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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

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

Plaintiffs

- and -

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

BOOK OF AUTHORITIES OF INVESCO CANADA LTD., NORTHWEST & ETHICAL INVESTMENTS L.P., and COMITÉ SYNDICAL NATIONAL DE RETRAITE BÂTIRENTE INC.

(Motion for Notice Approval)

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Bâtirente Inc.

TO SERVICE LIST

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TAB 1

Case Name:

Currie v. McDonald's Restaurants of Canada Ltd.

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

[2005] O.J. No. 506

74 O.R. (3d) 321

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

195 O.A.C. 244

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

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

Dockets: C41264, C41289 and C41361

Ontario Court of Appeal
Toronto, Ontario

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

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

(53 paras.)

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

Appeal by the defendant, McDonald's Restaurants of Canada Ltd, from an order that allowed this matter to proceed, despite the fact that similar claims had been settled by class action. McDonald's had run promotional games which were tied to food purchases at its restaurants. Senior employees of the maretking company that operated these games were indicted for embezzling the prizes. A class-action was launched in the US for consumer fraud and unjust enrichment and a settlement was reached. The settlement was approved by US courts and a media process by which Canadian claimants were to be contacted was set up. In the criminal trial of the marketing employees, evidence was led that indicated that McDonalds had instructed the marketing company to ensure no high value prizes were awarded to Canadians. The terms of the settlement were given final approval in the US courts despite the objections of Canadian objectors. Currie

then launched this action and McDonalds moved to dismiss the action on the ground that the claims had been disposed of by the class action. The judge found that the notice given to the Canadian members of the class was so inadequate as to violate the rules of natural justice, and allowed this action to proceed.

HELD: Appeal dismissed. The unnamed, non-resident class members from Canada did nothing to invite or invoke jurisdiction from the deciding US court. The principal connecting factors linking the cause of action to the US were that the alleged wrong occurred in the US and the US was the site of McDonald's headquarters. This was a real and substantial connection. Damages from the wrong were suffered in Ontario and the consumer transactions giving rise to the claims were within Ontario. The unnamed plaintiffs were not afforded adequate notice of the U.S. class action, The Ontario courts should not recognize and enforce the US class action settlement. Currie was not bound by the US judgment. The mode of notice in Canada did not fulfill the obligation to make the members of the class understand they could opt out if they wished. There was a denial of natural justice as the court applied a different and lower standard in determining what notice should be given to Canadian plaintiffs. Res judicata did not apply here as Curie took no part in the US action and McDonald's Canada was not named as a defendant in that action.

Statutes, Regulations and Rules Cited:

Ontario Class Proceedings Act, S.O. 1992, c. 6, ss. 17, 17(2), 30.

Appeal From:

On appeal from the judgment of Justice Maurice Cullity of the Superior Court of Justice dated January 13, 2004, reported at (2004), 70 O.R. (3d) 53.

Counsel:

Ronald Slaght, Q.C. for McDonald's Restaurants of Canada Limited

Joel Richler and J.A. Prestage for McDonald's Corporation

Glenn Zakaib for Simon Marketing Inc.

Chris G. Paliare, Martin Doane and John Phillips for Greg Currie

---

The judgment of the Court was delivered by

1 **R.J. SHARPE J.A.**:-- The plaintiff Greg Currie brings a proposed class action alleging wrongdoing in relation to promotional games offered to customers of McDonald's Restaurants of Canada Ltd. ("McDonald's Canada"). He is met with an Illinois judgment approving the settlement of a class action brought on behalf of an American and international class of McDonald's customers, including the customers of McDonald's Canada (the "Boland judgment"). The Illinois court directed that notice of the class action to Canadian class members be given by means of an advertisement in Maclean's magazine. Currie did not participate in the Illinois proceedings but Preston Parsons, the named plaintiff in another Ontario class proceeding, represented by the same law firm and purporting to represent the same class, appeared in the Illinois court to challenge the settlement.

2 The central issue on this appeal is whether the Boland judgment is binding so as to preclude Currie's proposed class action in Ontario.

FACTS

3 I adopt the following summary of the essential facts from the reasons of the motion judge.

> 1. In the period between January 1, 1995 and December 31, 2001 - and earlier - McDonald's sponsored numerous promotional games, or contests, of chance - or chance and skill - at its restaurants in North America. Some, but not all, of these were made available in the Canadian restaurants. Prizes of different kinds and amounts were to be awarded. Participation in the games was, to a large extent, tied to the purchase of food at the restaurants. Simon Marketing Inc. - a corporation

LaForest J. in Hunt v. T & N plc., above at p. 325, "the exact limits of what constitutes a reasonable assumption of jurisdiction" cannot be rigidly defined and "no test can perhaps ever be rigidly applied" as "no court has ever been able to anticipate" all possibilities. Second, it may be easier to justify the assumption of jurisdiction in interprovincial cases than in international cases: see Muscutt v. Courcelles (2002), 60 O.R. (3d) 20 at paras. 95-100 (C.A.).

