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*

SUPPLEMENTARY 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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Comité Syndical National de Retraite
Bâtirente Inc.

TO: THE SERVICE LIST

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TAB 1

2012 CarswellOnt 9321, 2012 ONSC 4317, 218 A.C.W.S. (3d) 762, 112 O.R. (3d) 294

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2012 CarswellOnt 9321, **2012** ONSC 4317, 218 A.C.W.S. (3d) 762, 112 O.R. (3d) 294

1250264 Ontario Inc. v. Pet Valu Canada Inc.

1250264 Ontario Inc., Plaintiff/Respondent and Pet Valu Canada Inc., Defendant/Moving Party

Ontario Superior Court of Justice

G.R. Strathy J.

Heard: July 4, 2012
Judgment: July 27, 2012
Docket: CV-09-392962-00CP

Proceedings: additional reasons at *1250264 Ontario Inc. v. Pet Valu Canada Inc.* (2012), 2012 ONSC 5029, 2012 CarswellOnt 11304 (Ont. S.C.J.)

Counsel: David Sterns, Jean-Marc Leclerc, for Plaintiff / Moving Party

Geoffrey B. Shaw, Derek Ronde, for Defendant / Respondent, Pet Valu Canada Inc.

Lawrence G. Theall, Bevan Brooksbank, for Respondent Franchisees

Subject: Civil Practice and Procedure

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Conduct of class proceeding — Participation of class members — Opting out and opting in

Plaintiff was franchisee of retail pet food and supply company — Common issue certified was that company had duty to share volume discounts and rebates from suppliers with franchisees — Communication with class members had been contentious subject since certification — Certain franchisees began campaign to defeat class action, and there was significant spike in opt-out notices — Plaintiff brought motion to set aside opt-out notices — Motion granted — While franchisees had right of association, class members were unfairly pressured, singled out and misinformed by actions of association, and opt-out process was corrupted as result — Opt-out process was so irreparably impaired that judicial intervention was required — Actions of association interfered with class members' fundamental right of access to justice.

Cases considered by *G.R. Strathy J.*:

Bywater v. Toronto Transit Commission (1999), 1999 CarswellOnt 1139, 28 C.P.C. (4th) 307, 43 O.R. (3d) 367 (Ont. Gen. Div.) — considered

Fairview Donut Inc. v. TDL Group Corp. (2008), 2008 CarswellOnt 6987 (Ont. S.C.J.) — referred to

tion — the fact that, if the action was successful, every class member might have a right to substantial damages, was not even mentioned.

(e) The website disparaged class counsel — references were made to lawyers "creating walls", receiving "25% if not more" out of any settlement or judgment and referred to them as "lawyers who seek to assert claims focused upon allegations of past misconduct." The message was: "This is all driven by class action lawyers trying to make money".

(f) The suggestion that the lawsuit was motivated by a "desire to punish" the former owners has no factual basis. The liability of Pet Valu in this action is a corporate liability, which is obviously distinct from the ownership of the corporation.

(g) The suggestion that the issue of volume rebates could be addressed by the CFC is contrary to the evidence on certification that the CFC had been either unable or unwilling to do so. There is no evidence at all that Pet Valu as a corporation, under new management or otherwise, is prepared to address this issue voluntarily and without being required to do so as a result of this action.

(h) The alleged consequences of the class action, including its impact on franchisee profitability, its effect on Pet Valu, and its effect on the brand, were exaggerated and lacked any factual or evidentiary foundation.

(i) The statement that opting out would not prevent franchisees from individually or collectively pursuing their rights was misleading. It failed to address the reality, to which I averted in my decision on certification at para. 111, that individual claims by franchisees would be impractical. Collective pursuit would almost certainly be ineffective without the clout of a class action, given that Pet Valu continues to vigorously contest the franchisees' rights to share in volume rebates.

55 The CPVF telephone campaign and website were an unabashed attempt to destroy the class action. The campaign made no pretence of giving franchisees an opportunity to make a private, considered and informed decision. It made no attempt to provide them with any information concerning the positive aspects of the class action. While expressing concern about franchisees being "confused or misinformed", the CPVF gave them more misinformation and added to the confusion. In an environment in which communications to the class by the parties had been strictly curtailed at the request of the parties and with the court's approval, the CPVF was able to use its influence and its opinions to advance what it perceived to be the interests of franchisees, which it aligned with the interests of the franchisor.

56 I now turn to the applicable principles.

Applicable Principles

57 The *C.P.A.* contemplates that important notices to class members will be approved by the court. It requires that the representative plaintiff must give notice of certification to class members (s. 17). Section 19 provides that "[A]t any time in a class proceeding, the court may order any party to give such notice as it considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding." Section 20 stipulates that such notices must be approved by the court.

58 The right of a party to opt out is fundamental to the court's jurisdiction over un-named class members. It is also fundamental to preserve the legal rights of those who wish to exercise those rights other than through the class action: see *Sauer v. Canada (Attorney General)*, 2010 ONSC 4399, [2010] O.J. No. 3381 (Ont. S.C.J.); *Parsons v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321, [2005] O.J. No. 506 (Ont. C.A.) at para. 28.

59 This court has consistently spoken of the importance of a fair and informed opt-out process in which class members are protected from coercion and from misleading, incomplete, biased or otherwise inappropriate information: see *Mangan v. Inco Ltd.* (1998), 38 O.R. (3d) 703 (Ont. Gen. Div.).

60 Where necessary to uphold the integrity of the opt-out process, the court can and must intervene by imposing conditions on communications between the parties and class members or by taking such other measures as may be required:

- *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (Ont. S.C.J.) at paras. 69-92, leave to appeal granted, (2003), 64 O.R. (3d) 42 (Ont. Div. Ct.), aff'd (2004), 70 O.R. (3d) 182 (Ont. Div. Ct.);

- *Smith v. National Money Mart Co.*, [2007] O.J. No. 1507 (Ont. S.C.J.) at para. 31: "If communication by a defendant to a class member during the opt-out period is inaccurate, intimidating or coercive, or is made for some other improper purpose aimed at undermining the process the court will, on the motion of a party or class member, intervene under s. 12 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 to ensure the fair determination of the class proceeding";

- *Robinson v. Rochester Financial Ltd.*, 2010 ONSC 5116, [2010] O.J. No. 3912 (Ont. S.C.J.): opt-out deadline extended as opt-out forms had been solicited not by the defendants but by someone who had a relationship with them and did not reflect informed decision by the person signing them;

- *Ward-Price v. Mariners Haven Inc.*, [2004] O.J. No. 2308, 71 O.R. (3d) 664 (Ont. S.C.J.).

