the submission of counsel from ATP that in those cases in which IPEX is claiming indemnity from ATP, ATP is in the same position as a third party without the same rights of production that a third party would have from the plaintiffs. Accordingly, IPEX shall produce to ATP all documents produced or created in those U.S. Kitec actions which are the basis for indemnity claims against ATP. Those documents shall include any settlement agreements and documents filed for the mediations, but the plaintiff may redact any portions of any documents that constitute admissions against IPEX's interest in relation to ATP. This court cannot apply the U.S. statutes relied upon by IPEX in relation to settlement or mediation privilege where the U.S. law is not properly proven through an expert. (See *Lear v. Lear*, [1974] O.J. No. 2100, 1974 CarswellOnt 162 at para. 10.) The provisions of rule 24.1.14 cannot apply to a mediation held in another jurisdiction.
>
> In addition, even though the plaintiff IPEX is not claiming indemnity with respect to 'dezincification' claims, ATP's pleading in para. 21(f)(i) of its statement of defence with respect to IPEX's use of brass fittings makes relevant documents in any case or cases in which the U.S. plaintiffs make a similar allegation relating

to the use of brass fittings. Documents in any such action or actions shall be produced.

ATP's use of the documents ordered produced shall be subject to the provisions of Rule 30.1.

Applicable Law and the Agreement of the Parties

**16** The Master's observations about U.S. law not having been properly proven through an expert were the result of submissions by counsel for ATP that the evidence adduced by IPEX concerning U.S. law, which had not been tendered through an expert in U.S. law, was inadmissible. This led to a motion by IPEX for leave to adduce further evidence of U.S. law on the appeal before me. The issue was, very sensibly, resolved by the parties by agreement that the issue of privilege should be decided under Ontario law. The agreement was in the following terms:

1. The issue of whether or not documents should be produced in this action, including mediation materials, offers to settle and settlement agreements, is governed by and should be decided under Ontario law, including the questions of whether they are subject to a class privilege and, if so, if there is an exception to the privilege that would justify their production in this case, or if they are not subject to a class privilege, whether they meet the *Wigmore* test.
2. The materials exchanged or presented at or in connection with mediations or settlement conferences relating to claims in the United States that are the subject of the Order appealed from (which would include offers to settle, correspondence, mediation or settlement materials and settlement agreements as itemized in the Order) were produced or created in a 'without prejudice' process in circumstances where the parties had an expectation of confidentiality.
3. On the basis of the foregoing agreements, the court does not need to dispose of IPEX's motion for leave to file the fresh evidence and it will be withdrawn.

The Standard of Review

**17** The standard of review on an appeal from a Master was set out by the Divisional Court in *Zeitoun et al. v. The Economical Insurance Group* (2008), 91 O.R. (3d) 131, [2008] O.J. No. 1771 (S.C.J.), aff'd. (2009), 96 O.R. (3d) 639 (C.A.): the decision should not be interfered with unless the Master made an error of law, exercised his or her discretion on the wrong principles or misapprehended the evidence such that there was a palpable or overriding error.

**18** Where there is an error of law, the standard of review is correctness, whether the order is final or interlocutory. Where there is an error in the exercise of discretion, it must be established that the discretion was based on a wrong principle or that there was a palpable or overriding error in the assessment of the evidence: see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. The relevance of a document is a question of law, but whether or not a particular relevant document should be produced may involve an element of discretion: *Wahid v. Malinkovski,* 2010 ONSC 3249, [2010] O.J. No. 2872 at para. 8, referring to *Air Canada v. McDonnell Douglas Corp.* (1994), 34 C.P.C. (3d) 181, [1994] O.J. No. 4435 (Gen. Div.) at para. 6.

**19** I accept the general proposition, put forward by counsel on behalf of ATP, that a Case Management Master's decision on documentary production is one that falls squarely within the Master's area of experience and expertise. Masters have been aptly described as being on the "front line" of production and discovery motions and their decisions on those issues are entitled to deference on appeal: *Noranda Metal Industries Ltd. v. Employers Liability Assurance Corp.* (2000), 49 C.P.C. (4th) 336, [2000] O.J. No. 3846 (S.C.J.); *Temelini v. Wright,* [2009] O.J. No. 4447 (S.C.J.) at para. 16, aff'd. 2010 ONCA 354, [2010] O.J. No. 5994. This is particularly so where the decision involves an element of discretion.

**20** I also accept the general proposition that a Judge sitting in appeal of a Master's decision should assume that the Master considered all the issues before him or her, even if those issues are not directly addressed in the reasons: *Temelini*, above, at para. 18. That being said, in this particular case the Master made no reference to the principle of proportionality, an issue that has particular significance in this case and to which I shall refer below. The absence of reasons on this issue makes it difficult to assess whether the Master gave any weight to the proportionality factor.

The Issues and the Positions of the Parties

**21** The principal issues on this appeal are:

(a) whether, having regard to the existence of settlement privilege, the Master erred in ordering production of the Mediation Briefs; and
(b) whether, having regard to the principles of relevance and proportionality, the Master erred in ordering production of the entire Litigation Files.

**22** IPEX asserts that the Master's decision with respect to the Litigation Files failed to consider the relevance of those records, including the Mediation Briefs, particularly because some of the underlying U.S. Actions were not the subject of claims for contribution and indemnity and some of the cases were ongoing and had not been settled. It says, as well, that the production of all Litigation Files was not proportionate, would involve extraordinary time and expense, including the expense of reviewing the files for privileged information, and would involve production of irrelevant documents. It says that ATP has not established that those documents are relevant and that, when considered in the context of the substantial production that IPEX has voluntarily agreed to make, the additional production ordered by the Master is simply not proportional.

**23** IPEX takes the position that the Mediation Briefs are privileged. It also says that the order fails to take into account the interests of third parties who were parties to the underlying actions.

**24** ATP's position is that the Litigation Files and the Mediation Briefs are relevant and that it would be unfair not to require their production. It says that IPEX is seeking contribution and indemnity for amounts it is required to pay under some settlements of U.S. litigation and that it is entitled to discovery of all the documents that were generated in arriving at those settlements. The reasons why IPEX agreed to enter into settlement agreements will be a key issue for the trial judge and IPEX will have to demonstrate that the settlements were reasonable. ATP will be entitled to show that they were not reasonable or that they were entered into for reasons having to do with other factors, such as, for example, the dezincification problem, which had nothing to do with ATP. ATP says that even if the Mediation Briefs and settlement agreements are subject to some form of privilege, IPEX has waived privilege by putting the settlements directly in issue.

**25** ATP says that there was no evidence before the Master to suggest that the production of the Litigation Files requested was disproportionate and that IPEX failed to discharge its onus of showing that it was disproportionate.

Settlement Privilege

**26** The law of privilege is a judicial, and in a few cases legislative, compromise between the search for the truth and over-riding social values. It has the effect of excluding relevant evidence because the admission of the evidence would impair important social relationships and values. Communications in the context of certain relationships are said to be subject to a "class privilege", in which the communications are presumptively protected from disclosure and the onus is on the party seeking disclosure of the communication to show that there is an over-riding interest in such disclosure: *R. v. Beharriell,* [1995] 4 S.C.R. 536. The tendency in Canada has been to limit class privileges and to take a more flexible and nuanced approach to claims for privilege on a case-by-case basis: see *Slavutych v. Baker*, [1976] 1 S.C.R. 254; J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (2nd) ed., (Markham, Ont: LexisNexis, 1999) ch. 14: "Privilege".

**27** Solicitor and client privilege attaches to communications between lawyer and client in connection with the provision of legal advice. It is a class privilege, does not require a balancing of interests on a case-by-case basis and is subject to limited and defined exceptions: *Ontario (Liquor Control Board) v. Magnotta Winery Corp.* (2009), 97 O.R. (3d) 665, [2009] O.J. No. 2980 (Div. Ct.), at paras. 28-30, aff'd. 2010 ONCA 681, 102 O.R. (3d) 545 ("*Magnotta*").

**28** Litigation privilege, also known as "work product privilege", is a broader privilege, but it is not a class privilege. It was described by Carnwath J. for the Divisional Court in *Magnotta* at paras. 31-36:

> Litigation privilege, also called work product privilege, applies to communications between a lawyer and third parties or a client and third parties, or to communications generated by the lawyer or client for the dominant purpose of litigation when litigation is contemplated, anticipated or ongoing. Generally, it is information that counsel or persons under counsel's direction have prepared, gathered or annotated.
>
> Litigation privilege is not a class or absolute privilege and, unlike solicitor-client privilege, has not evolved into a substantive rule of law.
>
> Information sought to be protected by litigation privilege must have been created for the dominant purpose of use in actual, anticipated or contemplated litigation.
>
> Litigation privilege can protect documents that set out the lawyer's mental impressions, strategies, legal theories or draft questions. These documents do not have to be from or sent to the client. This is the first broad category of documents that are most often protected by litigation privilege as part of the lawyer's brief. The second broad class of documents includes communications by the lawyer, client or third party, created for the purpose of litigation, e.g., witness statements, expert opinions and other documents from third parties.

> Litigation privilege allows a lawyer a "zone of privacy" to prepare draft questions and arguments, strategy or legal theories.
>
> The elements required in order to claim work product or litigation privilege over documents or communications are as follows:
>
> (a) the documents or communications must be prepared, gathered or annotated by counsel or persons under counsel's direction;
> (b) the preparation must be done in a realistic anticipation of litigation;
> (c) if there is more than one purpose or use for the document, facts must reveal that the dominant purpose was for the anticipated litigation;
> (d) there must be no requirement under legal rules governing the proceeding to disclose the documents or facts; and,
> (e) there has been no prior waiver of documents or facts by disclosure to the opposing party ...

**29** Settlement privilege protects communications made with a view to settlement. The rationale is that the settlement of disputes is desirable and parties would not enter into settlement negotiations if their communications could be used against them if the negotiations were not successful. The privilege is intended to encourage settlement and to protect the parties to negotiations for that purpose: *I. Waxman & Sons Ltd. v. Texaco Canada Ltd.*, [1968] 1 O.R. 642, 67 D.L.R. (2d) 295 (H.C.J.), aff'd. [1968] 2 O.R. 452 (C.A.) ("*Waxman*"). As Doherty J., as he then was, observed in *Mueller Canada Inc. v. State Contractors Inc.* (1989), 71 O.R. (2d) 397, [1989] O.J. No. 2059 (H.C.J.) ("*Mueller*") at para. 7, the "parties should be free to engage in frank and reasonable negotiations without fear that their offers of peace will be turned on them as admissions against interest should negotiations fail."

**30** Rule 24.1.14 of the *Rules of Civil Procedure*, R.R.O. 1990, reg. 194 recognizes the common law settlement privilege and provides that all communications at a mediation session are deemed to be without prejudice settlement discussions.

**31** In *Muller v. Linsley & Mortimer* [1996] P.N.L.R. 74, [1994] A.D.R.L.R. 11/30, the English Court of Appeal adopted the following statement, which had been approved by the House of Lords in *Rush & Tompkins Ltd. v. Greater London Council*, [1989] A.C. 1280:

> That the rule rests, at least in part, upon public policy is clear from many authorities and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations ... may be used to their prejudice in the course of the proceedings. ... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.

**32** In order for the privilege to be recognized:

(a) there must be a litigious dispute in existence or contemplated;
(b) the communication must be made with the express or implied intention that it would not be disclosed to the court in the event the negotiations failed; and
(c) the purpose of the communication must be to attempt to effect a settlement.

See Sopinka et al., above, at s. 14.207.

**33** In Ontario, it is settled law that litigation privilege applies not only to the immediate parties to litigation, but to subsequent litigation between one of those parties and another party. In the decision of the Court of Appeal in *Waxman*, it was stated, at paras. 2 and 3:

> Admittedly, the issue is one upon which there is no direct and binding authority in this jurisdiction and hence admittedly the question to be resolved is one at large in this jurisdiction. The question, of course, is whether or not discovery can be compelled in the production by one party to the litigation before the Court of letters written by another party to this litigation in previous litigation with a party, a complete stranger, to the present proceedings. To put it another way, are communications written without prejudice and with a view to settlement of issues between A and C compellable at the instance of B in subsequent litigation between A and B on the same subject-matter or subject-matter closely related to that with which the correspondence in question was concerned? We find ourselves in agreement with the conclusions reached by Fraser, J., and also with his analysis, in the main, of the very numerous decisions referred to in his reasons for judgment and, as I have said, discussed in the submissions of counsel before this Court. Specifically, we agree with the learned trial Judge wherein he states his conclusion as follows, and I quote from his reasons [[1968] 1 O.R. 642 at p. 656, 67 D.L.R. (2d) 295 at p. 309]:
>
> > ... I am of opinion that in this jurisdiction a party to a correspondence within the "without prejudice" privilege is, generally speaking, protected from being required to disclose it on discovery or at trial in proceedings by or against a third party.
>
> Fraser, J., expresses the view that the principle upon which he concluded the case is supported in large measure by two Ontario cases referred to by him and in this we also agree. The two Ontario cases are *Pirie v. Wyld* (1866), 11 O.R. 422, and *Underwood v. Cox* (1912), 26 O.L.R. 303, 4 D.L.R. 66, a decision of a Divisional Court of this Province. I may add that although there are numerous decisions elsewhere on subject-matter related to the matters to be decided here, although not specifically in point, we prefer, so far as the principle expressed by Fraser, J., is concerned, the reasoning in four of those cases and apply it by way of analogy to the problem which we are here deciding. Those four cases are *Hoghton v. Hoghton* (1852), 15 Beav. 278, 51 E.R. 545; *Warrick v. Queen's College, Oxford (No. 2)* (1867), L.R. 4 Eq. 254; *Cory v. Bretton* (1830), 4 Cr. & P. 462, 172 E.R. 783, and finally *La Roche v. Armstrong*, [1922] 1 K.B. 485.

**34** In *Magnotta*, the Divisional Court endorsed a case-by-case approach to settlement privilege. Carnwath J., writing for the court, stated, at para. 48, that:

> ... a case-by-case analysis must be undertaken, given that the development of settlement privilege continues as is so often the case with the common law. At its current stage, it is not yet a class or absolute privilege nor has it evolved into a substantive rule of law.

**35** He continued, at paras. 51-52, describing what has come to be known as the "Wigmore Test" for the determination of whether a privilege has been established on a case-by-case basis:

> Solicitor-client privilege is a class privilege which never ends unless waived or unless the communication is in furtherance of a crime. Settlement privilege is not a class privilege. Its existence must be established on a case-by-case analysis first applying the "Wigmore" test, as described in *Slavutych v. Baker*, [1976] 1 S.C.R. 254 at 260:
>
> (1) The communications must originate in a confidence that they will not be disclosed.
> (2) The element of confidentiality must be essential to the maintenance of the relationship in which the communications arose.
> (3) The relationship must be one which, in the opinion of the community, ought to be 'sedulously fostered'.
> (4) The injury caused to the relationship by disclosure of the communications must be greater than the benefit gained for the correct disposal of the litigation.
>
> The Supreme Court of Canada re-affirmed the approach in *Slavutych*, making it clear that privilege is to be determined on a case-by-case basis (see: *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157 at para. 20; see also *Rudd v. Trossacs Investments Inc.* (2006), 79 O.R. (3d) 687 at para. 26 (Div. Ct.) ...

**36** This decision was affirmed by the Court of Appeal, which described the reasons of the Divisional Court as "thoughtful" and "detailed". The Court of Appeal did not, however, discuss the settlement privilege aspect of the decision.

**37** A few months after the decision of the Divisional Court in *Magnotta,* a different panel of the Court released a decision that suggested that settlement privilege is a class privilege. In *Inter-Leasing Inc. v. Ontario (Minister of Finance)* (2009), 256 O.A.C. 83, [2009] O.J. No. 4714 (Div. Ct.), after referring to the extract from Sopinka et al. at para. 32 above, the Divisional Court stated at para. 11:

> A party seeking to introduce in evidence material subject to settlement privilege must show that the communication is relevant and the disclosure is necessary, either to show the agreement of the parties or to address a compelling or overriding interest of justice (*Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada*, [2005] B.C.J. No. 5 (B.C.C.A.) at para. 20). Exceptions to the privilege have arisen where there has been fraud, where production is necessary to meet a defence of laches, lack of notice or the passage of a limitation period, or where

> parties have made an agreement respecting evidence in the litigation (*Middelkamp v. Fraser Valley Real Estate Board* (1992), 96 D.L.R. (4th) 227 (B.C.C.A.) at 223).

**38** The Court found that the necessity test had not been met - at para. 21:

> Moreover, the applicant has not satisfied the necessity test. To satisfy this test, the applicant must demonstrate a compelling or overriding interest of justice that outweighs the public interest in protecting settlement discussions from disclosure. While the applicant argues that disclosure of this information will not affect the issue of its tax liability, settlement privilege exists not only to protect a party against disclosure of information that may affect its position on liability. It extends, as well, to protect other statements against interest made in the course of settlement negotiations that a party may wish to remain confidential.

**39** The two decisions referenced by the Divisional Court, *Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada* and *Middelkamp v. Fraser Valley Real Estate Board*, are decisions of the British Columbia Court of Appeal that come down squarely in favour of settlement privilege being a class privilege. No mention was made of *Magnotta.*

**40** The following year, in *R. v. McKinnon*, 2010 ONSC 3896, [2010] O.J. No. 3001, the Divisional Court did not find it necessary to decide the issue, as it found that the settlement documentation would be admissible under either the *Wigmore* criteria or as an exception to the class privilege - at paras. 4-6:

> Argument was also directed at whether the settlement documentation in question is subject to a class privilege or whether the presence of a privilege can only be determined on a case by case basis. Again, we do not consider it necessary to decide that issue especially given that the issue is currently scheduled to be argued before the Court of Appeal in September. Whether one concludes that settlement documentation is *prima facie* privileged or can only be found to be privileged on the individual case, we agree with the adjudicator that on either test the material was properly ordered to be produced. Any privilege is not absolute. It is subject to exceptions. One of these exceptions is where the settlement documentation is necessary for the proper disposition of a proceeding. As was said in *Inter-Leasing Inc. v. Ontario (Minister of Finance),* [2009] O.J. No. 4714 (Div. Ct.) at para. 11:
>
> > A party seeking to introduce in evidence material subject to settlement privilege must show that the communication is relevant and the disclosure is necessary, either to show the agreement of the parties or to address a compelling or overriding interest of justice.
>
> In our view, the adjudicator correctly decided that the settlement documentation in question was relevant and necessary for the proper disposition of the matter that was before him. In particular, we agree with the adjudicator that the decision in *Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada,* [2005] B.C.J. No. 5 (B.C.C.A.) does not require that the documentation in question be

> the "only way" in which a fact in question can be established. Rather necessity is established if there is a compelling or overriding interest of justice achieved through production of the material in the circumstances of a given case.
>
> There is a compelling interest in having the documentation produced given the nature of the allegations made against the Ministry. Central to the issues currently before the adjudicator is whether the Ministry has failed to abide by earlier orders directed at remedying a serious case of discrimination. Indeed the adjudicator refers to the material as touching upon "matters that lie at the heart of this litigation" and "crucial to a proper resolution of the matters before the Tribunal". The adjudicator provided cogent reasons for those characterizations of the material and why they were necessary to the task before him including that the settlement documentation may provide important evidence suggesting that the Ministry has not been acting in good faith in terms of its implementation of the remedies earlier ordered. These included that the settlements arose out of the same workplace of Mr. McKinnon, that two of them involved a high ranking person within the workplace who has figured as an antagonist to Mr. McKinnon throughout the long saga of his complaint, and that the Ministry might be engaged in a systematic process of trying to protect this person from adverse findings that would figure prominently in the issues that the adjudicator was tasked with determining.