31 The motion judge determined that the notice given to the non-resident class members was inadequate. He observed that traditional conflict of laws doctrine treats adequacy of notice as an element of natural justice that can be raised as a defence to enforcement, once the jurisdiction of the foreign court has been established. He did not find it necessary to decide, on the facts of this case, whether or not the notice issue had a bearing on jurisdiction. As I have already explained, it is my opinion that the notice issue does bear upon jurisdiction. I consider the motion judge's ruling on the adequacy of notice below and conclude that there is no basis upon which I would interfere with that ruling. I would apply it to the question of jurisdiction and hold that as the unnamed plaintiffs were not afforded adequate notice of the Boland proceedings, the Ontario courts should not recognize and enforce the Boland judgment against Currie and the non-attorning Canadian class members he seeks to represent.

32 I would add this observation. Even if the Boland judgment is not accorded recognition and enforcement, it may still have some impact upon Currie's proposed class action in Ontario because of the principle against double recovery. As a result of the Boland judgment, certain benefits were conferred upon Canadian McDonald's patrons. If the Currie action succeeds on the merits, then the trial judge will likely take into account the benefits already received by the plaintiff class in order to determine the appropriate remedy and prevent over-compensation.

33 Accordingly, I conclude that Currie and the unnamed members of the class he seeks to represent (excluding the Parsons group) are not bound by the Boland judgment.

2. Did the notice to the Canadian class members satisfy the requirements of natural justice?

34 In the Boland action, the Illinois court ordered that notice be given in Canada by means of two advertisements in Maclean's Magazine for English Canada and in La Presse, Le Journal de Québec and Le Journal de Montréal for Quebec. Notice was also published in three U.S. publications with circulation in Canada, People Magazine, USA Today and four copies of TV Guide.

35 The respondents rely upon the evidence of Todd Hilsee, an individual with experience in developing notice programs for class actions. In Hilsee's opinion, the notice to Canadian members of the plaintiff class in Boland was inadequate. Relying on "net-reach" analysis, he asserts that the notice had reached only 29.9% of Canadian adults who frequent burger restaurants. The notice approved in the United States, meanwhile, would have reached 72% of American fast food patrons.

36 In response to Hilsee's evidence, the appellants filed the affidavit of Wayne Pines, who prepared the Boland notice plan. He stated that Maclean's readership, in addition to circulation figures, should be considered, as should the impact of the notice in the U.S. publications with circulation in Canada. Pines also swore that the notice to Canadians in Boland was more effective and broader than the notice approved in Chadha v. Bayer Inc. (1999), 43 C.P.C. (4th) 91 (Ont. S.C.J.).

37 The motion judge made the following findings at para. 58 with respect to the adequacy of the notice in the Boland action:

> I am satisfied that it would be substantially unjust to find that the Canadian members of the putative class in Boland had received adequate notice of the proceedings and of their right to opt out. Quite apart from the form and contents of the notice - Mr. Hilsee's reference to "wall to wall legalese" conveys no more than a hint of its eye-glazing opaqueness - I believe that its dissemination in Canada was so woefully inadequate that the decision should be held to offend the rules of natural justice recognized in this court and, on that ground, to be not binding on the Canadian members of the putative class in Boland, other than those whom I have found to have submitted to the jurisdiction of the court in Illinois. It would not, in my judgment, be at all reasonable to consider publication in two issues of Maclean's magazine as adequate notice to unilingual English-speaking Canadians - or, indeed, to French-speaking Canadians outside Quebec - who were customers of McDonald's. Nor, as the question is governed by the laws of this jurisdiction, do I believe it would be helpful to speculate whether the decision of Schiller J. on the adequacy of the notice plan would have been the same if, at the preliminary hearing, he had been provided with

the true circulation of Maclean's magazine or if the mistake in the initial declaration had been drawn to his attention at the final hearing.

38 I am not persuaded that we should interfere with the motion judge's findings. They are essentially factual in nature and therefore entitled to deference on appeal to this court.