61 In *Bywater v. Toronto Transit Commission* (1999), 43 O.R. (3d) 367, [1999] O.J. No. 1402 (Ont. Gen. Div.), Sharpe J. observed, at p. 377 O.R.:

> As these cases hold, the court must retain the power to sanction conduct that undermines its statutory mandate to ensure that class members are given appropriate information when required to make binding decisions in relation to their legal rights in a class proceeding.

62 In *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (Ont. S.C.J.), Winkler J. spoke, at para. 74 and following, of the duty of the court to ensure that the *C.P.A.* is administered in a manner that is fair not only to the parties, but most importantly to absent class members. He noted that the underlying presumption is that class members "ought to be free to exercise their right to participate in or abstain from the class action on an *informed, voluntary basis, free from undue influence*" [at para. 74, emphasis added]. He continued, at paras. 75 and 76:

> Although s. 17(6) addresses post-certification notice, it is relevant on this motion because of its purpose. Here, the class members are being asked to effectively "opt out" of the class proceeding by A&P prior to certification, through the execution of the releases, without the benefit of the information that would be provided in a certification notice. The primary protection for the absent class members in the class proceeding process is the right to opt out of the class action. It is axiomatic that no class member need participate in a class action against his or her will. However, to ensure the integrity of the opt-out process, absent class members must be fully informed of the issues in the proceeding and the impact on them as individuals. Thus, s. 17(6) is intended to prevent piecemeal dissemination of information critical to the decision making process by one side or the other.
>
> Further, the purpose and content of s. 17(6) serve as a useful guide with respect to communications with the putative class members. In that respect, the CPA does not prohibit pre-certification communication with the putative class, nor does it require prior court approval for every communication. Where, however, a communication

> constitutes misinformation, a threat, intimidation, coercion or is made for some other improper purpose aimed at undermining the process, the court must intervene.
>
> [Emphasis added].

63 In making these observations, I do not overlook the fact that the opt-out process can also be a means for parties to express their disapproval of the class action or to pursue others means of resolving the issues: see *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* at para. 33; *Fairview Donut Inc. v. TDL Group Corp.*, [2008] O.J. No. 4720 (Ont. S.C.J.).

Discussion

64 I accept that an order restricting communication is extraordinary: see *Smith v. National Money Mart Co.*, [2007] O.J. No. 1507 (Ont. S.C.J.) at para. 31. This should be particularly so where the communications come from a third party and not from the plaintiff or the defendant.

65 I also accept Pet Valu's assurances that it was not party to the activities of the CPVF. An extensive affidavit was sworn by McNeely of Pet Valu. On the basis of that affidavit, which is largely unchallenged, I conclude that Pet Valu itself did not interfere with the integrity of the opt-out process or attempt to influence franchisees to opt out of the class action. I also conclude that Pet Valu did not *directly* encourage the CFC or the CPVF to do so. That said, McNeely was clearly aware of what CPVF was up to and was content to let it continue unabated.

66 I also accept McNeely's evidence that Pet Valu has not taken and would not take repercussions against a franchisee as a result of his or her or its participation in the class action. McNeely's evidence is that he has "consistently" told franchisees that whatever their decision on the class action, it would not affect their relationship with him or Pet Valu. This is commendable. Unfortunately, it is inconsistent with the message delivered to franchisees by the CFC and the CPVF.

67 The CPVF was in large measure an initiative of the Executive of the CFC, which had publicly stated at the Annual Meeting its concern that the litigation would jeopardize the franchisees' relationship with the franchisor. There was a natural concern, expressed at that meeting, that franchisees who supported the class action would be subject to discriminatory measures (i.e., "repercussions") by the franchisor.

68 One of the great strengths of a class action is that it permits class members to pursue their claims, in the relative anonymity of a class, without fear of the consequences, whether real or perceived. It recognizes that access to justice can be impaired, in many relationships, including employer/employee and franchisor/franchisee, because people in vulnerable positions are afraid of suing their more powerful superiors. The CPVF exploited this by asking for an electronic show of hands on the website — asking, in effect, "are you with us and your fellow franchisees or against us?"

69 In my view, the opt-out process has been subverted by the actions of the CPVF. It has interfered with the class members' fundamental right of access to justice.

70 The CFC, wearing the hat of the CPVF, mounted a campaign designed to kill the class action. It did so by putting subtle and not-so-subtle pressure on hold-outs by prominently listing the "growing" list of names of opt-outs. A franchisee who did not pledge allegiance to the CPVF and promise to opt out could reasonably conclude that he or she would be outed as part of an identified minority who were pursuing their own selfish interests, who were not team players, and who were indifferent to the concerns of the majority. They could also conclude that they would be easily identified by the franchisor and that their participation in the class action might prejudice them in the future.

71 The campaign painted an exaggerated and misleading picture of the dire consequences of the class action. It made no attempt to identify, or to discuss, the potential financial benefits of the class action.

72 The campaign also painted a misleading picture of the legal rights of opt-outs. It suggested that there was a possibility that franchisees could opt out yet still pursue their claims either collectively or individually when, as a practical matter, this was highly unlikely, as I found on the certification motion. It also gave an insufficient and simplistic explanation of the potential limitations issues if a franchisee opted out of the class action but did not pursue his or her own individual action in a timely way.

73 The campaign demonized class counsel. It preyed on franchisees' scepticism of lawyers.

74 That demonization continued on the motion, with Pet Valu submitting that this motion is really being driven by class counsel's interest in a large fee. Class counsel has been appointed by the court, having found that a class action serves the goals of the *C.P.A.* and that this action meets the test under s. 5(1) of that statute, including the requirement that the class representative has retained competent counsel. Class counsel has a responsibility to class members and the court to ensure that the opt-out process is fair. Unfair aspersions of this nature, which denigrate the discharge of class counsel's responsibility and challenge his integrity and professionalism, are entirely unwarranted. As Rosenberg J.A. observed in *R. v. Felderhof*, [2003] O.J. No. 4819, 68 O.R. (3d) 481 (Ont. C.A.), at para. 93, "[I]t is a very serious matter to make allegations of improper motives or bad faith against any counsel."