**41** The Divisional Court noted that in any case the issue would be before the Court of Appeal later in the year. As it happened, the Court of Appeal did not address the settlement privilege issue in *Magnotta*.

**42** It has been suggested, however, that *Magnotta* is at odds with other Canadian authorities. In *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32, [2011] N.S.J. No. 164, the Nova Scotia Court of Appeal concluded that the weight of authority, and sound policy reasons, support the "class approach" - at paras. 54-56:

> *Magnotta* is at odds with the Canadian decisions that have adopted the "class" or "blanket" approach to settlement privilege (e.g. *Heritage Duty Free Shop Inc. v. Canada (Attorney General)*, 2005 BCCA 188; *British Columbia Children's Hospital v. Air Products Canada Ltd.*, [2003] B.C.J. No. 591; *Waxman*; the majority in *Middelkamp*; *Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4). Nova Scotia courts have adopted the class approach: *Berta*, [2007] N.S.J. No. 537, *supra*; *Gay v. UNUM Life Insurance Company of America*, 2003 NSSC 228. Many secondary sources agree: *Sopinka* at p. 1033; David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 5th ed. (Toronto, ON: Irwin Law, 2008) at pp. 248-54; Gordon D. Cudmore, *Civil Evidence Handbook*, loose-leaf, (Toronto, ON: Thomson Reuters, 1994), ch. 6 at 6-30.14(2).
>
> With respect, *Magnotta* and the Ontario cases are not compelling. First, those decisions do not engage all the contrary jurisprudence. Second, despite *Magnotta's* reliance on Supreme Court decisions such as *Slavutych*, no Supreme Court decision suggests that settlement privilege is not a class privilege. For example, one

of the cases relied upon in *Magnotta* is *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157. But at paragraph 20 of *Ryan*, McLachlin J. (as she then was) talks about the Wigmore test applying to new situations where "... reason, experience and application of the principles that underlie the traditional privileges so dictate: ..." Again, at para. 32, reference is made to "new" privileges in the context of the Wigmore test. There is nothing new about settlement privilege. *Ryan* did not alter the law for blanket privilege (*Heritage*, *supra*, at para. 29, citing *R. v. McClure*, 2001 SCC 14).

But the fundamental reason that the case-by-case analysis should be rejected is that it does not adequately support the policy underlying settlement privilege. If settlement discussions and agreements are not *prima facie* privileged and therefore are disclosable, the very reason for protecting and fostering informal resolution of disputes is at risk. The price of this approach is uncertainty of application of the rule. For this reason, the words of Binnie J. in *National Post*, [2010] 1 S.C.R. 477 at para. 44, are apposite. When rejecting a class privilege for journalists, Binnie J. noted the importance of certainty:

> ... It is particularly important in the case of class privilege that the rules be clear in advance to all participants so that they may govern themselves accordingly.

**43** Similarly, in *Middelkamp v. Fraser Valley Real Estate Board*, (1992), 96 D.L.R. (4th) 227, [1992] B.C.J. No. 1947, the majority of the British Columbia Court of Appeal, speaking through McEachern C.J.B.C., were of the view that settlement privilege is a "class privilege" - at paras. 18-20:

> ... I find myself in agreement with the House of Lords that the public interest in the settlement of disputes generally requires "without prejudice" documents or communications created for, or communicated in the course of, settlement negotiations to be privileged. I would classify this as a "blanket", *prima facie*, common law, or "class" privilege because it arises from settlement negotiations and protects the class of communications exchanged in the course of that worthwhile endeavour.
>
> In my judgment this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, and whether or not a settlement is reached. This is because, as I have said, a party communicating a proposal related to settlement, or responding to one, usually has no control over what the other side may do with such documents. Without such protection, the public interest in encouraging settlements will not be served.
>
> I recognize that there must be exceptions to this general rule. An obvious exception would be where the parties to a settlement agree that evidence will be furnished in connection with the litigation in which the application is made. In such cases, the public interest in the proper disposition of litigation assumes

> paramountcy and opposite parties are entitled to know about any arrangements which are made about evidence. Other exceptions could arise out of such matters as fraud, or where production may be required to meet a defence of laches, want of notice, passage of a limitation period or other similar matters which might displace the privilege. As we did not have argument on these matters I prefer to say nothing further about them.

**44** The Newfoundland and Labrador Court of Appeal has taken a similar view: *Meyers v. Dunphy*, 2007 NLCA 1, [2007] N.J. No. 5.

**45** The significance of the distinction between a "class" privilege and the case-by-case "*Wigmore*" analysis is that in the case of a class privilege, the party seeking disclosure must establish that the case falls within an exception to the privilege. In the case-by-case approach, the burden is on the party asserting privilege to show that it applies. In *Brown v. Cape Breton*, the Nova Scotia Court of Appeal observed at para. 51:

> The "blanket" versus "case-by-case" distinction matters because the question of whether settlement discussions are *prima facie* privileged or not is at issue. If the former, then the settlement communications are inadmissible and an applicant has the burden of establishing an exception to privilege. If the latter, then the claimant of privilege must establish it and the need for an exception to a *prima facie* rule does not arise.

And at para. 60, it concluded that there are sound practical reasons for adopting a class approach:

> If settlement privilege enjoys a "class" status, those seeking an exception carry the burden of establishing an exception. If settlement privilege requires a case-by-case analysis, then the burden rests with the claimant of privilege. As a matter of practice, it would be unwise to send a message to litigants and the bar that communications designed to explore settlement are *prima facie* disclosable unless a judge, applying the Wigmore test, says otherwise. The importance of the doctrine, coupled with the need for relative certainty of application, favours a class approach.

**46** In this case, the parties acknowledge that the first three requirements of the *Wigmore* test have been met. They acknowledge that the Mediation Briefs were "produced or created in a 'without prejudice' process in circumstances where the parties had an expectation of confidentiality." Confidentiality is essential to the relationship between parties to settlement discussions and it should be "sedulously fostered" to promote the acknowledged benefits of settlement. The real issue - indeed, the only issue - is whether the injury caused to the relationship by disclosure of the Mediation Briefs will be greater than the benefit to be achieved by the correct disposal of this litigation.

**47** This calls for a balancing of the rights and confidentiality expectations of the parties to the settlement against the rights of the party seeking disclosure to properly meet the case against it. The process was described by Master Dash in *Ricci v. Gangbar*, 2010 ONSC 5450, [2010] O.J. No. 4321, at para. 21:

> The fourth Wigmore condition states: 'The injury caused to the relationship by disclosure of the communications must be greater than the benefit gained for the

> correct disposal of the litigation.' In the context of this motion that means that the injury caused to the relationship between the parties who engaged in confidential settlement negotiations in the Will Challenge must be greater than the benefit gained for the correct disposition of the Lawyer Action. It requires a balancing of the rights and confidentiality expectations of the parties to the settlement with the rights of the lawyer in this action to be able to properly meet the claims advanced against him and advance his defence to those claims.

**48** In this case, it requires a balancing of the rights and expectations of IPEX and the parties with which it settled, against the right of ATP to meet the claims brought against it by IPEX.

**49** Dealing first with the rights and confidentiality expectations of the parties to the settlement, it has been pointed out that the purpose of the settlement privilege was to prevent disclosure of offers of settlement only when the disclosure was to show that a party had made an admission of liability or had acknowledged that it had a weak case - see *Mueller*, at para. 12. Parties can reasonably expect that admissions of liability or confessions of weakness will not be used against them, by the opposite party or by third parties in future litigation. That concern has been specifically addressed by the Master, who said that IPEX would be entitled to "redact any portions of any documents that constitute admissions against IPEX's interest in relation to ATP." Permitting production of the Mediation Briefs with this condition acknowledges the underlying rationale of the privilege. As well, there is no reason to think that the plaintiffs in the settled U.S. Actions would have any reason to be concerned about disclosure of the Mediation Briefs. They have no potential liability to ATP and they assert no claims against ATP. It has not been suggested that they could have made admissions in the course of settlement negotiations that might be used against them in this litigation.

**50** I turn then to the benefit to be achieved from the correct disposal of this litigation if the Mediation Briefs are produced. IPEX's claim against ATP will be based on the settlements. Production of the Mediation Briefs is therefore essential to permit ATP to defend the claim. Without that information, it will simply be presented with a dollar amount and told:

> We are claiming this amount, which we had to pay to settle litigation brought against us because the material you sold us was defective. Pay up.

**51** Since the actions were settled, there will be no reasons for judgment or jury findings to explain why IPEX was found liable to the plaintiff. It will be impossible to know the extent to which the settlement was due to deficiencies in the pipe caused by the materials supplied by ATP or due to factors, such as dezincification, that had nothing to do with ATP. Unless ATP is permitted to lift the veil on the settlements, and to understand the evidence and arguments that caused IPEX to agree to pay the settlement amounts, it will be unable to defend itself.

**52** Unlike many claims for indemnity, which are capable of independent determination, an *ex post facto* claim for recovery of settlement amounts can only be resolved based on an analysis of the terms of the settlement and the circumstances and considerations that led to it. To what extent did it reflect matters for which the defendant had responsibility and to what extent did it reflect other factors including: (a) the fault of other tortfeasors; (b) the contributory fault of the plaintiff; (c) goodwill, contingencies, other risk factors?

**53** As there has been no trial on the merits supporting the result, the only way to understand the basis of IPEX's liability, and the quantum claimed, is to examine the evidence, arguments and au-

thorities advanced by the parties to the settlement negotiations. Production of the Mediation Briefs is essential for that purpose.

**54** IPEX has put the settlements in issue. The Mediation Briefs have relevance in their own right, not because they contain admissions but because the settlements that flowed from them are the basis of the claim against ATP. The trial judge will be required to determine not only whether the settlements were reasonable, but also whether some or all of the settlement amounts should be recoverable from ATP. In order to defend itself, ATP must be permitted to explore the settlements, must be permitted to review the factual and expert evidence, the arguments and the law that was presented by both parties and must be entitled to assess what factors, on both sides, were taken into account in coming to the settlement.

**55** This is the same rationale that has persuaded other courts that settlement documents should be disclosed in appropriate cases. It engages the fundamental principle of our legal system that a party is entitled to know the case that it must meet and must be given a fair opportunity to meet that case: see *Stevenson v. Reimer,* [1993] O.J. No. 2440 (Gen. Div.); *Robichaud v. Clarica Life Insurance Co.* (2007), 53 C.C.L.I. (4th) 234, [2007] O.J. No. 3648 (S.C.J.). It provides the parties with the "equality of arms", which is so fundamental to our concept of a fair trial: see *Ontario v. Rothmans Inc.*, 2011 ONSC 2504, [2011] O.J. No. 1896.

**56** The same result is achieved even if settlement privilege is a class privilege. In *Unilever PLC v. The Procter & Gamble Co.*, [2000] 1 W.L.R. 2436, the English Court of Appeal, referring to *Muller v. Linsley & Mortimer*, [1996] P.N.L.R. 74 (C.A.), identified the following exception as "among the most important instances" of the admissibility of settlement discussions:

> ... whether the claimant had acted reasonably to mitigate his loss in his conduct and conclusions of negotiations for the compromise of proceedings [brought by him]

**57** This exception was referred to by the Newfoundland and Labrador Court of Appeal in *Meyers* and by the Nova Scotia Court of Appeal in *Brown.*

**58** This exception is necessary to address a compelling or over-riding interest of justice, because without disclosure of details of the process by which the plaintiff settled its claim, the defendant will be unable to effectively defend itself against the plaintiff's claim. It will be unable to meet the case the plaintiff has set up against it.

**59** In this case, ATP has pleaded that IPEX failed to take reasonable steps to mitigate its damages, but ATP's defence will go beyond this. An analysis of the settlements will be necessary not only to determine whether IPEX mitigated its damages, but also, as I have noted, to determine whether IPEX settled the claims for reasons that had nothing to do with ATP's alleged manufacturing failures. The over-riding interest of justice demands that ATP be given a fair opportunity to know the underlying factual foundation for IPEX's claim and to properly meet that claim.

**60** I therefore conclude that the Mediation Briefs should be produced in all cases where IPEX is claiming contribution or indemnity from ATP for settlement amounts.

**61** I have also concluded, however, with respect, that the Master erred in ordering production of Mediation Briefs in all the U.S. Actions, without differentiation. In my view, he ought not to have ordered production of Mediation Briefs in the U.S. Actions that were not subject to a claim for con-

tribution and indemnity from ATP or that had not yet settled. The relevancy of those documents, and the balancing process, results in different conclusions.

**62** The Mediation Briefs in actions that are not the subject of a claim for contribution and indemnity are not directly relevant to the disposition of the litigation between IPEX and ATP. They are not required to give ATP "equality of arms" to defend itself from the very claims that are the subject of the action against it. The information might be helpful and interesting to ATP because they might demonstrate that IPEX was settling claims relating to Kitec pipe due to dezincification and not due to the alleged flaws in ATP's product. However, that does not make the reasons for those settlements relevant to the issues between IPEX and ATP.

**63** The Master based his decision on this issue on ATP's pleading in para. 21(f)(i) of its statement of defence, in which it pleads that the damage to the Kitec pipe was due to dezincification caused by IPEX's use of brass fittings in the construction of the pipe. ATP does not require these Mediation Briefs to prove that the Kitec pipe failed due to dezincification. ATP will be fully entitled to explore the dezincification issue on discovery, and will be entitled to comprehensive disclosure on the issue as it arises in the actions in which there is a claim for indemnity. The balancing process does not justify a significant intrusion into the confidentiality of settlements that are not part of the claim against ATP.

**64** The same is true for actions that have not yet settled. If the action eventually settles, the Mediation Briefs will be producible. If the action does not settle, and results in a judgment, the judgment and not the settlement negotiations will be relevant for the determination of liability and quantum. Again, the balancing process does not result in the conclusion that disclosure of the Mediation Briefs is necessary in these cases.

Proportionality

**65** The same logic leads to the conclusion that, subject to the issue of proportionality, most of the remaining materials in the Litigation Files should be produced, but that Litigation Files that are not the subject of claims for contribution and indemnity are not relevant and need not be produced.

**66** Rule 29.2.03 of the *Rules of Civil Procedure* gives express recognition to the principle of proportionality. It provides:

> (1) In making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether,
> (a) the time required for the party or other person to answer the question or produce the document would be unreasonable;
> (b) the expense associated with answering the question or producing the document would be unjustified;
> (c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;
> (d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and
> (e) the information or the document is readily available to the party requesting it from another source.
> (2) In addition to the considerations listed in subrule (1), in determining whether to order a party or other person to produce one or more documents, the court shall

> consider whether such an order would result in an excessive volume of documents required to be produced by the party or other person.

**67** As I noted earlier, while I can assume that the Master was aware of, and considered, the proportionality principle in coming to his decision, his reasons do not make his analysis explicit. To the extent that his decision on the issue was discretionary, therefore, I consider that a somewhat modified degree of deference is appropriate. While ATP says that there was no evidence before the Master on which a determination of proportionality could be made, it can reasonably be assumed that the Litigation Files in more than twenty-five complex class action law suits would contain a vast array of written and electronic materials, including emails, correspondence, memoranda and notes.

**68** IPEX says that proportionality is not determined by the theoretical amounts at issue in the case; rather, it says that proportionality is at first instance a measure of the effort required and the extent of the material, in relation to its probative value. I do not necessarily accept this submission, particularly because sub-paras. 1(a) and (b) use the words "unreasonable" and "unjustified" in relation to the time and expense required to produce the document. The expense might be unjustified in a case involving $100,000 in damages but very justified in a case involving $100 million in damages. This is confirmed by rule 1.04(1.1):

> In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

**69** Proportionality is not a concern with respect to the Mediation Briefs because the information is highly relevant and easily identifiable.

**70** Nor is it a concern for many of the other parts of the Litigation Files that the Master ordered produced, including productions and pleadings (both of which IPEX has agreed to produce), motion materials, discovery requests and responses, transcripts from examinations and court orders. These are easily identifiable, clearly relevant, not the subject of lawyer-client privilege and can be produced with relative ease. While they may well be voluminous, in a case involving hundreds of millions of dollars, it cannot be said that the time and expense is disproportionate to the importance of the documents.

**71** The same cannot be said, however, with respect to other materials, namely correspondence, written and electronic communications, notes, memoranda and lawyers' work-product. Production of these materials would require a painstaking, document-by-document review for the purposes of privilege. Moreover, a large proportion of the documents would be entirely irrelevant to the matters at issue in this action. Indeed, counsel for ATP did not identify any particular value of such production, other than "context". In my view, this can better be described as a large-scale fishing expedition. IPEX concedes that ATP is free to establish the existence of relevant documents in the Litigation Files and that, if it does so on discovery, it is entitled to move for further production: see *Bow Helicopters v. Textron Canada Inc.* (1981), 23 C.P.C. 212, [1981] O.J. No. 2265 (H.C.). In my view, the Master erred in his apparent failure to give any weight to the principle of proportionality in ordering the broad production of the Litigation Files without any consideration for the relevance of many of the underlying documents and the time, effort and expense involved in the exercise.