39 It was open on the evidence for the motion judge to conclude that the wording of the notice was so technical and obscure that the ordinary class member would have difficulty understanding the implications of the proposed settlement on their legal rights in Canada or that they had the right to opt out. As I have already indicated, that right is of vital importance to the jurisdiction of the foreign court in international class action litigation. The right to opt out must be made clear and plain to the non-resident class members and I see no basis upon which to disagree with the motion judge's assessment of this notice.

40 Nor would I interfere with the motion judge's finding that the mode of notice was inadequate. The appellants opted to publish the notice in a publication that is not ordinarily used in English-Canada for such purposes and there was evidence that this notice reached only a small proportion of the members of the plaintiff class. It was open on the evidence for the motion judge to conclude that such notice was inadequate.

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

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

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

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

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

45 The appellants submit that the Currie action should be dismissed on the basis of res judicata or as an abuse of process. They argue that Currie makes essentially the same allegations as were made by Parsons and that the Currie

TAB 2

Indexed as:

Mangan v. Inco Ltd.

Between
James Mangan, plaintiff, and
Inco Limited, defendant

[1998] O.J. No. 551

38 O.R. (3d) 703

55 O.T.C. 161

27 C.E.L.R. (N.S.) 141

16 C.P.C. (4th) 165

77 A.C.W.S. (3d) 709

Court File No. C-1923/96

Ontario Court of Justice (General Division)
Sudbury, Ontario

Poupore J.

February 11, 1998.

(28 pp.)

[Ed. note: A Corrigendum was released by the Court February 12, 1998 and the correction has been made to the text.]

Practice -- Persons who can sue and be sued -- Individuals and corporations, status or standing -- Class or representative actions, members of class -- Settlements -- Breach, what constitutes -- Barristers and solicitors -- Relationship with client -- Confidential communications.

Motion by the defendant for relief from alleged violations of minutes of settlement. Sulphur dioxide gas escaped from the defendant's premises, and an action was commenced under the Class Proceedings Act. Extensive negotiations and mediation resulted in detailed minutes of settlement. Under the settlement the defendants were required to establish a telephone hotline to provide information to claimants, and were required to publish notices in newspapers and on radio broadcasts. Class counsel retained a marketing firm to design, produce and distribute a large number of "claim form kits" to potential claimants. Most of the kits were mailed, but some were left at distribution points together with a leaflet advertising the services of the class counsel's firm. The defendant argued that the provisions of the Act prohibited any notice not first approved by the Court, and that the class counsel's tactics violated the spirit of the settlement. Class

counsel stated that they had good reason to believe that many class members were not aware of their rights under the settlement after receiving the court-approved notice. They also argued that communications with potential class members were protected by privilege.

HELD: Motion granted. It was not for the court to rule on the spirit of the settlement. However, the Act required all notices to be approved by the Court. The solicitation campaign did not constitute privileged solicitor-client communication, as there was no intention of confidentiality or confidentiality in fact and no element of litigation strategy involved. Class counsel was restrained from further attempts at giving unapproved notice and was required to provide the defendant with copies of all notices of claim received after the mailing of the claim form kits. The defendant was entitled to as many additional peremptory challenges, pursuant to the terms of settlement, as there were notices of claim obtained under the unauthorized notice. Class counsel was responsible for the defendant's solicitor and client costs in exercising its additional peremptory challenges. Class counsel was prohibited from recovering its costs of providing the unauthorized notice, either from the defendant or from the class. Class counsel was liable for the defendant's costs in respect of any claims found to be fraudulent.

Statutes, Regulations and Rules Cited:

Act Respecting Champerty.
Canadian Charter of Rights and Freedoms, 1982, ss. 1, 2(b).
Class Proceedings Act, 1992, ss. 17, 17(4), 17(5), 17(6), 17(6)(c), 17(6)(d), 20, 33(1).

Counsel:

James M. Young and Michael McGowan, for the plaintiff.
Larry P. Lowenstein, for the defendant.

POUPORE J.:--

THE FACTS

1 Sulphur dioxide and/or other gases were released from Inco Limited's Copper Cliff plant on November 16, 1995. As a result, a potentially large number of persons living within the gases plume area may have been adversely affected.

2 This action was commenced under the Class Proceedings Act, 1992 (The Act) on March 8, 1996. Lengthy and difficult settlement negotiations ensued, including mediation. Detailed Minutes of Settlement were executed on the 16th day of September, 1997.