75 To conclude, there is a reasonable probability, in my view, that many franchisees decided to opt out as a result of misleading information and unfair pressure amounting to intimidation. The fact that some class members have sworn that they did not experience pressure and acted on their own volition does not alter my conclusion.

76 The question is, what should be done to remedy this unfortunate situation?

The Appropriate Remedy

77 The plaintiff asks for an order setting aside all opt-outs received and postponing the opt-out process until after the plaintiff's pending summary judgment motion has been finally determined. In the meantime, it asks that the court send an additional notice, explaining what has transpired and why.

78 Pet Valu opposes this extraordinary relief. It objects to a process that would allow class members to "wait and see" whether the action is successful before they decide to participate. It points out that this is not how class actions are supposed to work. It argues that this would permit class members to avoid the *res judicata* effect of a class action by opting out of the class action if it is not successful, giving them a "second kick at the can", either individually or as part of a subsequent class. The *C.P.A.* contemplates that the judgment, "whether favourable or not", will bind the class: see *C.P.A.* s. 17(6)(f).

79 CPVF says that I have no jurisdiction to make an order in relation to non-parties, including franchisees who have opted out and are not before the court.

80 I agree that the relief is extraordinary. The circumstances are also extraordinary. The acrimonious relationship between the parties, the confusion and misinformation amongst class members, the judicial restriction on communication with the class, and the aggressive campaign by CPVF designed to "out" those who did not fall in line, all raise a reasonable apprehension that the results of the "vote" do not reflect the informed wishes of the class. The court's over-riding responsibility, in the context of this motion, is to the absent class members. It is not a matter of exercising jurisdiction over non-parties. It is a matter of protecting the integrity of the court's process and protecting the rights of all class members.

81 I am satisfied that class members have been unfairly pressured, singled out and misinformed by the actions of the respondents and that the opt-out process has been corrupted as a result. The damage has been done. Sending a new notice or "re-doing" the opt-out process at this time would not put the genie back in the bottle.

82 I should add that I do not attach particular weight to either the statements of the affiants who say that they want nothing to do with the class action or to the hearsay statements by Rodger that certain unidentified class members felt pressured to opt out. The evidence as a whole satisfies me that results of the opt-out process cannot be relied upon as an informed and independent expression of the will of class members.

83 I have decided that any opt-out on or after September 5, 2011 will be declared invalid. Any opt-out prior to that date will be presumptively valid, subject to the right of any franchisee who opted out prior to that date to move to set aside his or her opt-out. Following the release of the court's decision on the summary judgment motion, or other final disposition of the action on its merits, those class members whose opt-outs have been declared invalid will be given a further opportunity to opt out, on terms to be fixed at that time.

84 A notice to the class will be prepared to the foregoing effect.

85 I realize that this is an imperfect solution to a difficult problem. I also realize that it may aggravate some franchisees, including some deponents on this motion, who do not want the court to interfere with their free will. My decision does not interfere with that right. If they wish to opt out, they will be entitled to do so, with full knowledge of what they are giving up if they do so.

86 I understand Pet Valu's concern that franchisees who have previously opted out should not have a "second kick at the can" if the action is unsuccessful. The issue in this action is a very narrow one. If the plaintiff's action is dismissed on the merits, it seems highly unlikely that any subsequent action, individual or collective, would be successful. The concern in this case is not a real and substantial one.

87 In coming to these conclusions, I have not overlooked the fact that there may have been delay on the part of the plaintiff in bringing this motion or the fact that the plaintiff himself may have engaged in communication that was not sanctioned by the court. Neither of these concerns detracts from the point that the process itself has been impaired, not by the plaintiff's actions but by the actions of the CPVF and the respondent franchisees.

88 Nor have I overlooked the importance of the franchisees' right of association, as confirmed by s. 4(1) of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 (*AWA*) or the right of franchisees to freely express themselves. The *AWA* is concerned with the relationship between franchisor and franchisee, as opposed to the rights of franchisees *inter se*. The issue here is not whether franchisees are entitled to associate or to express their views, it is whether, in the peculiar circumstances of this case, the exercise of those rights have interfered with the rights conferred by the *C.P.A.* For the reasons given, I have concluded that they have so significantly interfered with those rights that relief is necessary.

89 I should also add that I do not find it necessary to address the submission of Pet Valu that Rodger's affidavit should be struck because it contains inadmissible hearsay from unnamed sources. I have not relied on any of this evidence in coming to my conclusions.

90 An order will issue to the foregoing effect. A copy of these reasons shall be posted on class counsel's website. Counsel are to make best efforts to agree on a short form notice to be sent to all franchisees, informing them of the outcome of this motion. That notice is subject to my approval. It need not be particularly lengthy or elaborate and class members can be directed to these reasons for further information. If there is no agreement within fifteen days, each of the plaintiff and Pet Valu shall submit its proposed form of notice to me. Alternatively, and preferably, they may submit a single draft notice, blacklined to show the nature of their differences, with a letter explaining their

positions on those differences.

91 There were no submissions as to costs. The plaintiff shall deliver written submissions within fifteen days or such further time as the parties may agree. The respondents shall have the same amount of time within which to reply. Submissions shall be limited to five pages, excluding the costs outline.

Motion granted.

FN1 *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 287, [2011] O.J. No. 1618 (Ont. S.C.J.).

FN2 The website was not password protected. It was open for anyone to see. The evidence is that on about September 8, 2011, Dale told McNeely of the existence of the website and suggested that he have a look at it. As a result, the franchisor would know the name of every franchisee who had indicated an intention to opt out.