Conclusion

**72** In summary, and for the foregoing reasons, I conclude:

(a) IPEX shall produce all Mediation Briefs in actions that have resulted in settlements for which it claims contribution and indemnity from ATP;
(b) Such production shall include all offers to settle, settlement agreements, briefs, experts' reports and other materials filed on the mediations;
(c) IPEX is not required to produce Mediation Briefs in actions that have not settled or in actions for which there is no claim for contribution and indemnity from ATP;
(d) IPEX shall produce all Litigation Files in actions for which it claims contribution and indemnity from ATP, including productions, pleadings, transcripts, depositions, court orders, discovery requests and responses, but excluding correspondence, written and electronic communications, notes, memoranda and lawyers' work product.

**73** As ordered by the Master, production shall be subject to the deemed undertaking in rule 30.1. The Master ordered that any admissions would be redacted. To this, I would add that this order shall not impinge on the jurisdiction and discretion of the trial judge to rule on the exclusion of admissions or other statements or communications made in the course of settlement discussions. This was the course of action followed by Doherty J. in *Mueller* and by Pepall J. in *Sabre Inc. v. International Air Transport Association.* (2009), 76 C.P.C. (6th) 146, [2009] O.J. No. 903 (S.C.J.).

**74** As success has been divided, I am inclined to make no order as to costs. If either party takes a different view, written submissions may be addressed to me care of Judges' Administration. I will leave it to counsel to agree on a schedule for the delivery of such submissions.

G.R. STRATHY J.

cp/e/qllxr/qlvxw/qlced/qlbdp/qlhcs/qlhcs

*Case Name:*

# Hollinger Inc. (Re)

**IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF a Proposed Plan of Compromise or Arrangement with Respect to Hollinger Inc., 4322525 Canada Inc. and Sugra Limited, Applicants**

[2011] O.J. No. 3977

**2011 ONCA 579**

283 O.A.C. 264

107 O.R. (3d) 1

84 C.B.R. (5th) 79

341 D.L.R. (4th) 182

12 C.P.C. (7th) 29

2011 CarswellOnt 9272

207 A.C.W.S. (3d) 234

Docket: C53706

Ontario Court of Appeal
Toronto, Ontario

**S.T. Goudge, R.J. Sharpe and A. Karakatsanis JJ.A.**

Heard: August 24, 2011.
Judgment: September 8, 2011.

(32 paras.)

*Civil litigation -- Civil procedure -- Discovery -- Production and inspection of documents -- Confidentiality orders -- Privileged documents -- Documents prepared for the purpose of settlement -- Appeal by Black and Conrad Black Corporation from sealing order redacting amounts to be paid by law firm and accounting firm to Hollinger pursuant to proposed settlement agreements dismissed -- After Hollinger, law firm and accounting firm entered into settlement agreement, amounts agreed to be paid were redacted and agreements were distributed to other parties and sealing order was obtained -- Sealing order protected litigation settlement privilege and fostered public interest in settling disputes -- Litigation settlement privilege applied as Hollinger, law firm and accounting firm had legally protected interest in settlement and salutary effects of sealing order outweighed deleterious effects.*

*Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Discovery -- Appeal by Black and Conrad Black Corporation from sealing order redacting amounts to be paid by law firm and accounting firm to Hollinger pursuant to proposed settlement agreements dismissed -- After Hollinger, law firm and accounting firm entered into settlement agreement, amounts agreed to be paid were redacted and agreements were distributed to other parties and sealing order was obtained -- Sealing order protected litigation settlement privilege and fostered public interest in settling disputes -- Litigation settlement privilege applied as Hollinger, law firm and accounting firm had legally protected interest in settlement and salutary effects of sealing order outweighed deleterious effects.*

Appeal by Black and Conrad Black Corporation from a sealing order redacting the amounts to be paid by a law firm and an accounting firm to Hollinger Inc pursuant to two proposed settlement agreements. In 2007, Hollinger and two related corporations were granted Companies' Creditor Arrangement Act ("CCAA") protection. Black made a claim against Hollinger in the CCAA proceedings. In addition, he claimed for contribution and indemnity against the law firm and the accounting firm in relation to several claims asserted against him by Hollinger. Hollinger, the law firm and the accounting firm entered into settlement agreements that required court approval. The draft settlement agreements were circulated to all parties with the amounts to be paid redacted. Hollinger, the law firm and the accounting firm brought a motion for a sealing order. The motions judge granted the sealing order, finding that litigation settlement privilege applied and that a sealing order was in the public interest. The sealing order provided for the immediate full disclosure of all terms of the settlements, other than the amounts to be paid, and details as to the manner of payment. In addition, the sealing order provided that any non-settling party could access the redacted information to use in the settlement approval process upon signing a confidentiality agreement. Black and his corporation sought to appeal the sealing order on the basis that the evidence was insufficient to justify a sealing order and departure from the open court principle, that the requirement that a party seeking disclosure of the settlement amounts sign a confidentiality agreement imposed an undue burden, and that the parties to the agreements waived privilege.

HELD: Appeal dismissed. The motions judge made no error in granting the sealing order as it protected litigation settlement privilege and fostered public interest in settling disputes. Litigation settlement privilege applied as Hollinger, the law firm and the accounting firm had a legally protected interest in the proposed settlement. It was open to the motions judge to find that the salutary effects of the sealing order outweighed its deleterious effects on the right to freedom of expression and the public interest in open and accessible court proceedings. Requiring parties who sought disclosure of

the redacted information to sign a confidentiality agreement was not an undue burden as sanctions would only be imposed if the party used the information for an impermissible reason. Finally, as the terms of the order were imposed by the court, abiding by those terms did not result in a waiver of privilege.

**Statutes, Regulations and Rules Cited:**

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

**Appeal From:**

On appeal from the order of Justice Colin L. Campbell of the Superior Court of Justice dated February 5, 2011.

**Counsel:**

Earl A. Cherniak Q.C., Kenneth D. Kraft and Jason Squire, for Conrad Black and Conrad Black Capital Corporation.

Paul D. Guy and Faren Bogach, for Daniel Colson.

Michael E. Barrack and Megan Keenberg, for Hollinger Inc.

John Lorn McDougall, Q.C., Norman J. Emblem and Matthew Fleming, for KPMG LLP.

Ronald Foerster, for Torys LLP.

David C. Moore, for Catalyst Fund General Partner I Inc.

George Benchetrit, for the Indenture Trustee.

Lawrence Thacker for Ernst & Young Inc., Monitor.

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The following judgment was delivered by

**1** THE COURT:-- Conrad Black and Conrad Black Capital Corporation ("Black") appeal a sealing order redacting the amounts to be paid by the respondents, Torys LLP and KPMG LLP Canada, to the respondent, Hollinger Inc., pursuant to two proposed settlement agreements. The settlement agreements were made in the context of a *Companies' Creditor Arrangement Act* ("CCAA") proceeding and are subject to court approval. The sealing order provides for the immediate full disclosure of all terms of the settlements, other than the amounts to be paid, and details as to the manner of payment in the Torys agreement. The sealing order further provides that any non-settling party may have access to the redacted information upon signing a confidentiality agreement only to use the redacted information in the settlement approval proceeding. The sealing order terminates upon final approval of the settlements.

**2** For the following reasons, we reject Black's argument that the sealing order constitutes a serious and unjustified infringement of the open court principle and dismiss the appeal.

**FACTS**

**3** Hollinger and two related corporations have been granted CCAA protection pursuant to a Commercial List order made in August 2007. The order appoints a Litigation Trustee to deal with the assets available to Hollinger's creditors which consist almost entirely of Hollinger's claims against former officers, directors and advisors, including Black, Torys and KPMG.

**4** Black asserts a claim against Hollinger in the CCAA proceedings, as well as claims for contribution and indemnity against Torys and KPMG in relation to several claims asserted against him by Hollinger.

**5** Settlement discussions and mediations between Hollinger, the Litigation Trustee, Torys and KPMG led to two settlement agreements that require court approval. The draft settlement agreements were circulated to all parties with the amounts to be paid by way of settlement redacted. The respondents moved before the judge dealing with the CCAA proceedings for the sealing order that is the subject of this appeal. The crucial paragraph of the affidavit filed by Hollinger in support of that motion reads as follows:

> 21. In my view, disclosure of the commercially sensitive terms contained in the Settlements and the strategy of the Litigation Trustee and other confidential details relating to Litigation Assets set out in the Litigation Trustee's Report would undermine the Litigation Trustee's initiatives with respect to the remaining Litigation Assets including, without limitation, any possible settlements the Litigation Trustee may reach in respect of any of the remaining Litigation Assets and litigation with KPMG or Torys, in the event that the settlements are not approved.

**6** The Litigation Trustee's Report has since been disclosed. There was no cross-examination on that affidavit.

**7** Although the terms of the settlements are not directly at issue on this appeal, Black relies on the fact that both settlement agreements provide for a "bar order" that would prevent anyone sued by Hollinger; any shareholder, officer, director, or creditor of Hollinger; and any person who could claim rights or interest through Hollinger, from making any claim against Torys or KPMG in relation to the advice given by those parties to Hollinger. Black points out that the bar orders would extinguish his indemnity claims against Torys and KPMG. On the other hand, the respondents submit that the bar orders are economically neutral for Black and other non-settling defendants. This is because Hollinger waives its right to claim joint and several liability with respect to shared liability between settling and non-settling defendants if the non-settling defendant can establish a right to contribution and indemnity from a settling defendant.

## DECISION OF THE MOTION JUDGE

**8** The motion judge found that litigation settlement privilege applied to the terms of the two settlement agreements. He concluded that the onus to establish that a sealing order protecting the confidentiality of the amounts of the settlements was in the public interest had been satisfied and that the test set out in *Sierra Club of Canada v. Canada (Minister of Finance),* [2002] 2 S.C.R. 522 ("*Sierra Club*") had been met.

**9** On the motion judge's suggestion, the sealing order included a "comeback" clause, permitting any party affected by the settlement motion to request relief from the sealing order if it operated in a manner that would prevent that party from making full submissions as to the approval of the settlement.

**ISSUES**

**10** Black submits:

1. That the evidence was insufficient to justify a sealing order and departure from the open court principle;
2. That the requirement that a party seeking disclosure of the settlement amounts must sign a confidentiality agreement imposes an undue burden; and
3. That the respondents have waived privilege.

**ANALYSIS**

***1. Sufficiency of the evidence to justify a sealing order.***

**11** It is common ground that the motion judge applied the correct legal test, namely that laid down by the Supreme Court of Canada in *Sierra Club* at para. 53:

> A confidentiality order ... should only be granted when:
>
> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

**12** Before us, there were two significant concessions.

**13** First, the respondents indicated that they place no reliance upon the portions of the Litigation Trustee's affidavit referring to the "commercial sensitivity" of the redacted terms of the settlement. They rely solely upon the evidence that public disclosure of the settlement amounts before the agreements had been approved "would undermine the Litigation Trustee's initiatives with respect to ... litigation with KPMG or Torys, in the event that the settlements are not approved."

**14** Second, Black conceded that his attack on the terms of the sealing order rests on the open court principle and that he does not assert that the terms of the sealing order give rise to any procedural disadvantage.

**15** The respondents assert that their interest in maintaining the confidentiality of the amounts of the proposed settlements falls squarely within litigation settlement privilege. Simply put, the respondents say that should the settlement agreements not be approved, they would be unfairly prejudiced in the litigation that would follow if they had to disclose publicly the amounts they were prepared to pay or accept in settlement of the claims asserted by the Litigation Trustee.

**16** It is well established that in order to foster the public policy favouring the settlement of litigation, the law will protect from disclosure communications made where;

1) there is a litigious dispute;

2) the communication has been made "with the express or implied intention it would not be disclosed in a legal proceeding in the event negotiations failed;" and
3) the purpose of the communication is to attempt to effect a settlement: see Bryant, Lederman & Fuerst, *The Law of Evidence in Canada*, 3d ed. (Markham: LexisNexis, 2009) at p. 1033, s. 14.322); *Inter-Leasing Inc. v. Ontario (Minister of Finance)* (2009), 256 O.A.C. 83 (Div. Ct.).

**17** We agree with the motion judge that those conditions are met here. We see no error in the motion judge's conclusion that "[l]itigation settlement privilege ... applies in this case at least until the Court either accepts or rejects the settlement". In the context of this case, Hollinger, Torys and KPMG have a legally protected interest in being afforded a zone of confidentiality to shelter the most sensitive aspect of their proposed settlement.

**18** The sealing order protects litigation settlement privilege and thereby fosters the strong public interest in the settlement of disputes and the avoidance of litigation. "This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial Court system," (*Kelvin Energy Ltd. v. Lee*, [1992] 3 S.C.R. 235, at p. 259, citing *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (Ont. H.C.), at p. 28 (emphasis added by the Supreme Court)).

**19** The rationale for litigation settlement privilege is that unless parties have an assurance that their efforts to negotiate a resolution will not be used against them in litigation should they fail to resolve their dispute, they will be reluctant to engage in the settlement process in the first place. A legal rule that created a disincentive of that nature would run contrary to the public policy favouring settlements.

**20** We agree with the respondents that litigation settlement privilege constitutes a social value of super-ordinate importance capable of justifying a sealing order that limits the open court principle.

**21** In our view, it was open to the motion judge to conclude under the *Sierra* test that the salutary effects of the sealing order outweighed its deleterious effects on the important right to free expression and the public interest in open and accessible court proceedings.

**22** While the evidence led in support of the sealing order is limited to a bald statement that full disclosure of the terms of the settlement agreement "would undermine the Litigation Trustee's initiatives with respect to ... litigation with KPMG or Torys, in the event that the settlements are not approved," in light of the strong public policy favouring settlements and the recognized privilege that protects the confidentiality of settlement discussions, the motion judge did not err in concluding that the evidence was sufficient to satisfy the onus under the *Sierra* test.

**23** We agree with the respondents that the motion judge's sealing order was a minimal intrusion on the open court principle and on the procedural rights of the non-settling parties. The sealing order protected only the amounts of the settlements and it gave the non-settling parties ready access to the amounts of the settlement upon signing a confidentiality agreement. The "come back" clause allowed any party to return to court for a reassessment of the need for the sealing order should the circumstances change.

**24** We do not accept Black's submission that these are concluded agreements for which the litigation settlement privilege is spent. The settlement agreements at issue here have no legal effect until they are approved. In the context of this litigation and these settlement discussions, we are satisfied that just as the threat of disclosure of pre-resolution discussions would likely discourage parties from attempting to settle, so too would the threat of disclosure of their tentative settlement requiring court approval. We add, however, that our conclusion on the privileged nature of a settlement requiring court approval is based on the facts and circumstances of this case, and we leave to another day the issue of whether the privilege always attaches to other settlements requiring court approval, for example, class action settlements or infant settlements, where different values and considerations may apply.

**25** Nor do we agree with Black's argument that because the litigation settlement privilege would still prevent any party from introducing the terms of the settlement into evidence in any trial that might follow should the court not approve the settlements, the information can now be made available to the public at large. We know of no authority that limits the reach of litigation settlement privilege in this manner. Moreover, the argument that no harm could flow from full public disclosure appears to us to ignore the practical reality that allowing for full public disclosure of all terms of the settlement agreements prior to court approval would have a very perverse effect on the desired incentives to engage in settlement discussions in the context of high stakes, high profile litigation.

***2. Did the confidentiality agreement impose an undue burden?***

**26** We see no merit in the submission that Black's right to obtain disclosure of the settlement amounts was unduly burdened by the term of the sealing order requiring him to sign a confidentiality agreement as a pre-condition to disclosure. This term of the sealing order protects the non-settling parties' procedural right to have full access to the terms of the settlement agreements while maintaining the protection of the litigation settlement privilege. It is only if Black uses the privileged information for some improper purpose that he would face the prospect of some sanction for breach. Contrary to the submission that that sanction would inevitably be "draconian," it would be a matter for the discretion of the court to decide an appropriate sanction in the circumstances and we see no reason to fear that the court would decide to impose a sanction that did not fit the circumstances of the case.

**27** We add here that we do not consider the terms of the bar orders relevant to the issue of the sealing order. Neither the motion judge nor this court was asked to pass upon the appropriateness of the bar orders at this stage and as the sealing order allows Black to obtain full disclosure of the terms of the settlement, Black suffers no disadvantage if he chooses to challenge the settlement on the ground that the bar orders should not be approved.

***3. Did the respondents waive privilege?***

**28** Black submits that by putting virtually all of the terms of the settlements on the public record and by disclosing the redacted portions of the settlement agreements to those non-settling parties who sign confidentiality agreements, the respondents have waived privilege.

**29** We disagree. These terms were imposed by court order (albeit at the suggestion of the parties) and we fail to see how or why abiding by the terms of a court order should result in a finding that a party has waived privilege. Moreover, in our view, this argument is inconsistent with Black's purported reliance on the open court principle as requiring disclosure of the settlement amounts.

The terms of the order said to amount to a waiver of privilege were plainly motivated to ensure that the sealing order was minimally intrusive on the open court principle. To accept Black's submission that those terms of the order constitute waiver would be to require sealing orders to be more restrictive than necessary to protect the public interest in fostering settlements. Such a rule would be self-defeating and contrary to the public interest in open access to court proceedings.

*4. Conclusion*

**30** We conclude that the sealing order strikes an appropriate balance between the public interest in the promotion of settlements and the public interest in the open court principle:

(i) the public interest in the promotion of settlements and the protection of settlement privileged information and communications is met by the sealing of the redacted portions of the settlement agreements from the public record; and

(ii) the public interest in the open court principle is met by the public disclosure of all but the redacted terms of the settlement agreements, and the time-limited nature of the sealing order, lasting only so long as the settlements remain contingent on court approval.

**31** In addition, the sealing order strikes the appropriate balance between the competing private interests of the parties:

(i) the settling parties' interest in maintaining the confidentiality of their privileged information is met by the sealing of the redacted portions of the Settlement Agreements;

(ii) the interests of all non-settling defendants (including Black) are met by the approval of the confidentiality agreement provision affording them access to the redacted portions of the settlement agreements and thereby enabling them to respond meaningfully to the settlement approval motion.

**DISPOSITION**

**32** The appeal is dismissed. In accordance with the agreement of counsel, the respondents Hollinger, Torys and KPMG are entitled to costs of $10,000 each, inclusive of disbursements and applicable taxes.

S.T. GOUDGE J.A.
R.J. SHARPE J.A.
A. KARAKATSANIS J.A.