3 The within class proceeding was certified on the 25th day of November, 1997. The Order certifying the proceeding specified in part:

> NOTICE
>
> 23. THIS COURT ORDERS that notice be provided to the Class by:
> (a) the defendant's causing notices substantially in the dorm attached hereto as Schedule "G" to be published in the Sudbury Star and in Northern Life on 2 occasions each, one week apart;
> (b) the defendant's causing notices in the form of a French language translation of schedule "G" to be published in the Le Voyageur on 2 occasions, one week apart;
> (c) the defendant's causing notices substantially in the form attached hereto as Schedule "H" to be read on each radio station located in Sudbury on 2 occasions each between 7 and 9 a.m. or between 5 and 7 p.m. A french language translation of Schedule "H" shall be used on french language stations; and
> (d) the plaintiffs establishing a telephone hotline for claimants to call to request information.
> 24. THIS COURT ORDERS that the plaintiff and defendant shall coordinate the notice efforts and agree on the timing and incidental details of the notices. Any disputes shall be summarily determined by this court.

of the Class, Class counsel's fees, Class Proceedings Fund fees and Inco's rights of challenge and/or for random assessments. The impropriety of Class counsel promoting their firm members and the firm itself with respect to wills and powers of attorney under the auspicious of what could be considered court proceedings was mentioned as well.

15 Inco further states that the settlement arrived at after long and difficult negotiations, including mediation prohibited Class counsel's actions.

16 Class counsel on the other hand state that the provisions of the Act respecting notice are cumulative. They do not prevent vigorous counsel from issuing their own notice in a form of their choosing.

17 Class counsel state they had good reason to believe many Class members did not know of or understand their rights under the settlement after receiving, if at all, the Court approved notice. Mr. McGowan, for the plaintiff, went so far as to state that he was of this opinion even at the time of seeking court approval of the settled upon Court notice of certification.

18 Further, it was argued that Class members are entitled to untrammelled legal advice and the Court ought not to shackle the scope of Class counsel's work except where there has been a clear and objectionable excess. Class counsel go on to raise the question of privilege with respect to their communications with potential Class members. They particularly object to Inco's request to know who responded to these communications and to view the claim forms filed.

19 Also, Class counsel state that they, no less than any other citizen, have a constitutionally protected right of free expression. They go on to quote Sections 1 and 2(b) of the Canadian Charter of Rights and Freedoms Act.

THE ISSUES:

20

1. Does notice within a Class Proceeding require prior Court approval: before certification; after certification but before the opting out period; and after the opting out period expires?
2. To what extent may Class counsel communicate with both potential and actual Class members
3. Does the settlement arrived at by the parties in this proceeding impact on No. 1 and/or No. 2 above?

THE LAW:

Issue #1 - Notice

21 Class actions are very powerful devices that multiply the stakes of ordinary litigation many fold. Consequently, the parties to a class action and counsel for the class are driven by very strong incentives which do not necessarily coincide with the interests of absent class members or tend to promote fairness to the other side. The Court's review of notices to the class is designed to provide a check on the tendency of a class action to be turned into an instrument of oppression or unfairness through the dissemination of misleading, incomplete, one-sided or otherwise inappropriate notices. "Notice is available fundamentally for the protection of the members of the class or otherwise for the fair conduct of the action and should not be used merely as a device for the undesirable solicitation of claims."

> Advisory Committee Notes, 1966 Amendment, Subdivision (d)(2), U.S. Fed. R. Civ. P. 23

22 American courts have recognized that notice in a class action is a powerful instrument that carries with it a great potential for abuse. For example, various parties will have a strong interest in the decisions of Class members to opt out or not. Court supervision of any attempt to systematically notify the class about the case is essential if the opt-out decision is to be informed, balanced and independent:

> It is essential that class members' decisions to participate or to withdraw be made on the basis of independent analysis of their own self interest, and the vehicle for accomplishing this is the class notice. See Impervious Paint Ind. v. Ashland Oil, 508 F. Supp. 720, 723 (W.D. Ky.), appeal dismissed without op., 659 F.2d 1081 (6th Cir. 1981). Accordingly, it is essential that the district court closely monitor the notice process and take steps necessary to ensure that class members are informed of the opportunity to exclude themselves or to participate in the judgment. Id. at 1202; see Fed. R. Civ. P. 23(c)(2).

The notice disseminated to class members is "crucial" to the entire scheme of Rule 23. See Kleiner 751 F.2d at 1202 ("In view of the tension between the preference for class adjudication and the individual autonomy afforded by exclusion, it is critical that the class receive accurate and impartial information regarding the status, purposes and effects of the class action."). Notice "sets forth an impartial recital of the subject matter of the suit, informs members that their rights are in litigation, and alerts them to take appropriate steps to make certain their individual interests are protected." Erhardt v. Prudential Group, Inc., 629 F. 2d 843, 846 (2d Cir. 1980); Impervious Paint Ind., 508 F. Supp. at 723.