END OF DOCUMENT

TAB 2

2010 CarswellOnt 6412, 2010 ONSC 418

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2010 CarswellOnt 6412, **2010 ONSC 418**

Davies v. Clarington (Municipality)

BONNIE DAVIES (Plaintiff) and THE CORPORATION OF THE MUNICIPALITY OF CLARINGTON, VIA RAIL CANADA INC., CANADIAN NATIONAL RAILWAY COMPANY, TIMOTHY GARNHAM, THE BLM GROUP INC., APACHE SPECIALIZED EQUIPMENT INC., APACHE TRANSPORTATION SERVICES INC., BLUE CIRCLE CANADA INC., ONTARIO HYDRO SERVICES COMPANY (Defendants)

Ontario Superior Court of Justice

P.D. Lauwers J.

Heard: January 14-15, 2010
Judgment: September 2, 2010
Docket: CV-00-1075-00CP

Counsel: D. Fulton for Christopher Zuber

R. Winsor for Defendant, Corporation of the Municipality of Clarington

J. Campion, D. Merner for Defendant, VIA Rail Canada Inc., Canadian National Railway

B. Sunohara for Defendant, BLM Group Inc.

J. Regan, A. Sciacca for Defendants, Apache Specialized Equipment Inc., Apache Transportations Services Inc.

J. Agostino for Defendant, Ontario Hydro Services Company

Subject: Civil Practice and Procedure

Civil practice and procedure --- Parties — Representative or class proceedings under class proceedings legislation — Conduct of class proceeding — Applications or motions

Plaintiff was passenger on train that was derailed in accident — Plaintiff was thrown into wall of coach and struck his head, suffering compression injury to cervical spine — Class action was brought by representative plaintiff and plaintiff opted in as class member — Claims of certain class members were settled including claim of representative plaintiff — Plaintiff brought motion to amend claim to increase damages in claim from $10 million to $50 million — Motion granted — Any motions were required to be brought by representative plaintiff — Representative plaintiff had no further interest in action — Most expeditious way to deal with situation was to give leave to plaintiff to bring motion in respect of his own claim only — Liability had only been determined with respect to one defendant — Plaintiff could continue against other defendants — Certification order and settlement order both contemplated individual assessment of damage claims — Change in amount of claim

would not have materially changed strategy of defendants and there was no prejudice related to litigation strategy — Defendants had not demonstrated prejudice and plaintiff was granted leave to amend claim to increase amount claimed.

Cases considered by *P.D. Lauwers J.*:

Apotex Inc. v. Wellcome Foundation Ltd. (2009), 2009 CarswellNat 350, 2009 FC 117, 2009 CF 117, 2009 CarswellNat 4487, 343 F.T.R. 41 (Eng.) (F.C.) — considered

Barker v. Furlotte (1985), 12 O.A.C. 76, 1985 CarswellOnt 974 (Ont. Div. Ct.) — considered

Beals v. Saldanha (2001), 10 C.P.C. (5th) 191, 202 D.L.R. (4th) 630, 148 O.A.C. 1, 54 O.R. (3d) 641, 2001 CarswellOnt 2286 (Ont. C.A.) — followed

Dabbs v. Sun Life Assurance Co. of Canada (1998), 40 O.R. (3d) 429, 22 C.P.C. (4th) 381, 5 C.C.L.I. (3d) 18, [1998] I.L.R. I-3575, 1998 CarswellOnt 2758 (Ont. Gen. Div.) — referred to

Dabbs v. Sun Life Assurance Co. of Canada (1998), 165 D.L.R. (4th) 482, 113 O.A.C. 307, 7 C.C.L.I. (3d) 38, 27 C.P.C. (4th) 243, 1998 CarswellOnt 3539, [1999] I.L.R. I-3629, 41 O.R. (3d) 97 (Ont. C.A.) — followed

Davies v. Clarington (Municipality) (2006), 2006 CarswellOnt 2020, 266 D.L.R. (4th) 375 (Ont. S.C.J.) — referred to

Family Delicatessen Ltd. v. London (City) (2006), 2006 CarswellOnt 1021 (Ont. C.A.) — considered

Haikola v. Arasenau (1996), 1996 CarswellOnt 259, 46 C.P.C. (3d) 292, 27 O.R. (3d) 576 (Ont. C.A.) — considered

Hall v. Hogarth (2000), 2000 CarswellOnt 713 (Ont. Master) — referred to

Hill v. Church of Scientology of Toronto (1992), 7 O.R. (3d) 489, 1992 CarswellOnt 1076 (Ont. Gen. Div.) — considered

Iroquois Falls Power Corp. v. Jacobs Canada Inc. (2009), 2009 CarswellOnt 3617, 2009 ONCA 517, 80 C.L.R. (3d) 1, 71 C.P.C. (6th) 9, 75 C.C.L.I. (4th) 1 (Ont. C.A.) — followed

King's Gate Developments Inc. v. Drake (1994), 23 C.P.C. (3d) 137, (sub nom. *Kings Gate Developments Inc. v. Colangelo)* 17 O.R. (3d) 841, 1994 CarswellOnt 483, (sub nom. *Kings Gate Developments Inc. v. Colangelo)* 70 O.A.C. 140 (Ont. C.A.) — referred to

Mazzuca v. Silvercreek Pharmacy Ltd. (2001), 2001 CarswellOnt 4133, 207 D.L.R. (4th) 492, 152 O.A.C. 201, 56 O.R. (3d) 768, 15 C.P.C. (5th) 235 (Ont. C.A.) — referred to

National Trust Co. v. Furbacher (October 12, 1994), Doc. 93-CQ-41889, B-152/94 (Ont. Gen. Div. [Commercial List]) — considered

Shuker v. Gagne (2007), 2007 CarswellOnt 1510, 47 C.C.L.I. (4th) 156 (Ont. S.C.J.) — considered

370866 Ontario Ltd. v. Chizy (1987), 1987 CarswellOnt 835, 57 O.R. (2d) 587, 34 D.L.R. (4th) 404 (Ont. H.C.) — considered