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# Rogacki v. Belz et al.
# [Indexed as: Rogacki v. Belz]

**67 O.R. (3d) 330**

[2003] O.J. No. 3809

2003 CanLII 12584

Docket No. C38522

Court of Appeal for Ontario

**Abella, Borins and Armstrong JJ.A.**

October 3, 2003

*Civil procedure -- Discovery -- Deemed undertaking -- Defendant in libel action publishing newspaper article about his experiences upon being examined for discovery -- No breach of deemed undertaking rule -- Motion to have party found in contempt dismissed -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rules 30.1, 60.*

*Civil procedure -- Mandatory mediation -- Parties to libel action signing confidentiality agreement before mediation session -- Defendant in libel action publishing newspaper article about the mandatory mediation session -- Motion to have party found in contempt dismissed -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rules 24.1, 60.*

*Contempt -- Actus reus -- Disclosure of experiences at mandatory mediation session and at examinations for discovery -- Parties to libel action signing confidentiality agreement before mandatory mediation session under Rule 24.1 of Rules of Civil Procedure -- Defendant in libel action publishing newspaper article about the mediation session -- Defendant publishing second article about his experiences upon being examined for discovery -- Motion to have party found in contempt dismissed -- For actus reus, necessary to show that the articles had some significant adverse effect on the administration of justice.*

ZB was the editor and publisher of Gazeta, a Polish language newspaper, and he was a defendant in the plaintiff ER's libel action concerning certain articles published in the newspaper. On January 15, 2002, a mediation session pursuant to Rule 24.1 of the Rules of Civil Procedure took place. Before the mediation session, the parties signed a mediation agreement that provided that everything said at the mediation was confidential and privileged. The next day, ZB wrote and published in Gazeta an

article reporting that the mediation session had not yielded a reconciliation. On January 28, 2002, ZB was examined for discovery. Subsequently he wrote and published a lengthy article in Gazeta, in which he described his experience on the examination for discovery. On the basis of the two articles, the plaintiff ER moved for an order that ZB be found in contempt for breach of Rule 24.1, the confidentiality agreement, or Rule 30.1, the deemed undertaking rule. Brennan J. found ZB to be in contempt with respect to the first newspaper article but he found no contempt with respect to the second article. ZB appealed.

Held, the appeal should be allowed.

Per Borins J.A. (Armstrong J.A. concurring): ER, in seeking a contempt order against ZB, relied on Rule 60 of the Rules of Civil Procedure, which provides for the enforcement of an "order". However, neither Rule 24.1 nor the confidentiality provision in the mediation agreement was an order within the meaning of Rule 60, and neither was capable of enforcement under that rule by a contempt order. It was therefore necessary to consider whether Brennan J.'s contempt order was supportable under the court's inherent jurisdiction. In this regard, Brennan J. was incorrect in holding ER in contempt with respect to the first article. In the result, he was correct in dismissing the contempt motion respecting the second [page331] article. For ZB to be found in contempt in respect of either article, ER was required to prove that ZB did the relevant act (actus reus) with the necessary intent (mens rea). There was no doubt that ZB published the articles. However, to complete the actus reus, it was also necessary to show that the articles had some significant adverse effect on the administration of justice.

There was nothing in the record that would support a finding of contempt with respect to the two articles. There was nothing in either article that was prejudicial to ER and that could have compromised a fair trial. There was nothing in either article that even suggested a risk of serious, real or substantial prejudice to the administration of justice.

Brennan J. was correct in concluding that the deemed undertaking provided by rule 30.1(3) did not apply to the circumstances of this case. In publishing the article recounting his experience on being examined for discovery, ZB did not infringe Rule 30.1.

Per Abella J.A. (concurring): The appeal raised important policy questions about the mandatory mediation process. Although rule 24.1.14 does not create an enforceable guarantee of confidentiality, there were significant public policy reasons for keeping the mediation sessions confidential. Protecting confidentiality furthered the public policy goal of encouraging settlement discussions. Willful breaches of the confidentiality of a mediation is conduct that can create a serious risk to the full and frank disclosures the mandatory mediation process requires. Breach of confidentiality can significantly prejudice the administration of justice and, in particular, the laudable goal reflected in Rule 24.1 of attempting to resolve disputes effectively and fairly without the expense of trial. However, given the potential gravity of the consequences of a contempt finding, it should only be exercised when the circumstances are clear and beyond reasonable doubt. A contempt order was not appropriate in the immediate case.

Cases referred to

Attorney General v. Times Newspapers Ltd., [1973] 3 All E.R. 54, [1974] A.C. 273, [1973] 3 W.L.R. 298, 117 Sol. Jo. 617 (H.L.); Bell Canada v. Olympia & York Developments Ltd. (1994), 17 O.R. (3d) 135, 111 D.L.R. (4th) 589, 26 C.P.C. (3d) 368 (C.A.); Bhatnager v. Canada (Minister

of Employment & Immigration) (1990), 36 F.T.R. 91n, [1990] 2 S.C.R. 217, 71 D.L.R. (4th) 84, 111 N.R. 185, 43 C.P.C. (2d) 213; British Columbia Government Employees' Union v. British Columbia (Attorney General), [1988] 2 S.C.R. 214, 31 B.C.L.R. (2d) 273, 71 Nfld. & P.E.I.R. 93, 53 D.L.R. (4th) 1, 87 N.R. 241, [1988] 6 W.W.R. 577, 50 C.R.R. 397n, 44 C.C.C. (3d) 289, 30 C.P.C. (2d) 221, 88 D.T.C. 14,047 (sub nom. B.C.G.E.U. (Re)); Canadian Broadcasting Corp. v. Paul (2001), 198 D.L.R. (4th) 633, 274 N.R. 47, 9 C.C.E.L. (3d) 1, [2001] F.C.A. 93 (F.C.A.), revg in part [1999] 2 F.C. 3, 158 F.T.R. 161, 168 D.L.R. (4th) 727, 39 C.C.E.L. (2d) 179; Forrest v. Lacroix Estate (2000), 48 O.R. (3d) 619, 187 D.L.R. (4th) 280, 34 E.T.R. (2d) 241, 8 R.F.L. (5th) 51 (C.A.), revg (1999), 46 O.R. (3d) 364, 30 E.T.R. (2d) 200 (S.C.J.); Goodman v. Rossi (1995), 24 O.R. (3d) 359, 125 D.L.R. (4th) 613, 12 C.C.E.L. (2d) 105, 37 C.P.C. (3d) 181 (C.A.), revg (1994), 21 O.R. (3d) 112, 120 D.L.R. (4th) 557, 7 C.C.E.L. (2d) 188, 34 C.P.C. (3d) 18 (Div. Ct.); O. (G.) v. H. (C.D.) (2000), 50 O.R. (3d) 82, 11 C.P.C. (5th) 302, [2000] O.J. No. 1882 (QL), [2000] O.T.C. 400 (S.C.J.); Orfus Realty v. D.G. Jewellery of Canada Ltd. (1995), 24 O.R. (3d) 379, 41 C.P.C. (3d) 148 (C.A.); Prudential Assurance Company v. Fountain Page Limited, [1991] 1 W.L.R. 756 (Q.B.); R. v. Bunn (1994), 97 Man. R. (2d) 20, 79 W.A.C. 20, [1994] 10 W.W.R. 153, 94 C.C.C. (3d) 57 (C.A.), revg [1993] 8 W.W.R. 344 (Man. Prov. Ct.) (sub nom. R. v. Chippeway); R. v. Kopyto (1987), 62 O.R. (2d) 449, 24 O.A.C. 81, 47 D.L.R. (4th) 213, 39 C.C.C. (3d) 1, 61 C.R. (3d) 209 (C.A.); [page332] R. v. Vermette, [1987] 1 S.C.R. 577, 52 Alta. L.R. (2d) 97, 38 D.L.R. (4th) 419, 74 N.R. 221, [1987] 4 W.W.R. 595, 32 C.C.C. (3d) 519, 57 C.R. (3d) 340; Tanner v. Clark (2003), 63 O.R. (3d) 508, 224 D.L.R. (4th) 635, 34 M.V.R. (4th) 23, 30 C.P.C. (5th) 103, [2003] O.J. No. 677 (QL) (C.A.), affg (2002), 60 O.R. (3d) 304, 31 M.V.R. (4th) 91, 27 C.P.C. (5th) 52 (Div. Ct.), supp. reasons (2002), 24 C.P.C. (5th) 68 (Ont. Div. Ct.)

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 66(2)(s)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 1.03 "order", 24.1, 24.1.05, 24.1.13(2), 24.1.14, 30.1, 30.1.01, 34.15(2), 50.03, 60.05, 60.11, 69.14(9)

Authorities referred to

Boulle, L., and K. Kelly, Mediation: Principles, Process, Practice (Markham: Butterworths, 1998)

Grey, O.V., "Protecting the Confidentiality of Communications in Mediation" (1998) 36 Osgoode Hall L.J. 667

Hamilton, J.W., "Protecting Confidentiality in Mandatory Mediation: Lessons from Ontario and Saskatchewan" (1999) 24 Queen's L.J. 561

Miller, J., The Law of Contempt in Canada (Scarborough, Ont.: Carswell, 1997)

Vaver, D., "Without Prejudice Communications -- Their Admissibility and Effect" (1974) 9 U.B.C.L. Rev. 85

APPEAL of an order holding the defendant in contempt.

Robert B. Bell, for respondent.

Peter I. Waldmann, for appellant.

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[1] **BORINS J.A.** (ARMSTRONG J.A. concurring): -- The appellant, Zbigniew Belz, appeals from an order of Brennan J. holding him in contempt of court in respect of a breach of confidentiality arising from a mandatory mediation conducted pursuant to Rule 24.1 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. The mediation took place in the context of a libel action brought by the respondent concerning certain articles published in a Polish language newspaper known as Gazeta, of which the appellant was the editor and publisher. For the reasons that follow, I would allow the appeal.

The Facts

[2] The mediation session took place on January 15, 2002. The mediator was William R. McMurtry. The parties and their lawyers were present. Prior to the commencement of the mediation, counsel for the parties signed what the court was told was a standard form mediation agreement. Clause 4 of the agreement reads as follows: [page333]

> 4. CONFIDENTIALITY
>
> The mediator will not disclose to anyone who is not a party to the mediation any information or documents submitted to the mediator, EXCEPT:
>
> (a) to the lawyers, or any experts retained by the parties, as deemed appropriate by the mediator;
> (b) where ordered to do so by judicial authority or where required to do so by law;
> (c) with the written consent of all parties.
>
> The parties agree that they will not require the mediator to testify in court, to submit any report for use in legal proceedings or otherwise to disclose any written or oral communication that has taken place during the mediation.

[3] Mr. McMurtry explained to the parties that it was fundamental to the mediation process that discussions forming part of it be kept confidential. At the end of the mediation agreement he added in handwriting the following clause, which was signed by the parties:

> The parties agree that everything that is said or done in the mediation is strictly confidential and privileged, and no reference will be made to anyone other than the parties or their solicitors of anything that is said during the process.

[4] On January 16, 2002, the appellant wrote and published in Gazeta an article reporting on the mediation session which reads, in part, as follows (English translation):

> No reconciliation was reached in the action brought against Gazeta and its Editors Alicja Gettlich and Zbigniew Belz.

> After a mediation session that lasted for a few hours last Tuesday, Ms. Elzbieta Rogacka, the Plaintiff (let us refresh our memory: a private action taken, corporate money used) rejected the Gazeta editors' proposal which might have served as a basis for reconciliation of the parties.

[5] On January 28, 2002, the appellant was examined for discovery. Subsequently, he wrote and published a lengthy article in Gazeta in which he described his experience on being examined for discovery and recalled the content of some of the questions he was asked by the respondent's counsel. In addition, the appellant provided editorial comments concerning some of the questions.

The Contempt Motion

[6] On the basis of the two articles, the respondent moved for the following orders:

1. An order that the defendant, Zbigniew Belz, be found in contempt of court for breach of Rule 24.1.14 of the Rules of Civil Procedure and the Confidentiality Agreement which guard the confidentiality of Mediations; [page334]
2. An order that the defendant, Zbigniew Belz, be found in contempt of court for breach of the deemed undertaking rule.

She gave as grounds for her motion, rules 24.1.14, 30.1.01, 60.05 and 60.11 of the Rules of Civil Procedure and the "Confidentiality Provision" that Mr. McMurtry added to the mediation agreement. Rule 30.1 is the deemed undertaking rule.

[7] In his affidavit in response to the motion, the appellant discussed the two articles. In respect to the first article, he stated:

7. In the meantime a mediation was held on January 15, 2002, which lasted four hours. I was present, along with Mr. Czuma, Mrs. Gettlich, Mrs. Rogacki, two lawyers for Mrs. Rogacki and Mr. McMurtry, the mediator. A great deal was said during those four hours, some of it intemperate since the matters in issue provoked strong emotions on both sides. I did sign the Confidentiality Agreement, and whatever I did write, I did not include any details whatsoever about what was discussed, although a great deal was discussed, and the experience was a very emotional one for everyone concerned.
8. Gazeta is published five times a week, Monday to Thursday as a regular edition, and on Friday the weekly edition comes out, which includes a supplement. The mediation took place on January 15. The Article appeared in the next day's issue of Gazeta and consisted of a very brief report about the mediation, certainly nothing in terms of length with respect to details of what occurred. We were interested in settling the claim, and I was frustrated that it had not been settled. I do not believe that what I wrote is a contempt of court and was certainly never intended to be an insult to the court and, in my view, does not violate the Confidentiality Agreement.

[8] In respect of the second article, the appellant stated:

11. Prior to writing the article, I was completely unaware that I was unable to report on this part of the court proceeding. There was no confidentiality agreement signed in advance and neither Mr. Bell, nor my own lawyer, told me that I could not write about my expe-

> riences on the Examination for Discovery. I found it an interesting experience, which I thought might interest my readers, who have been following the progress of this law suit in our pages. Had I known that I should not write about it, I certainly would not have written about it and I will never do so again. I did not intend any insult towards the court. As far as I was aware it was a court proceeding, and it could be made public. If there was any offence in what I did, I certainly apologize to the court, but it was entirely unintended. Perhaps Mr. Czuma would not suspect that I would write such an article, but he certainly did not tell me that I could not write such an article. Since he has told me, I have certainly not written any other articles about what happens at the discovery, or released any other confidential information.

The Motion Judge's Reasons

[9] The motion judge found the appellant in contempt of court in respect to the first article, but not in respect to the second article.

[10] In his endorsement, the motion judge wrote:

> Motion granted. I find the defendant Belz in contempt of court in respect of his breach of the confidentiality of the mediation process. The importance of [page335] maintaining that confidentiality is demonstrated by the content of the Rule, elevating "all communications at a mediation session" to (deemed) without prejudice discussions. Further emphasis of that importance should have been apparent to Belz from the fact that the mediator insisted on the parties signing an express agreement on the matter.
>
> I am not satisfied that publication of information about his own examination for discovery falls within the prohibition found now in Rule 30.1 and the deemed undertaking rule as I accept the submission made on his behalf that he consents to its use as Rule 30.1.01(4) provides. Even if some of the information published about his examination does not fall within such consent, I am not satisfied of his wilfulness in that regard, as contempt relief would require.
>
> As suggested by counsel I am limiting my decision at this point to the finding that Belz's conduct amounts to contempt of court and requires that the court exercise some control of his conduct relating to the process of the court in the future.

(Emphasis added)

[11] In a subsequent endorsement, the motion judge imposed the following sanction on the appellant to "remedy" his contempt:

> To remedy his contempt I order that Mr. Belz conform with the confidentiality provisions of the Rules of Civil Procedure and that he cause to be published on the front page of Gazeta the following text, without comment. The Polish version is to be provided by a translator mutually acceptable to counsel, in accordance with their agreement at the hearing before me on June 11, 2002.
>
> Rogacki v. Belz, Gazeta and Gettlich:
>
> Publisher Belz found to be in contempt of court.

> In the case of Rogacki v. Belz, Gazeta and Gettlich a motion was brought asking the court to find that Zbigniew Belz was in contempt of court. On May 29, 2002 the Superior Court of Justice granted the motion, finding that Mr. Belz was in contempt in allowing the publication of an article in Gazeta No. 11 on January 16, 2002 entitled "The case of the President of the National Council of the Canadian-Polish Congress v. Gazeta: No Reconciliation So Far". The court found that publication of the story was a willful breach of confidentiality requirements of its Rules of Civil Procedure.
>
> Mr. Belz has been ordered to conform with the confidentiality provisions of the Rules of Civil Procedure and to pay court costs in the amount of $11,700.00 plus GST and disbursements to indemnify the plaintiff in respect of her costs of the motion.

(Emphasis added)

In addition, the motion judge ordered that the respondent be awarded costs on a substantial indemnity basis.

[12] The following paragraphs of the formal judgment of the court are also relevant:

1. THIS COURT ORDERS that the defendant Zbigniew Belz is in contempt of court in respect of breach of confidentiality of the mediation process. [page336]
3. THIS COURT ORDERS that the defendant Zbigniew Belz pay costs in the amount of $11,700.00 plus GST in the amount of $819.00 plus disbursements in the amount of $380.34 for a total of $12,899.34 to the plaintiff forthwith and in any event of the cause.
4. THIS COURT ORDERS that the defendant Zbigniew Belz cause to be published on the front page of the weekend edition of Gazeta the text attached as Schedule A hereto as translated into Polish, without comment.
5. THIS COURT ORDERS that the defendant Zbigniew Belz conform with the confidentiality provisions of the Rules of Civil Procedure.

Relevant Rules of Civil Procedure

[13] The following rules are relevant to this appeal:

Rule 24.1

> 24.1.14 All communications at a mediation session and the mediator's notes and records shall be deemed to be without prejudice settlement discussions.

Rule 30.1

30.1.01(1) This Rule applies to,

> (a) evidence obtained under,
>
> . . . . .
>
> (ii) Rule 31 (examination for discovery),

. . . . .

(b) information obtained from evidence referred to in clause (a).

. . . . .

(3) All parties and their counsel are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

(4) Subrule (3) does not prohibit a use to which the person who disclosed the evidence consents.

Rule 60

60.05 An order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be enforced against the person refusing or neglecting to obey the order by a contempt order under rule 60.11.

. . . . .

60.11(1) A contempt order to enforce an order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be obtained only on motion to a judge in the proceeding in which the order to be enforced was made.

. . . . . [page337]

(5) In disposing of a motion under subrule (1) the judge may make such order as is just, and where a finding of contempt is made, the judge may order that the person in contempt,

(a) be imprisoned for such period and on such terms as are just;
(b) be imprisoned if he or she fails to comply with a term of the order;
(c) pay a fine;
(d) do or refrain from doing an act;
(e) pay such costs as are just; and
(f) comply with any other order that the judge considers necessary,

and may grant leave to issue a writ of sequestration under rule 60.09 against the person's property.