"It is the responsibility of the court to direct the 'best notice practicable' to class members, Rule 23(c)(2), and to safeguard them from unauthorized, misleading communications from the parties or their counsel." Erhardt, 629 F.2d at 846. Misleading communications to class members concerning litigation pose a serious threat to the fairness of the litigation process, the adequacy of representation and the administration of justice generally. In re School Asbestos Litigation, 842 F.2d at 680. "Unsupervised, unilateral communications with the plaintiff class sabotage the goal of informed consent by urging exclusion on the basis of a one-sided presentation of the facts, without opportunity for rebuttal. The damage from misstatements could well be irreparable." Kleiner 751 F.2d at 1203. Here, I find that unilateral communications with class members by various attorneys were misleading and made it unlikely that class members, who received these communications or were informed of their contents, made an informed choice to exclude themselves from the class.

...

I find that the misleading aspects of the communications of counsel were self-evident. These communications undermined the spirit of the notice plan approved by this Court.

...

I approved the notice plan because it apprised prospective class members of the terms of the proposed settlement in a neutral fashion that would enable class members to make an informed choice. Id.; see In re Corrugated Container Antitrust Litig., 643 F.2d 195, 223 (5th Cir. 1981). I now conclude that the misleading letters and advertisements of counsel opposed to the settlement interfered with the careful balance that the notice package achieved. Instead of providing class members with documents that would enable a reasonable person to make an informed, intelligent decision whether to opt out or remain a member of the class, some counsel have now exposed class members to one-sided, misleading claims that likely will prohibit a "free and unfettered" decision to opt out of the class. See Erhardt, 629 F.2d at 846 ("Unapproved notices to class members which are factually or legally incomplete, lack objectivity and neutrality, or contain untruths will surely result in confusion and adversely affect the administration of justice."). (emphasis added)

Georgine v. AmChem Products, Inc., 160 F.R.D. 478, 490, 497 (E.D. Pa. 1995)

Notice to class members is crucial to the entire scheme of Rule 23(b)(3). It sets forth an impartial recital of the subject matter of the suit, informs members that their rights are in litigation, and alerts them to take appropriate steps to make certain their individual interests are protected. See In re Gypsum Antitrust Cases, 565 F.2d 1123, 1125(9 Cir. 1977); In re Nissan Motor Corp. Antitrust Litigation, 552 F.2d 1088 (5 Cir. 1977). It also preserves the right of class members to "opt out" if they believe their interests are antagonistic to the other class members, or if they wish to proceed by separate suit. In re Nissan Motor Corp. Antitrust Litigation, supra at 1104-05.

It is the responsibility of the court to direct the "best notice practicable" to class members, Rule 23(c)(2), and to safeguard them from unauthorized, misleading communications from the parties

> or their counsel. Unapproved notices to class members which are factually or legally incomplete, lack objectivity and neutrality, or contain untruths will surely result in confusion and adversely affect the administration of justice. (emphasis added)
>
> Erhardt v. Prudential Group, Inc., 629 F.2d 843, 846 (2nd Cir. 1980)
>
> Unapproved communications to class members that misrepresent the status or effect of the pending action also have an obvious potential for confusion and/or adversely affecting the administration of justice. Particularly should such communications seem vested with official authority, there arises not only the risk of subsequent disenchantment with the judicial process, but also the danger that individuals will be induced to act to their detriment in reliance upon misinformation and/or falsehoods. Thus entailed in this abuse is something more than a general interest in orderly process which is shared by the court and the public; there is the added interest of the individual in achieving a full and fair judicial remedy.
>
> Waldo v. Lakeshore Estates, Inc., 433 F. Supp. 782, 790-91 (E.D. La. 1977)
>
> Commentators have suggested that FR Civ P 23(c)(2) notice should emanate from the court and on the court's stationery in order to prevent FR Civ P 23 from being used as a device to enable client solicitation.
>
> 32B Am Jur 2d FEDERAL COURTS, s. 2062

23 One of the greatest risks of unsupervised notice is that the party providing the notice will fail to disclose its interest in the case. The drafters of the Act worried specifically about this problem, requiring that class counsel's fee arrangements be disclosed and establishing judicial supervision of notice to insure adequate disclosure. Accordingly, s. 17(6)(c) and (d) of the Act provide (emphasis added):

> Notice under this section shall, unless the court orders otherwise, ...
>
> (c) describe the possible financial consequences of the proceeding to class members;
> (d) summarize any agreements between representative parties and their solicitors respecting fees and disbursements ...