> for Blue Circle Canada Inc. The balance of the litigation is to solely determine the quantum of damages arising from Mr. Zuber's personal injuries. (para. 2)
>
> There cannot be any prejudice to my client amending the Class proceeding in any event, because it was a term of the dismissal of Mr. Zuber's personal claim (in 2002) that it was on a without prejudice basis that Mr. Zuber was free, if he chose not to participate in the class proceeding at any time, to re-instate Mr. Zuber's personal action. In my opinion, that preserved my client's rights to start a fresh action in which my client could claim damages for any amount...(para. 14)
>
> Mr. Zuber is at liberty to commence a fresh action seeking damages for $50 million. However, Mr. Zuber has decided to operate within the existing frame of the class proceeding...(para. 15)

31 Mr. Fulton submits that it was a term of the discontinuance of Mr. Zuber's personal action in 2002 that it was on a "without prejudice" basis, and argues that Mr. Zuber was free, if he chose not to participate in the class proceeding at any time, to reinstate his personal action. This flows, he says, from the words of a letter from Brian J.E. Brock, then counsel for Blue Circle:

> Mr. Strype's action should be dismissed without costs and without prejudice to him re-instating that action at some future time if he chooses to do so and follows the appropriate procedures. Might I suggest to you at this stage his client to be included in the Class, because he did not opt out.
>
> However, it is certainly possible within the framework of the Class Proceedings Act, for any individual to seek the permission of the court to opt out at some later state. To do so, however, you need the court's fiat. Whatever those rights might be, Mr. Strype and his client should be deemed to have retained those, even though they brought this action.

This statement formed the basis of the discontinuance of Mr. Zuber's personal claim since it was accepted by the co-defendants.

32 Mr. Fulton argues that Mr. Brock's letter should be read as providing that Mr. Zuber had, by private agreement among the parties, effectively contracted out of section 9 of the *Class Proceedings Act* (the opt-out provision). This is objectionable in principle, given the policy thrust of the Act. But I also find that this interpretation of Mr. Brock's words is wrong. Mr. Brock was simply pointing out the rights of the parties under the *Class Proceedings Act*, which might permit Mr. Zuber to opt out at some later state, with the court's permission, and which might permit him to later start his own action in whatever amount.

33 But choices have consequences. Mr. Zuber did not opt out within the time period provided in the certification order. He neither sought nor obtained a provision in the minutes of settlement or the approval order permitting him to opt out later. His failure to take these steps leaves him bound by the class proceeding as he finds it; he is not free to start a new action and insist on another liability trial.

34 Contrary to Mr. Strype's assertion, it is not true that liability has been determined, as Ferguson J.'s order approving the settlement and the minutes of settlement make plain. Ferguson J. heard the evidence and has not rendered a decision on the liability of defendants other than Blue Circle. Consequently, since Mr. Zuber clearly intends to continue against the other defendants, then they may properly reconvene the trial before Ferguson J. and argue liability taking the trial record as it is; the decision determining liability is still open. The defendants may, of course, instead agree with Mr. Zuber to waive the determination of the liability issue by Ferguson J. That is, however, what it means "to operate within the existing frame of the class proceeding," in Mr. Strype's words.

35 I am supported in this conclusion by the court's approach in *Dabbs, supra*. The approved settlement agreement specifically permitted class members to opt out of the settlement and sue on their own behalf for whatever claim they wished to assert at a number of different times; see 40 O.R. (3d) 429, [1998] O.J. No. 2811 (Ont. Gen. Div.), per Sharpe J. This figured

importantly in the Court of Appeal's decision, *supra*, at para. 20, to refuse a dissident's motion for leave to appeal. A similar degree of flexibility does not, however, exist in Ferguson J.'s approval order.

Issue Three: Should the Amendment be Permitted?

36 The major issue is whether Mr. Zuber should be given leave to amend the Statement of Claim to increase the amount claimed from $10 to $50 million.

37 Section 35 of the *Class Proceedings Act* simply states that the Rules of Court apply to class proceedings. Rule 26.01 of the Rules of Civil Procedure obliges the court to approve the amendment:

> On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

38 There are numerous supporting precedents in ordinary personal injury cases such as this one. The burden of showing prejudice lies with the party opposing the amendment: *Barker v. Furlotte*, [1985] O.J. No. 1517, 12 O.A.C. 76 (Ont. Div. Ct.). There is much case law supporting the right of a party to amend a pleading to increase the amount claimed prior to trial, during trial or even after a decision is made by a judge or a jury after a trial: *370866 Ontario Ltd. v. Chizy*, [1987] O.J. No. 2244, 57 O.R. (2d) 587 (Ont. H.C.) [claim amended from $10,000 to $100,000]; *Hill v. Church of Scientology of Toronto*, [1992] O.J. No. 451, 7 O.R. (3d) 489 (Ont. Gen. Div.) [claim amended to match jury award from $400,000 for general damages and $400,000 for aggravated damages to $300,000 for general damages, $500,000 for aggravated damages and $800,000 for punitive damages]; *Haikola v. Arasenau*, [1996] O.J. No. 231, 27 O.R. (3d) 576 (Ont. C.A.) [claim amended from $200,000 to $1,650,000]; [*Hall v. Hogarth*] [2000] O.J. No. 778 (Ont. Master); *Beals v. Saldanha*, [2001] O.J. No. 2586, 54 O.R. (3d) 641 (Ont. C.A.) at paras. 98 - 99; *Apotex Inc. v. Wellcome Foundation Ltd.*, [2009] F.C.J. No. 177 (F.C.).

39 The plaintiff argues that it is appropriate to permit the increase in the amount of damages where his injuries turn out to be more severe than contemplated at the commencement of the action and where no prejudice can be shown: *Shuker v. Gagne*, [2007] O.J. No. 941 (Ont. S.C.J.).

Is There Prejudice?