(Emphasis added)

The Issues

[14] In the respondent's notice of motion for the contempt order she relied on Rule 60 of the Rules of Civil Procedure. In my view, the respondent's reliance on Rule 60 raises the issue of the

availability of the contempt power in the circumstances of this case, primarily because of the language of rules 60.05 and 60.11(1), which are parts of Rule 60, which is entitled "Enforcement of Orders". Rule 60.05 provides for the enforcement of "an order requiring a person to do an act . . . or to abstain from doing an act . . . by a contempt order under rule 60.11". Rule 60.11(1) provides for a contempt order to enforce compliance with such an order "on [a] motion to a judge in the proceeding in which the order to be enforced was made". It is also apparent from the language of rule 60.11(5), which contains the sanctions that the court may impose where a finding of contempt is made, that the focus of the contempt power in Rule 60 is the failure of an individual to comply with an order made by the court. (Under rule 1.03 "order" includes a judgment.) In this case, no order had been made that was enforceable under Rule 60.

[15] In seeking the order under appeal, it was the respondent's position that in publishing the article reporting on the result of the mandatory mediation session, the appellant was in contempt of court because he was in breach of both rule 24.1.14 and the "Confidentiality Provision" that was added to the mediation agreement. Thus, the first issue to be decided is whether either rule 24.1.14 or the "Confidentiality Provision" is an order within the meaning of Rule 60 and, therefore, capable of enforcement under that rule by a contempt order. [page338]

[16] If, however, I am of the opinion that neither rule 24.1.14 nor the "Confidentiality Provision" is an order within the meaning of Rule 60, I think that the inherent jurisdiction of the court to invoke the contempt power should be considered if that jurisdiction forms a basis for the order under appeal, notwithstanding the fact that the respondent relied on Rule 60 and not on the inherent jurisdiction of the court. Although, as Morden J.A. pointed out in Forrest v. Lacroix Estate (2000), 48 O.R. (3d) 619, 187 D.L.R. (4th) 280 (C.A.), at para. 23, rule 60.11(1) "is intended to occupy the field in proceedings under the Rules of Civil Procedure relating to the enforcement of court orders which require an act to be done", the inherent jurisdiction of the court may be exercised to invoke the contempt power where the impugned conduct does not involve a failure to comply with a court order. See R. v. Bunn (1994), 97 Man. R. (2d) 20, 94 C.C.C. (3d) 57 (C.A.); R. v. Vermette, [1987] 1 S.C.R. 577, 38 D.L.R. (4th) 419. In the circumstances of this case, under the inherent jurisdiction of the court, the second issue then becomes whether the articles written and published by the appellant, or either of them, constitute a contempt of court as recognized by the Canadian authorities.

The Rule 60 issue

[17] In my opinion, Rule 60 was not available to the respondent as the foundation for a contempt order based on the article written and published by the appellant reporting on the result of the mandatory mediation session. Rule 60, and in particular rules 60.05 and 60.11(1), by their plain language provide for a contempt order to enforce a court order. There was no order of the court prohibiting the publication of the article. Indeed, in her notice of motion the respondent did not rely on the appellant's breach of a court order. The grounds for her motion were "breach of Rule 24.1.14 . . . and the Confidentiality Agreement" signed by the parties at the outset of the mediation session. The respondent has provided no authority that the breach of a rule of court or a private agreement is equivalent to an order of the court within the meaning of Rule 60, and I have been unable to locate any such authority. The Rules of Civil Procedure contain many sanctions where a party has failed to comply with a rule of court. In the few instances where a contempt order is provided as a sanction for failing to comply with a rule, as in rules 34.15(2) and 69.14(9), such sanction is expressly provided. Had the Civil Rules Committee, in the exercise of its powers under s. 66(2) (s) of the Courts of Justice Act, R.S.O. 1990, c. C.43, intended to provide that the contempt power may [page339] be

used to enforce the obligations imposed on litigants under rule 24.1, it would have done so expressly.

[18] In my respectful opinion, the motion judge not only misapprehended the contempt power contained in Rule 60, but he also misinterpreted rule 24.1.14. As I understand his reasons, as reflected in para. 1 of the formal order of the court, the motion judge appeared to interpret rule 24.1.14 as providing for the "confidentiality of the mediation process". (A similar misapprehension of rule 24.1.14 is reflected in para. 5 of the order which required the appellant to "conform with the confidentiality provisions of the Rules of Civil Procedure".) This is not what rule 24.1.14 states, nor is there any other subrule within Rule 24.1 that addresses the confidentiality of the mandatory mediation process. By deeming "all communications at a mediation session and the mediator's notes and records . . . to be without prejudice settlement discussions", rule 24.1.14 codifies the principle that communications made without prejudice in an attempt to resolve a dispute are not admissible in evidence unless they result in a concluded resolution of the dispute. As such, rule 24.1.14 is a necessary ingredient of Rule 24.1 as it furthers the public interest in promoting free and frank settlement discussions by protecting communications for that purpose from compelled disclosure in subsequent proceedings involving the parties to the settlement discussions, such as discovery or trial, in circumstances where the mediation fails to resolve the litigation. In this regard, Clause 4 of the mediation agreement is consistent with the purpose of rule 24.1.14. Another rule which serves a purpose similar to rule 24.1.14 is rule 50.03, which precludes disclosure of communications made at a pre-trial hearing at a subsequent trial or motion. See Bell Canada v. Olympia & York Developments Ltd. (1994), 17 O.R. (3d) 135, 111 D.L.R. (4th) 589 (C.A.).

The inherent jurisdiction issue

[19] Having found that a motion for a contempt order under Rule 60 was not available to the respondent in respect of the article published by the appellant reporting on the result of the mandatory mediation session, I turn to whether the inherent jurisdiction of the court may be exercised to sanction the appellant for publishing the article. I will include within my analysis the second article, in respect of which the respondent had unsuccessfully sought a contempt order under Rule 60 on the ground that its publication was in breach of Rule 30.1, the deemed undertaking rule. In this article, the appellant discussed his experience when he was examined for discovery. Although there [page340] is no cross-appeal from the dismissal of the contempt motion respecting this article, in her factum the respondent suggested that the publication of the article infringed Rule 30.1. In my view the motion judge was correct in dismissing the contempt motion for reasons that I will outline subsequently.

[20] For the appellant to be found in contempt of court in respect of either article, the respondent was required to prove that the appellant did the relevant act (actus reus) with the necessary intent (mens rea). There is no doubt that the appellant published the articles. However, to complete the actus reus it was also necessary for the respondent to prove that the articles had some significant adverse effect on the administration of justice. If the respondent proved the actus reus, it would then be necessary for her to prove that the appellant published the articles with the necessary intent.

[21] There are many forms of contempt of court. The publication of the two articles comes closest to that form of contempt embraced by the sub judice rule, which seeks to avoid prejudicing the fair trial of pending litigation by precluding the publication of material that would have that effect. As such, the sub judice rule represents the intersection of two principles of fundamental importance: freedom of expression, and the rule of law which precludes interference with the administration of

justice. As stated by Jeffrey Miller in The Law of Contempt in Canada (Scarborough, Ont.: Carswell, 1997) at pp. 101-02, the leading case in Canada on this subject remains Attorney General v. Times Newspapers Ltd., [1973] 3 All E.R. 54, [1974] A.C. 273 (H.L.), from which the author extracted the following principles to be considered in assessing an impugned pre-trial publication:

(1) The issues must not be prejudged in a manner likely to affect the mind of the trier of fact.
(2) Contempt exists only if there is a real risk of prejudice as opposed to a mere possibility of interference with the due administration of justice.
(3) The rule applies even if the litigation is in a quiescent stage, such as during protracted settlement discussions.

[22] Although civil contempts, as in this case, and criminal contempts take a variety of forms, it is important to emphasize that each involves an interference with the due administration of justice. Indeed, contempt of court, both civil and criminal, has existed for centuries. It is the mechanism used by the court to ensure compliance with its orders and to protect its process. As such, it is a sanction that serves the administration of justice in the public interest. [page341]

[23] It is helpful to repeat what was said by Dickson C.J.C. in British Columbia Government Employees' Union v. British Columbia (Attorney General), [1988] 2 S.C.R. 214, 53 D.L.R. (4th) 1, at p. 234 S.C.R.:

> In some instances the phrase "contempt of court" may be thought to be unfortunate because, as in the present case, it does not posit any particular aversion, abhorrence or disdain of the judicial system. In a legal context the phrase is much broader than the common meaning of "contempt" might suggest and embraces "where a person, whether a party to a proceeding or not, does any act which may tend to hinder the course of justice or show disrespect to the court's authority", "interfering with the business of the court on the part of a person who has no right to do so", "obstructing or attempting to obstruct the officers of the Court on their way to their duties": see Jowitt's Dictionary of English Law, 2nd ed., vol. 1, at p. 441.

[24] I find nothing in the record that would support a finding of contempt with respect to either article. As for the first article, it reported that a mandatory mediation session had taken place that did not result in a settlement of the respondent's claim. The second article was concerned with the appellant's perception of his examination for discovery interspersed with some comments critical of the questions that he had been asked. Although it would have been better in the circumstances of this hotly contested litigation had the appellant not published the articles, as I have explained, I find nothing in Rule 24.1 that precluded him from publishing the first article. Nor, as I will explain, did Rule 30.1 preclude him from publishing the second article. As he explained in his affidavit, in writing the articles he did not intend an insult to the court. In my view, each article has not been demonstrated to constitute a contempt of court. There is nothing in either article that was prejudicial to the respondent and that could have compromised a fair trial. Indeed, the respondent presented no evidence to that end.

[25] Earlier I expressed agreement with the motion judge's dismissal of the contempt motion arising from the appellant's publication of the article about his own examination for discovery.

However, in my view the motion judge was not correct in dismissing the motion on the application of rule 30.1.01(4) which, as I will explain, in the circumstances of this case does not apply.

[26] This motion was brought on the ground that the article was in "breach of the deemed undertaking rule", which is Rule 30.1. The motion judge dismissed the motion because he was of the view "that the appellant's publication of information about his own examination for discovery" did not fall "within the prohibition found now in Rule 30.1 and the deemed undertaking rule". [page342] He was further of the view that because the appellant "consented" to the "use" of the information, rule 30.1(4) permitted its use for purposes other than those of the proceedings in which the information was obtained.

[27] In my view, the motion judge was correct in concluding that the deemed undertaking provided by rule 30.1(3) did not apply in the circumstances of this case. The deemed, or implied, undertaking rule at common law was thoroughly discussed by Morden A.C.J.O. on behalf of this court in Goodman v. Rossi (1995), 24 O.R. (3d) 359, 125 D.L.R. (4th) 613 (C.A.). As explained in Rossi, there is an implied undertaking by the discovering party to a proceeding to whom testimony or documents are provided by the discovered party in the course of the discovery process that he or she will not use such information for purposes other than those of the proceeding in which the testimony or documents were obtained. Because the undertaking is to the court, its breach gives rise to direct sanctions that a court may impose, such as a finding of contempt of court, and can be relieved or modified by an order of the court. See, also, Orfus Realty v. D.G. Jewellery of Canada Ltd. (1995), 24 O.R. (3d) 379, 41 C.P.C. (3d) 148 (C.A.). Subsequent to the decision in Rossi, and based on it, the Civil Rules Committee introduced Rule 30.1.

[28] The documents and testimony obtained from the discovered party are protected by the deemed undertaking from improper use by the discovering party. Under Rule 30.1 the discovered party is not constrained from any use of his testimony or the documents elicited by the discovering party. It is the discovering party's use of information obtained from the discovered party for a purpose other than that of the litigation in which it was obtained that is precluded by Rule 30.1. See Tanner v. Clark (2003), 63 O.R. (3d) 508, 224 D.L.R. (4th) 635 (C.A.). It follows, as the appellant was the discovered party, that in publishing the article recounting his experience on being examined for discovery he did not infringe Rule 30.1. In the circumstances, therefore, rule 30.1.01(4) has no application. Nevertheless, the motion judge correctly dismissed the contempt motion based on the publication of the discovery article.

[29] I would apply the following passage from the reasons of Dubin J.A. in R. v. Kopyto (1987), 62 O.R. (2d) 449, 47 D.L.R. (4th) 213 (C.A.), at pp. 525-26 O.R. to the circumstances of this case:

> It was essential for the Crown to prove that the statement made by the appellant was calculated to bring the administration of justice into disrepute. That is the actus reus of this offence. The mere fact that the words are capable of bringing the administration of justice into disrepute does not suffice. What must be shown is that, by reason of the statement made by the [page343] appellant, there was a serious risk that the administration of justice would be interfered with. The risk of prejudice must be serious, real or substantial.

[30] To this I would add the following passage written by Lord Reid in Times Newspapers Ltd., supra, at p. 60 All E.R., quoted with approval by Dubin J.A. in Kopyto, at p. 512 O.R.:

> The law on this subject is and must be founded entirely on public policy. It is not there to protect the private rights of parties to a litigation or prosecution. It is there to prevent interference with the administration of justice and it should in my judgment be limited to what is reasonably necessary for that purpose. Public policy generally requires a balancing of interests which may conflict. Freedom of speech should not be limited to any greater extent than is necessary but it cannot be allowed where there would be real prejudice to the administration of justice.

(Emphasis added by Dubin J.A.)

[31] I find nothing in either article that even suggests the risk of serious, real or substantial prejudice to the administration of justice.

[32] I conclude with the observation, found in many of the authorities, that it is a serious matter for a person to be found in contempt of court. Even in a case of civil contempt such as this, a contempt proceeding is punitive in nature with broad powers given to the court including the power to order imprisonment. Because of the criminal nature of contempt proceedings, the person who is its object has many of the safeguards accorded a person accused of a criminal offence. The onus is on the applicant to prove its case beyond a reasonable doubt. See Bhatnager v. Canada (Minister of Employment & Immigration), [1990] 2 S.C.R. 217, 71 D.L.R. (4th) 84. Given the gravity of a finding of contempt, the court's contempt power should be exercised with scrupulous care and only when the circumstances are clear and beyond reasonable doubt.

Result

[33] For the foregoing reasons, I would allow the appeal with costs, set aside paras. 1, 3, 4 and 5 of the order of the motion judge, and in their place make an order dismissing in its entirety the respondent's motion for contempt with costs. The parties are to address the costs of the motion and the appeal by way of written submissions. The appellant is to provide the Senior Legal Officer with his submissions on costs and his bill of costs within 15 days from the release of these reasons. The respondent may file her submissions within seven days after the receipt of the appellant's submissions. The appellant may respond within seven days thereafter. [page344]

[34] ABELLA J.A. (concurring): -- I have had the benefit of reading the excellent reasons of Borins J.A. While I agree with his conclusions, I think this appeal raises important policy questions about the mandatory mediation process.

[35] Rule 24.1 compels parties to attend a mediation and to exchange information. Rule 24.1.14 provides that the settlement discussions are "without prejudice".

[36] I agree with Borins J.A. that rule 24.1.14 does not create an enforceable guarantee of confidentiality, but that does not mean that there do not exist significant public policy reasons for keeping the mediation sessions confidential.

[37] The purpose of protecting confidentiality in the mandatory mediation process is to further the public policy goal of encouraging settlement discussions. The particular significance of upholding confidentiality in mandatory mediation within the legal system is explained by Jonnette Watson Hamilton in her article, "Protecting Confidentiality in Mandatory Mediation: Lessons from Ontario and Saskatchewan" (1999) 24 Queen's L.J. 561 at p. 574 as follows:

> In any process forced upon parties, they must have confidence in the integrity of the process and those who have a major role in it. One of the results of requiring mediators to testify or produce documents may be a perception that the mediator, the program or the process itself does not keep confidences. While such a perception might normally cause parties to avoid mediation, they cannot do so where it is mandatory. They might, however, treat mediation as a mere formality.
>
> Treating mediation as a formality would frustrate the goals of annexing it to the legal system. The goals of mandatory mediation include efficiency improvements for court systems and administrators by relieving case load pressures and reducing delay and cost for litigants, qualitative improvements for participants through more satisfying or more appropriate procedures and outcomes, relationship preservation and improvement and community and responsibility building. Indeed, if participation in mediation becomes merely an empty gesture, then the legal system will become less efficient, and the parties less satisfied rather than more.

(Citations omitted)

(See also Canadian Broadcasting Corp. v. Paul (2001), 198 D.L.R. (4th) 633, 274 N.R. 47 (F.C.A.) at p. 643 D.L.R. per Sexton J.A.; Owen V. Grey, "Protecting the Confidentiality of Communications in Mediation" (1998) 36 Osgoode Hall L.J. 667 at p. 677; David Vaver, "Without Prejudice Communications -- Their Admissibility and Effect" (1974) 9 U.B.C.L. Rev. 85 at p. 94; and Lawrence Boulle and Kathleen Kelly, Mediation: Principles, Process, Practice (Markham: Butterworths, 1998)).

[38] The failure to protect confidentiality could profoundly prejudice the effectiveness of mandatory mediation. It is difficult to [page345] see how anyone would agree to be open and frank in discussions designed to effect settlement -- discussions they have no choice about participating in -- when there is no protection for the confidentiality of the process.

[39] A useful analogy can be made, it seems to me, with the implied undertaking found to be crucial to the integrity of the discovery process in Goodman v. Rossi (1995), 24 O.R. (3d) 359, 125 D.L.R. (4th) 613 (C.A.). This court held that much like an order, statutory rules for examinations for discovery require disclosure of relevant evidence, and as a result, the court can cite for contempt anyone who breaches an implied undertaking not to use discovery evidence for a collateral or ulterior purpose.

[40] At p. 370 O.R. of Goodman v. Rossi, Morden A.C.J.O. explained the basis for the implied undertaking rule and the availability of contempt to sanction its breaches. Citing Prudential Assurance Company v. Fountain Page Limited, [1991] 1 W.L.R. 756 (Q.B.), at pp. 764-65 per Hobhouse J., he said:

> The rational basis for the rule is that where one party compels another, either by the enforcement of a rule of court or a specific order of the court, to disclose documents or information whether that other wishes to or not, the party obtaining the disclosure is given this power because the invasion of the other party's rights has to give way to the need to do justice between those parties in the pending litigation between them; it follows from this that the results of such compulsion should likewise be limited to the purpose for which the order was made, namely, the purposes of that litigation then be-

> fore the court between those parties and not for any other litigation or matter or any collateral purpose: see, for example, per Lord Keith of Kinkel in Home Office v. Harman, [1983] 1 A.C. 280, 308.