24 Here, Class counsel's fees depended upon the number of claims submitted into the settlement: 20% of the amounts awarded were to be diverted to Class counsel (and a further 10% was to go to the Class Proceedings Fund). This, however, was not revealed in Class counsel's unauthorized solicitation campaign although the "claim form kits" were cloaked with the appearance of a dispassionate summary of the claims process and its consequences.

25 In a spirit similar to section 17 of the Act, American courts have recognized that the failure to disclose one's financial interest in a case renders a notice materially misleading:

> Various communications disseminated to class members by attorneys opposed to this settlement were, on their face, clearly materially false and misleading in several respects. Many of the letters and advertisements were misleading because they ... did not reveal the personal interests of the drafters of the letters and advertisements.
>
> ...
>
> Another misleading characteristic of the letters and advertisements disseminated by counsel is that each of them failed to disclose that the authors had a strong pecuniary interest in disseminating/publishing the communications ... In addition, asbestos plaintiffs' counsel would benefit financially from additional opt-outs ...
>
> ...

TAB 3

Case Name:

Thomas v. Thiessen

Between
Jayne Thomas, Shawn Fee, Shannon Fee a minor by her litigation guardian Jayne Thomas and Alexandria fee a minor by her litigation guardian Jayne Thomas, Plaintiffs, and
Donna June Thiessen, and Tammy Doe, Defendants

[2009] O.J. No. 1371

176 A.C.W.S. (3d) 607

Court File No. 48078/06

Ontario Superior Court of Justice
St. Catharines, Ontario

J.W. Quinn J.

Heard: February 12, 2009.
Judgment: March 30, 2009.

(50 paras.)

Civil litigation -- Civil procedure -- Pleadings -- Amendment of -- Statement of claim -- Motion by plaintiff for an order amending statement of claim dismissed -- Motion was brought on short notice -- There was no evidence upon which court could exercise discretion to abridge the notice period -- Given the importance of the matter to the plaintiffs and that the dismissal arose out of a lawyer's error, the dismissal was without prejudice to a fresh motion.

Motion by the plaintiff for an order amending the statement of claim. The plaintiff claimed damages for negligence related to the existence of mould in the property she rented from the defendant. The plaintiff sought to amend the statement of claim by adding claims related to the defendant's misrepresentations regarding insurance coverage.

HELD: Motion dismissed. The motion was brought on short notice. There was no evidence upon which the court could exercise the discretion available under rule 3.02 of the Rules of Civil Procedure to abridge the notice period. Given the importance of the matter to the plaintiffs and the fact that the dismissal arose out of a lawyer's error, the dismissal was without prejudice to a fresh motion.

Statutes, Regulations and Rules Cited:

Family Law Act, R.S.O. 1990, c. F.3,

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 3.01(1), Rule 3.02, Rule 25.02, 37.07(6)

> 16.9 ... these material representations and omissions to the insurer ... and to the plaintiffs amount to fraudulent misrepresentation, or alternatively, negligent misrepresentation.

Discussion

discretion to abridge times

37 Rule 3.02 of the *Rules of Civil Procedure* gives to the court the discretionary power to abridge times prescribed by those rules:

> 3.02(1) *General powers of court* - Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

minimum notice for motions

38 Rule 37.07(6) stipulates four days as a minimum period of notice for a motion:

> Rule 37.07(6) *Minimum notice period* - Where a motion is made on notice, the notice of motion shall be served at least four days before the date on which the motion is to be heard.

computation of time

39 The computation of the period of "at least four days" referred to in rule 37.07(6) is governed by rule 3.01(1)(a), the relevant portion of which states:

> 3.01(1) In the computation of time under these rules ... except where a contrary intention appears,
>
> (a) where there is a reference to a number of days between two events, they shall be counted by excluding the day on which the first event happens and including the day on which the second event happens, even if they are described as clear days or the words 'at least' are used;

40 Then there is rule 3.01(1)(b):

> (b) where a period of less than seven days is prescribed, holidays shall not be counted;

41 I have already made reference to rule 3.01(1)(c) which deals with times periods that expire on a holiday.

42 The notice of motion and supporting affidavit were served on February 9, 2009. The affidavit of service does not specify the time of service. Mr. Elkin deposes that service occurred "at or around 4:00 p.m." The time of service is relevant because of rule 3.01(1)(d), which reads, in part:

> (d) service of a document ... made after 4 p.m. ... shall be deemed to have been made on the next day that is not a holiday.

last day for service to comply with status-hearing deadline

43 To comply with the February 15th deadline ordered at the status hearing, the last day for service of the motion to amend was Friday, February 6th, bearing in mind the provisions of the rules that I have mentioned and the fact that motions in St. Catharines are heard only on Thursday.