40 The defendants say that there is prejudice here arising out of a number of elements.

Litigation Strategy

41 First, they point to the litigation strategy decisions they made, particularly in reaching the cost sharing agreement by which they apportioned responsibility for paying settlements, and in agreeing to the minutes of settlement. The defendants rely on *Family Delicatessen Ltd. v. London (City)*, [2006] O.J. No. 669 (Ont. C.A.). The Court refused leave to amend the Statement of Claim to allege new causes of action:

> 6 The appellants could have brought the motion to amend their claim at any time after the outset of these proceedings. They chose not to do so despite repeated requests from the City that they either bring a motion to amend or agree to a dismissal of the action against the City. There is no justification for the inordinate delay in bringing the motion to amend the statement of claim. While delay is not in and of itself a basis for refusing an amendment, there must come a point where the delay is so long and the justification so inadequate that some prejudice to the defendants will be presumed absent a demonstration by the party seeking the amendment that there is in fact no prejudice despite the lengthy and unexplained delay.
>
> 7 We agree with counsel for the City that there would be some prejudice to the City had the amendment been al-

TAB 3

2006 CarswellOnt 3536, 24 E.T.R. (3d) 189, 2006 C.E.B. & P.G.R. 8205, 53 C.C.P.B. 88, 29 C.P.C. (6th) 13

2006 CarswellOnt 3536, 24 E.T.R. (3d) 189, 2006 C.E.B. & P.G.R. 8205, 53 C.C.P.B. 88, 29 C.P.C. (6th) 13

Paramount Pictures (Canada) Inc. v. Dillon

Paramount Pictures (Canada) Inc. (Applicant) and Gerald Dillon, Douglas G. Lawless, Dudley Dumond and Royal Trust Corporation of Canada (Respondent)

Proceeding Under the Class Proceedings Act, 1992

Ontario Superior Court of Justice

Cullity J.

Heard: June 5, 2006
Judgment: June 13, 2006
Docket: 06-CV-304599CP

Counsel: J.A. Prestage for Applicant

Ari N. Kaplan for Respondents

Subject: Corporate and Commercial; Civil Practice and Procedure; Estates and Trusts

Pensions --- Practice in pension actions — Parties

Plan was established for salaried employees of owner and operator of movie theatre assets — Assets and control of plan were subsequently acquired by employer — Employer sold substantially all of assets and most active employees became employees of purchaser — Pension liabilities in respect of past service of employees were transferred to pension plan sponsored by purchaser, but employer continued to act as sponsor of and administrator of plan in respect of members whose employment was not transferred — Employer sought to withdraw surplus amount from original plan — Employer brought notice of application to remove surplus in accordance with proposal previously presented to members — Members formed mandate to represent interests of former employees in negotiating and settling fair surplus distribution — Employer brought motion for certification of proceedings as class action — Motion granted — Employer was granted certification of class of members as respondents in application — Employer's notice of application raised justiciable issues that would determine legal rights of involved parties — Application included common issue of whether plan provided for payment of surplus to employer on wind-up of plan — Application included common issues regarding who was entitled to surplus and how it should be distributed — Class proceeding procedure was eminently suited to resolution of disputes relating to respective rights of members and employers under pension plans — Representive members could provide limited litigation plan necessary for proceedings and would fairly and adequately represent interests of class — Each representative member had been active in communicating with other members and instructing lawyers during negotiations with employer.

Cases considered by *Cullity J.*:

make application to this court with respect to its legal entitlement to share in the surplus and the reimbursement of its costs.

The Motion

13 The proceeding was commenced by a notice of application dated January 23, 2006. In the application Paramount seeks certification of a class of respondents who would be represented by the respondents, Dillon, Lawless and Dumond. As defined in the notice, the class would comprise

> All members, former members, past members, annuitants and beneficiaries (and the estates, heirs, successors, beneficiaries, assignees and representatives thereof) [of the Plan].

14 The substantive relief requested is:

> (a) a declaration that the Plan provides for payment of surplus to the applicant on the wind-up of the Plan within the meaning of paragraph 79 (3) (b) of the *Pension Benefits Act*, R.S.O. 1990, c. P. 8 ("PBA");
>
> (b) a declaration of the respective entitlements of Paramount and the Plan members to the surplus funds remaining after the termination of the Plan;
>
> (c) an order directing the Royal Trust Corporation of Canada to distribute the surplus in the Plan, as soon as practicable after the date on which consent from the Superintendent pursuant to subsection 78 (1) and 79 (3) of the *PBA* is filed with the court; and
>
> (d) an order for the costs of the applicant and of the respondents on this application to be paid out of the Plan on a solicitor and his own client basis.

Representation

15 At a case conference on January 26, 2006, I was asked to sign an order certifying the proceeding on the ground, apparently, that it would be made on consent or, perhaps, that it was sufficiently plain and obvious that the requirements for certification were satisfied to make a formal hearing a waste of time. I declined to do this. Apart from any other consideration, I was concerned that the proposed class was wider than the Sharing Group in that it included persons and estates (together "Excluded Persons") who had ceased to have an entitlement to receive pension benefits. It was suggested that such persons had no conflict of interest with — and could be represented by — the proposed representative respondents who intend to take the position that Excluded Persons would not be entitled to receive any part of the surplus under the sharing agreement with Paramount. It was also counsel's position that, even though Excluded Persons could be bound by any certification — and settlement approval — orders I might make, it would be unnecessary and inappropriate to require that they be given notice of certification, and of their rights to opt out, or notice of the approval hearing.

16 As my initial reaction was that these propositions were untenable, I indicated that the question whether Excluded Persons should be independently represented should be considered, and dealt with, at the outset. I also had difficulty with counsel's submission that I should find — then and there — that the Excluded Persons had no beneficial interest in the surplus and that, on this ground, neither independent representation nor notice was required. I indicated that I did not see how I could have jurisdiction under the CPA, or otherwise, to bind persons who were neither served, represented, or provided with notice of the proceedings.

17 Counsel then proposed to narrow the definition of the class so that it would comprise only the members of

the Sharing Group. The draft order was amended accordingly and, in a letter delivered on the same day as the case conference, Mr Prestage expressed the hope that the amendments addressed all my concerns and indicated that he would appreciate it if I would sign the certification order.

18 There remained, however, the question whether the Excluded Persons had a sufficient interest in the proceedings to still be considered as necessary parties within the meaning of rule 5.03 (1) for the purposes of the class proceeding. This could have been effected by including them in separate classes of respondents. Alternatively, a representation order could be made pursuant to rule 10.01 (1). If they had any possible interests in the surplus, I did not believe that I should consider making an order for its distribution to other persons without requiring the Excluded Persons to participate in the proceeding or, at least, giving them an opportunity to do so. Representation orders are commonly made in similar circumstances where rights to share in family trust funds and estates are in issue. The fact that potential beneficiaries who are not parties to the litigation would not otherwise be bound by an order for a division or distribution of the assets of the trust or estate to one or more of the parties is not considered to be sufficient justification for the court to allow the litigation to proceed in the absence of the unrepresented potential beneficiaries.