(Emphasis added)

[41] Again referring to Prudential, supra, at pp. 764-65 W.L.R., Morden A.C.J.O. aptly described the implied undertaking in connection with discoveries as follows, at p. 370 O.R.:

> It is an obligation which arises from legal process and therefore is within the control of the court, gives rise to direct sanctions which the court may impose (viz. contempt of court) and can be relieved or modified by an order of the court.

[42] Morden A.C.J.O. emphasized the necessity of having a contempt of court order available as a remedy to protect confidentiality during the discovery process, at p. 371 O.R.:

> I think that there would be a serious gap in the range of possible sanctions for breach of the obligation not to make improper use of documents disclosed on discovery, if it were not associated with an implied undertaking to the court and, therefore, capable of giving rise to a contempt of court order.

[43] This analysis is equally applicable to mandatory mediation, and, it seems to me, compels the same protection that the implied undertaking in discoveries affords. Just as parties to litigation [page346] are compelled by the discovery rules to disclose information they might not otherwise disclose, so too parties falling within the scope of Rule 24.1 are required to attend a mediation session and are required to submit certain information in the mediation process.

[44] It is true that the purpose of mandatory mediation is to settle a dispute outside of the court's process, and, as in discovery, it is not conducted by a judge. But it is also true that aspects of mandatory mediation directly engage the court's process. First and foremost, the fact that mediation is mandated by the commencement of a proceeding under the rules, directly implicates the mediation in the court's process. Rule 24.1.09 provides that the mediation session shall take place within 90 days after the first defence has been filed. Rule 24.1.10 provides that at least seven days before the mediation, each party is to prepare a form that identifies the factual and legal issues in dispute, briefly sets out the position and interests of the party making the statement and, requiring the "party making the statement [to] attach to it any documents that the party considers of central importance to the action".

[45] In addition, Rule 24.1 sets out what conduct constitutes non-compliance: failure to provide a copy of a statement of issues to the mediator and the other parties; failure to provide a copy of the pleadings to the mediator and failure to attend within the first thirty minutes of the scheduled mediation session. Upon the occurrence of any of these events, a party files a certificate of non-compliance with the mediation co-ordinator, who then refers the matter to a case management master or judge who in turn can convene a case conference and make a number of orders pursuant to rule 24.1.13(2) such as an order striking pleadings, to pay costs, or "any other order that is just".

[46] And while the mediation is mandatory, rule 24.1.05 provides that the court may make an order on a party's motion exempting its action from mandatory mediation, a course of conduct the

courts have been rare to indulge. (See O. (G.) v. H. (C.D.) (2000), 50 O.R. (3d) 82, 11 C.P.C. (5th) 302 (S.C.J.), at p. 85 O.R.)

[47] Mandatory mediation is a compulsory part of the court's process for resolving disputes in civil litigation. Wilful breaches of the confidentiality it relies on for its legitimacy, in my view, represent conduct that can create a serious risk to the full and frank disclosures the mandatory mediation process requires. It can significantly prejudice the administration of justice and, in particular, the laudable goal reflected in Rule 24.1 of attempting to resolve disputes effectively and fairly without the expense of a trial.

[48] However, given the potential gravity of the consequences of a contempt finding, it should only be exercised, as Borins J.A. [page347] indicated, "when the circumstances are clear and beyond reasonable doubt". In the absence of a Rule or legislative provision explicitly declaring what most lawyers and participants to the mandatory mediation process likely assume, namely, that is confidential, no such clarity exists at this time sufficient to justify attracting so powerful a remedy.

[49] I therefore agree with Borins J.A. that the appeal should be allowed.

Order accordingly.

*Case Name:*

# Muscletech Research and Development Inc. (Re)

**IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended AND IN THE MATTER OF Muscletech Research and Development Inc. and those entities listed on Schedule "A" hereto**

[2006] O.J. No. 3300

25 C.B.R. (5th) 218

33 C.P.C. (6th) 131

150 A.C.W.S. (3d) 534

[2006] O.T.C. 737

2006 CarswellOnt 4929

Court File No. 06-CL-6241

Ontario Superior Court of Justice
Commercial List

**R.E. Mesbur J.**

Heard: July 31, 2006.
Judgment: August 16, 2006.

(45 paras.)

[Editor's note: Supplementary reasons for judgment were released September 13, 2006. See [2006] O.J. No. 5305.]

**Counsel:**

Fred Myers and David Bish for the applicants

Kevin P. McElcheran for the "Representative Plaintiffs"

James H. Grout and Kyla Mahar for Krys Osborne, on behalf of herself and all other similarly situated California consumers, (the "California Consumers")

Derrick Tay for Iovate Health & Sciences, the DIP Lender

Jeff Carhart for the Ad Hoc Tort Claimants Committee

Natasha MacParland for the Monitor, RSM Richter Inc.

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[Editor's note: A corrected version was released by the Court September 13, 2006; the corrections have been made to the text and the corrigendum is appended to this document.]

**ENDORSEMENT**

R.E. MESBUR J.:--

**Nature of the motions**:

1 These motions raise the question of whether plaintiffs in uncertified class actions may file claims in the claims process in this CCAA proceeding on behalf of themselves and all other similarly situated plaintiffs. The applicant, the Monitor, the DIP lender and the Ad Hoc Tort Claimants Committee all take the position that claims filed in this manner are a nullity, and should be forever barred.

2 Mr. McElcheran, on behalf of four plaintiffs in four yet-uncertified US class actions, and Mr. Grout and Ms. Mahar for a plaintiff in a yet-uncertified class action in California all are of the view that there is jurisdiction under the CCAA to permit such representative claims, and either the claims should be permitted, or alternatively, the stay of proceedings imposed by the CCAA should be lifted to allow them to proceed to certification motions in the United States for their respective actions. I will refer to Mr. McElcheran's clients as the "Representative Plaintiffs", and Mr. Grout's clients as the "California Consumers".

**Some history**:

3 The applicants, whom I will refer to collectively as "Muscletech", are comprised of the applicant, Muscletech, and its various subsidiaries and related companies listed in Schedule "A". Muscletech is a Canadian company. Historically, it was in the business of the manufacture and sale of dietary supplements. Some of these supplements contained the chemical ephedra, while others contained what have been referred to as prohormones. Muscletech was not alone in selling supplements containing these compounds. A number of American companies did so as well. Because of problems surrounding the compounds, Muscletech's products have ceased to contain them since 2002. Nevertheless, there was significant litigation, particularly in various states in the United States, brought by the consumers of these products, against both Muscletech and other companies.

4 The litigation is essentially of two kinds. The ephedra litigation primarily concerns those consumers of products containing ephedra who allege they have suffered physical damages as a result of using these products. The parties here refer to that litigation as the Products Liability litigation. The prohormone litigation has been brought by consumers of products containing prohormone who allege either that the product failed to produce the promised increased muscle mass, or alternatively, produced the promised increased muscle mass, but in doing so, must have contained a con-

trolled substance, namely anabolic steroids. In the first instance, the prohormone consumers complain of being the victims of false and misleading advertising. In the second, they complain of being illegally sold a controlled substance.

**5** For the purposes of this motion, there are several of these lawsuits that are important. First, there is the group of four yet to be certified class actions relating to prohormone claims. These have been described as the Hannon Claim, the Hochberg Claim, the Rodriguez Claim and the Guzman Claim, or collectively, the Representative Plaintiffs' Claims.

**6** The Hannon Claim was commenced in the State of Florida. The Hochberg and Rodriguez claims were commenced in New York State, and the Guzman claim was commenced in California. Using the multi-district litigation (MDL) provisions available in the United States, all four proceedings have been moved to the United States District Court for the Southern District of New York (the "U.S. District Court") in New York City, to be managed, along with all the other related ephedra litigation by Justice Rakoff of that court. As I have said, I will refer to these four claims as the "Representative Plaintiffs' Claims", and to the plaintiffs in them as the "Representative Plaintiffs".

**7** In addition to the Representative Plaintiffs' Claims, there is a further yet-to-be-certified class action in the United States that is germane to this motion. It has been described as the California Consumers' Claim. Unlike the Representative Plaintiffs' Claims, the California Consumers' Claim is an ephedra claim, seeking damages for personal injuries. I refer to this action as the "California Consumers' Claim", and its plaintiffs as the "California Consumers". The California Consumers participated on the motion simply to support the Representative Plaintiffs' position; they seek no relief themselves.

**8** In January 2006, Muscletech sought and was granted CCAA protection in this court. The initial stay has been extended throughout the proceedings to August 11, 2006.[1] As the applicants' factum puts it, seeking CCAA protection was done "principally as a means of achieving a global resolution of the large number of product liability and other lawsuits" against the applicants and others. These lawsuits relate to the products that Muscletech and others sold.

**9** Once the initial order was granted, the Monitor commenced ancillary proceedings in the USA under Chapter 15 of the U.S. Bankruptcy Code. These proceedings are before the U.S. District Court as well. As a result of these ancillary proceedings, there is a similar stay in the U.S.

**10** At the same time, the Monitor also applied for a Temporary Restraining Order and Preliminary Injunction (TRO/PI Application) in the U.S. District Court, to prohibit anyone commencing or continuing any products liability actions. The TRO/PI application was granted. That application is referred to as the "Adversary Proceeding" under Chapter 15 of the U.S. Bankruptcy Code.

**11** On February 8, 2006, an Ad Hoc committee of products liability claimants sought and was granted representative status in this CCAA proceeding. On March 3, 2006, this court made a Call for Claims order. American counsel for both the Representative Plaintiffs and the California Consumers were served with the motion and draft order in relation to the Call for Claims order, just as they have been served throughout these CCAA proceedings. Although many interested parties made submissions concerning the terms of the order both before the hearing and at the hearing itself, counsel for the Representative Plaintiffs and California Consumers did not. They took no steps, as did the Ad Hoc Committee, to obtain representative status, or direction as to how they might put forward their claims.

**12** As I have mentioned, Muscletech sought and obtained an order in the USA bankruptcy court, recognizing and enforcing the Ontario CCAA order, including its automatic stay. The Call for Claims order was similarly recognized and approved by Judge Rakoff in the U.S. District Court on March 22, 2006. Judge Rakoff is managing all the ephedra litigation, as well as the motions to recognize and enforce orders made here under these CCAA proceedings, and the Adversary Proceeding as well.

**13** The Call for Claims order established a process for calling for what were defined as both "claims" and "product liability claims". The object of the order was to identify everyone with any kind of claim against Muscletech, its affiliates, and some defined Third Parties. The process envisions "a person" completing a proof of claim, with particulars of the claim, and sending it to the Monitor.[2] In this way, the Monitor could identify what Mr. Tay for the DIP lender has called the "total universe of potential claims". The Call for Claims order does not set the process for deciding on the validity of any of the claims. Its purpose is simply to identify them.

**14** The Call for Claims order set out comprehensive definitions of what constitutes both types of claims, as well as an elaborate method of giving broad notice to anyone who might have a claim. In this case, the order required the Monitor to send a package containing a proof of claim and other necessary information to all known creditors of Muscletech. It also required that the Monitor file these documents and the Call for Claims order electronically on the U.S. District Court's website in all three pieces of litigation there. These are described in the Call for Claims order as the "U.S. Chapter 15 Proceedings", the "U.S. Chapter 15 Adversary Proceedings" and the "U.S. MDL Proceedings". The order required the Monitor to publish notices to creditors in the national edition of the *Globe and Mail* newspaper, the *Wall Street Journal,* and *USA Today.* The Monitor was also required to post copies of the documents and Call for Claims order on the Monitor's website. The Monitor did all these things.

**15** All proofs of claim were to be filed by May 8, 2006. This date was defined in the order as the Claims Bar date. Any creditor who has not filed a proof of claim by that date is forever barred from making or enforcing any claim, and is not entitled to participate as a creditor in the CCAA proceedings, or to vote at any meeting of creditors. Prior to the Claims Bar date, the members of the Ad Hoc Tort Claimants Committee filed individual proofs of claim. The California Consumers also filed individual proofs of claim.

**16** On May 8, the Representative Plaintiffs, (that is, Hannon, Hochberg, Rodriguez and Guzman), filed proofs of claim, claiming to do so on their own behalves, and "on behalf of all other similarly situated persons". Unlike the Representative Plaintiffs, the California Consumers filed individual proofs of claim. Even though they have done so, they support the Representative Plaintiffs' position on this motion.

**17** The monitor received some 33 ephedra claims, both from the California Consumers individually, and from others, including the members of the Ad Hoc Tort Committee. The only prohormone claims the monitor has received are from the Representative Plaintiffs. No other individual claims relating to prohormones have been filed.

**18** After the claims bar date, this court made a Claims Resolution order. That order, dated June 8, 2006, provided, among other things, for a method for the monitor to review proofs of claim, accept or reject them, and for a claims resolution process for resolving disputed claims. The Claims Resolution order is subject to an earlier Mediation Order, which provided for mediation of ephedra

claims. Of the 33 ephedra claims filed, 30 have already been settled through the mediation process. The mediation process is part of a larger mediation process in New York, in the context of the much broader ephedra litigation that Judge Rakoff is managing. This litigation is referred to as the MDL, or multi-district litigation, in the U.S.

**19** No one has appealed the Call for Claims order. No one moved to vary its terms, prior to the claims bar date. No one has appealed the Claims Resolution order. None of the Representative Plaintiffs have taken any steps in the United States (where their class actions are pending), to lift the stay of proceedings there to permit their actions to proceed to certification.

**The parties and their positions**:

**20** On these motions the applicants take the position that the proofs of claims by the Representative Plaintiffs are a nullity, since there is no provision in either the CCAA or any of the court orders that permit these claims to be made either as representative claims, or class action claims. They say that to allow these claims would unreasonably delay the CCAA process, and would undermine the process that has already been established, which all stakeholders rely on.

**21** The DIP lender supports the applicants' position. The DIP lender takes the position that if the proposed claims were allowed, there is a potential for significant prejudice to the DIP lender who is funding the process, and will ultimately fund any plan of compromise. The DIP lender has already settled with a significant number of other tort claimants (albeit ephedra, as opposed to prohormone claimants). The DIP lender says it reached its settlement on the basis of a particular "known universe" of claims. It suggests that allowing these indeterminate claims, and claimants, at this late date, would prejudice its position.

**22** The Ad Hoc Committee of Tort Claimants supports the applicants as well. The Committee takes the position that even before the Call for Claims order was made, it was able to obtain an order allowing it to participate as a Committee in the CCAA process and obtain what is called representative status in the proceedings. It says that if the Ad Hoc Committee was able to do so within the CCAA process, these other proposed claimants could, and should have done the same. Since the other proposed claimants did not, and took no steps to appeal the Call for Claims order, and indeed, declined to participate in the motion in which its terms were set, they should be barred from doing so at this late date.

**23** The Monitor also supports the applicants' position, saying the CCAA process gave the Representative Plaintiffs adequate opportunity to file individual claims. The forms were readily accessible in plain English. The Products Liability claimants, that is, the members of the Ad Hoc Committee, were able to put individual claims forward in the CCAA process and the Representative Plaintiffs had the same opportunity to participate in exactly the same way. Lastly, the Monitor says that the CCAA process is far more economic than the lengthy process of certification of class actions, particularly in the USA, where certification would have to take place. To allow this new process to be overlaid on the existing CCAA process would be cumbersome, excessively expensive and time consuming.

**24** All those opposing the Representative Plaintiffs' Claims and California Consumers suggests that the real motivation for putting these claims forward is to obtain and secure payment of significant legal fees for the lawyers involved, rather than to reap any meaningful benefits for any class participants. I need not comment on what is essentially a bald allegation. I mention it only to make the record of the parties' positions complete.

**25** Both the Representative Plaintiffs and the California Consumers take a contrary view. They say their clients' claims should not be defeated on what they describe as essentially procedural grounds. They suggest that fairness requires that they be permitted to file in this way. They say the current CCAA process is not so far advanced that there would be undue prejudice to any of the other stakeholders, if their proofs of claims were allowed to be filed as representative claims.

**The law and analysis**:

**26** The first question to consider is whether the CCAA permits representative claims, or class action claims. The next issue is whether this particular CCAA process adequately protected the interests of this potential group of claimants. Lastly, given the inherent jurisdiction of the court, I must also address whether this case might be an appropriate case to exercise my discretion and permit the Representative Plaintiffs' Claims to proceed in some fashion at this time.

***Does the CCAA permit representative claims?***

**27** The CCAA neither expressly permits nor forbids representative claims. The CCAA defines "claim" in s. 12(1). It says that for the purposes of the CCAA, "claim" means "any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act.*" Thus, to determine what a CCAA "claim" is, one must turn to the *Bankruptcy and Insolvency Act,* and the definition of debts "provable in bankruptcy".

**28** Section 121(1) of the BIA deals with "claims provable", and says:

> All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason on any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

**29** The BIA has a mechanism to determine whether a contingent or unliquidated claim is a provable claim. The mechanism is found in section 135(1.1), which provides:

> The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

**30** A determination under s. 135(1.1) is "final and conclusive", unless within a thirty day period after the trustee serves a notice of disallowance, the person to whom the notice of disallowance was sent appeals the trustee's decision.

**31** Section 124 of the BIA deals with the proof of claims. First, it provides in subsection (1) that creditors shall prove claims. It says: "Every creditor shall prove his claim, and a creditor who does not prove his claim is not entitled to share in any distribution that may be made." The section goes on, in subsection (3) to deal with who may make proof of claims. The subsection says: "The proof of claim may be made by the creditor himself or by a person authorized by him on behalf of the creditor, and, if made by a person authorized, it shall state his authority and means of knowledge."

**32** The term "creditor" is not specifically defined in the CCAA. The applicants therefore point to the definition of "creditor" in the Call for Claims order itself. There, creditor is defined as "any *Person* having a Claim or a Product Liability Claim" [emphasis added]

**33** From the interplay of the sections of the CCAA and the BIA, together with the definition in the Call for Claims order, the applicants infer that only individual creditors may make claims, unless they have authorized someone else to do so on their behalf. Since there is no question the Representative Plaintiffs' Claims have not been authorized by the group of people whom they purport to represent, they have no authority to do so, and the applicants say these claims must therefore be declared a nullity, at least to the extent that they purport to advance claims for other than Hannon, Hochberg, Rodriguez and Guzman personally.