no explanation for short service of motion

44 This, at last, brings me to the basis for my dismissal of the motion.

45 The affidavit in support of the motion to amend, sworn by Mr. Harris, makes no effort to explain why notice of the motion could not have been given in accordance with the rules. In argument, Mr. Harris says that he "believed that an amendment to the statement of claim would be consented to by counsel for the defendants." The basis for his belief was expressed this way:

> Given that pleadings had recently closed in November of 2008, that affidavits of documents had not been exchanged,[8] nor had examinations for discovery been scheduled, it was not unreasonable for the plaintiffs to expect that a simple amendment would not be contested ...

46 The source of an explanation must be evidence, not argument.[9]

47 The discretion available under rule 3.02(1) to abridge a prescribed time under the rules cannot be exercised without evidence of why compliance with the prescribed time was impossible. It must never be assumed that abridging time periods is a routine exercise. An indulgence is being sought. The court cannot be expected to exercise its discretion in a vacuum.

Result

48 The motion was brought on short notice. It must be dismissed because there is no evidence upon which the court can exercise the discretion available under rule 3.02 of the *Rules of Civil Procedure* to abridge the notice period. However, because of the importance of the matter to the plaintiffs and the fact that the dismissal arises out of a lawyer's error, the dismissal is without prejudice to a fresh motion.

49 In the circumstances, I will not comment on the merits of the proposed amendments.

50 This motion was not the finest hour for the lawyers involved. Accordingly, I am not inclined to award costs. If either side disagrees, I will be happy to entertain oral submissions.

J.W. QUINN J.

cp/e/qlrxg/qlpxm/qlaxw/qljyw

1 All or part of paragraphs 7, 8, 12, 15, 21, 22, 23 of Mr. Elkin's 26-paragraph affidavit contain legal argument.

2 For example, paragraphs 15, 16 and 28 in the written submissions of Mr. Harris and paragraphs 20, 22 and 23 in those of Mr. Elkin.

3 The statement of claim is not artfully drawn. For example, it ignores the requirement that each allegation in a pleading "shall, so far as is practical, be contained in a separate paragraph": see rule 25.02 of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194. Also, I note that the statement of claim (and the proposed amended statement of claim) pleads five statutes without giving section numbers. This either means that the drafter was ignorant as to the applicability of the statutes or knew the relevant section numbers but was too lazy to set them out in the pleading. The defendants should not have to guess the statutory basis for the plaintiffs' claims.

4 Mr. Elkin, in his written argument, referred to a number of events in the period May-July of 2007, but they are not in evidence.

5 There is no indication of the date when this discovery occurred.

6 Mr. Elkin disputes all three versions of the allegation in question.

7 I note that the dates of February 15, March 15 and May 31 all fall on Sunday. Rule 3.01(1)(c) states: "where the time for doing an act under these rules expires on a holiday, the act may be done on the next day that is not a holiday." Although the "act" to be done here is pursuant to an order and not a rule, the result is the same (there being no contrary intention apparent in the order). Thus, for example, the deadline for the plaintiffs to amend their statement of claim would be pushed back from Sunday, February 15th to Monday, February 16, 2009. However, February 16th is a provincial holiday (Family Day), which means that the deadline to amend, effectively, was further extended to Tuesday, February 17th.

8 Only the plaintiffs had not served their affidavit of documents.

9 I make no comment on whether this explanation, if it were properly before the court, would be sufficient to attract the discretion of the court under rule 3.02(1).

TAB 4

Indexed as:

Western Canadian Shopping Centres Inc. v. Dutton

Bennett Jones Verchere, Garnet Schulhauser, Arthur Andersen & Co., Ernst & Young, Alan Lundell, The Royal Trust Company, William R. MacNeill, R. Byron Henderson, C. Michael Ryer, Gary L. Billingsley, Peter K. Gummer, James G. Engdahl, Jon R. MacNeill, appellants/respondents on cross-appeal;

v.

Western Canadian Shopping Centres Inc. and Muh-Min Lin and Hoi-Wah Wu, representatives of all holders of Class "A", Class "E" and Class "F" Debentures issued by Western Canadian Shopping Centres Inc., respondents/appellants on cross-appeal.

[2001] 2 S.C.R. 534

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

2001 SCC 46

File No.: 27138.