19 In view of the effect that an order under either rule might have on the possibility of obtaining approval of the proposed settlement, counsel, understandably, resisted my suggestion that one or other of such orders might be appropriate.

20 This issue is likely to be of particular importance in cases involving claims to surplus assets made by different classes of members, or former members, of pension plans. The necessity to appoint representatives for other classes of members, or for deceased and other former members of a plan, may complicate class proceedings, increase costs significantly, create obstacles to settlement and, generally, detract from the utility of the procedure under the CPA for resolving claims to surplus and other disputes involving pension plans. At the same time, I believe the court must be concerned to ensure that orders do not detract from, or adversely affect, the interests of persons who have no notice of the proceedings. Obviously, sweetheart deals that are prejudicial to the interests of other members, or former members, of a plan cannot be endorsed.

21 In *Sutherland v. Hudson's Bay Co.*, [2005] O.J. No. 1455 (Ont. S.C.J.), I accepted the submissions of counsel for an employer that members of certain related plans should be represented and, notwithstanding the opposition of other parties, made a representation order pursuant to rule 10.01 (1). In several other cases, declarations affirming the ownership of pension surplus by active plan members without requiring former members of a plan to be represented, or to receive notice, have been made. The cases tend to be fact specific in that the issue may be affected by the nature of the claims asserted, the terms of the plan documentation and, in some cases, the history of the amendment or administration of the plan. I believe the crucial question, however, is not whether persons other than the parties, or the members of the proposed class, have legal rights. That would be an issue to be decided post-certification at a trial of issues or, as here, at the hearing of the application. The question at this preliminary stage is, I believe, whether there is a sufficient possibility that unrepresented persons may have rights that fairness and justice require that they be given an opportunity to assert and protect them. If it is beyond doubt that they have no rights, they are not necessary parties, or persons "who may be affected by the proceeding" within the meaning of rule 10.01 (1). In such a case — even though such a finding would not bind them — no question of avoiding a multiplicity of proceedings, and an infringement of section 138 of the *Courts of Justice Act*, R.S.O. 1990, c. 43, would arise; *cf.*, *Brett v. Fleet* (1980), 30 O.R. (2d) 397 (Ont. H.C.); *Noik v. Noik* (2001), 14 R.F.L. (5th) 370 (Ont. S.C.J.); *Amoco Canada Petroleum Co. v. Alberta & Southern Gas Co.* (1993), 10 Alta. L.R. (3d) 325 (Alta. Q.B.); *Amon v. Raphael Tuck & Sons Ltd.* (1955), 2 W.L.R. 372 (Eng. Q.B.), at pages 390-392.

22 The question in this case was, in my opinion, particularly difficult in that no members of the Sharing Group were active members of the plan and while surviving beneficiaries of former members of the plan were included in the group, other former members and deceased beneficiaries were Excluded Persons.

23 After a further case conference at which the issue of separate representation of the Excluded Persons was addressed, a hearing was held on May 24, 2006 at which Mr Timothy Youdan appeared at my invitation to make submissions as a friend of the court. Following that hearing, for reasons endorsed on the motion record, I accepted the submissions of counsel — supported by those of Mr Youdan — that the Sharing Group includes all persons, other than Paramount, who have any possible interest in the surplus. In consequence, I ruled that it was unnecessary to serve, or to give notice to, other persons — or for them to be represented under the CPA, or Rule 10. I deferred, until the hearing of this motion, the question whether Paramount's original version of the respondent class could, and should, be accepted.

Requirements for Certification

1. Disclosure of a cause of action — section 5 (1) (a)

24 Most class proceedings in this jurisdiction are commenced by a statement of claim. In such cases, it is established that the plain and obvious test propounded for the purposes of rule 21.01 (1) (b) is to be applied to determine whether a pleading discloses a cause of action as required by section 5 (1) (a) of the CPA. The section extends the requirement to notices of application. This may raise questions with respect to the concept of a cause of action in such cases and the manner in which the plain and obvious test is to be applied to the contents of a notice of application. Such notices tend to be brief and comprehensive allegations of fact are uncommon. Although it has been consistently held that evidence is not admissible when the section is applied to a statement of claim, it will often be required to explain or flesh out the issues in an application.

25 Although counsel did not refer me to any authorities in which these questions were considered, I believe it is clear that the notice of application raises justiciable issues that, when resolved by the court, will determine the legal rights of the parties. It is also clear that the application was properly brought under the provisions of any one of a number of the paragraphs of rule 14.05 (3). Whether or not these considerations will be sufficient in all cases, I believe they are enough for the purposes of this motion.

26 The Plan is referred to in the notice of application and, in paragraph 14.03, it currently provides that on its termination, or partial termination, "... any surplus resulting from the fact that actual costs under this Plan have been less than actuarially predicted, shall be returned" to the employer. The interpretation of that provision is not in doubt, so that the substantive relief sought by the applicant relates entirely to its validity. I find that this issue is disclosed in the notice of application and that this is sufficient to satisfy the requirements of section 5 (1) (a).

2. An identifiable class — section 5 (1) (b)

27 The revised definition of the proposed class that was submitted after the first case conference would limit its composition to the members of the Sharing Group. This definition comprises all the persons whose rights may be affected by the resolution of the common issues to which I will refer, and, in my opinion, it satisfies the requirements of section 5 (1) b) as interpreted by the Supreme Court of Canada in *Hollick v. Metropolitan Toronto (Municipality)* (2001), 205 D.L.R. (4th) 19 (S.C.C.).

28 While Mr Prestage informed me that Paramount was prepared to live with the revised definition, both counsel submitted that the original wider class that would include the Excluded Persons was acceptable. Having given that matter further consideration, I confirm that I am not prepared to accept the submission. I find it more than a little incongruous that having urged me, successfully, to find that the Excluded Persons have no possible interests in the surplus, I should now be asked to find that they have "colourable" claims, or interests, that have the rational connection with the common issues required by *Hollick*, at pages 30-31.