**34** While this interpretation may be technically correct, it is also clear that representative orders of some kind have been used in other CCAA proceedings[3], and even in this case.[4] In addition, there have been cases in which a stay has been lifted in order to permit a potential class proceeding to file certification materials,[5] while in other cases, a motion to lift the stay for that purpose and to file a class claim have been denied.[6] As yet, however, there are no examples in Canada where a class proof of claim has been specifically permitted.[7]

**35** It is noteworthy here, that even though Farley J. made an order granting a "representation and ancillary order regarding funding" to the Ad Hoc Committee in this proceeding, there was no order permitting "representative" claims to be filed; each member of the committee filed an individual proof claim with the monitor.

**36** From this I conclude that while it is possible at least to have a limited representation order in CCAA proceedings, it is by no means clear that representation orders have been extended to permit a "representative" proof of claim to be filed. Canadian courts have not yet permitted a filing of a proof of claim by a plaintiff in an uncertified class proceeding on behalf of itself and other members of the class. At best, our courts have at least once lifted a stay to permit the filing of certification materials. Any steps beyond that would be the subject of a further motion.[8] In the case of *Re Air Canada,* however, there was no suggestion that certification motions were going to be made in a foreign jurisdiction, as would be the case here.

**37** While a representative claim may therefore be possible, the next question is whether this is a proper case to either permit this kind of "representative" claim, without the necessity of the individual members of the class filing claims, or whether the stay should be lifted to permit certification motions to proceed in the United States. This involves a discussion first of whether the orders here gave adequate protection to this potential group or groups of creditors, and second, whether this might be an appropriate case for the court to exercise its discretion and grant the relief the Representative Plaintiffs seek.

***Did the CCAA process adequately protect the interests of these potential claimants?***

**38** When I consider the CCAA process here, I am drawn inescapably to the conclusion that it adequately protected the interests of these potential claimants, had they availed themselves of the process as other claimants did.

**39** The Ad Hoc committee obtained a representation order, and participates on that basis, although its members filed individual proofs of claim. Even the California Consumers filed individual claims. If the members of the Representative Plaintiff's proposed class had wished to file proofs of

claim, they had as much notice and opportunity to do so as anyone else. This is particularly so since the required notices were published not only in two American nation-wide newspapers, but also in three locations on the U.S. District Court's website. Not a single "similarly situated" person, other than Hannon, Hochberg, Rodriguez and Guzman filed a proof of claim . They easily could have. They did not. I cannot conclude that the absence of additional claims implies the process was somehow unfair or flawed. To the contrary, the absence of even a single additional claim suggests there may be no other claimants at all. The process adequately protected the interests of these potential claimants. They simply chose not to utilize that process.

***Should the court exercise its discretion?***

**40** While the court clearly has a broad discretion in CCAA matters[9], I am not persuaded that this is a proper case to exercise that discretion either to allow the representative claims as they are, or to lift the stay to permit certification motions to proceed.

**41** First, representative claims *per se,* have not been recognized in Canadian jurisprudence in the context of CCAA proceedings. It is clear that rule 10 of the *Rules of Civil Procedure* permits the court to "appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served."

**42** Rule 10, however, is generally used in estates and trusts cases, or as what has been described as the "simplified procedure" version of proceedings under the *Class Proceedings Act,* particularly in pension fund disputes.[10] I was referred to no case in which the rule was specifically used in CCAA proceedings to permit the filing of a representative or class claim. I do not see rule 10 as useful in these CCAA proceedings, which has created its own process and procedures. Here, a structure was established by court order, on notice to the very parties who now wish to alter the process fundamentally, after all stakeholders have relied on the structure that was established.

**43** Changing and increasing the landscape of claimants after the settlement of 30 of the ephedra claims after the claims bar date could cause prejudice to the eventual success of the CCAA process. Simply put, all the arguments made by the Representative Plaintiffs and California Consumers should have been made before Farley J. when the Call for Claims order was made, or earlier motions should have been made to deal with these issues before the Call for Claims order was even made.

**44** The process gave adequate opportunity for anyone with a claim to file a proof of claim. The forms were accessible, in plain English. The products liability claimants all managed to make individual claims, even though they might have been involved in class actions. No other prohormone claimants have filed a proof of claim. To allow representative or class claims at this date would be prejudicial to the entire claims process, and would impair the integrity of the CCAA process here. I decline to exercise my discretion in these circumstances.

**Disposition**:

**45** The applicants' motion is therefore granted, and the representative plaintiffs' motion is dismissed. To be clear, the "representative" claims are to be considered as individual claims for each of Hannon, Hochberg, Rodriguez and Guzman. As the parties have agreed, there will be no order as to costs.

R.E. MESBUR J.

* * * * *

**SCHEDULE "A"**

HC Formulations Ltd.

CELL Formulations Ltd.

NITRO Formulations Ltd.

MESO Formulations Ltd.

ACE Formulations Ltd.

MISC Formulations Ltd.

GENERAL Formulations Ltd.

ACE US Formulations Ltd.

MT Canadian Supplement Trademark Ltd.

Mt Foreign Supplement Trademark Ltd.

MC Trademark Holdings Ltd.

HC US Trademark Ltd.

1619005 Ontario Ltd. (f/k/a NEW HC US Trademark Ltd.)

HC Canadian Trademark Ltd.

HC Foreign Trademark Ltd.

* * * * *

Corrigendum
Released: September 13, 2006

The Court has issued the following correction:

**CORRECTION TO ENDORSEMENT**

[1] Ms. MacParland and Ms. Mahar have brought to my attention two inaccuracies in my endorsement dated August 16, 2006. First, the reference in paragraph 13 of the endorsement to counsel for the DIP Lender should be to Mr. Tay, rather than Mr. Carhart.

[2] Second, apparently the California Consumers did not file individual proofs of claim. Their proofs of claim were similar to those filed by the Representative Plaintiffs. Ms. Mahar points out that the California Consumers' claim is a false advertising claim that seeks restitution, rather than damages for personal injury. Their claim is not the same nature as those filed by the Representative Plaintiffs. The statutory scheme in California (namely the Business & Professions Code Section 17203) apparently expressly authorizes Ms. Osborne to act as the representative of other parties, and thus she filed a proof of claim on behalf of herself and other simnilarly situated California consumers. The California Consumers did not file any affidavit material on the motion, and counsel did not make this clear at the hearing. However, these changes should be incorporated into my earlier endorsement.

cp/e/qw/qlhjk/qlbxs/qlrme/qlgpr

1 Since hearing this motion, I have granted an order extending the stay to November 10 of this year. Judge Rakoff has made a similar order in the corresponding US litigation.

2 See "Notice to Creditors Re: Notice of Call for Claims and Product Liability Claims", Schedule "E" to the call for claims order.

3 See, for example, *Canadian Red Cross Society/Société Canadienne de la Croix-Rouge, Re* (1999), 12 C.B.R. (4th) 194 (S.C.J. Commercial List). See also the order of Blair J. in *Canadian Red Cross Society* dated July 29, 1998, in which he appointed representative counsel for various groups of claimants. It is noteworthy, however, that he did not provide for the filing of representative proofs of claim in the order.

4 see the reasons of Farley J. dated February 6, 2006, at paragraph 8, in which he says: "I understand that later this week the Ad Hoc Committee will be requesting a representation and ancillary order incorporating a joint funding agreement. [Note: as this is being typed up February 8th, I would note that I have just granted such an order.]" Again, nothing in the order permitted a representative *claim* to be filed.

5 *Re Air Canada,* Court File # 03-CL-4932. Endorsement of Farley J dated. September 24, 2003.

6 *Re Canadian Red Cross, supra*

7 *Re Canadian Red Cross,* note 2, above, at page 197

8 *Re Air Canada,* note 5, above at paragraph 18.

9 The *CCAA* has been described as having a "broad remedial purpose", and cases have stated the Act should be given a large and liberal interpretation. See Holden & Morawetz *The 2006 Annotated Bankruptcy and Insolvency Act,* [Carswell, 2006] pp 1163-64, and these cases referred to there.

10 see *Overview* to rule 10, Killeen, Morton and James, *Ontario Superior Court Practice*

---- End of Request ----
Email Request: Current Document: 1
Time Of Request: Tuesday, October 02, 2012  13:36:06

*Case Name:*

# Nortel Networks Corp. (Re)

**IN THE MATTER OF a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation Applicants**
**Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended**
**RE: IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended**

[2009] O.J. No. 2166

75 C.C.P.B. 206

2009 CarswellOnt 3028

Court File No. 09-CL-7950

Ontario Superior Court of Justice
Commercial List

**G.B. Morawetz J.**

Heard: April 20, 2009.
Judgment: May 27, 2009.

(67 paras.)

*Bankruptcy and Insolvency Law -- Companies' Creditors Arrangement Act (CCAA) matters -- Motions by various factions of Nortel's current and former employees to appoint various representative counsel allowed in part -- Koskie Minsky appointed representative counsel and motions of other proposed representative counsel dismissed -- Appropriate to exercise discretion to make representation order -- No conflict of interest between various employee groups and they had commonality of interest as unsecured creditors -- Appointment of single representative counsel most time efficient and cost effective way -- Appointment of Koskie Minsky as representative counsel was logical as willing to act on behalf of all former employees and had experience and expertise.*

*Civil Litigation -- Civil Procedure -- Parties -- Representation of -- Motions by various factions of Nortel's current and former employees to appoint various representative counsel allowed in part -- Koskie Minsky appointed representative counsel and motions of other proposed representative counsel dismissed -- Appropriate to exercise discretion to make representation order -- No conflict of interest between various employee groups and they had commonality of interest as unsecured creditors -- Appointment of single representative counsel most time efficient and cost effective way -- Appointment of Koskie Minsky as representative counsel was logical as willing to act on behalf of all former employees and had experience and expertise.*

Motions by various factions of Nortel's current and former employees to appoint various representative counsel. In January 2009, Nortel filed for Companies' Creditors Arrangement Act protection. At the time of the filing, the Nortel group of companies ("Nortel") employed approximately 6,000 employees and had approximately 11,700 retirees or their spouses receiving pension and/or benefits from retirement plans sponsored by Nortel. Nortel continued to honour substantially all of the obligations to current employees, but upon commencement of the CCAA proceedings, they ceased making all payments to former employees of amounts that would constitute unsecured claims, including termination, severance and amounts under various retirement and retirement transition programs. The opinion of the Monitor was that it was appropriate that there be representative counsel in light of the large number of former employees and that the financial burden of multiple representative counsel would further increased the financial pressure faced by Nortel. The former employees of Nortel had an interest in the CCAA proceedings in respect of severance, termination pay, retirement allowances and other amounts owed in respect of contractual obligations and employment standards legislation. In addition, most former employees and survivors of former employees had basic entitlement to receive payment from the Nortel pension plan and some might have also been entitled to a payment from certain non-registered retirement plans, health benefits and other retirement allowances. Both the Monitor and Nortel recognized the benefits of representative counsel and Nortel consented to the appointment of one of the proposed representative counsel, but opposed the appointment of any additional representatives. The representative whose appointment Nortel consented to represented a cross-section of all former employees who were entitled to severance and termination pay and payments under some or all of the various other plans.

HELD: Motions allowed in part. Koskie Minsky appointed as representative counsel and motions of all other proposed representative counsel dismissed. It was appropriate to exercise discretion pursuant to s. 11 of the Companies' Creditors Arrangement Act to make a Rule 10 representation order. There was no real or direct conflict of interest between various employee groups and the former employees had a commonality of interest in that they all had unsecured claims against Nortel for some form of deferred compensation. The appointment of a single representative counsel was the most time efficient and cost effective way to ensure that the arguments of the employees were placed before the Court. The appointment of Koskie Minsky as representative counsel was a logical choice as they indicated a willingness to act on behalf of all former employees, they received a

broad mandate from the employees, they had experience in representing large groups of retirees and employees in large scale restructurings and specialty practice in relevant areas of law.

**Statutes, Regulations and Rules Cited:**

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended, s. 11

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.),

Ontario Pension Benefits Act,

Rules of Civil Procedure, Rule 10.01, Rule 12.07

**Counsel:**

Janice Payne, Steven Levitt and Arthur O. Jacques for the Steering Committee of Recently Severed Canadian Nortel Employees.

Barry Wadsworth for the CAW-Canada and George Borosh and Debra Connor.

Lyndon Barnes and Adam Hirsh for the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited.

Alan Mersky and Derrick Tay for the Applicants.

Henry Juroviesky, Eli Karp, Kevin Caspersz and Aaron Hershtal for the Steering Committee for The Nortel Terminated Canadian Employees Owed Termination and Severance Pay.

M. Starnino for the Superintendent of Financial Services or Administrator of the Pension Benefits Guarantee Fund.

Leanne Williams for Flextronics Telecom Systems Ltd.

Jay Carfagnini and Chris Armstrong for Ernst & Young Inc., Monitor.

Gail Misra for the Communication, Energy and Paperworkers Union of Canada.

J. Davis-Sydor for Brookfield Lepage Johnson Controls Facility Management Services.

Mark Zigler and S. Philpott for Certain Former Employees of Nortel.

G.H. Finlayson for Informal Nortel Noteholders Group.

(A) Kauffman for Export Development Canada.

Alex MacFarlane for the Unsecured Creditors' Committee (U.S.).

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## ENDORSEMENT

**1 G.B. MORAWETZ J.**:-- On May 20, 2009, I released an endorsement appointing Koskie Minsky as representative counsel with reasons to follow. The reasons are as follows.

**2** This endorsement addresses five motions in which various parties seek to be appointed as representative counsel for various factions of Nortel's current and former employees (Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation are collectively referred to as the "Applicants" or "Nortel").

**3** The proposed representative counsel are:

(i) Koskie Minsky LLP ("KM") who is seeking to represent all former employees, including pensioners, of the Applicants or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in respect of a pension from the Applicants. Approximately 2,000 people have retained KM.

(ii) Nelligan O'Brien Payne LLP and Shibley Righton LLP (collectively "NS") who are seeking to be co-counsel to represent all former non-unionized employees, terminated either prior to or after the CCAA filing date, to whom the Applicants owe severance and/or pay in lieu of reasonable notice. In addition, in a separate motion, NS seeks to be appointed as co-counsel to the continuing employees of Nortel. Approximately 460 people have retained NS and a further 106 have retained Macleod Dixon LLP, who has agreed to work with NS.

(iii) Juroviesky and Ricci LLP ("J&R") who is seeking to represent terminated employees or any person claiming an interest under or on behalf of former employees. At the time that this motion was heard approximately 120 people had retained J&R. A subsequent affidavit was filed indicating that this number had increased to 186.

(iv) Mr. Lewis Gottheil, in-house legal counsel for the National Automobile, Aerospace, Transportation and General Workers Union of Canada ("CAW") who is seeking to represent all retirees of the Applicants who were formerly members of one of the CAW locals when they were employees. Approximately 600 people have retained Mr. Gottheil or the CAW.

**4** At the outset, it is noted that all parties who seek representation orders have submitted ample evidence that establishes that the legal counsel that they seek to be appointed as representative counsel are well respected members of the profession.

**5** Nortel filed for CCAA protection on January 14, 2009 (the "Filing Date"). At the Filing Date, Nortel employed approximately 6,000 employees and had approximately 11,700 retirees or their spouses receiving pension and/or benefits from retirement plans sponsored by the Applicants.

**6** The Monitor reports that the Applicants have continued to honour substantially all of the obligations to active employees. However, the Applicants acknowledge that upon commencement of the CCAA proceedings, they ceased making almost all payments to former employees of amounts that would constitute unsecured claims. Included in those amounts were payments to a number of former employees for termination and severance, as well as amounts under various retirement and retirement transition programs.

**7** The Monitor is of the view that it is appropriate that there be representative counsel in light of the large number of former employees of the Applicants. The Monitor is of the view that former employee claims may require a combination of legal, financial, actuarial and advisory resources in order to be advanced and that representative counsel can efficiently co-ordinate such assistance for this large number of individuals.

**8** The Monitor has reported that the Applicants' financial position is under pressure. The Monitor is of the view that the financial burden of multiple representative counsel would further increase this pressure.

**9** These motions give rise to the following issues:

(i) when is it appropriate for the court to make a representation and funding order?
(ii) given the completing claims for representation rights, who should be appointed as representative counsel?

**Issue 1 - Representative Counsel and Funding Orders**

**10** The court has authority under Rule 10.01 of the *Rules of Civil Procedure* to appoint representative counsel where persons with an interest in an estate cannot be readily ascertained, found or served.

**11** Alternatively, Rule 12.07 provides the court with the authority to appoint a representative defendant where numerous persons have the same interests.

**12** In addition, the court has a wide discretion pursuant to s. 11 of the CCAA to appoint representatives on behalf of a group of employees in CCAA proceedings and to order legal and

other professional expenses of such representatives to be paid from the estate of the debtor applicant.

**13** In the KM factum, it is submitted that employees and retirees are a vulnerable group of creditors in an insolvency because they have little means to pursue a claim in complex CCAA proceedings or other related insolvency proceedings. It was further submitted that the former employees of Nortel have little means to pursue their claims in respect of pension, termination, severance, retirement payments and other benefit claims and that the former employees would benefit from an order appointing representative counsel. In addition, the granting of a representation order would provide a social benefit by assisting former employees and that representative counsel would provide a reliable resource for former employees for information about the process. The appointment of representative counsel would also have the benefit of streamlining and introducing efficiency to the process for all parties involved in Nortel's insolvency.

**14** I am in agreement with these general submissions.

**15** The benefits of representative counsel have also been recognized by both Nortel and by the Monitor. Nortel consents to the appointment of KM as the single representative counsel for all former employees. Nortel opposes the appointment of any additional representatives. The Monitor supports the Applicants' recommendation that KM be appointed as representative counsel. No party is opposed to the appointment of representative counsel.

**16** In the circumstances of this case, I am satisfied that it is appropriate to exercise discretion pursuant to s. 11 of the CCAA to make a Rule 10 representation order.

**Issue 2 - Who Should be Appointed as Representative Counsel?**

**17** The second issue to consider is who to appoint as representative counsel. On this issue, there are divergent views. The differences primarily centre around whether there are inherent conflicts in the positions of various categories of former employees.