Supreme Court of Canada

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

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

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

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

L and W, together with 229 other investors, became participants in the federal government's Business Immigration Program by purchasing debentures in WCSC, [page535] which was incorporated by D, its sole shareholder, for the purpose of helping investor-class immigrants qualify as permanent residents in Canada. WCSC solicited funds through two offerings to invest in income-producing properties. After the investors' funds were deposited, WCSC purchased from CRI,

76. Common sense suggests that these factors should no more bar a class action suit in Alberta than in Ontario or British Columbia.

44 Where the conditions for a class action are met, the court should exercise its discretion to disallow it for negative reasons in a liberal and flexible manner, like the courts of equity of old. The court should take into account the benefits the class action offers in the circumstances of the case as well as any unfairness that class proceedings may cause. In the end, the court must strike a balance between efficiency and fairness.

45 The need to strike a balance between efficiency and fairness belies the suggestion that a class action should be struck only where the deficiency is "plain and obvious", as the Chambers judge held. Unlike Rule 129, which is directed at the question of whether the claim should be prosecuted [page557] at all, Rule 42 is directed at the question of how the claim should be prosecuted. The "plain and obvious" standard is appropriate where the result of striking is to forever end the action. It recognizes that a plaintiff "should not be 'driven from the judgment seat' at this very early stage unless it is quite plain that his alleged cause of action has no chance of success": Drummond-Jackson v. British Medical Association, [1970] 1 All E.R. 1094 (C.A.), at p. 1102 (quoted in Hunt, supra, at pp. 974-75). Denial of class status under Rule 42, by contrast, does not defeat the claim. It merely places the plaintiffs in the position of any litigant who comes before the court in his or her individual capacity. Moreover, nothing in Alberta's rules suggests that class actions should be disallowed only where it is plain and obvious that the action should not proceed as a representative one. Rule 42 and the analogous rules in other provinces merely state that a representative may maintain a class action if certain conditions are met.

46 The need to strike a balance between efficiency and fairness also belies the suggestion that class actions should be approached restrictively. The defendants argue that General Motors of Canada Ltd. v. Naken, [1983] 1 S.C.R. 72, precludes a generous approach to class actions. I respectfully disagree. First, when Naken was decided, the modern class action was very much an untested procedure in Canada. In the intervening years, the importance of the class action as a procedural tool in modern litigation has become manifest. Indeed, the reform that has been effected since Naken has been motivated in large part by the recognition of the benefits that class actions can offer the parties, the court system, and society: see, e.g., Ontario Law Reform Commission, supra, at pp. 3-4.

47 Second, Naken on its facts invited caution. The action was brought on behalf of all persons who purchased new 1971 or 1972 Firenza motor vehicles in Ontario. The complaint was that General [page558] Motors had misrepresented the quality of the vehicles and that the vehicles "were not reasonably fit for use" (p. 76). The statement of claim alleged breach of warranty and breach of representation, and sought $1,000 in damages for each of approximately 4,600 plaintiffs. Estey J., writing for a unanimous Court, disallowed the class action. While each plaintiff raised the same claims against the defendant, the resolution of those claims would have required particularized evidence and fact-finding at both the liability and damages stages of the litigation. Far from avoiding needless duplication, a class action would have unnecessarily complicated the resolution of what amounted to 4,600 individual claims.

48 To summarize, class actions should be allowed to proceed under Alberta's Rule 42 where the following conditions are met: (1) the class is capable of clear definition; (2) there are issues of fact or law common to all class members; (3) success for one class member means success for all; and (4) the proposed representative adequately represents the interests of the class. If these conditions are met the court must also be satisfied, in the exercise of its discretion, that there are no countervailing considerations that outweigh the benefits of allowing the class action to proceed.

49 Other procedural issues may arise. One is notice. A judgment is binding on a class member only if the class member is notified of the suit and is given an opportunity to exclude himself or herself from the proceeding. This case does not raise the issue of what constitutes sufficient notice. However, prudence suggests that all potential class members be informed of the existence of the suit, of the common issues that the suit seeks to resolve, and of the right of each class member to opt out, and that this be done before any decision is made that purports to prejudice or otherwise affect the interests of class members.

[page559]

50 Another procedural issue that may arise is how to deal with non-common issues. The court retains discretion to determine how the individual issues should be addressed, once common issues have been resolved: see Branch, supra, at para. 18.10. Generally, individual issues will be resolved in individual proceedings. However, as under the legislation of

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

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

The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, *et al.* v. Sino-Forest Corporation, *et al.*

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF INVESCO CANADA LTD. NORTHWEST & ETHICAL INVESTMENTS L.P., and COMITÉ SYNDICAL NATIONAL DE RETRAITE BÂTIRENTE INC.

(Motion for Notice Approval)

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