29 Moreover, as I have indicated, I do not consider that, under the provisions of the CPA — including the lim-

TAB 4

CLASS PROCEEDINGS ACT, 1990 / LOI DE 1990 SUR LES RECOURS COLLECTIFS

Mr Winninger, on behalf of Mr Hampton, moved second reading of Bill 28, An Act respecting Class Proceedings/Projet de loi 28, Loi concernant les recours collectifs.

LAW SOCIETY AMENDMENT ACT (CLASS PROCEEDINGS FUNDING), 1990

Mr Winninger, on behalf of Mr Hampton, moved second reading of Bill 29, An Act to amend the Law Society Act to provide for Funding to Parties to Class Proceedings.

Mr Winninger: I am pleased to move second reading today actually of two bills, Bill 28 and Bill 29, which are companion bills that will greatly improve access to justice for the people of Ontario.

Bill 28, the Class Proceedings Act, and Bill 29, An Act to amend the Law Society Act to provide for Funding to Parties to Class Proceedings, between them create a sophisticated procedure for the litigation of complex cases concerning mass loss.

As the two bills go hand in hand, I propose to address them both in my opening remarks with respect to Bill 28. However, I look forward to receiving further comments from members upon second reading of both Bill 28 and Bill 29.

By way of background, I remind the members of the House of the origins of this legislation. In 1982, the Ontario Law Reform Commission released the most thorough report on the state of class action law in Canada and indeed the world. The research and recommendations contained in that report formed the basis of work by an advisory committee on class action reform established by the Attorney General's predecessor, the member for St George-St David.

The advisory committee on class action reform, which was a broadly representative group that included spokespersons for business, consumers, environmentalists, insurers and the legal profession, developed unanimous recommendations for reform in this area. Members will recall that a class action or a class proceeding is a special procedure that permits numerous individuals who have suffered a common wrong to seek redress in one law suit as a group rather than in numerous law suits as individuals.

In this day and age, when resources for new government initiatives are so scarce, a reform such as this is a particularly welcome change. One of the primary goals of Bill 28 is to economize on the use of legal and judicial resources. With this procedure in place, many injured persons will be able to use one litigation vehicle to obtain compensation. We know the type of society we enjoy in Ontario is sometimes witness to incidents of mass loss. Ontario residents use an array of complex pharmaceutical and other products such as motor vehicles and carry on activities that often, if events go awry, threaten our very environment. It is precisely these cases of mass injury that will be well suited to treatment in a class proceeding.

1640

Concerns have been expressed in the past about the potential impact of the increased availability of class actions in Ontario. Fears have been voiced about opening the floodgates of litigation, increasing the use of our courts and facilitating litigation in what is considered to be an already overly litigious society. It is precisely these concerns that were addressed and resolved by the advisory committee that developed this legislation.

The procedure contained in these bills is a sophisticated one that treats plaintiffs and defendants fairly and with an even hand. I would like to take a moment to set out the highlights of this procedure for members of this House.

First of all, the class proceeding will include a step in which a judge will screen potential class proceedings according to a specific test. Members of the class who do not wish to participate in the class proceeding will have the opportunity to exclude themselves from, or opt out of, the proceeding.

The representative plaintiff will be required to ensure that class members obtain notice of the proceeding. Once certified by the court, the proceeding would continue in a manner similar to other civil litigation but with a number of significant differences, namely, that one judge will hear all motions up to the trial and the court will have the ability to make aggregate judgements in cases where the only issue is the assessment of damages for many individuals.

Normal cost rules for litigation will apply, but lawyers and their clients will be permitted to engage in special fee arrangements for such proceedings, subject, however, to the court having final control over all agreements with respect to fees and disbursements.

Another important feature of this procedure is the creation of a class proceeding fund. The Law Foundation of Ontario will endow a fund in the amount of $500,000 which is designed to provide financial assistance to representative plaintiffs in class proceedings. It will provide representative plaintiffs with financial assistance for disbursements such as expert reports and notice to class members. Members across the House who have practised law will know how costly some of these disbursements can be at the initial stages. It will also indemnify a representative plaintiff who has been assisted by the fund in the event the proceeding is unsuccessful and the court has ordered the representative plaintiff to pay the defendant's costs.

This is a progressive means by which the traditional financial barriers to this type of litigation can be lowered to permit representative plaintiffs to come forward on behalf of a class of injured persons.

The Law Foundation of Ontario deserves a vote of thanks from the residents of Ontario for its generous contribution to this fund. This procedure would not be possible were it not for the financial assistance of the Law Foundation of Ontario. It is an unprecedented contribution that will not only make this particular procedure work, but will also

demonstrate to the people of Ontario that the legal profession itself is anxious to see increased access to justice for injured persons.

In conclusion, the two bills I bring forward today for second reading on behalf of the Attorney General will make an important contribution to what I know is a goal shared by all members of this House: access to justice. I urge the members of this House to study the legislation closely and provide either the Attorney General or myself with their comments. I hope we can enact both bills quickly in order that the procedure is made available at the earliest possible date for those who must use our courts to seek compensation in situations of mass loss.

The Acting Speaker: Before we proceed with questions or comments on the parliamentary assistant's participation, I believe the parliamentary assistant has requested that we proceed simultaneously with Bill 28 and Bill 29. Do we have consent to proceed simultaneously?

Agreed to.

Mr Harnick: At this juncture, with the two minutes I believe I have, I am interested, because the parliamentary assistant has actually done something unprecedented by his government: He has actually thanked lawyers.

We have heard the Treasurer blame lawyers for all the ills of the auto insurance business. We have heard one government member after another talk about the lawyers ruining the justice system of this province. Now here they are at the other end accepting money the lawyers are giving to make this program work.

I would like to thank the parliamentary assistant for the magnanimous gesture he has made and the fact that he, among all the government members -- I suspect he is probably the only one who recognizes the contribution the lawyers have made to the justice system in this province and particularly to facilitating the possibility for Bill 28 and Bill 29 to become realities.

Mr Winninger: I indicate very briefly that I suggest this government has the highest respect for the legal profession and in fact this assembly counts many members of that august law society within its ranks. I do not believe this is a precedent.

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

SUPPLEMENTARY 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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