**18** The motion to appoint KM was brought by Messrs. Sproule, Archibald and Campbell (the "Koskie Representatives"). The Koskie Representatives seek a representation order to appoint KM as representative counsel for all former employees in Nortel's insolvency proceedings, except:

(a) any former chief executive officer or chairman of the board of directors, any non-employee members of the board of directors, or such former employees or officers that are subject to investigation and charges by the Ontario Securities Commission or the United States Securities and Exchange Commission:
(b) any former unionized employees who are represented by their former union pursuant to a Court approved representation order; and
(c) any former employee who chooses to represent himself or herself as an

independent individual party to these proceedings.

**19** Ms. Paula Klein and Ms. Joanne Reid, on behalf of the Recently Severed Canadian Nortel Employees ("RSCNE"), seek a representation order to appoint NS as counsel in respect of all former Nortel Canadian non-unionized employees to whom Nortel owes termination and severance pay (the "RSCNE Group").

**20** Mr. Kent Felske and Mr. Dany Sylvain, on behalf of the Nortel Continuing Canadian Employees ("NCCE") seek a representative order to appoint NS as counsel in respect of all current Canadian non-unionized Nortel employees (the "NCCE Group").

**21** J&R, on behalf of the Steering Committee (Mr. Michael McCorkle, Mr. Harvey Stein and Ms. Marie Lunney) for Nortel Terminated Canadian Employees ("NTCEC") owed termination and severance pay seek a representation order to appoint J&R in respect of any claim of any terminated employee arising out of the insolvency of Nortel for:

(a) unpaid termination pay;
(b) unpaid severance pay;
(c) unpaid expense reimbursements; and
(d) amounts and benefits payable pursuant to employment contracts between the Employees and Nortel

**22** Mr. George Borosh and/or Ms. Debra Connor seek a representation order to represent all retirees of the Applicants who were formerly represented by the CAW (the "Retirees") or, alternatively, an order authorizing the CAW to represent the Retirees.

**23** The former employees of Nortel have an interest in Nortel's CCAA proceedings in respect of their pension and employee benefit plans and in respect of severance, termination pay, retirement allowances and other amounts that the former employees consider are owed in respect of applicable contractual obligations and employment standards legislation.

**24** Most former employees and survivors of former employees have basic entitlement to receive payment from the Nortel Networks Limited Managerial and Non-negotiated Pension Plan (the "Pension Plan") or from the corresponding pension plan for unionized employees.

**25** Certain former employees may also be entitled to receive payment from Nortel Networks Excess Plan (the "Excess Plan") in addition to their entitlement to the Pension Plan. The Excess Plan is a non-registered retirement plan which provides benefits to plan members in excess of those permitted under the registered Pension Plan in accordance with the *Income Tax Act*.

**26** Certain former employees who held executive positions may also be entitled to receive payment from the Supplementary Executive Retirement Plan ("SERP") in addition to their entitlement to the Pension Plan. The SERP is a non-registered plan.

**27** As of Nortel's last formal valuation dated December 31, 2006, the Pension Plan was funded at a level of 86% on a wind-up basis. As a result of declining equity markets, it is anticipated that the Pension Plan funding levels have declined since the date of the formal valuation and that Nortel anticipates that its Pension Plan funding requirements in 2009 will increase in a very substantial and material matter.

**28** At this time, Nortel continues to fund the deficit in the Pension Plan and makes payment of all current service costs associated with the benefits; however, as KM points out in its factum, there is no requirement in the Initial Order compelling Nortel to continue making those payments.

**29** Many retirees and former employees of Nortel are entitled to receive health and medical benefits and other benefits such as group life insurance (the "Health Care Plan"), some of which are funded through the Nortel Networks' Health and Welfare Trust (the "HWT").

**30** Many former employees are entitled to a payment in respect of the Transitional Retirement Allowance ("TRA"), a payment which provides supplemental retirement benefits for those who at the time of their retirement elect to receive such payment. Some 442 non-union retirees have ceased to receive this benefit as a result of the CCAA proceedings.

**31** Former employees who have been recently terminated from Nortel are owed termination pay and severance pay. There were 277 non-union former employees owed termination pay and severance pay at the Filing Date.

**32** Certain former unionized employees also have certain entitlements including:

(a) Voluntary Retirement Option ("VRO");
(b) Retirement Allowance Payment ("RAP"); and
(c) Layoff and Severance Payments

**33** The Initial Order permitted Nortel to cease making payments to its former employees in respect of certain amounts owing to them and effective January 14, 2009, Nortel has ceased payment of the following:

(a) all supplementary pensions which were paid from sources other than the Registered Pension Plan, including payments in respect of the Excess Plan and the SERP;
(b) all TRA agreements where amounts were still owing to the affected former employees as at January 14, 2009;
(c) all RAP agreements where amounts were still owing to the affected former employees as at January 14, 2009;
(d) all severance and termination agreements where amounts were still owing to the affected former employees as at January 14, 2009; and
(e) all retention bonuses where amounts were still owing to affected former

employees as at January 14, 2009.

**34** The representatives seeking the appointment of KM are members of the Nortel Retiree and Former Employee Protection Committee ("NRPC"), a national-based group of over 2,000 former employees. Its stated mandate is to defend and protect pensions, severance, termination and retirement payments and other benefits. In the KM factum, it is stated that since its inception, the NRPC has taken steps to organize across the country and it has assembled subcommittees in major centres. The NRPC consists of 20 individuals who it claims represent all different regions and interests and that they participate in weekly teleconference meetings with legal counsel to ensure that all former employees' concerns are appropriately addressed.

**35** At paragraph 49 of the KM factum, counsel submits that NRPC members are a cross-section of all former employees and include a variety of interests, including those who have an interest in and/or are entitled to:

(a) the basic Pension Plan as a deferred member or a member entitled to transfer value;
(b) the Health Care Plan;
(c) the Pension Plan and Health Care Plan as a survivor of a former employee;
(d) Supplementary Retirement Benefits from the Excess Plan and the SERP plans;
(e) severance and termination pay ; and
(f) TRA payments.

**36** The representatives submit that they are well suited to represent all former employees in Nortel's CCAA proceedings in respect of all of their interests. The record (Affidavit of Mr. D. Sproule) references the considerable experience of KM in representing employee groups in large-scale restructurings.

**37** With respect to the allegations of a conflict of interest as between the various employee groups (as described below), the position of the representatives seeking the appointment of KM is that all former employees have unsecured claims against Nortel in its CCAA proceedings and that there is no priority among claims in respect of Nortel's assets. Further, they submit that a number of former employees seeking severance and termination pay also have other interests, including the Pension Plan, TRA payments and the supplementary pension payments and that it would unjust and inefficient to force these individuals to hire individual counsel or to have separate counsel for separate claims.

**38** Finally, they submit that there is no guarantee as to whether Nortel will emerge from the CCAA, whether it will file for bankruptcy or whether a receiver will be appointed or indeed whether even a plan of compromise will be filed. They submit that there is no actual conflict of interest at this time and that the court need not be concerned with hypothetical scenarios which may never materialize. Finally, they submit that in the unlikely event of a serious conflict in the group,

such matters can be brought to the attention of the court by the representatives and their counsel on a *ex parte* basis for resolution.

**39** The terminated employee groups seeking a representation order for both NS and J&R submit that separate representative counsel appointments are necessary to address the conflict between the pension group and the employee group as the two groups have separate legal, procedural, and equitable interests that will inevitably conflict during the CCAA process.

**40** They submit that the pensioners under the Pension Plan are continuing to receive the full amount of the pension from the Pension Plan and as such they are not creditors of Nortel. Counsel submits that the interest of pensioners is in continuing to receive to receive their full pension and survivor benefits from the Pension Plan for the remainder of their lives and the lives of surviving spouses.

**41** In the NS factum at paragraphs 44 - 58, the argument is put forward as to why the former employees to whom Nortel owes severance and termination pay should be represented separately from the pensioners. The thrust of the argument is that future events may dictate the response of the affected parties. At paragraph 51 of the factum, it is submitted that generally, the recently severed employees' primary interest is to obtain the fastest possible payout of the greatest amount of severance and/or pay in lieu of notice in order to alleviate the financial hardships they are currently experiencing. The interests of pensioners, on the other hand, is to maintain the status quo, in which they continue to receive full pension benefits as long as possible. The submission emphasizes that issues facing the pensioner group and the non-pensioner group are profoundly divergent as full monthly benefit payments for the pensioner group have continued to date while non-pensioners are receiving 86% of their lump sums on termination of employment, in accordance with the most recently filed valuation report.

**42** The motion submitted by the NTCEC takes the distinction one step further. The NTCEC is opposed to the motion of NS. NS wishes to represent both the RSCNE and the NCCE. The NTCEC believes that the terminated employees who are owed unpaid wages, termination pay and/or severance should comprise their own distinct and individual class.

**43** The NTCEC seek payment and fulfillment of Nortel's obligations to pay one or several of the following:

(a) TRA;
(b) 2008 bonuses; and
(c) amendments to the Nortel Pension Plan

**44** Counsel to NTCEC submits that the most glaring and obvious difference between the NCCE and the NTCEC, is that NCCE are still employed and have a continuing relationship with Nortel and have a source of employment income and may only have a contingent claim. The submission goes on to suggest that, if the NCCE is granted a representation order in these proceedings, they will

seek to recover the full value of their TRA claim from Nortel during the negotiation process notwithstanding that one's claim for TRA does not crystallize until retirement or termination. On the other hand, the terminated employees, represented by the NTCEC and RSCNE are also claiming lost TRA benefits and that claim has crystallized because their employment with Nortel has ceased. Counsel further submits that the contingent claim of the NCCE for TRA is distinct and separate with the crystallized claim of the NTCEC and RSCNE for TRA.

**45** Counsel to NTCEC further submits that there are difficulties with the claim of NCCE which is seeking financial redress in the CCAA proceedings for damages stemming from certain changes to the Nortel Networks Limited Managerial and Non-negotiated Pension Plan effective June 1, 2008 and Nortel's decision to decrease retirees benefits. Counsel submits that, even if the NCCE claims relating to the Pension Plan amendment are quantifiable, they are so dissimilar to the claims of the RSCNE and NTCEC, that the current and former Nortel employees cannot be viewed as a single group of creditors with common interests in these proceedings, thus necessitating distinct legal representation for each group of creditors.

**46** Counsel further argues that NTCEC's sole mandate is to maximize recovery of unpaid wages, termination and severance pay which, those terminated employees as a result of Nortel's CCAA filing, have lost their employment income, termination pay and/or severance pay which would otherwise be protected by statute or common law.

**47** KM, on behalf of the Koskie Representatives, responded to the concerns raised by NS and by J&R in its reply factum.

**48** KM submits that the conflict of interest is artificial. KM submits that all members of the Pension Plan who are owed pensions face reductions on the potential wind-up of the Pension Plan due to serious under-funding and that temporarily maintaining of status quo monthly payments at 100%, although required by statute, does not avoid future reductions due to under-funding which offset any alleged overpayments. They submit that all pension members, whether they can withdraw 86% of their funds now and transfer them a locked-in vehicle or receive them later in the form of potentially reduced pensions, face a loss and are thus creditors of Nortel for the pension shortfalls.

**49** KM also states that the submission of the RSCNE that non-pensioners may put pressure on Nortel to reduce monthly payments on pensioners ignores the *Ontario Pension Benefits Act* and its applicability in conjunction with the CCAA. It further submits that issues regarding the reduction of pensions and the transfers of commuted values are not dealt with through the CCAA proceedings, but through the Superintendent of Financial Services and the Plan Administrator in their administration and application of the PBA. KM concludes that the Nortel Pension Plans are not applicants in this matter nor is there a conflict given the application of the provisions of the PBA as detailed in the factum at paragraphs 11 - 21.

**50** KM further submits that over 1,500 former employees have claims in respect of other employment and retirement related benefits such as the Excess Plan, the SERP, the TRA and other

benefit allowances which are claims that have "crystallized" and are payable now. Additionally, they submit that 11,000 members of the Pension Plan are entitled to benefits from the Pensioner Health Care Plan which is not pre-funded, resulting in significant claims in Nortel's CCAA proceedings for lost health care benefits.

**51** Finally, in addition to the lack of any genuine conflict of interest between former employees who are pensioners and those who are non-pensioners, there is significant overlap in interest between such individuals and a number of the former employees seeking severance and termination pay have the same or similar interests in other benefit payments, including the Pension Plan, Health Care Plan, TRA, SERP and Excess Plan payments. As well, former employees who have an interest in the Pension Plan also may be entitled to severance and termination pay.

**52** With respect to the motions of NS and J&R, I have not been persuaded that there is a real and direct conflict of interest. Claims under the Pension Plan, to the extent that it is funded, are not affected by the CCAA proceedings. To the extent that there is a deficiency in funding, such claims are unsecured claims against Nortel. In a sense, deficiency claims are not dissimilar from other employee benefit claims.

**53** To the extent that there may be potentially a divergence of interest as between pension-based claims and terminated-employee claims, these distinctions are, at this time, hypothetical. At this stage of the proceeding, there has been no attempt by Nortel to propose a creditor classification, let alone a plan of arrangement to its creditors. It seems to me that the primary emphasis should be placed on ensuring that the arguments of employees are placed before the court in the most time efficient and cost effective way possible. In my view, this can be accomplished by the appointment of a single representative counsel, knowledgeable and experienced in all facets of employee claims.

**54** It is conceivable that there will be differences of opinion between employees at some point in the future, but if such differences of opinion or conflict arise, I am satisfied that this issue will be recognized by representative counsel and further directions can be provided.

**55** A submission was also made to the effect that certain individuals or groups of individuals should not be deprived of their counsel of choice. In my view, the effect of appointing one representative counsel does not, in any way, deprive a party of their ability to be represented by the counsel of their choice. The Notice of Motion of KM provides that any former employee who does not wish to be bound by the representative order may take steps to notify KM of their decision and may thereafter appear as an independent party.

**56** In the responding factum at paragraphs 28 - 30, KM submits that each former employee, whether or not entitled to an interest in the Pension Plan, has a common interest in that each one is an unsecured creditor who is owed some form of deferred compensation, being it severance pay, TRA or RAP payments, supplementary pensions, health benefits or benefits under a registered Pension Plan and that classifying former employees as one group of creditors will improve the efficiency and effectiveness of Nortel's CCAA proceedings and will facilitate the reorganization of

the company. Further, in the event of a liquidation of Nortel, each former employee will seek to recover deferred compensation claims as an unsecured creditor. Thus, fragmentation of the group is undesirable. Further, all former employees also have a common legal position as unsecured creditors of Nortel in that their claims all arise out of the terms and conditions of their employment and regardless of the form of payment, unpaid severance pay and termination pay, unpaid health benefits, unpaid supplementary pension benefits and other unpaid retirement benefits are all remuneration of some form arising from former employment with Nortel.

**57** The submission on behalf of KM concludes that funds in a pension plan can also be described as deferred wages. An employer who creates a pension plan agrees to provide benefits to retiring employees as a form of compensation to that employee. An underfunded pension plan reflects the employer's failure to pay the deferred wages owing to former employees.

**58** In its factum, the CAW submits that the two proposed representative individuals are members of the Nortel Pension Plan applicable to unionized employees. Both individuals are former unionized employees of Nortel and were members of the CAW. Counsel submits that naming them as representatives on behalf of all retirees of Nortel who were members of the CAW will not result in a conflict with any other member of the group.

**59** Counsel to the CAW also stated that in the event that the requested representation order is not granted, those 600 individuals who have retained Mr. Lewis Gottheil will still be represented by him, and the other similarly situated individuals might possibly be represented by other counsel. The retainer specifically provides that no individual who retains Mr. Gottheil shall be charged any fees nor be responsible for costs or penalties. It further provides that the retainer may be discontinued by the individual or by counsel in accordance with applicable rules.

**60** Counsel further submits that the 600 members of the group for which the representation order is being sought have already retained counsel of their choice, that being Mr. Lewis Gottheil of the CAW. However, if the requested representative order is not granted, there will still be a group of 600 individual members of the Pension Plan who are represented by Mr. Gottheil. As a result, counsel acknowledges there is little to no difference that will result from granting the requested representation order in this case, except that all retirees formerly represented by the union will have one counsel, as opposed to two or several counsel if the order is not granted.

**61** In view of this acknowledgement, it seems to me that there is no advantage to be gained by granting the CAW representative status. There will be no increased efficiencies, no simplification of the process, nor any real practical benefit to be gained by such an order.

**62** Notwithstanding that creditor classification has yet to be proposed in this CCAA proceeding, it is useful, in my view, to make reference to some of the principles of classification. In *Re Stelco Inc.*, the Ontario Court of Appeal noted that the classification of creditors in the CCAA proceeding is to be determined based on the "commonality of interest" test. In *Re Stelco*, the Court of Appeal upheld the reasoning of Paperny J. (as she then was) in *Re Canadian Airlines Corp.* and articulated

the following factors to be considered in the assessment of the "commonality of interest".

In summary, the case has established the following principles applicable to assessing commonality of interest:

1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
3. The commonality of interests are to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations if possible.
4. In placing a broad and purposive interpretation on the CCAA, the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.
6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.

*Re Stelco Inc.*, 15 C.B.R. (5th) 307 (Ont. C.A.), paras 21-23; *Re Canadian Airlines Corp.* (2000) 19 C.B.R. (4th) 12 Alta. Q.B., para 31.

**63** I have concluded that, at this point in the proceedings, the former employees have a "commonality of interest" and that this process can be best served by the appointment of one representative counsel.

**64** As to which counsel should be appointed, all firms have established their credentials. However, KM is, in my view, the logical choice. They have indicated a willingness to act on behalf of all former employees. The choice of KM is based on the broad mandate they have received from the employees, their experience in representing groups of retirees and employees in large scale restructurings and speciality practice in the areas of pension, benefits, labour and employment, restructuring and insolvency law, as well as my decision that the process can be best served by having one firm put forth the arguments on behalf of all employees as opposed to subdividing the employee group.

**65** The motion of Messrs. Sproule, Archibald and Campbell is granted and Koskie Minsky LLP is appointed as Representative Counsel. This representation order is also to cover the fees and disbursements of Koskie Minsky.

**66** The motions to appoint Nelligan O'Brien Payne and Shibley Righton, Juroviesky and Ricci,

and the CAW as representative counsel are dismissed.

**67** I would ask that counsel prepare a form of order for my consideration.

G.B. MORAWETZ J.

cp/e/qlrpv/qlpxm/qlmxl/qlaxw/qlaxr

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

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**

Proceedings commenced in Toronto

# BRIEF OF AUTHORITIES OF SINO-FOREST CORPORATION (Motions Returnable October 9-10, 2012)

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